



Issue Date: 12 April 2019

BALCA Case No.: 2019-TLN-00096  
ETA Case No.: H-400-18363-854506

*In the Matter of:*

**SOUTHERN REFRACTORIES, INC.,**  
*Employer.*

Certifying Officer:  
Chicago National Processing Center

Appearances: Wendel Hall, *Esq.*  
Hall Law Offices, PLLC  
Washington, D.C.  
*For the Employer*

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

Before: Joseph E. Kane  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Southern Refractories, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non-Acceptance Denial in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary,

---

<sup>1</sup> On April 29, 2015, the Department of Labor 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. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id.* at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

non-agricultural work within the United States (“U.S.”) 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). 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. 20 C.F.R. § 655.61(a).

## STATEMENT OF THE CASE

The Employer, located in Keller, Texas, is a refractory contractor and distributor. (AF 88.)<sup>3</sup> On January 7, 2019, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”). (AF 88-95). The Employer requested certification for 18 brickmasons from April 1, 2019 until September 30, 2019, based on an alleged peakload need during that period. (AF 88-95).

On February 15, 2019, the CO issued a Notice of Deficiency, which outlined two deficiencies in the Employer’s Application. (AF 81-87). Specifically, the CO determined that the Employer failed to: (1) establish that its job opportunity is temporary in nature and (2) to establish temporary need for the number of workers requested.<sup>4</sup> (*Id.*) Regarding the first deficiency, the CO stated that the Employer did not sufficiently demonstrate the requested standard of peak load need. The Employer failed to adequately explain and demonstrate its temporary need. “The Employer stated that it was just awarded a project, and needed workers for the project. It was not clear from the employer’s statement of need if the employer’s temporary need is solely based on the projects the employer is awarded at any time, or if the temporary need is based on historical peaks in the employer’s business cycle.” (*Id.*) The CO requested that the Employer submit supporting evidence documenting that it has a temporary need for labor. (*Id.*) The CO explained that in order to establish that it has a peakload need, the Employer should submit: a statement describing the Employer’s business history and services throughout the year, a summary of all projects in the area of intended employment for the previous two years, monthly payroll reports for 2017 and 2018 that identify both permanent and temporary employment in the occupation of brickmasons, the total workers employed, total hours worked, and other evidence and documentation to justify the dates of need being requested for certification. Alternatively, the CO stated that the Employer could submit any other evidence that “similarly serves to justify the period of need being requested for certification.” (*Id.*)

Thereafter, on March 4, 2019, the Employer filed a response to the CO’s Notice of Deficiency. (AF 63-71). The Employer filed letters from the Office Manager and President, a proposal and acceptance of the work, and a purchase order for the work to be completed. The Employer explained that its need was based on a single project, but the history of its business

---

<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 now 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).

<sup>3</sup> In this Decision and Order, “AF” refers to the Appeal File.

<sup>4</sup> As I have affirmed the CO’s findings related to the first deficiency, I will not address the issues surrounding the second.

cycle also provided an alternative rationale for the temporary need. (AF 63). Employer's President stated that the request and need is based on his historical knowledge of handling similar projects. (AF 66). However, the Employer failed to provide the CO with the additional requested documents and payroll information to illustrate the Employer's past historical needs.

On March 6, 2019, the CO issued a Final Determination denying acceptance. (AF 57). The CO found that the Employer failed to cure the deficiencies. The CO concluded that the Employer failed to submit evidence establishing that it has a temporary need for workers. (*Id.*) On March 20, 2019, the Employer requested administrative review of the CO's Non-Acceptance Denial, as permitted by 20 C.F.R. § 655.61.<sup>5</sup> (AF 1).

On March 26, 2019, 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. 20 C.F.R. § 655.61(c). On April 9, 2019, BALCA received the Appeal File from the CO. Both the Solicitor and the Employer filed briefs on April 8, 2019.

## **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. 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). 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).

---

<sup>5</sup> 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

### Failure to Establish a Peakload Need for Workers

The sole issue on appeal is whether the Employer has established 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. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). 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.” 20 C.F.R. § 655.6(a). Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, “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).” 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). 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.

In this case, the Employer alleges it has a peakload need for 18 brickmasons. (AF 88-89). In order to establish a peakload need, 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.” 8 C.F.R. 214.2(h)(6)(ii)(B)(3).

After reviewing the record and the parties’ legal arguments, I concur with the CO that the Employer has failed to establish that it has a temporary need for H-2B workers. Although the Employer has stated that it regularly employs permanent workers and this request is based on one job, the Employer has failed to actually demonstrate that need beyond statements and generalizations. The CO provided the Employer with ways to establish the need but the Employer failed to provide the requested information. Statements from the Employer’s President stating based on his historical knowledge of the company there is a need, are not sufficient. The Employer has to actually illustrate that need and provide documentation to show that need. The Employer failed to provide payroll records, records of past projects, and records illustrating the makeup of its workforce. Instead of providing the requested documents the Employer argued that the regulations do not require it to provide the information. The burden, however, is on the Employer to prove the need. There is simply no evidence in the record to show the Employer’s historically need for similar workers or that in the event this is a first time occurrence that the need is justified. Just saying you have a need is not sufficient. Even in its brief, the Employer failed to point to evidence proving its need. I find that the Employer has not demonstrated that it has a peakload need for temporary workers from April to September.

Based on the evidence of record, I find that the Employer has not carried its burden to show that it regularly employs permanent workers to work as brickmasons and that it needs to supplement its permanent staff on a temporary basis due to peakload need. Moreover, the Employer has not established that any temporary additions to its staff will not become a part of its regular operations. Therefore, I find that the CO properly concluded that the Employer failed to establish a temporary need for H-2B workers.

**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:

Joseph E. Kane  
Administrative Law Judge