



Issue Date: 13 February 2019

BALCA Case No.: 2019-TLN-00026
ETA Case No.: H-400-18268-875508

In the Matter of:

FLAT RATE MOVERS, LTD.,
Employer.

Appearances: David Giampietro, Esq.
Chief Operation Officer and General Counsel
For the Employer

Matthew Bernt, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

DECISION AND ORDER

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Flat Rate Movers, Ltd.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) final determination 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 on a one-time, seasonal, peak load, or intermittent basis, as defined by Department of Homeland Security regulations.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 using a Form ETA-9142B, *Application for Temporary Employment*

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015).

² 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).

Certification (“Form 9142”).³ A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BACLA.⁴

Employer filed a Form 9142 in this case requesting 90 Household Goods Movers for a seasonal need period of March 1, 2019 to October 5, 2019. (P 77)⁵ The CO issued a Notice of Deficiency on December 2, 2018, citing six deficiencies. (P 67-76). The Employer responded to the Notice of Deficiency on December 24, 2018. (P 60). On January 8, 2019 the CO issued a Final Determination denying the application, citing two deficiencies. The CO first asserted that, pursuant to 20 C.F.R. § 655.6(a) and (b), the Employer failed to establish the job opportunity was temporary. In other words, the Employer did not show how the need for the movers was seasonal in nature or “traditionally tied to a season of the year by an event or pattern and is of a recurring nature,” stating “moving is not tied to a specific season of the year.” (P 44-45). The CO next asserted that, pursuant to 20 C.F.R. § 655.11(e)(3) and (4), the Employer had failed to establish temporary need for the specific number of workers requested. The CO stated that the Employer had not provided information about how many temporary workers were employed in the past, and that there was no explanation of how the number 90 was determined. (P16).

The Employer requested expedited review on January 16, 2019 and provided further legal argument as well as additional data and exhibits supporting the application.⁶ However, pursuant to 20 C.F.R. § 655.61, the request for review by the Employer “[m]ay contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” Therefore, though credibly persuasive, I cannot consider the additional exhibits and attachments and may only review the evidence that was actually submitted to the CO.

On this point, the evidence the Employer submitted to the CO in response to the Notice of Deficiency was, in fact, inadequate. In regards to the first deficiency, the nature of the temporary need, the Employer was asked to submit, in part, monthly invoices and payroll reports separately listing its full-time permanent and temporary employees. The Employer was also required to submit evidence justifying the dates of need. The Employer was further requested to submit similar documentation and evidence supporting its claim that it needed 90 temporary workers.

Instead, the Employer submitted one document containing a chart of “summarized monthly invoices” and a “summarized monthly payroll.” (P 62). The document did not differentiate between temporary or permanent workers. The document was not signed by the Employer as requested, and therefore had no attestation that these statistics were from the Employer’s actual accounting records or system. It is clear from the summary that there is an

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ The appeal file is paginated, and these citations refer to the page number.

⁶ I issued a *Notice of Docketing and Order Establishing Briefing Schedule* on January 23, 2019 affording the parties seven business days after receipt of the appeal file to file briefs; I received none.

increase in jobs and in revenue during the summer months. There is also an increase in “total movers.” However, there is no evidence supporting the need for 90 additional temporary laborers, as opposed to any other number, and there is also no evidence that this number is tied to a “season.” The CO is correct—moving occurs year round. Instead, the need in this case appears to be “peakload” in nature, but this, unfortunately, is not what the Employer stated on its application and I am bound to what the Employer submitted.

The additional evidence the Employer included with its request for review is compelling, and may have supported its argument for temporary need and the requisite number of workers. However, pursuant to the regulations, under an expedited record review, I may not consider new evidence.

Accordingly the decision of the CO is affirmed.

SO ORDERED.

For the Board:

Stephen R. Henley
Chief Administrative Law Judge
Chair, Board of Alien Labor Certification Appeals