



Issue Date: 04 April 2019

BALCA Case No.: 2019-TLN-00086
ETA Case No.: H-400-19007-025671

In the Matter of:

FALLS CITY MARKET, INC.
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

The above-captioned case arises from a request for review by Falls City Market, Inc. (“the Employer”) of a United States Department of Labor (“DOL”) Certifying Officer’s denial of its application for temporary alien labor certification under H-2B non-immigrant program. The H-2B program permits employers to hire farm workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. See 8 U.S.C. §1101 (a)(15)(H)(ii)(b)¹; 8 CFR §214.2 (h)(6)(i); 20 CFR part 655, subpart A.²

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for Temporary Employment Certification (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20.

After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies

¹ 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).

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this decision and order are to the IFR.

certification, in whole or in part, the employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On January 7, 2019, Employer filed an H-2B Application for Temporary Employment Certification (“ETA Form 9142b”) for the job titled “Kitchen Help,” Standard Occupational Classification (“SOC”) code/occupational title 35-2021, Food Preparation Workers. AF 86.³ Employer requested six Kitchen Help workers for a period of employment starting from April 1, 2019 to October 31, 2019. *Id.* Employer listed the nature of the temporary need as a peakload need. *Id.* Employer explained that they are a restaurant located adjacent to Ohiopyle State Park that experiences an “annual peakload of business in connection with the use of the park in the summer or shoulder seasons.” *Id.*

On February 6, 2019, the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application failed to meet the acceptance criteria in light of three deficiencies.

First, the CO found that Employer failed to establish that they were a valid employer under 20 C.F.R. 655.5 and 20 C.F.R. 655.15(a). AF 82. The CO was unable to verify the existence of the business associated with the filing. *Id.* The CO directed the employer to submit a response including evidence of Employer’s business name and that the address provided on the ETA form 9142 is associated in the state of Pennsylvania with Falls Market Restaurant. *Id.*

Second, the CO found that Employer failed to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. 655.6(a)-(b). AF 83. The CO noted that Employer did not sufficiently demonstrate the requested standard of temporary need and did not provide an explanation regarding its standard selection. *Id.* Additionally, the CO stated that Employer did not establish that it regularly employs permanent workers to perform the services of labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand, and that the temporary additions to the staff will not become part of the employer’s regular operation. *Id.* The CO directed Employer to submit the following documents:

- 1) A statement describing the employer’s (a) business history, (b) activities, (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
- 2) A detailed explanation as to the activities of the of the employer’s permanent workers in this same occupation during the stated non-peak period;
- 3) Summarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full time permanent and temporary employment in the requested occupation, Kitchen Help, the total number of workers or staff employed, total hours worked and total earnings received;
- 4) Summarized monthly food/beverage gross sales report for a minimum of two previous calendar years for the employer’s worksite location of 69 Main Street, Ohiopyle, PA. Such document must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and

³ For the purposes of this opinion, “AF” stands for “Appeal File.”

- 5) Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 83-84.

Third, the CO additionally found that the Employer failed to establish that there was a temporary need for the number of workers requested pursuant to 20 C.F.R. 655.11(e)(3) and (4). AF 84. The CO noted that the employer had not sufficiently demonstrated that the number of workers requested on the application was “true and accurate and represents bona fide job opportunities.” *Id.* The CO concluded that Employer did not indicate how it determined that it needed six Kitchen Help workers during the requested period of need. *Id.* The CO directed the Employer to submit the following documents:

- 1) An explanation with supporting documentation of why the employer is requesting six Kitchen Help workers for Ohiopyle, PA during the dates of need requested;
- 2) If applicable, documentation supporting the employer’s need for six Kitchen Help workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
- 3) Summarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Kitchen Help, the total number of workers or staff employed, total hours worked and total earnings received; and
- 4) Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

Id.

On February 20, 2019, Employer responded to the CO’s request, providing documentation in support of its application. AF 49-76. Employer provided the following documents: an e-mail to the CO, a letter to the CO with an explanation about Employer’s labor need, Employer’s 2017-2018 profit and loss reports, and Business Entity Details.

On February 25, 2019, the CO issued a Non-Acceptance Denial (“Denial”). AF 41-48. The CO found that Employer properly established that it was a valid employer, and that issue is thus not in question. The CO did, however, find that the Employer’s response to the NOD was still insufficient because 1) Employer failed to establish that the job was temporary in nature and 2) Employer failed to establish the need for the number of workers requested. AF 45-46. The CO concluded that Employer failed to provide summarized monthly payroll reports and summarized monthly food/beverage sales as directed, and with the documentation provided, was unable to establish a temporary peakload need for the requested period of employment. *Id.* The CO also concluded that Employer failed to submit any of the documents requested in its NOD and thus failed to sufficiently demonstrate that the number of workers requested on the application was true, accurate, and represented bona fide job opportunities. AF 46-47.

On March 14, 2019, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”) AF 1-39. Employer’s request included a copy of the Final Determination, a copy of Employer’s response letter to the Notice of

Deficiency, a copy of the 2017-2018 profit and loss reports, Business Entity Details, a request letter, and a mailing label. BALCA docketed Employer's appeal on March 18, 2019. The undersigned received the Appeal File on March 21, 2019 and issued a Notice of Assignment and Expedited Briefing Schedule on March 22, 2019, allowing Employer and the Solicitor on behalf of the CO, to file briefs by no later than April 2, 2019.

In support of its request for review before BALCA, Employer argued that CO erroneously found that the record did not support a finding that Employer's response to the Notice of Deficiency was sufficient and thus erroneously denied Employer's H-2B application. AF 1-2. Employer stated that the CO went above and beyond the necessary requirements set forth in 20 C.F.R. 655 "usurping the second part of the process being the recruitment requirements as established by the U.S. Citizen and Immigration Services." AF 2. Employer argues that the documentation it provided clearly establishes that Employer made a "reasonable showing of its need and its intent to utilize the seasonal employees." *Id.* Employer further argues that the CO abused her discretion in arriving at her decision. AF 3.

The Associate Solicitor for Employment and Training Legal Services ("Solicitor") did not file a brief. The Solicitor notified the undersigned of their intent not to file a brief on March 25, 2019. Employer timely filed a brief on April 2, 2019. In its brief, Employer argued the same points it had previously addressed in its response letter to the Notice of Deficiency while also making the additional argument that the CO usurped the power of the Department of Homeland Security by improperly denying Employer's application at the first stage of review.

SCOPE AND STANDARD OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file, the parties' legal briefs, and the employer's request for review, which may contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLNL-00024, slip op. at 6 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLNL-00033 (May 10, 2016); *see also J&V Farms, LLC*, 2016-TLNL-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks

omitted). In reviewing the CO's explanation, the Board must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* A determination is considered arbitrary and capricious if the CO "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence." *Id.* Inquiry into factual issues "is to be searching and careful," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board may not supply a reasoned basis that the CO has not itself provided. *See State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1946)); *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that "an agency provide reasoned explanation for its action").

DISCUSSION

I. Employer Failed to Establish the Job Opportunity as Temporary in Nature

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *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).

The DHS regulations provide that 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." 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLN-00044, slip op. at 5 (May 8, 2009). Here, Employer requests temporary workers for a "peakload" need. To establish 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 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).

Employer has not established that it has a temporary peakload need for six Kitchen Help workers. Employer failed to provide any proof that it employs permanent workers within their business to perform Kitchen Help duties or any other jobs within their business. In Employer's H-2B application, Employer listed its number of non-family full time equivalent employees as "N/A." AF 87. After the CO requested payroll information to establish that Employer had regularly-employed permanent workers, the Employer did not furnish this information. The only information that Employer provided that even vaguely alluded to their number of permanent employees were the 2017-2018 profit and loss reports, but these reports only provided general expenses relating to employees without providing any substantiating evidence of their permanent workers.

Employer has also failed to definitively establish a seasonal or short term demand. The CO, in the Notice of Deficiency, requested that Employer send itemized gross sales of food and beverages, but Employer instead sent a more generalized 2017-2018 profit and loss report. In Employer's letter to BALCA to request review, Employer argued that the evidence it provided in response to the Notice of Deficiency was "clear to a lay person and the employer did submit the explanation of 'exactly' how the documents supported the requested dates of record. Upon review of the materials submitted by the Employer in response to the Notice of Deficiency, this simply does not hold up to being true. The 2017-2018 profit and loss report does not establish an itemized list of food and beverages, but rather, just lists Employer's "food purchases" and "grocery purchases." No further details are given on Employer's permanent staff, and it is unclear how many permanent employees Employer has. The 2017-2018 profit reports do show a general trend towards Employer having a greater profit and greater food and grocery purchases during the months that Employer is requesting temporary laborers, but that in of itself is inconclusive of a specific peakload need for Kitchen Help workers, especially when it is unclear what current permanent staff Employer retains. Employer asserts that it requires temporary workers to allow its current employees to "continue to work efficiently during peak months," but it has provided insufficient records to substantiate that fact. Therefore, given the information of record, the CO did not act in an arbitrary and capricious manner in finding that Employer failed to provide the necessary information for the CO to find a peakload need under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), and thus, the undersigned finds that Employer failed to establish a "peakload" need.

II. Employer Failed to Establish Temporary Need for the Number of Workers Requested

The CO, upon reviewing the H-2B registration and its accompanying documentation, is to make a determination based on the following factors:

- 1) The job classification and duties qualify as non-agricultural;
- 2) The Employer's need for services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;
- 3) The number of worker positions and period of need are justified; and
- 4) The request represents a bona fide job opportunity.

20 C.F.R. § 655.11(e).

Employer has not established that the number of worker positions and period of need are justified, nor has it established that its request represents a bona fide job opportunity. In Employer's letter to the CO, Employer stated that it needed six workers because it "believe[d] that six full-time employees working different shifts will provide the extra assistance we require to get through the busier tourist season." This statement alone is not substantiated by any further evidence of record as to why six employees, specifically, would serve this need. The Employer also did not provide any records of current workers employed in the Kitchen Staff position Employer was requesting H-2B workers for, and so as the record stands, it is unclear if this is a bona fide job opportunity. Thus, the undersigned finds that Employer failed to justify the

number of Kitchen Workers sought or that Employer was presenting a bona fide job opportunity in its submissions to the CO provided in response to the NOD.

As the CO did not act in an arbitrary and capricious manner in determining that the Employer failed to meet the burdens of establishing a peakload need, establishing that the number of worker positions they requested were justified, and establishing that the request represented a bona fide job opportunity, the CO's decision must stand.

III. The Certifying Officer Acted Within Their Authority and Did Not Usurp the Power of the Department of Homeland Security by Denying Employer's Application at the Initial Stage.

20 C.F.R. 655.1, which outlines the Scope and Purpose of Subpart A, Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers), reads as follows:

Section 214(c)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1184(c)(1), requires the Secretary of Homeland Security to consult with appropriate agencies before authorizing the classifications of aliens as H-2B workers. Department of Homeland Security (DHS) regulations at 8 C.F.R. 214(h)(6)(iii)(D) designate the Secretary of Labor as an appropriate authority with whom DHS consults with regarding the H-2B program, and specifies that the Secretary of Labor, in carrying out this consultative function, shall issue regulations regarding the issuance of temporary labor certifications. DHS regulations at 8 C.F.R. 214.2(h)(6)(iv) further provide that an employer's petition to employ H-2B nonimmigrant workers for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor (Secretary).

20 C.F.R. 655.30 requires that the CO review Applications for Temporary Employment Certification and job orders for compliance with all applicable program requirements. Under 20 C.F.R. 655.31, if the employer fails to meet any of the requirements within Subpart A, or if the application is incomplete or contains errors, the CO is to send a Notice of Deficiency to the employer and offer the employer an opportunity to submit a modified Application for Temporary Employment Certification within 10 business days from the date of the Notice of Deficiency. It is a necessary part of the H-2B application process for an employer's petition to be accompanied by an approved temporary labor certification from the Secretary of Labor and for the CO to review applications for temporary employment certifications. As detailed further in the procedural history of the case at hand, *supra*, the CO followed the procedures as required in Subpart A for the processing of temporary employment certifications. The CO, by making a decision that Employer finds unfavorable, is not "stopp[ing] the process and usurp[ing] the power of the DHS" (Emp. Br. at 9). Rather, it is the CO properly following regulatory procedures to ensure that employers are in compliance with the rules surrounding the H-2B application process. As established *supra*, as long as the CO is not acting in an arbitrary and capricious manner, the CO has the right to deny an Application

for Temporary Employment Certification that does not meet the statutory requirements for compliance.

In its brief, Employer relied on a case, *Louisiana Forestry Assoc., Inc. v. Solis*, from the District Court of the Eastern District of Pennsylvania to support its assertion that the requirement of labor certifications from the Department of Labor in the H-2B process usurps the power of the Department of Homeland Security. In this case, however, the District Court found that the Department of Homeland Security has the authority to require employers participating in the H-2B program to obtain labor certifications from the Department of Labor. *Louisiana Forestry Assoc., Inc. v. Solis*, 889 F.Supp.2d. 711, 720-27. The court also found that the Department of Homeland Security's adoption of 8 C.F.R. 214(h)(6)(iii) was reasonable and thus required the courts to defer to that agency under *Chevron*.⁴ *Id* at 726.

The CO had the requisite authority under Title 20 of the Code of Federal Regulations to review Employer's application. The argument that Employer proffered with respect to the Department of Labor "usurping" the authority of the Department of Homeland Security lacks merit in light of the statutory scheme contemplated in the establishment and administration of the H-2B program.⁵

CONCLUSION

For the reasons above, the evidence presented by the Employer fails to support its temporary need for six Kitchen Help workers from April 1 to October 31, 2019. It was not then an abuse of discretion for the CO to issue a denial of Employer's application. In light of the foregoing, the record establishes that Employer failed to establish that the temporary nature of the job opportunity, and the temporary need for the number of workers requested.

ORDER

In light of the foregoing, the Certifying Officer's decision is **AFFIRMED**.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

⁴ If an agency's interpretation is "reasonable" with respect to its construction of a statute where a statute is silent as to a particular issue, a court must defer to the agency's interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45.

⁵ Even if were deemed to have merit, this argument was not raised before the CO and therefore cannot be considered before BALCA on its review of the CO's determination in this matter.