

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 March 2019

BALCA Case No.: 2019-TLN-00055
ETA Case No.: H-400-18362-633401

In the Matter of:

Alma Collier, Inc. dba Coburn and Company
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center\

Appearances: Kevin R. Lashus
Fisher Broyles, LLP
Austin, Texas
For the Employer

Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Judge Francine L. Applewhite**

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Alma Collier, Inc. d/b/a Coburn and Company (Employer) request for review of the Certifying Officer's (CO) Final Determination regarding the Employer's H-2B temporary labor certification.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (DOL).³ Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA).

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (2015 IFR) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the 2008 Rule, found at 73 Fed. Reg. 78020 (Dec. 19 2008). See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. See 20 C.F.R. 655.4e (explaining transition procedures).

² See 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 U.S.C. §214.2(h)(6); 20 C.F.R. §655.6(b).

³ 8 C.F.R. §214.2(h)(6)(iii).

H-2B Application

The Employer engages in the commercial craft sub-contractor in Central Texas area.⁴ On January 7, 2019, the Employer filed an ETA 9142B, *Application for Temporary Employment Certification* (Application), with the CO. The Employer requested certification of 24 “commercial painters” from April 1, 2019 to November 1, 2019 based on peakload need.⁵ According to the Employer, the temporary peak load need is “because business significantly lulls during the mid-winter because of the lack of construction partially attributable to the winter weather conditions, but more likely attributable to the holiday season beginning on Halloween and lasting through the beginning of the year.”⁶

Notice of Deficiency (NOD)

On February 4, 2019, the CO issued a NOD.⁷ The CO listed three deficiency grounds: 1) failure to establish the job opportunity as temporary in nature (20 CFR §655.6(a) and (b)); 2) failure to establish temporary need for the number of workers requested (20 CFR §655.11(e)(3) and (4)); and 3) failure to establish the job opportunity as temporary in nature (20 CFR §655.6(a) and (b)).⁸

As to the first deficiency ground, the CO explained that the Employer’s Application did not sufficiently demonstrate the requested standard of temporary need. Specifically, the CO noted that in order to establish a peak load need the Employer must establish that it regularly employ’s permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer’s regular operation. The NOD requested the Employer to provide additional information including:

1. A statement describing the Employer’s (a) business history, (b) activities, and (c) schedule of operations throughout the entire year;
2. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need.
3. Further explanation and supporting documents that substantiate its type of work cannot be performed under certain weather conditions; and
4. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.⁹

As to the second deficiency ground, the CO explained that the Employer’s Application did not sufficiently demonstrate that the number of workers requested is true and accurate and represents bona fide job opportunity. Specifically, the CO noted that in the current application,

⁴ AF 161. Citations to the Appeal File are abbreviated as “AF”. For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted.

⁵ Id.

⁶ Id.

⁷ AF 153-160

⁸ AF 156-160

⁹ AF 157-158

H-400-18352-100505, the Employer is requesting certification for 24 Commercial Painters from April 1, 2019 through November 1, 2019, but the Employer did not indicate how it determined that it needed the 24 Commercial Painters.¹⁰ The NOD requested that the Employer provide additional information including:

1. An explanation with supporting documentation of why the Employer is requesting 24 Commercial Painters for Austin, Texas during the dates of need requested;
2. If applicable, documentation supporting the Employer's need for 24 Commercial Painters, such as contracts, letters of intent, etc. that specify the number of workers and dates of need; and
3. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.¹¹

As to the third deficiency ground, the CO explained that the Employer did not submit sufficient information in its Application to establish its requested period of intended employment. Specifically, the CO noted that the Employer did not include adequate attestations to justify the change in dates of need from the Employer's prior certification, H-400-16335-840610, which requested 24 Commercial painters from February 15, 2017 through November 15, 2017.¹² The NOD requested the Employer to provide additional information including:

1. A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need.
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; and
4. An explanation as to why the requested dates of need have changed from the Employer's prior application.¹³

Employer's Response to NOD

On February 19, 2019, the Employer submitted its response to the NOD.¹⁴ The Employer stated that due to the current economic upturn in the Austin building market, the peak need for workers fluctuates throughout the year. The Employer further stated that based on the 2018 sales cycle their work load increased rapidly starting in April and they maintained a steady work flow throughout the next eight months, with their highest sales peaking in November and December. They went on to conclude that the monthly variability of the workload and payroll history reflects the essential nature of the unpredictability of the peakload standard of temporary need rather than a purely predictable seasonal need. In support, the Employer submitted

¹⁰ AF 158

¹¹ AF 158-159

¹² AF 159

¹³ Id.

¹⁴ AF 32-151

subcontracts, Form 941 quarterly tax liability reports, summarized payroll documents, deposit logs, sales charts, manpower charts, and Board of Realtors local market reports.

In addition, the Employer noted that it had allocated 24 Commercial painters in 2017 and that they kept them working a full 40 hour work week, and that their current and future workload is no less than it was in 2017. The Employer also noted that during 2018 man hours worked, including overtime and subcontract labor, averaged 101 man hours worked per week from April 2 through December 24, with a 79 field labor force. Thus, in order to eliminate sub-labor and overtime, and allow for sick days and personal time off, they would need an additional 24 qualified Commercial painters.¹⁵

CO's Final Determination

On February 22, 2019, the CO issued a final determination denying the temporary labor certification.¹⁶ The CO found the response to the NOD unacceptable. Although the Employer provided some additional information and documentation with its response, the CO found that the Employer did not provide the specific information or documentation requested. For example, the CO requested an explanation and supporting documentation as to why the Employer's job opportunity and number of foreign workers being requested reflected a temporary need, this was not provided.¹⁷ In addition, while the Employer submitted summarized payroll documents, the information indicates that the Employer has a year round need rather than a peak load need.¹⁸ The CO also noted that the sales charts, reporting sales from January to December 2018, indicates that the Employer's sales fluctuates year-round, and does not experience a peak in sales during the dates of requested.¹⁹ Similarly, the weekly chart of man-hours worked showed that total man-hours worked increased in the Employer's non-peak period, November and December, versus its peak period of May through September.²⁰ Concerning the Employer's sales cycle and its correlation to the economic uptick in the Austin building market, the CO noted that the Employer's business operations are not tied to a true peak business need, rather it is tied to fluctuating market demands in the Central Texas area.²¹ The CO concluded that the Employer did not overcome the deficiencies. In accordance with the regulations, 20 C.F.R. §655.51, Subpart A, a denial of the application was issued.²²

Procedural History

The Employer filed a Notice of Appeal appealing the CO's final determination, which was received by BALCA on February 27, 2019. The Appeal File was received on March 8, 2019. On March 11, 2019, I issued a Notice of Docketing and Order Establishing Briefing Schedule. The CO has not filed a brief. The Employer filed an Appeal Brief on March 19, 2019.

¹⁵ AF 32

¹⁶ AF 19-31

¹⁷ AF 24

¹⁸ AF 23

¹⁹ AF 26

²⁰ AF 28

²¹ AF 30

²² AF 31

In its brief, the Employer argued that the CO failed to follow recent departmental guidance regarding the processing of renewal applications like its own. The Employer further argued that the CO applied the wrong standard in her analysis of the Employer's temporary need: rather than applying the standard for a "peakload" need, the CO applied "seasonal" need analysis.²³

The Employer stated that "[t]he clearest basis for reversing the denial of Coburn and Company's application is that the decision is at variance with the Department of Labor's 2016 guidance regarding subsequent determinations of an employer's previously certified temporary need and the evidence necessary to support such a subsequent determination." Employer's Brief at 3. The Employer discusses the developments that led to the Department of Labor issuance of the 2016 guidance, including the 2012 Interim Rule (the "2012 Rule") as well as a 2015 Interim Rule (the "2015 Rule") on the evidence necessary to substantiate an employer's temporary need.²⁴

The Employer equates certain language in these rules as a "reduced burden to prove (and correspondingly lessen [the] degree of regulatory scrutiny of) temporary need for employers that have previously demonstrated such need's existence in their businesses."²⁵ Under the 2012 Rule, for the first time, employers would file a multi-year registration of temporary need; if approved, "the registration would be valid for a period of up to 3 years, absent a significant change in conditions." 77 Fed. Reg. at 10,058. In particular, like the 2012 Rule, the 2015 Interim Rule "adopts an employer registration process that requires employers to demonstrate their temporary need for labor or services before they apply for a temporary labor certification," which, upon approval, "remain[s] valid for up to three years, thereby shortening the employer's certification process in future years." 80 Fed. Reg. 24,042 (Apr. 29, 2015).

Applicable Law

BALCA's standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

²³ Employer's Brief at 1

²⁴ The "2012 Rule" refers to *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,038 (Feb. 21, 2012), an interim final rule that was ultimately struck down. The "2015 Rule" was an interim final rule that was jointly published by the Department of Labor and the Department of Homeland Security on April 29, 2015. *See supra*, at fn. 2.

²⁵ Employer's Brief at 5.

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

The Employer is required to establish that its need for the workers requested is "temporary." Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

- (A) Definition. Temporary services or labor under the H-2B classifications refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
- (B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a "peakload need" if it shows it "regularly employs permanent workers to perform the services at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Discussion

An employer's failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.²⁶

In the NOD, the CO clearly identified information and evidence that would provide a reasonable basis upon which to analyze the application. According to the CO, the Employer did not provide information and documentation sufficient to overcome its noted deficiencies. Specifically, the Employer did not provide supporting documentation that shows that business operations are tied to temporary peak load standard of need. The Employer submitted subcontracts and sales data that is unclear as to performance of duties during peak or non-peak periods, as well as whether there is a peak in services for Commercial Painters during the dates of need requested. Although the Employer submitted a 2018 weekly chart of man-hours worked, the chart indicated that the Employer had more total man-hours worked during the off peak period of November and December than it did during the peak period May through September. Moreover, the Employer's statement that because of the economic upturn in the Austin building market the exact timing of the peak need for workers fluctuates indicates that its business operations is not tied to a true peak load but to fluctuating market demands for its services.

The Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested commercial painters. The Employer was provided with a NOD and in response, the Employer submitted additional evidence. However, the CO determined that the responsive evidence did not cure the deficiencies. After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer did not provide sufficient information and documentation to overcome its deficiencies. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the denial is **AFFIRMED**.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED**.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge

²⁶ 20 C.F.R. §655.32(a).