

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 December 2018

**BALCA Case Nos.: 2019-TLN-00014
2019-TLN-00015**

ETA Case Nos.: H-400-18234-552485
H-400-18222-331389

In the Matter of:

INTERNATIONAL PLANT SERVICES, LLC
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Ashley Foret Dees, Esq.
Michael Jeb Richard, Esq.
Lake Charles, Louisiana
For the Employer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to International Plant Services, LLC’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On August 24, 2018, Employer applied for temporary employment certification through the H-2B program to fill 125 positions for “Plumbers, Pipefitters, and Steamfitters” and 120

positions for “Welders, Cutters, Solderers, and Brazers” for the period of November 15, 2018 through April 15, 2019. (AF-1 120-228; AF-2 118-222).¹

On September 5, 2018, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b), 655.11(e)(3) and (4), and 655.15(a).² (AF-1 113-119; AF-2 111-117). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer did not demonstrate how its need meets the regulatory standard of a peakload need. The CO also noted Employer’s payroll reports did not include the number of workers nor the number of hours worked by each worker in the requested occupation. Further, it was not clear if any of the payroll represents the work site at Ingleside, Texas. Also, the CO noted the payroll reports did not show that the revenue during the months of need requested are consistently the highest throughout the year. (AF-1 116-118; AF-2 114-116).

Next, the CO noted Employer did not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities or how it determined that it needs 125 “Industrial Pipefitters” and 120 “Combo Welders” during the requested period of need. Finally, the CO found Employer failed to submit a complete and accurate ETA Form 9142 such that the end date of need was inconsistent throughout the application. (AF-1 118-119; AF-2 116-117).

On September 19, 2018, Employer responded to the CO’s Notices of Deficiency and submitted response letters with explanation, Statements of Need, webpage printouts, contracts, news articles, 2015-2017 gross revenue on project charts, histogram and forecast charts, 2018 industrial market outlook reports, workforce projection charts, profit and loss reports, and payroll reports. (AF-1 30-112; AF-2 30-110).

On October 24, 2018, the CO made its final determination regarding Employer’s H-2B applications. The CO denied Employer’s application due to its failure to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. §§ 655.6(a) and (b) and due to its failure to establish its temporary need for the number of workers requested pursuant to 20 C.F.R. §§ 655.11(e)(3) and (4). (AF-1 12-29; AF-2 12-29).

Specifically, the CO found that Employer did not submit sufficient information in its application to establish its requested standard of a peakload need. In response to the documents submitted by Employer requested in the Notice of Deficiency, the CO noted Employer’s payroll reports did not include the number of workers nor the number of hours worked by each worker in the requested occupation. Also, it was unclear from these reports if any of the payroll represented the work site at Ingleside, Texas. Further, the gross revenue charts and profit & loss reports indicate Employer shows more revenue in non-peak months than in the requested peak months.

¹ In this decision, AF-1 is an abbreviation for “Appeal File” associated with BALCA Case No. 2019-TLN-00014, and AF-2 is an abbreviation for “Appeal File” associated with BALCA Case No. 2019-TLN-00015.

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

Moreover, the CO found that a labor shortage, no matter how severe, was insufficient to justify a temporary need. (AF 14-18).

In addition, the CO also found Employer failed to establish a temporary need for the number of workers requested and that the number of workers requested is true, accurate, and represents bona fide job opportunities. Rather, the CO found the service agreement submitted by Employer did not specify or give an indication of how much manpower or how many workers would be needed for the services to be provided. Further, Employer's payroll records failed to demonstrate a need for the requested during the dates requested. Thus, the CO determined Employer failed to meet the regulatory requirements at 20 C.F.R. §§ 655.6(a) and (b) and 20 C.F.R. §§ 655.11(e)(3) and (4) and denied Employer's application. (AF 18-29).

On November 7, 2018, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. (AF-1 1-11; AF-2 1-11). On November 14, 2018, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b). Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of November 29, 2018. Thereafter, Employer timely submitted its brief to the undersigned. No brief was received by the undersigned on behalf of the Solicitor.

APPLICABLE LAW

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(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 certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), "[t]he scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which

may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a), (e).

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).

After considering all 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. § 655.61(e)(1)-(3).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

DISCUSSION

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. *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); 20 C.F.R. § 655.11(a)(3). Employer “must establish that its 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). The 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). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) 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 Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

Employer alleges it has a peakload need for 125 positions for “Plumbers, Pipefitters, and Steamfitters” and 120 positions for “Welders, Cutters, Solderers, and Brazers” from November 15, 2018 through April 15, 2019. (AF-1 120-228; AF-2 118-222). In order to establish a peakload need, Employer must establish 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). Generally, the regulations state that a temporary need lasts for less than a year, though certain circumstances can warrant extensions of time. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Employer states it “provides services to chemical, petrochemical, refining, pulp and paper industry, including liquefied natural gas industry- primarily along the coast of the Gulf of Mexico- during ‘turnaround’ season, which begins in the late fall and ends in the spring.” Employer further explained that during this period, industrial facilities stop operations to allow for companies to make any necessary repairs/complete construction before reopening at full capacity during the summer months. As such, Employer seeks its requested workers in order to complete a substantial turnaround project. (Emp. Br., pp. 3-4).

After reviewing the record in this matter, I find Employer submitted insufficient evidence to establish that it has a peakload need for temporary workers. Employer submitted several documents in support of its need for the requested workers, including various total payroll reports, employment graphs, profit and loss statements, financial graphs, and an updated statement of need. However, these documents do not include the number of workers nor the number of hours requested by each worker in the requested occupation. Moreover, the 2017 payroll report shows temporary workers were used throughout the year, with the information not summarized in a manner that supports Employer’s dates of need. Indeed, the 2017 payroll reports indicate the most hours worked per month are outside of Employer’s requested peakload period and decrease during the late fall months through the end of the year. As a result, it is difficult to determine whether Employer actually has a temporary need for its requested workers.

Further, the Employer’s profit and loss reports and its gross revenue charts fail to show that the revenue during the months of need requested represents a peakload period. Rather, it appears the revenue in its nonpeak months of July and September exceeds its revenue in its peak month of December. Despite the Employer’s contention, I find there is no “well defined peak season” evinced from the documentation submitted.

While Employer contends the CO primarily relied on 2017 data to show it failed to demonstrate a peak in its operations during the dates requested, I find that Employer’s reliance on an industrial projects report indicates shutdown and outage durations vary from a few weeks to a few months. As such, the undersigned concludes Employer has failed to meet its burden to establish that it has a peakload temporary need for 125 “Plumbers, Pipefitters, and Steamfitters” and 120 positions for “Welders, Cutters, Solderers, and Brazers” from November 15, 2018 through April 15, 2019.

In addition, I also find Employer has submitted no evidence from which the CO could conclude that its request for 125 “Plumbers, Pipefitters, and Steamfitters” and 120 positions for “Welders, Cutters, Solderers, and Brazers” was justified. Employer asserts it determined the number of workers requested based on historical data and proprietary internal planning/scheduling forecasting models. (Emp. Br., p. 10). However, the service agreement submitted by Employer between itself and its client does not specify how many workers are needed for the services to be provided. Further, the payroll reports do not show any decrease in the summer months. Rather, the payroll report indicates July 2017 showed the most hours worked in the entire year. Accordingly, I find Employer has not sufficiently demonstrated that the number of workers requested is true, accurate, and represents bona fide job opportunities.

Therefore, for the reasons stated above, Employer has failed to meet its burden of showing how its employment need 125 “Plumbers, Pipefitters, and Steamfitters” and 120 positions for “Welders, Cutters, Solderers, and Brazers” is temporary in nature based on peakload need or that the number of worker positions and period of need are justified. Therefore, I find the CO’s determination is neither arbitrary nor capricious. Accordingly, the denial of Employer’s H-2B certification must be affirmed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

ORDERED this 6th day of December, 2018 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge