



Issue Date: 25 April 2019

BALCA Case No.: 2019-TLN-00080

ETA Case No.: H-400-18362-472860

In the Matter of:

A.C.T. Rebar Contractors, Inc.,
Employer.

Certifying Officer: Leslie Abella
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center

Appearances: Michele Contreras, Esq.
The Law Office of Michele Contreras, LLC
Cherry Hill, New Jersey

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to A.C.T. Rebar Contractors, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).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 (“Department” or “DOL”). 8 C.F.R. § 214.2(h)(6)(iii). 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. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (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. 655.4(e) (explaining transition procedures).

² The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

STATEMENT OF THE CASE

H2-B APPLICATION

Employer is a subcontractor for placement of reinforcement of steel in swimming pool and spa construction projects in Arizona. Appeal File (“AF”) 2. Employer operates out of Glendale, Arizona. *Id.* at 300. In its ETA Form 9141, Employer stated that its workers would perform work in Maricopa, Pinal, Yavapai, Pima, Gila, and Coconino counties of Arizona. *Id.* at 304. Employer seeks five temporary “Construction Laborers” to assist with physical labor at construction sites. *Id.* at 301. The Construction Laborers will be responsible for duties such as cleaning and preparing sites, digging trenches, setting braces for excavations, erecting scaffolding, and cleaning up rubble, debris, and other waste materials. *Id.*

Notice of Deficiency

On February 6, 2019, the CO issued a Notice of Deficiency (“NOD”). AF 270. The CO listed two deficiency grounds: (1) failure to establish the job opportunity as temporary in nature, pursuant to 20 C.F.R. § 655.6(a),(b); and (2) failure to establish temporary need for the number of workers requested, pursuant to 20 C.F.R. § 655.11(e)(3),(4). *Id.* at 273-276.

As to the first deficiency ground, the CO stated that the documents provided by Employer failed to establish a temporary need from April 1, 2019 to November 15, 2019. AF 273. Specifically, the CO stated that the two sample bids provided by Employer “do not provide information that substantiates the period of need requested.” *Id.* Additionally, the CO identified fluctuations in Employer’s project outline that are inconsistent with the dates of temporary need requested in Employer’s application. *Id.* To overcome this deficiency, the CO requested that Employer submit, *inter alia*, a statement describing the Employer’s schedule of operations throughout the entire year, supporting documents that substantiate the Employer’s statement that there is not much construction during the months of December through March, a summary listing projects in the area of intended employment for the previous two calendar years, and summaries of monthly payroll reports for the 2017 and 2018 calendar years. *Id.* at 274-275.

Concerning the second deficiency ground, the CO stated that the Employer “did not indicate how it determined that it needs five Construction Laborers during the requested period of need.” *Id.* at 275. To overcome this deficiency, the CO requested that Employer submit, *inter alia*, an explanation with supporting documentation of why the Employer is requesting five Construction Laborers during the dates of need, summarized monthly payroll reports for a minimum of one previous calendar year, and other evidence that similarly serves to justify the number of workers requested. *Id.* at 276.

Employer Response

On February 19, 2019, Employer submitted its response to the NOD. AF 144-268. Employer’s response included a response letter with explanation, 2018 summarized monthly payroll report, a 2017-2018 summarized monthly projects report, support letters from industry

contractors, and a 2017-2018 unsummarized employee log for multiple subcontractors. *Id.* The Employer’s response letter included an explanation of its schedule of operations throughout the entire year, its need to supplement its permanent workforce from April through November, and its lack of enough full-time work during winter months to support additional permanent positions. AF 144-150.

CO’s Final Determination

On February 22, 2019, the CO Issued a Non Acceptance Denial of Employer’s Application. AF 138-143. The CO determined that Employer did not overcome either of the deficiencies identified in the NOD. *See id.*

First, the CO found that Employer failed to establish the job opportunity as temporary in nature because the document submitted by Employer “do not support its statement [of temporary need].” AF 141. The CO expressed concern over an inconsistency between Employer’s statement that “[w]e never have enough full-time work available during the winter months so the temporary additions to our staff will not become a part of our regular operation,” and payroll documentation showing that Employer continued to use temporary labor during the nonpeak months of November, December, and February. AF 141. Moreover, the CO found that the refusal by or inability of permanent staff to do full-time work during the “intense heat” of an Arizona summer does not support a finding of short-term demand. *Id.* at 142. The CO concluded that a labor shortage no matter how severe does not constitute a temporary need. *Id.*

Second, the CO found that the Employer failed to provide an explanation, as requested, for how it calculated its need for five temporary workers. AF 143. The CO again noted that the Employer continued to use temporary workers during nonpeak months. *Id.* Furthermore, the CO noted that “the total hours worked by [Employer’s] Construction Laborers in any month of the year, did not support the need for five additional workers.” *Id.*

The CO found the Employer’s response did not overcome the deficiencies identified in the NOD and, accordingly, denied the Employer’s application. *Id.* at 143.

PROCEDURAL HISTORY

On March 8, 2019, Employer filed a request for administrative review of the CO’s final determination in this matter and the case was docketed in the Office of Administrative Law Judges that same day. It was assigned to me on March 11, 2019. On March 15, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule (“Notice”). I received the Appeal File on March 18, 2019.³ The AF includes a Request Letter from Employer containing legal argument. I have not received additional briefs from the parties.

³ On March 28, 2019, the office building containing the OALJ in Washington, D.C., was temporarily closed due to unforeseen circumstances. I asked my law clerk to contact the parties during the week of April 1, 2019, to inform them that there would be an unanticipated delay in issuing a decision due to this closure.

SCOPE OF REVIEW

BALCA's standard of review is limited in H-2B cases. 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 actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon 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).

DISCUSSION

Employers seeking certification under the H-2B program "must establish that [their] need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). Need is considered temporary if justified as "a one-time occurrence[,] a seasonal need[,] a peakload need[,] or an intermittent need." 20 C.F.R. § 655.6(b); *see also* 8 U.S.C. § 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6).

Of the four kinds of temporary need, Employer asserts a peakload need based on a seasonal or short-term demand. AF 2. To qualify for a peakload need, an employer must establish "that it regularly employs permanent workers to perform the services or labor 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 seasonal or short-term demand and the temporary additions to staff will not become part of the employer's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(3); *see* AF 2.

In this case, the CO found that Employer's response to the NOD was insufficient to establish a temporary need because a labor shortage does not establish a seasonal or short-term demand and because the Employer failed to establish that the temporary workers would not become part of Employer's regular operation. *See* AF 135-143. Upon review of the evidence, I note that the Employer provided evidence that it experiences a peakload need due to an increased seasonal or short-term demand, rather than a labor shortage. In particular, I find Employer's 2017 and 2018 monthly sale reports persuasive. *See* AF 7-10, 149, 152. However, sales from the non-peak month of February 2018 were greater than sales during the peak months of April, May, June, August, October, and November 2018. AF 7-10. Though Employer's response letter provided a reasonable explanation that in the non-peak month of February may appear as an "outlier" in the sales reports because it is often when "project demands commence and invoices are sent out and pre-paid," I find that this explanation, without supporting evidence, is insufficient to establish a peakload demand for the dates requested. *See* AF at 148.

Moreover, I agree with the CO's finding that Employer failed to establish that the temporary workers would not become part of the Employer's regular operation. *See* AF 135-143. Employer submitted persuasive evidence, such as the monthly payroll report, showing that its permanent staff often did not work full-time during winter months. *See* AF 151. However, Employer failed to overcome the discrepancy between its statement that temporary workers would not become part of its regular operation and the payroll reports showing that Employer did

in fact use temporary workers during three of its four non-peak months. *Compare* AF 4-5 and 145, *with* 151.

Additionally, the CO denied Employer's application for failure to establish the temporary need for the number of workers requested, pursuant to 20 C.F.R. § 655.11(e)(3),(4). AF 142-143. In the NOD, the CO requested that Employer provide, *inter alia*, an explanation with supporting documentation of why the Employer is requesting five Construction Laborers during the dates of need. AF at 270- 276. In its response, the Employer provided much of the information requested by the CO, such as a letter with explanations, a summarized 2018 monthly payroll report, a 2017-2018 summarized monthly project report, and support letters. AF 144-268. However, these documents did not explain the underlying calculus used to determine its request for five temporary workers. Nor is the need for five temporary workers apparent to me on the face of my review of the documents, such as the 2018 payroll report. *See* AF 151.

For the reasons explained above, I find that the Employer did not provide sufficient evidence to overcome the deficiencies identified by the CO. Accordingly, I find that the CO did not err in denying certification in this matter.

I am requesting that the parties be provided a courtesy copy of this order in addition to service by regular mail.

ORDER

Based on the foregoing, the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge