



Issue Date: 27 February 2019

BALCA Case No.: 2019-TLN-00032
ETA Case No.: H-400-18351-356991

In the Matter of:

PALMISANO CONTRACTORS, LLC

Employer.

Appearance: Kristen Stachowiak, Director, People Operations for Employer
Self-represented
For the Employer

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

Before: Drew A. Swank
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Palmisano Contractors, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

² On April 29, 2015, the Department of Labor (“DOL”) 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

BACKGROUND

On December 20, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer for five trim carpenters for the period of March 15, 2019 to November 30, 2019. (AF 346-448.)³ Employer indicated that the nature of its temporary need was “seasonal.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer stated:

Palmisano Contractors is a licensed commercial general contractor operating in Louisiana. We are responsible for the new build, restoration, renovation construction of commercial buildings. Palmisano manages the active construction projects and subcontractor labor activities, provides in house, general, rough and trim carpentry labor on projects.

This letter of needs serves for two separate applications for a combined total of ten workers, five construction laborers and five carpentry workers.

Palmisano Contractors operates year-round but we experience an increased need for seasonal labor during the construction season between March 15th and November 30th. Our seasonal need is directly tied to the weather patterns. Our season is recurrent annually and we do not require these additional temporary workers during the months from December to March due to colder [months]...

(AF 409).

In support of its application, and in particular of its seasonal need, Employer attached letters of intent regarding the “Kimpton” hotel as well as an 80-unit condominium project. Employer stated these were only two of many similar contracts that supported its need for additional seasonal staff beyond its permanent staff. Employer also attached a full project schedule showing all projects on which seasonal workers would be used in order to alleviate its increased need during this period. Employer noted that it had used subcontractors for the past several years to supply its required labor force and therefore it was unable to provide their payroll data to support its application. Employer further asserted that “[t]hese temporary positions are not attractive to US workers regardless of our incentive initiatives and have become very hard to fill with our booming economy. We will continue to exhaust all methods to attract and recruit locally.” (AF 413). Accordingly, Employer expressed its desire to use the H-2B program to meet its recurring temporary seasonal need.

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

The CO issued a notice of deficiency on December 31, 2018, listing four deficiencies in Employer's application. (AF 335-45). For the purposes of this appeal, only the first two deficiencies will be addressed.⁴ First, the CO found that Employer failed to "establish the job opportunity as temporary in nature." 20 C.F.R. §§ 656.6(a) and (b). The CO explained that "an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." (AF 340). The CO noted that an employer's need is considered temporary if it is justified to the CO as one of the following: (1) a one-time occurrence; (2) a seasonal need; (3) a peak load need; or (4) an intermittent need as defined by DHS regulations. The CO determined that Employer failed to submit sufficient information to establish its requested standard of need or period of intended employment. *Id.* The CO stated that it is "unclear if the employer is experiencing a true seasonal need for services as the letters of intent do not support the dates of need requested." *Id.* The CO further stated that "a labor shortage, no matter how severe, does not justify a temporary need." (AF 341).

The CO determined that further explanation and documentation was necessary. Specific documentation requested included the following:

- 1) Documentation concerning the weather in the area of intended employment supporting Employer's statements that weather is a controlling factor on its ability to do work;
- 2) Supporting documentation showing an increased demand for services during the warmer weather months;
- 3) A list summarizing all projects for the previous year with start and end dates and worksite addresses;
- 4) A summarized monthly payroll for a minimum of one previous year, broken down separately for full-time permanent and temporary employment in the requested occupation of "trim carpenter"; and
- 5) Other evidence and documentation that similar justifies the dates of need requested.

(AF 341).

Second, the CO found that Employer failed to establish temporary need for the number of workers requested. §§ 656.11(e)(3) and (4). The CO stated that Employer did not indicate how it determined that it needed five trim carpenters during the requested period of need, stating that additional explanation and documentation were required. The CO requested that Employer submit an explanation with supporting documentation of why Employer is requesting five trim carpenters; supporting documentation that specifies the number of workers and dates of need;

⁴ The two additional deficiencies pertained to Employer's job order, and Sections F.B Item 5 and F.C Item 7 of the Application. (AF 335-45). The CO requested that Employer modify the job order and Sections F.B Item 5 and F.C Item 7, which Employer did. As Employer seemingly cured these two deficiencies, they are not relevant for the purpose of this appeal.

summarized monthly payroll reports for a minimum of one previous calendar year, as noted *supra*; and other evidence and documentation that similarly serves to justify the dates of need being requested for certification. (AF 341-42).

On January 15, 2019, Employer filed a response to the Notice of Deficiency and provided additional information and further explanation of the submitted documents, which it asserted supported its temporary need for the number of trim carpenters requested. (AF 132-334). Employer also amended its standard of need to indicate a peakload need rather than a seasonal need. (AF 136).

Employer submitted weather data and alleged that there are warmer temperatures and less rain from March 15, 2019 to November 30, 2019. (AF 137-39, 175-77, 218-19, 247-53). Employer stated that the weather data shows the average low temperatures in December, January, and February are in the 40s with highs in the 50s/60s. Employer contends that productivity in these months is 25% to 50% of the normal workload as compared to the summer months. Employer explained that structures are not enclosed or heated, exposing workers to the elements. Employer also explained that winter months see an increased average in rainfall, which directly impacts construction as “foundations aren’t poured when temperatures dips consistently below 50 or [when] wet.” (AF 209).

Employer further explained that weather also impacts tourism and occupancy rates, noting that late/February and early March sees its peak tourism rates during the Mardi Gras season and that tourism rates are the lowest in summer months, June to September, “due to extreme heat and humidity” as well as during hurricane season, June to November. As such, Employer stated that hotel occupancy rates determine the season in which renovations of hotels are scheduled for construction. (AF 209-10).

Next, Employer explained its need for five trim carpenters. Employer explained that hotel renovation projects are scheduled to begin after peak occupancy season and continue throughout the summer and fall. Employer included a summary of all 2018 projects, including the start date, substantial completion date, and worksite address for each project, but stated that “start dates and substantial completion dates do not capture the need for work with regard to labor.” (AF 211). Employer explained it employs permanent workers to “handle the reduced workload in the job startup and close out period” and that, from March to November, additional temporary workers are needed to ensure that it meets schedule deadlines. Employer further stated that the 2018 pattern will be repeated in 2019, and included a list of all projects. Additionally, Employer included summarized payroll reports of permanent workers. However, Employer stated that it previously acquired temporary workers through subcontractors and that those payroll records are unavailable. Employer also included copies of H-2B applications for other employers (Saba Stucco, LLC; Creative Edge, LLC; Bart Keller Co.; and CAP Services of Louisiana), doing business in the same area of intended employment which had been certified in 2018 for similar dates of need, and which also alleged a peakload or seasonal need for similar reasons involving the construction industry in Louisiana. (AF 210-13).

On January 18, 2019, the CO issued a Final Determination, finding that Employer failed to establish (1) the job opportunity as temporary in nature and (2) a temporary need for the

number of workers requested. (AF 121-31). The CO acknowledged the information submitted by the Employer and its request to amend its standard of need from seasonal to peakload. The CO determined that the information Employer submitted did not overcome the deficiencies regarding its failure to establish its temporary need and a bona fide need for the number of workers requested.

Regarding the climate data for New Orleans, the CO stated that it was not clear how the weather in the area of intended employment effected the job duties of a trim carpenter given that “at no time during the year, does New Orleans experience monthly low averages below freezing; and its lowest average low is 43.4 degrees [Fahrenheit].” (AF 128). The CO further found that Employer did not submit documentation to substantiate its statements that it experiences an increased demand for services during the warmer months. The CO noted Employer’s reference to certifications of other contractors, and stated that it “evaluates each application independently of each other and its determination is based on reviewing the individual application on its own merits.” *Id.* The CO noted that the 2018 schedule of projects “encompasses all months of the years” and found that it does not demonstrate a peakload need. *Id.* The CO noted that Employer stated it used subcontractors in the past to perform temporary work, but stated that Employer “must have records indicating the dates the subcontractor(s) were utilized and the number of hours it was billed by the subcontractor for work performed.” (AF 129). The CO then stated that Employer’s payroll records indicated a slight increase in the number of hours worked in August and November, but that the records “also shows that the stated non-peakload month of December had higher hours worked than the peakload months of April, May, September, and October” and that Employer’s records do not support the requested period of need. (AF 129, 131). The CO concluded that Employer did not overcome the deficiencies. *Id.*

By letter dated February 4, 2019, which was received on February 5, 2019, Employer submitted a request for administrative review to the Chief Administrative Law Judge regarding the CO’s January 18, 2019 denial.⁵ Employer states in its request for review that it had submitted a detailed response addressing all deficiencies. (AF 1-120). Employer resubmitted some of the documentation previously submitted in its response to the CO. Employer argues that the certified applications of its competitors, which it had previously submitted, demonstrate the underlying seasonal need in the construction industry in Employer’s geographical area of Louisiana. Therefore the previous certifications of these other contractors in its geographical area should be given precedential weight in determining the seasonal need for the requested workers in the Employer’s current application.

By Order dated February 14, 2019 the CO and the Employer were given the opportunity to file briefs in support of their positions on or before February 25, 2019.

Neither the Employer nor the CO filed a brief in this matter.

⁵ Employer also filed an appeal on February 5, 2019, of the Certifying Officer’s January 18, 2019 Final Determination Denial in Case No. 2019-TLN-00033, ETA Case No. H-400-18351-746330, a related case involving Employer’s application for temporary labor certification for 4 “construction laborers.” This case was also assigned to the undersigned Administrative Law Judge and involves essentially the same issues. A separate Decision is issued on today’s date addressing this matter.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO's determination; or (2) reverse or modify the CO's determination; or (3) remand to the CO for further action. (20 C.F.R. § 655.61(e)).

ISSUES

The two issues on appeal from the CO are whether the Certifying Officer properly denied Employer's H-2B application due to:

- 1) Employer's failure to establish that its request for 5 trim carpenters for the period of March 15, 2019 to November 30, 2019 was based on a "temporary" employment need according to Employer's stated standard of "peak load" need; and
- 2) Employer's failure to establish a bona fide need for the number of workers requested.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation as "any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. §214.2(h)(6)(ii)(A).⁶ Per the DHS regulations, employment is "of a temporary nature" when:

[T]he 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.

8 C.F.R. §214.2(h)(6)(ii)(B).

⁶ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

The DOL regulation addressing temporary need in H2-B cases also states:

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

(20 C.F.R. §655.6).

In the current case, the Employer originally applied for temporary labor certification for five trim carpenters for the period of March 15, 2019 to November 30, 2019, on the basis of a "seasonal" need. Employer amended its standard of need to "peakload" in its January 15, 2019 response to the Notice of Deficiency. (AF 242). In regard to peakload need 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 Employer bears the burden of establishing why the job opportunity and number of workers being requested reflects a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

An Employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4). *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers or period of need);

In this case the Employer submitted weather data relevant to its geographical area of intended employment in the state of Louisiana which provides some support for its requested period of need between March 15, 2019 and November 30, 2019. (AF 137-39, 175-77, 218-19, 247-53). Employer points out the data submitted shows that the average low temperatures in the months of December, January and February are in the 40s as opposed to the months in its requested period of need during which the average lows range between approximately 54 degrees and 74 degrees.⁷ Employer argues that the productivity is reduced in the winter months as structures aren't enclosed or heated which exposes workers to the elements. Employer also notes that foundations cannot be poured when temperatures dip consistently below 50 degrees or conditions are wet. (AF 209-11).

⁷ Employer also asserts that the winter months are the "rainy season" in Louisiana which it argues negatively impacts the construction industry. However, Employer's assertion is not supported by the data provided which reflects that the highest average precipitation in Louisiana is in the summer months of June, July and August.

In the final denial, the CO acknowledged that Employer's submitted weather data showed an average low temperature in January (the coldest month of the year) of 43.4 degrees. In response, the CO remarked that "at no time during the year, does New Orleans experience monthly low averages below freezing" and that "it is not clear how the weather in its area of intended employment effects the job duties of a Trim Carpenter." (AF 128). The CO's comment would appear to be somewhat cavalier and unreasonably dismissive of the value of this weather data in establishing the peak season for construction in Louisiana.

However, the CO reasonably requested documentation to support the Employer's specific need for the requested labor and period of need, which the Employer failed to provide. The information provided by the Employer shows a year round need for construction labor but does not establish the peakload need during the requested period of need (March 15, 2019 –November 30, 2019), which is required to support its application for temporary labor.

The letters of intent submitted by the Employer did not provide any information which correlated with the requested period of need. Likewise, the project schedule provided by the Employer shows project work which appears to be year round. (AF 150-56, 188-99). A review of the project schedule shows over 25 projects (or portions of projects) beginning in December, January, and February. There does not appear to be any clear way to interpret the project schedule which would provide the necessary support for the Employer's alleged peakload need between March 15, 2019 and November 30, 2019. If there is an interpretation which would support Employer's claim of peakload need between March 15, 2019 and November 30, 2019, Employer, has failed to provide it. The regulations are clear that the burden is on the Employer to establish its temporary need on the basis of the chosen standard. *See 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.").

In addition, the payroll information provided by the Employer shows it employed workers in the position of trim carpenter, in a fairly consistent fashion in the months of January through December. Employer claims that it has historically used subcontracted labor to address its increased need during the requested period of March 15th through November 30th, however, as it does not have access to the payroll records of its subcontractors, it cannot supply this information. Although Employer would not have access to payroll records of subcontractors, it should be able to supply some financial information or copies of contracts made with subcontractors which would support an increased use of subcontracted labor during the period requested, March 15th through November 30th in prior years. None of the documentation submitted to the CO supports this claim.⁸

⁸ Employer also submitted copies of H-2B applications of other contractors in the Louisiana area in support of its application for temporary labor certification. (AF 139-48, 165-74, 178-84, 216-31, 254-88). These applications have no bearing on whether the Employer in this case has met its burden of establishing its temporary peakload need for workers during the requested period of need. There is no reasonable way to compare the relative merits of these applications, nor is it clear what information was submitted with the other, allegedly certified, applications. As noted by the CO, "the Department evaluates each application independently of each other and its determination is based on reviewing the individual application on its own merits." (AF 128). Accordingly each application has to stand on its own merits and a prior certification of an application does not mandate a certification in a subsequent application,

The CO is not required to accept the claims of an Employer who does not supply supporting documentation. *See AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient). *See also Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need).

Accordingly, based on the information submitted to the CO, and for the reasons stated above, the undersigned finds the CO reasonably determined that the Employer failed to meet its burden of proving its temporary need for five trim carpenters for the period of March 15, 2019 to November 30, 2019, based on Employer's stated "peakload" standard, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii), or that the request represents a bona fide job opportunity for the number of workers requested

ORDER

Employer has failed to meet its burden of showing its temporary employment need for five trim carpenters between March 15, 2019 and November 30, 2019 and has also failed to demonstrate a bona fide need for the number of workers requested.

Accordingly it is hereby ORDERED that the Certifying Officer's denial of Employer's application for temporary labor certification is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge

whether pertaining to the same, or a different Employer. *See Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017).