



**Issue Date: 30 January 2019**

BALCA Case No.: 2019-TLN-00020

ETA Case No.: H-400-18025-593152

*In the Matter of:*

**J & J Construction Company**  
*Employer*

**DECISION AND ORDER AFFIRMING DENIAL OF REQUEST  
FOR EXTENSION OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant a request for review of the Certifying Officer’s (“CO”) Denial of Extension Request in the above-captioned H-2B temporary labor certification matter by J & J Construction (“the Employer”).<sup>1</sup>

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“US”) on a one-time, seasonal, peakload, or intermittent basis.<sup>2</sup> 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”). 8 C.F.R. § 214.2(h)(6)(iii).

On April 29, 2015, the Department of Labor (the “Department” or “DOL”) and the Department of Homeland Security (“DHS”) 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). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR. *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)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018). The DOL 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. 20 C.F.R. § 655.61(a).

---

<sup>1</sup> 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). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

<sup>2</sup> *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)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

## Statement of the Case

On January 26, 2018, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), seeking approval of 10 construction laborers as temporary labor for the period from May 7, 2018 to November 30, 2018, and describing the nature of its temporary need for such workers as “peakload.” (AF<sup>3</sup> 106-147). On March 13, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in the Employer’s Application: one instance of failure to submit an acceptable job order and two instances of failure to submit a complete and accurate ETA Form 9142. (AF 99-105). The CO gave the Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD, or request administrative review before BALCA. *Id.* Thereafter, the Employer responded to the NOD, granting the CO permission to modify the Application, along with other supporting documentation. (AF 87-98).

On April 4, 2018, the CO issued a Notice of Acceptance of the Employer’s Application. (AF 80-86). The CO then issued a Notice of Certification on May 7, 2018, granting the certification for 10 construction laborers “for a period beginning on May 7, 2018 and ending on November 30, 2018” as requested in the Employer’s Application. (AF 45-55).

On or about November 30, 2018, the Employer submitted a request for an extension of the certification granted on May 7, 2018 due to anticipated increase in business in the winter and spring season. (AF 10-44). Specifically, the Employer sought an extension of the period so it would end on May 30, 2019 rather than November 30, 2018. *Id.*

On December 7, 2018, the CO issued a Denial of Extension Request (“Denial”). (AF 8-9). In support of the Denial, the CO concluded that

The [E]mployer has not demonstrated that an extension is necessary due to weather conditions or other reasons beyond the control of the employer that could not be reasonably foreseen. In addition, the extension requested would extend the period of certification beyond 10 months (for seasonal, peakload or intermittent need) or 3 years (for a one-time occurrence), as applicable.

AF at 8.

By letter filed on December 19, 2018, the Employer requested administrative review of the CO’s Denial (“Employer’s Appeal”). (AF 1-7). On January 2, 2019, the Office of Administrative Law Judges (“OALJ”) received the Appeal File from the CO.<sup>4</sup> On January 8, 2019, the undersigned issued a Notice of Assignment and Order for Expedited Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). The Employer, which is unrepresented, filed a letter dated January 15, 2019, stating that it “does not wish to file a brief or any new documents.”<sup>5</sup> The Solicitor did not file a brief.

---

<sup>3</sup> “AF” refers to the Appeal File.

<sup>4</sup> The OALJ docketing clerk advised the undersigned on January 7, 2019 that the AF had been received.

<sup>5</sup> Included with the letter was the December 15, 2018 letter Employer previously submitted to request its administrative review of the CO’s Denial.

### Applicable Legal Analysis and Findings

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 of the CO's determination. 20 C.F.R. § 655.61. 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. 20 C.F.R. § 655.61(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). A CO may only grant an Employer's Application to admit H-2B workers for temporary nonagricultural employment if an 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).

Neither the INA, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO's determination in H-2B temporary labor certification cases. *See, e.g., Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

#### *Employer failed to establish a need for the certification extension requested*

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, peak load, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). 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.

Employers may request an extension of the period of employment for a labor certification pursuant to 20 C.F.R. § 655.60. The extension request "must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the

extension is needed and that the need could not have been reasonably foreseen by the Employer.” *Id.* Stated differently, an employer must establish that its need for an extension is due to factors outside of its control and that were not “reasonably foreseen.” An employer bears the burden of proof to establish it has met the requirements under the H-2B program. *See, e.g., D & R Supply*, 2013- TLN-00029 (Feb. 22, 2013) (citing 8 U.S.C. § 1361).

Here, in support of its requested certification extension, the Employer submitted the first pages of seven general construction job contracts naming it as a subcontractor; the intermittent dates of these contracts range from June 28, 2017 to September 21, 2018.<sup>6</sup> AF at 41-48. In its letter requesting the certification extension, the Employer maintains that these seven contracts reflect “four projects estimated to end in the middle of January [2019] and three to start up that same month.” AF at 12. The Employer maintains that these contractual obligations inform its need for the requested time period extension.

First of all, the extension which Employer seeks would result in the total work period exceeding nine months which the applicable regulation prohibits for a temporary labor need characterized in Employer’s Application as ‘peakload’. The DOL regulation specifies that certification will be denied if the “employer has a need lasting more than 9 months” while the DHS regulation only indicates that the need will generally “be limited to one year or less” except in cases of a “one time event” which “could last up to 3 years.” *See* 20 C.F.R. § 655.6(b) and 8 C.F.R. §214.2(h)(6)(ii)(B).

In this case, the Employer applied and received temporary labor certification for 10 laborers on a “peakload” basis for the period from May 7, 2018 to November 30, 2018. Regarding a ‘peakload’ need for temporary workers, the DHS regulation states, “[t]he petitioner 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.”

The DHS and DOL jointly-issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule (“IFR”), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position[.]  
82 Fed. Reg. 24056 (April 29, 2015).

Here, the Employer is requesting to extend the work period to over one year, contrary to the purpose of the H-2B program. And the Employer had not demonstrated in the documentation

---

<sup>6</sup> The Employer also included with its extension request to the CO the original Application for temporary labor certification (Forms ETA 9141, ETA 9142B), as the CO’s Notice of Deficiency, Notice of Acceptance, Notice of Certification and a “new I-797 from the USCIS,” in which it sought extension of the temporary visas issued to the 10 temporary non-immigrant construction laborers.

submitted to the CO prior the Denial, extraordinary circumstances existed which would justify such an extension of the work period. While the contracts referenced in the Employer's request for the extension might support finding the Employer had a need for temporary workers, they do not support finding that factors existed beyond the Employer's control the Employer could not have reasonably foreseen on its initial application for temporary labor certification in January 2018. *See, e.g., Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) ("An employer cannot just toss hundreds of puzzle pieces—or hundreds of pages of document—on the table and expect a CO to see if he or she can fit them together: the burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers"); *but see Chippewa Retreat Spa*, 2016-TLN-00063 (September 12, 2016); *Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016) (payroll records do support alleged period of need).

Employer's November 29, 2018 letter requesting the work period extension at issue states the following:

Due to the growing economy, J & J Construction is going to have a busier than normal winter and spring season. With the lack of workers in our industry and this unforeseen busy period these extensions would help J & J Construction tremendously.  
AF at 12.

In its December 15, 2018 letter requesting administrative review of the CO's denial of its extension request, the Employer maintains that "many contractors have had to accelerate their schedules and have been awarded a 'Winter Protection' fund" which would mean that the Employer would "be working straight through the winter" when it would otherwise slow down during that season.<sup>7</sup> AF at 1. The December 15, 2018 letter further states that the release or application of such a fund cannot be foreseen until the season arrives. *Id.* The information described in the December 15, 2018 letter was not provided to the CO as part of the Employer's extension request and cannot therefore, be considered before BALCA in reviewing the CO's action.

The Employer has given some reasonable and valid reasons for its request to use foreign workers to fulfill its ongoing labor requirements. In its extension request, the Employer asserts "it is a difficult time to find employees in the construction industry." AF at 12. Nonetheless, it is clear that the DOL did not contemplate an employer using the H-2B temporary labor certification program to address or meet ongoing and continuous non-temporary labor needs.

### CONCLUSION

For the reasons stated above, the Employer has failed to meet its burden of showing that the requested extension of the work period of May 7, 2018 to November 30, 2018 for 10 temporary construction laborers previously certified in this matter was (1) related to weather conditions or other factors beyond its control and (2) supported before the CO in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the Employer.

---

<sup>7</sup> Contrary to assertion in the Employer's request for administrative review of the CO's Denial, an extension of a work period for non-immigrant workers based on "a one time occurrence" (not "peakload") temporary need could be extended for up to 3 years if the criteria under the regulations were met.

The CO's denial of the extension requested at issue was neither arbitrary nor capricious. Accordingly, the CO's denial of Employer's request of the extension of its temporary labor certification is **AFFIRMED**.

**SO ORDERED.**

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey