



Issue Date: 13 November 2018

BALCA Case No.: 2019-TLN-00004
ETA Case No.: H-400-18212-021546

In the Matter of:

ISCIN, LLC
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Debra Rodriguez, *Esq.*
Rodriguez & Moretzsohn, PLLC
Corpus Christi, Texas
For the Employer

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

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to ISGIN, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) 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

¹ 20 C.F.R. § 655, Subpart A (codified April 1, 2016). On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR rules apply to this case.

States on a one-time, seasonal, peakload or intermittent basis.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”).³ A Certifying Officer 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 BALCA.⁴

STATEMENT OF THE CASE

The Employer is a construction company located in Ingleside, Texas. (AF 139).⁵ On August 1, 2018, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”), signed appendix B, statement of need, disclosure of foreign recruitment, job order and prevailing wage determination, requesting certification for sixty-five (65) carpenter helpers⁶ from October 1, 2018, until July 1, 2019 based on a peakload need for temporary labor. (AF 139-162).

On August 9, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined six deficiencies in the Employer’s Application. (AF 128-138). Specifically, the CO stated that the Employer (1) failed to meet the definition of an employer under the regulations; (2) failed to satisfy the application filing time requirements; (3) failed to establish the job opportunity was temporary in nature; (4) failed to establish temporary need for the number of workers requested; (5) failed to submit an acceptable job order; and (6) failed to submit a complete and accurate ETA Form 9142B. *Id.* As pertinent to this appeal, the CO determined that it could not establish that the Employer was a registered business entity. (AF 131). The CO instructed the Employer to file documentation from the State of Texas verifying its existence at the address provided on the application. *Id.* Additionally, the CO determined that the Employer failed to establish that the job opportunity was temporary in nature. (AF 132-134). The CO requested the Employer provide documentation to establish a peakload need for additional workers. *Id.* Third, the CO stated that the Employer failed to establish a temporary need for the number of workers requested. (AF 134-136). The CO asked the Employer to provide documentation to explain its need for 65 workers. *Id.*

On August 14, 2018, the Employer submitted additional documents in response to the Notice of Deficiency including a summary of its construction jobs from 2017 to 2019, summaries of its payroll reports from 2016 to 2018, weather reports, a letter of intent, a contact agreement for work to be performed, IRS Form W-9 (request for Federal Employee Identification Number, AF 119), an amended statement of temporary need, an amended ETA Form 9142, a construction service list and a project list. (AF 99-127).

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). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

⁶ SOC (O*Net/OES) occupation title “Helpers – Carpenters” and occupation code 47-3012 (AF 139).

On October 10, 2018, the CO issued a Non Acceptance Denial (“Denial”) concluding that the Employer (1) failed to meet the definition of an employer under the regulations; (2) failed to establish the job opportunity was temporary in nature; and (3) failed to establish temporary need for the number of workers requested. (AF 81-98). On October 17, 2018, the Employer requested administrative review of the CO’s Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.⁷ (AF 1-80).

On October 22, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File.⁸ On October 30, 2018, BALCA received the Appeal File from the CO. The Employer submitted a brief on November 2, 2018. The CO did not file a brief.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. 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 that the Employer actually submitted to the CO before the date the CO issued a final determination.⁹ After 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.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer’s Application to admit H-2B workers for temporary non-agricultural 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.¹²

Status as an Employer

⁷ Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

⁸ 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 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).

¹² 20 C.F.R. § 655.1(a).

Section 655.5 of the regulations defines an ‘Employer’ as a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and (3) for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).¹³

In the present case, the CO was unable to verify the Employer existed as the physical address provided in the application and asked the Employer to submit documentation from the State of Texas verifying its address and existence. (AF 131). In response the Employer submitted IRS Form W-9, which it had completed itself. (AF 119). The CO determined that this documentation was insufficient to establish the Employer’s existence. (AF 83-84). I agree with the CO that paperwork completed by the Employer is insufficient to establish that it exists at a physical address within the U.S. and thus meets the definition of an Employer under the applicable regulations.¹⁴ Thus, I find that the Employer has failed to overcome this deficiency.

Failure to Establish a Temporary Need for Workers

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.¹⁵ The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.”¹⁶ Pursuant to § 113 of the 2018 Consolidated Appropriations Act, “for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).” Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

¹³ 20 C.F.R § 655.5.

¹⁴ In its request for administrative review, the Employer submitted Articles of Incorporation from the State of Texas (AF 20-24) and a letter from the IRS issuing it a FEIN. (AF 25). I am unable to consider these documents as my review of the file is limited to the evidence that the Employer submitted to the CO before the date the CO issued a final determination. 20 C.F.R. § 655.61. Even so, I find that this documentation is insufficient to overcome this deficiency as the Articles of Incorporation do not include or identify the Employer’s physical place of business and the IRS form includes a different address than the one provided on the ETA Form 9142. Thus, I am still unable to conclude that the Employer exists at the address in Ingleside, Texas indicated on its application.

¹⁵ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

¹⁶ 20 C.F.R. § 655.6 (a).

In this case, the Employer alleged a peakload need for 65 carpenter helpers from October 20, 2018, until July 20, 2019.¹⁷ In order to establish a peakload need for temporary workers, the 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.”¹⁸

In its Application, under the Statement of Temporary Need, the Employer stated that “it is preferred and greatly appreciated by our employees, that we complete a majority of the outside construction and remodeling work during the fall months due to the increased weather temperatures of summer.” (AF 151). In response to the NOD, the Employer submitted an Amended Statement of Need in which it stated that:

During the months of August and September, Ingleside, Texas experiences the hottest time of the year. The temperatures rise up into the 90s, with heat indexes soaring into the low 100s, creating an extremely hot and unsafe work environment for our employees. Workers may experience safety issues, such as heat exhaustion, during these months if not careful. We take pride in creating a safe and comfortable working environment for all employees, and do not require workers to be out in unfavorable weather conditions. . . . Therefore, our contracts are created to begin construction/remodeling work during the time of the year that is best suited for all involved.

(AF 121).

In support, the Employer summarized its payroll reports from 2016 and 2017. (AF 104-107). The documents indicate that for those years the Employer had 24 to 41 permanent employees and hired temporary workers from January to July and October to December. *Id.* Thus, the documentation supports the Employer’s assertion that it does a decreased amount of business during August and September. However, there is no evidence in the record that this downturn is caused by decreased market demand or decreased need for construction work. Rather, the Employer chooses to structure its contracts in such a way as to create the downtime in work that it experiences. For instance, the Employer entered into a contract agreement for construction work on June 4, 2018. (AF 118). There is no indication in the record, either in the contract or the letter of intent, to explain why work on the contract could not begin soon after the contract was signed. Instead, the Employer has acknowledged that it chooses to delay work until

¹⁷ In response to the deficiency that its Application was not timely filed, the Employer altered its dates of need from October 1, 2018 through July 1, 2019 to October 20, 2018 through July 20, 2019. (AF 123).

¹⁸ 8 C.F.R. 214.2(h)(6)(ii)(B)(3); *see also Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peakload standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload, temporary need).

a time when it is cooler outside. The Employer asserts that to work outside in August and September is “unfavorable” but has not presented any documentation to show that working outside in Ingleside, Texas in August and September is not possible, medically inadvisable or not done by other employers. Thus, there is nothing in the record to support the Employers assertion that there is an increased demand for work during the peakload season of October to July it identified, only that the Employer has a preference for not working outside in August and September. I find that the Employer’s preference does not create a seasonal or short-term demand that gives rise to the need for temporary workers. After reviewing the record, I concur with the CO that the Employer has failed to establish a “peakload” need for H-2B workers from October 20, 2018 until July 20, 2019.

Failure to Justify a Need for 65 Workers

The final issue on appeal is whether the Employer has demonstrated that it has a need for 65 carpenter helpers and whether its request for those workers represents a bona fide job opportunity. The regulations provide that the CO will “review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors . . . (3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.”¹⁹ In the NOD and Denial, the CO concluded that the Employer failed to justify a need for 65 carpenter helpers and that it was unclear how the Employer determined the number of worker’s requested. (AF 134-136, AF 88-90).

In its response to the NOD, the Employer provided a letter of intent and a summary of upcoming work in which it identified 5 upcoming projects. (AF 102, 117). It also identified a “project list” where it indicated that it would need 13 carpenter helpers for each of the 5 upcoming jobs, for a total of 65 workers. (AF 127). After reviewing the record, I find that the Employer has not explained how it determined it would need 65 workers. The 5 upcoming jobs are identified as “carpentry construction/home remodel.” (AF 102). From 2017-2018, the Employer completed 3 jobs it also identified as ““carpentry construction/home remodel.” (AF 103). From October 2017 through July 2018, the Employer hired 10 to 29 temporary workers, which breaks down to 3 to 10 workers per job site, not the 13 the Employer has indicated it needed. The Employer stated that the projects for 2018 to 2019 require more work than past projects because they have been hired to repair damages resulting from recent hurricanes. However, there is no documentation in the record to support this statement that the upcoming projects are of a bigger scale or require more work than past projects, especially as they are all identified as the same type of project. BALCA has held that “a bare assertion without supporting evidence is insufficient to carry the employer’s burden.”²⁰

Thus, it is not clear from the record how the Employer fully calculated how many additional workers it would need from October 20, 2018 to July 20, 2019. Therefore, I find that the Employer has not established that the need for 65 carpenter helpers is justified and represents

¹⁹ 20 C.F.R. § 655.11(e)(3)-(4).

²⁰ *BMC West Corp.*, 2016-TLN-00039/40, slip op. at 5 (May 18, 2016)(citing to *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

a bona fide job opportunity. Accordingly, I find that the CO properly determined that the Employer failed to meet the requirements of 20 C.F.R. § 655.11(e)(3)-(4).

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

LARRY A. TEMIN
Administrative Law Judge