



Issue Date: 29 August 2019

BALCA Case No.: 2019-TLN-00146
ETA No.: H-400-19181-425518

In the Matter of:

GARCIA FOREST SERVICE, LLC,
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) pursuant to Garcia Forest Service, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination regarding 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 (“OFLC”) of the Employment and Training Administration (“ETA”).

H-2B Application

Employer engages in reforestation activities in the Eastern United States, including Remer, Minnesota.⁴ On June 30, 2019, Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”), with the CO.⁵ Employer requested certification for 30 “forestry workers” from September 13, 2019

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. 655.4(e) (explaining transition procedures).

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).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ AF 163-166. 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 AF 163-170.

through January 1, 2020 based on a seasonal need because it does not employ forestry workers during the months of February, March, April, and half of May.⁶

Notice of Deficiency

On July 9, 2019, the CO issued a Notice of Deficiency (“NOD”).⁷ The CO listed seven deficiency grounds, only two of which are relevant here:

- 1) that Employer failed to establish the job opportunity was temporary in nature as required under 20 C.F.R. § 655.6(a)-(b);
- 2) that Employer failed to establish temporary need for the number of workers requested as required by 20 C.F.R. § 655.11(e)(3)-(4) . . .⁸

As to the first deficiency ground, the CO explained that Employer’s Application did not submit sufficient information to establish its requested period of intended employment. Specifically, the CO noted that Employer did not include adequate attestations to justify the change in dates of need from Employer’s prior certifications. The NOD requested Employer 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 job opportunity being requested for certification reflects a temporary need when it has shown it is able to employ its requested occupation during the months of March through January; a period over 10 months;
- 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;
- 4) An explanation as to why the requested dates of need have changed from the employer’s prior application;
- 5) Signed contracts that support the employer’s two crews of 15 workers during the dates of need requested. The contracts must include worksite location and the commencement and end date of the project. Contracts/agreements should include a description of the work performed and include the title and signatures of all appropriate parties;
- 6) Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment for *Forestry Workers*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer

⁶ AF 163. Although the Final Determination states the “Requested Period of Need” is from September 13, 2019 through January 1, 2020, this appears to be in error as the requested period is for September 13, 2019 through January 30, 2020. AF 163.

⁷ AF 153-162.

⁸ AF 156-158. The other five deficiency grounds were not discussed in the CO’s Final Determination and will not be addressed here.

attesting that the information being presented was compiled from the employer's actual accounting records or system; and
7) Other evidence and documentation that similarly serves to justify the chosen dates of need, if any.⁹

As to the second deficiency ground, the CO explained that Employer's Application did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. Specifically, the CO noted that that the Application did not indicate how it determined that it needed 15 additional workers than its prior request.¹⁰ The NOD requested Employer provide additional information including:

- 1) An explanation with supporting documentation of why the employer is requesting 30 Forest Workers for Remer, Minnesota, during the dates of need requested;
- 2) Signed contracts that support the employer's two crews of 15 workers in its area of intended employment during the dates of need requested;
- 3) Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment for *Forestry Workers*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
- 4) Other evidence and documentation that similarly serves to justify the number of workers requested, if any.¹¹

Employer's Response to NOD

On July 22, 2019, Employer submitted a response to the NOD.¹² As to the first deficiency, Employer states that in the past, there was one occurrence where they requested a start date as early as March 15th; however, Employer asserts that contracts and obligations have changed since then and that they have not requested a start date as early as March because it is still too cold to perform its forestry services at that time. According to Employer, for the last several years, their dates of need have remained constant. Employer asserts that their current contract for Timberstand Improvement of the forests inside the Leech Lake Reservation covers 950 acres of land, which will require two crews of 15 workers each. As to the second deficiency, Employer states that in prior years, they had less acreage under contract than they have contracted for this year. In support, Employer attached the contract with the Leech Lake Band of OJIBWE, along with payroll records.¹³

⁹ AF 156-157.

¹⁰ AF 157.

¹¹ AF 158.

¹² AF 24-26.

¹³ AF 24-25.

CO's Final Determination

On July 25, 2019, the CO issued a Final Determination denying the temporary labor certification.¹⁴ Although the NOD listed seven deficiencies, the CO's Final Determination only addressed deficiencies one and two. According to the CO, although Employer provided explanations and documentation with its response to the NOD, Employer did not overcome the deficiency. Specifically, the CO states that the contract referred to by Employer notes that the project is intended to be completed by September 30th, which is inconsistent with the requested dates of need. In addition, although payroll records were provided, the CO noted that the records were not summarized for the entire workforce. According to the CO, it is unable to use the limited information provided in order to make a determination regarding Employer's stated peak load need. Therefore, the CO issued a denial of the application because Employer did not overcome its deficiency.¹⁵

Procedural History

Employer filed a request for administrative review of the CO's final determination, which was received by BALCA on August 6, 2019.¹⁶ The Appeal File ("AF") was received on August 16, 2019 and this matter was assigned to the undersigned. On August 16, 2019, the undersigned issued a Notice of Assignment and Order for Expedited Briefing, requiring briefs to be submitted by August 27, 2019. On August 20, 2019, the undersigned was informed that the CO was not planning on filing a brief and no briefs were received by August 27, 2019.

Discussion

In its request for appeal, Employer asserts that, as to the CO's argument that the contract dates are inconsistent with the dates of need, the contract is behind schedule, which is why it appears that the dates of need are inconsistent. According to Employer, the contract is behind schedule due to factors including needing to be approved to work on the Indian reservation and finding an adequate labor force to perform the work. Employer asserts that, although previous dates of need ended in December, due to the current contract being behind schedule, it anticipates that it will require workers through the end of January, weather permitting. As to the CO's argument that there was no justification for an additional 15 workers than the prior year, Employer asserts that the current contract is on a larger scale than the contract in the prior year. As to the payroll records, Employer asserts that the records are summarized for each employee.¹⁷

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

¹⁴ AF 12-20.

¹⁵ AF 17-20.

¹⁶ AF 9-10.

¹⁷ AF 9-10.

Employment Certification.¹⁸ An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification.¹⁹

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 Upon considering the evidence of record, *de novo*, 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.²¹

Employer has the burden to prove that the requested positions represent bona fide job opportunities. The CO requested the payroll information in order to determine whether Employer's need is substantiated. Employer has the burden to establish its requested need within the meaning of the regulations and after a review of the record, the undersigned finds that it failed to meet its burden. Because Employer failed to demonstrate that the number of workers is justified, the CO's denial is affirmed.

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, Employer did not comply fully with the requested additional information. Specifically, the CO required monthly payroll reports for the prior calendar year that summarized monthly payroll for each month and to include the total number of workers or staff employed, total hours worked, and total earnings received for both permanent and temporary workers. Although Employer filed a lengthy payroll report, it was not broken down by month, or by type of employee, as requested by the CO. Rather, as acknowledged by Employer in its request for appeal, the payroll report was summarized by employee for the entire year.²²

Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested 30 forestry workers. Employer was provided with a NOD and in response, Employer submitted additional evidence. The CO determined that two of the seven deficiencies were not cured by the additional evidence. Reviewing the evidence considered by the CO, the undersigned agrees that Employer did not provide sufficient information to show its entitlement and did not properly complete its

¹⁸ 20 C.F.R. § 655.32(a).

¹⁹ 8 U.S.C. § 1361.

²⁰ 20 C.F.R. § 655.61(a)(5).

²¹ 20 C.F.R. § 655.61(e). The regulation is silent as to the standard of review to be applied during administrative review of the decision by the CO. 20 C.F.R. § 655.61; *cf.* 20 C.F.R. § 655.171(b) (describing the hearing under that procedure as "de novo" and allowing for the introduction of new evidence). Some ALJs have reviewed the decision by the CO under the "arbitrary and capricious" standard of review. *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 7, 2016). Notwithstanding this apparently common usage, the undersigned is not persuaded that any deference is due to the decision by the CO during this administrative review. *See Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3, n. 4 (Oct. 19, 2018).

²² AF10, 34-151.

application. Accordingly, for the foregoing reasons, the undersigned finds that the Denial issued by the CO was proper. Therefore, the Denial is AFFIRMED.

ORDER

Based on the foregoing, the Denial of temporary labor certification issued by the Certifying Officer in the above-captioned matter is AFFIRMED.

SO ORDERED.

For the Board:

JENNIFER WHANG
Administrative Law Judge