



Issue Date: 03 July 2019

BALCA Case No.: 2019-TLN-00138
ETA Case No.: H-400-19102-146843

In the Matter of:

TECHNICAL AMERICA, INC.
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Technical America, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its 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 non-agricultural 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 Labor (“Department”) using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department’s Employment and Training Administration (“ETA”) 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 April 16, 2019, ETA received an application for temporary labor certification from Employer. (AF 231.)³ Employer requested certification for ninety “fitters” for an alleged period of temporary peakload need from June 30, 2019, through February 29, 2020. (AF 231.) In

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.

³ Citations to the Appeal File will be abbreviated with an “AF” followed by the page number.

addition to its Form 9142B, Employer also submitted a statement of temporary need, prevailing wage documentation, a proposed job order, monthly payroll summaries from 2017 through 2019, letters of intent to conduct business along with a master service agreement, a no-collective-bargaining-agreement attestation, corporate entity documents, and a foreign recruiter disclosure and service agreement. (AF 244-303.)

Employer's Application

In its Form 9142B and attached statement of temporary need, Employer describes its business operations. Employer fabricates oil field equipment and, as required, performs upgrades to the equipment. (AF 244.) Employer is based out of Corona, California but is requesting approval for H-2B workers to perform work at several job sites in and around Corpus Christi, Texas. (232-34, 238, 245.) The ninety requested fitters would be responsible for fabricating, laying out, assembling, installing, repairing, and maintaining land-based structural and pipe system equipment. (AF 233, 256.)

Employer explains that it experiences increased workloads from June through February “due to industry practice and onshore and offshore oil & gas plant module and platform fabrication and construction needs.” (AF 244.) Employer indicates that, during this time, its customers “require quick turnaround on fabrication projects for rigs, platforms, and plant modules as well as other equipment or system upgrades,” thereby leading to an increased demand for fitters. (AF 244.)

Employer explains that, in the past, it has been able to satisfy its labor needs through domestic employment. However, because Employer expects “new business demand” based on “continued land-based oil production,” it must seek H-2B workers to supplement its regularly employed fitters. (AF 245-46.) Employer states that it expects “to experience a shortage of U.S. workers in the fitter field.” (AF 245.) Employer asserts that it has seen an increased need for fitters in 2018 and 2019, it anticipates several contracts for work requiring fitters to be performed in the last quarter of 2019 and in 2020, and it predicts “additional projects and work” generated from these contracts. (AF 245.) Employer points to the documentation included with its application for support.

Employer concludes its known workload for 2019 and 2020 is “undoubtedly enough to support the requested number of workers.” (AF 245.) Employer notes that its “need is obviously greater than 90 workers ... however, we believe we can staff many of the fitter positions with U.S. workers but will have approximately 90 positions that will need to be supplemented.” (AF 245.)

The payroll records submitted along with Employer's Form 9142B indicate that Employer did not employ any permanent fitters in 2017; employed between four and six permanent fitters in 2018; and between seven and eight permanent fitters in 2019. (AF 258-60.) During this entire period, Employer did not hire any temporary fitters. (AF 258-60.)

To support its temporary need for fitters, Employer submitted a services agreement and letters of intent to conduct business. The “Master Services Agreement” between Employer and

Bay, Ltd. (“Bay”), executed on April 3, 2019, shows that Employer agreed to act as a subcontractor for Bay. (AF 261-79.) One letter of intent from Bay is dated April 4, 2019, and discusses three projects in the Corpus Christi, Texas area that will run from June 1, 2019, through the first quarter of 2020 and will require “combined additional manpower” of “85 qualified and experienced pipefitters, 50 structural/tank fitters, 95 pipe welders, and 65 structural/tank welders.” (AF 281-82.) There are also two letters of intent between Employer and OTOG International, which discuss work to be performed in the second quarter of 2019 through the first quarter of 2020. (AF 282-83.) The letters from OTOG discuss the need for welders and pipefitters and also explain that the projects are not ongoing in nature. (AF 282-83.)

Legal Standard

An employer seeking certification under the H-2B program must show that it has a temporary need for workers. Temporary service or labor “refers to 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); 20 C.F.R. § 655.6(a). Employment “is of a temporary nature when the employer needs a worker for a limited period of time,” and the “employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer’s need is temporary if it qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b).⁴

An employer can establish a “peakload need” if it shows 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).

An employer must also demonstrate a bona fide need for the specific number of workers and period of need requested. 20 C.F.R. §§ 655.11(e)(3)-(4); *Roadrunner Drywall*, 2017-TLN-00035 (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); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

An employer bears the burden of proof. *Alter and Son Gen. Eng’g*, 2013-TLN-00003 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). Bare assertions without supporting evidence are insufficient to carry the employer’s burden. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). In addition, the burden is on the employer both to provide the necessary information and to present it in such a way so that the CO can determine that the

⁴ Because the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the Department to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

Notice of Deficiency

On April 24, 2019, the CO issued a Notice of Deficiency, identifying three reasons why the application could not be accepted for consideration. (AF 223-230.)

Deficiency #1

The CO concluded that Employer had failed to establish that its need is temporary in nature, as defined by 20 C.F.R. § 655.6(a)-(b). (AF 226-28.) The CO provided several reasons for reaching this conclusion, including: (1) that Employer did not provide sufficient explanation to justify its alleged increased workload from June 30, 2019, through February 29, 2020 (AF 226); and (2) that Employer had specified its dates of need but had not demonstrated that it “does not service other client[s] during the indicated nonpeak period.” (AF 227.) Thus, the CO concluded that Employer had not established a peakload need, but rather the information showed that Employer sought to secure additional work on an ongoing basis. (AF 227.) Accordingly, the CO instructed Employer to submit “a detailed statement of temporary need” and “supporting evidence and documentation that justifies the chosen standard of temporary need,” including several specifically identified documents. (AF 227.)

Deficiency #2

Second, the CO concluded that Employer had “not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities,” as required by 20 C.F.R. §§ 655.11(e)(3)-(4). (AF 227-28.) The CO noted that Employer’s payroll information shows it has never hired more than eight fitters in a month and has never hired temporary fitters. (AF 228.) The CO determined that Employer had not indicated how it arrived at the specific number of requested workers. (AF 227-28.) The CO again instructed Employer to submit documentation supporting its need for ninety fitters during the requested period.

Deficiency #3

Lastly, the CO determined that Employer had not submitted an acceptable job offer because it had not placed a job order with the Texas State Workforce Agency (SWA) by the time it had submitted its Form 9142B, as required under § 655.16. (AF 229.) Accordingly, the CO instructed Employer to submit its job order to the SWA. (AF 228-30.)

Employer’s Response

On May 6, 2018, Employer responded to the Notice of Deficiency. (AF 162-221.) Employer’s response included a response letter, an updated statement of temporary need, a schedule of projects and list of invoices from 2018 and 2019, an additional letter of intent between Employer and Bay, and a job order request submitted to the Texas SWA.

Employer's response letter explained that Employer is "is expanding [its] project services beyond California to a new geographic area in Texas where there is a temporary need to fabricate and upgrade equipment for new clients." (AF 167.) Employer cited to a recent BALCA case to support its reasoning concerning its temporary peakload need for ninety fitters. *See Industrial Equipment Solutions, Inc.*, 2018-TLN-00147, -00148 (Jul. 13, 2018). (AF 168, 170.) Employer's supplemental statement of temporary need explained that its central office and manufacturing facility is located in Corona, California and that all of the fitters referenced on its payroll summaries work in that location. (AF 175-77.) During its non-peak months (March through July), Employer typically focuses on performing routine engineering and equipment fabrication in California. (AF 176.)

Now, Employer has secured work projects in Texas. (AF 175-76.) These projects, as described in the letters of intent with Bay and OTOG, will run through the alleged period of need and, as Employer claims, will lead to a "shortage of U.S. workers in the fitter field," thereby creating its temporary need. (AF 175-77.) Employer also clarified that its work in Texas is "not ongoing and indefinite" and will only last through the end of its alleged period of need. (AF 177-78.)

Employer submitted a chart that lists current and recent projects. (AF 180-81.) This chart lists, among other things, the manufacturing location and delivery date for each project and also provides a brief description of each project. (AF 180-81.) For many of the projects, the delivery date listed is "in progress," while the others simply list "2019." (AF 180-81.) The chart does not include the number of employees needed to perform each project.

Employer also submitted a list of invoices. (AF 182.) It includes a list of clients, the invoiced amount, and payment information. (AF 182.) This document also does not make any reference to employees. Finally, Employer included another letter of intent from Bay, dated May 3, 2019, which reiterates the substance of Bay's April 4, 2019, letter. (AF 203.)

Final Determination

On May 30, 2019, the CO issued a Final Determination denying Employer's application for temporary labor certification. (AF 143-151.) The CO concluded that Employer's submissions failed to remedy two of the three identified deficiencies in the Notice of Deficiency.

First, the CO concluded that Employer did not establish a temporary peakload need under § 655.6(a) and (b). (AF 148-49.) Specifically, Employer failed to establish that it regularly employs permanent fitters at the place of employment because Employer's "year-round operations and its permanent workers are in Corona, California and not at the [E]mployer's requested worksites in the Corpus Christi area in Texas." (AF 148.)

Additionally, because Employer stated that it "will continue to pursue contracts in the area, from the current and new clients," the CO determined that its operations are centered on generating new business in the area and concluded that "it is not clear how one or two contracts

creates a peakload need for the employer.” (AF 148-49.) Finally, the CO stated that a shortage of domestic workers does not constitute a temporary need. (AF 149.)

Second, the CO found that Employer had failed to justify its need for ninety fitters and failed to establish that its request represents a bona fide job opportunity under § 655.11(e)(3)-(4). (AF 149-50.) Employer had explained that its need “was obviously greater than 90 workers,” but, Employer stated that it would be able to fill all but ninety positions with domestic workers. Based on this, the CO concluded that Employer “did not explain the true number of temporary workers required to complete the referenced projects.” (AF 150.) Moreover, the CO determined that “[t]he letters of intent do not clearly support the request for 90 [f]itters.” (AF 151). Thus, in accordance with § 655.51, the CO denied Employer application for temporary labor certification.

Employer’s Appeal

On June 11, 2019, Employer appealed the CO’s Final Determination. (AF 1-141.) Employer argues generally that it has “fully complied with the regulations and proven that the nature of [its] need is temporary” and “has provided adequate documentation to establish temporary need for the number of workers requested.” (AF 3.)

More specifically, with respect the CO’s determination that Employer had not established a temporary need under 20 C.F.R. § 655.6(a) and (b), Employer argues that the regulations allow an applicant for H-2B workers to use multiple worksites within its “area of intended improvement.” (AF 4.) Employer points out that the regulatory definition of “area of intended employment” appears to contemplate an employer with multiple worksites and even the development of new worksites within the area. *See* 29 C.F.R. § 503.4. Therefore, Employer asserts, although the record shows that it has only ever employed workers in California, it may nonetheless properly request H-2B workers to perform work in Texas where it has never regularly employed workers, if justified by a peakload need. (AF 4-6.)

Employer also contends that the CO inappropriately evaluated the potential for seeking additional contracts in Texas. (AF 6.) Employer suggests that the CO conflated its alleged *peakload* need with a temporary need that is *seasonal* in nature. (AF 6.) Employer again cites *Industrial Equipment Solutions, Inc.*, 2018-TLN-00147, -00148 (Jul. 13, 2018), for support. Finally, Employer also argues that the evidence submitted with its Form 9142B and its response to the Notice of Deficiency is sufficient to justify its temporary need for the number of workers requested under 20 C.F.R. § 655.11(e)(3)-(4). Employer highlights the information relating to the number of workers in the letters of intent and again relies on *Industrial Equipment Solutions*. (AF 7-8.)

I received the Appeal File on June 24, 2019, and issued a Notice of Assignment and Expedited Briefing Schedule on June 26, 2019. The CO has not filed a brief. This decision is issued within ten business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO’s determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016); *see also J&V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.*

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.* Inquiry into factual issues “is to be searching and careful,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board may not supply a reasoned basis that the CO has not itself provided. *See State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1946)); *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

DISCUSSION

The CO concluded that Employer did not establish a temporary peakload need. (AF 145.) As set forth above, an employer can establish a peakload need if it shows 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).

The CO determined that Employer does not regularly employ permanent workers who perform the duties of the requested workers *at the place of employment* because Employer does

not employ fitters in the geographic area of Corpus Christi, Texas. Therefore, the CO concluded Employer cannot establish a temporary peakload need under 20 C.F.R. § 655.6(a)-(b).

Employer argues that the Form 9142B specifically contemplates that a request may be made for H-2B workers to work at multiple worksites. Indeed, at question F.c.7, Form 9142B asks whether work will be performed “in multiple worksites within an area of intended employment.” Employer also cites to 29 C.F.R. § 503.4,⁵ which defines an “area of intended employment” as “the geographic area within normal commuting distance of the place (worksites address) of the job opportunity for which the certification is sought.” The regulation also clarifies that, “[i]f the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.” 29 C.F.R. § 503.4.

Employer is correct that the H-2B program permits an employer to seek certification for multiple proposed places of business. However, the issue here is not whether Employer may request workers for multiple worksites. Rather, the issue is whether Employer satisfied an entirely separate regulatory requirement necessary to establish temporary peakload need. That the regulations contemplate multiple worksites does not change the fact that the regulations *also* require Employer to 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added).

Employer has established that it permanently employs fitters in California. Thus, Employer’s argument regarding multiple worksites may be relevant if Employer were seeking to hire temporary employees within the MSA of Corona, California. However, Employer is seeking to temporarily employ fitters in and around Corpus Christi, Texas. Therefore, the relevant question is whether Employer *regularly* employs permanent workers who perform the duties of the requested workers (here, fitters) *at the place of employment* (here, Texas).⁶

Employer emphasizes that its permanent fitters are busy performing ongoing work in California, so it needs temporary workers to perform its upcoming new work in Texas. However, there is no evidence in the record to suggest that Employer presently employs or has ever employed any fitters in Texas. In fact, Employer acknowledges that it is only now beginning to employ fitters in Texas because it “is expanding [its] project services beyond California to a new geographic area in Texas where there is a temporary need to fabricate and upgrade equipment for new clients.” (AF 167.)

Employer argues that it will “utilize a safety coordinator (permanent worker) and any other qualified and available US workers at the proposed and upcoming places of employment

⁵ This regulation governs the enforcement of an employer’s obligations under the H-2B program after an application for temporary employment is certified.

⁶ “Place of employment” is the worksite or physical location where the work is actually performed. *See* 20 C.F.R. § 655.715 (governing the H-1B visa program); *GT Trans Inc.*, 2016-TLN-00029, at 5 (Apr. 15, 2016) (looking to § 655.715 for guidance on defining “place of employment” and “worksite” in a case arising under the H-2B program).

(permanent and temporary workers as available to complete the job).” (AF 6.) Employer’s intent to hire permanent workers at the place of employment (Texas) in the future is simply insufficient to satisfy the regulatory requirement that it “regularly employs permanent workers to perform the services or labor at the place of employment.”

On this point, Employer’s reliance on *Industrial Equipment Solutions* is unavailing. In that case, there was “no disagreement that the Employer regularly employs permanent workers to perform the services or labor at the place of employment” because the employer regularly employed permanent workers in “the areas of Texas where the temporary workers are sought.” *Industrial Equipment Solutions, Inc.*, 2018-TLN-00147, -00148, at 6 (Jul. 13, 2018).

I understand that Employer’s permanently employed fitters are currently performing work to capacity in California, and I recognize that Employer has a need to supplement its fitter workforce to fulfill its upcoming contracts in Texas. Employer complains that its permanent employees cannot be expected to be working at an upcoming worksite that “has not yet started,” but Employer cites no authority for this argument. (AF 5.) On the contrary, the definition of peakload need specifically requires Employer to demonstrate that it *regularly* employs permanent workers who perform the duties of the requested workers (here, fitters) *at the place of employment* (here, Texas). The record amply demonstrates that Employer employs fitters in California but not in Texas. Because Employer cannot satisfy this threshold element, it cannot meet the requirements for demonstrating a peakload need.

Accordingly, I conclude the CO’s determination that that Employer failed to establish a temporary peakload need was reasonable (and indeed legally correct). Thus, I conclude the CO’s Final Determination denying Employer’s application for temporary labor certification was not arbitrary and capricious. Because Employer’s failure to establish a temporary peakload need was a sufficient rational basis on which to deny Employer’s application, I need not address the additional deficiencies identified by the CO.

CONCLUSION AND ORDER

The Certifying Officer did not act in an arbitrary and capricious manner in denying Employer’s Application for Temporary Employment Certification (ETA Form 9142B). Accordingly, the Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey