



Issue Date: 03 December 2018

BALCA Case No.: 2019-TLN-00011
ETA Case No.: H-400-18235-827808

In the Matter of:

RAPID PALLET, INC.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Jerry R. DeMaio
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Rapid Pallet, Inc.’s (“Employer”) request for review before the Board of Alien Labor Certification Appeals (“Board”) of the denial of its application for an H-2B temporary labor certification by a Certifying Officer (“CO”) for the Employment and Training Administration. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655.6(b).¹ For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On August 29, 2018, Rapid Pallet filed an application for H-2B temporary labor certification with the ETA. (AF 191-97).² The application sought to certify the employment of 24 wooden pallet repairers for employment in the United States from November 26, 2018 through June 26, 2019. (AF 191). On September 7, 2018, the CO issued a Notice of Deficiency (“NOD”) outlining the reasons why the Employer’s application could not be accepted for consideration. (AF 182-90).

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) amending the standards and procedures for the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

² Citations to the appeal file are abbreviated “AF” followed by the page number.

The CO listed five deficiencies in the NOD. Deficiency 1 was identified as a failure to establish the job opportunity as temporary under 20 C.F.R. § 655.6(a) and (b). Specifically, the CO noted that the Employer must show that it regularly employs permanent workers to perform the services or labor at the place of employment, needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand and the temporary additions to staff will not become part of the employer's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The CO pointed out that, in the Employer's temporary need statement the employer references a labor shortage contributing to its need for workers, and that a labor shortage does not justify a temporary need. The CO also cited the Employer's reference to needing additional workers for "major seasonal holidays," without specifying the holidays and how they relate to the Employer's dates of need. (AF 185-86). Because the denial can be affirmed on this ground, the other grounds for denial cited by the CO are not addressed.

The CO requested either supplemental documentation or modifications of the application to conform to the relevant regulations. In response, the Employer filed a letter and attachments addressing the identified deficiencies. (AF 107-181). Among its attachments, the Employer submitted an explanation and described its business operations, its standard of need/dates of need, and a request for the number of workers. The Employer also submitted a 2016-2017 production report, employee count, gross salaries, and sales numbers, as well as emails describing delays in product deliveries. (AF 124-160).

On October 24, 2018, the CO issued a final determination denying the application. (AF 88-102). In the final determination, the CO retained two of the original five grounds for denial, including Deficiency 1, and pointed out several shortcomings in the evidence submitted by the Employer. (AF 90-94). On November 1, 2018, the Employer requested an administrative review of the denial with the Board. On November 16, 2018, a Notice of Docketing was issued allowing the parties to file briefs within seven business days. Neither party has filed a brief, though the Employer included brief arguments in its letter of request for review.

DISCUSSION

The 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. § 655.61(a), (e). The issue in this case is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for 24 wooden pallet repairers during its alleged peakload period.

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload, or intermittent. *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). Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify for peakload need, an 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.

Id.; see, e.g., *Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Prods.*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014).

Here, the Employer's purported period of need is November 26, 2018 through June 26, 2019. (AF 191). In response to the CO's final determination, the Employer argued the emails submitted show a substantial demand during the requested time which requires temporary labor to fill. (AF 1-2). The Employer further noted that, because a previous year's request for a temporary labor certification had been denied, the data submitted by the Employer was affected. (AF 1-2). Additionally, the Employer argued the email submitted did, in fact, show the beginning of a demand increase in September, which would justify the switch from its previous peakload application. (AF 2).).

The Employer has the burden to show that the job opportunities are temporary in nature in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B). However, in each area of concern the CO raised, the Employer failed to substantiate its need. First, the CO noted several shortcomings related to the Employer's production reports and sales data, including:

- The production reports submitted by the Employer show a high production rate in May and June, which the Employer linked to the Fourth of July holiday. However, other seasonal holidays such as Thanksgiving and Memorial Day also see a spike in demand that the Employer's full-time staff is able to handle. November begins the demand for the Christmas holiday, which is when Rapid Pallet says it needs to supplement its temporary full-time staff. No explanation is provided for the discrepancies among the holiday periods.
- The Employer's production reports do not illustrate a peak in pallets produced; instead, they illustrate a modest fluctuation in pallet production throughout the year.
- The Employer's sales data shows that the lowest sales are within the Employer's requested dates of need and thus do not support the request for temporary workers from November 26, 2018 through June 26, 2019.
- Emails submitted by the employer point to delays in shipping and an overall shortage of pallet repairers throughout the year, not exclusively as to the dates requested.

(AF 90-93).

A review of the documentation confirms the CO's concerns. The production reports do not indicate a peak in pallets produced, but instead illustrate a modest fluctuation. The pallets

produced from July to October of 2017 are certainly lower, but the sales numbers for the same time period are on par with the rest of the year. (AF 32, 67). In fact, the sales numbers are lowest in January and February of 2016 and 2017, which is the time period that the Employer alleges is their peakload; the highest sales are in October of 2017, which is outside of the peakload season. (AF 160). These inconsistencies do not justify a peakload need from November to June.

Second, the CO noted issues related to the total number of workers employed each month and the hours they worked in 2016 and 2017. Specifically:

- While the Employer provided the number of total workers employed each month throughout 2016 and 2017, and those numbers fluctuated, the Employer did not submit its total number of hours worked by Wooden Pallet Repairers and therefore, it is not clear if the Employer experiences a greater number of hours worked during certain times of a year.
- Employer's payroll documents were not summarized and did not include hours worked, and so could not be used to determine peakload need.

(AF 93-94).

The Employer claims these numbers were included in the response to the NOD. And in the record there is, in fact, a chart outlining the total hours worked by workers in 2016 and 2017. (AF 28, 66). However, the Employer's chart still does not demonstrate a peakload from November to June. In both 2016 and 2017, January has the lowest number of hours worked and, like the production reports, there was only a modest fluctuation over the course of the two years. (AF 28). The Employer's chart of the hours worked, while present in the record, does not support its case for temporary hiring.

The CO also addressed the Employer's previous application (H-400-17299-091568) for H-2B workers. In that application, the Employer had requested 23 Wooden Pallet Repairers from January 2, 2018, through October 31, 2018, and was denied for non-response to the NOD. The CO inquired about the shift in the period of need; the Employer stated that its needs had shifted due to the company's recent financial and supply chain data for the previous few years; however, no information was provided to explain the shift. (AF 94).

In reviewing the Appeal File, there was no specific information regarding the shift of the Employer's need for its peakload season. Without any documentary support, the Employer's assertions do not prove it experiences a short-term demand between November and June. *Cf. Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer failed to produce any documentation proving weather conditions and contract patterns contribute to a temporary seasonal need).

In short, the Employer is unable to point to any specific event or cause for its purported short-term demand between November and June. *See 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 need). Based on the foregoing, the Employer failed to meet its burden of establishing a need for temporary workers on a peak load need basis and the CO's denial of the Employer's application will be upheld.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Board:

JERRY R. DeMAIO
Administrative Law Judge