



Issue Date: 08 February 2019

BALCA Case No.: 2019-TLN-00023

ETA Case No.: H-400-18338-250079

In the Matter of:

TITUS WORKS, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Titus Works, 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 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. § 655.3, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a). For the reasons set forth below, the CO's denial of temporary certification is affirmed.

Statement of the Case

On December 4, 2018, Employer filed an ETA Form 9142B, H-2B Application for Temporary Employment Certification with U.S. Department of Labor, requesting certification for five Construction Laborers from February 18, 2019 through November 22, 2019. (AF 116-

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 Appropriation 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. 24,024 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.

90). On December 12, 2018, the CO issued a Notice of Deficiency and requested additional information. (AF 110-15). The CO identified two deficiencies in the application.

First, the CO stated Employer failed to establish that the job opportunity was temporary in nature. In the statement of temporary need section of its application, Employer stated:

We experience a temporary peak period during the year, based on various factors, including customer and market demand for our services, weather conditions such as warmer temperatures and increased daylight, which result in an increase in our workload. As a result, we need to supplement our permanent work force, by hiring additional temporary workers during our peak load period of need from February to November. When our peak load period ends in mid-November, due to a reduction in daylight hour and onset of fall weather, we no longer need the temporary workers, since we have permanent workers to complete the work.... Although we have tried to hire temporary workers through advertisements in various publications, online and through the State Workforce Agency, we have been unable to locate ready, willing, and available workers to work for our company during our temporary peak load period.

(AF 116). The CO questioned Employer's assertion that weather is a determining factor for its peakload standard of need, stating that "the weather in the area of intended employment appears to be favorable to outdoor work year-round." (AF 113). Therefore, the CO requested additional information that "support[s] the employer's statements that weather is a controlling factor on its ability to do its work" and "substantiate[s] the employer's statements indicating that it experiences an increased demand for services during the warmer weather months in the employer's area of intended employment in Texas." (AF 114). The CO also requested a summary listing of all projects in the area of intended employment for its previous calendar year, including the start and end dates of each project and worksite addresses, and summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Construction Laborer. *Id.* The CO furthermore reminded Employer that "a labor shortage, no matter how severe, does not justify a temporary need." (AF 113).

Second, the CO stated Employer failed to establish temporary need for the number of workers requested. (AF 115). The CO requested "[a]n explanation with supporting documentation of why the employer is requesting five Construction Laborers for Austin, Texas during the dates of need," documents, such as contracts or letters of intent, that specify the number of workers and dates of need, and "[s]ummarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment for Construction Laborers, the total number of workers or staff employed, total hours worked, and total earnings received." *Id.*

On December 27, 2018, Employer filed a response to the Notice of Deficiency and included the following additional documents: 2019 projections report with tables and graph, 2018 schedule of operations, billing, and staffing history report, 2018 federal quarterly tax returns, 2017 schedule of operations, billing and staffing history report, 2017 Texas quarterly tax returns. (AF 21-106). On January 8, 2019, the CO issued a Final Determination denying certification, concluding that Employer's response failed to correct the two identified

deficiencies. (AF 13-20). On January 16, 2018, Employer filed a request for administrative review before BALCA. (AF 1-6).

Legal Analysis

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination. 20 C.F.R. § 655.61(a).³ A CO may only grant an employer's H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification and the employment of H-2B workers will not adversely affect wages and working conditions of American workers. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655.1(a). The employer has the burden of proving entitlement to temporary labor certification. 8 U.S.C. § 1361; *see also M.A.G. Irrigation, Inc.*, 2017-TLN-00033, slip op. at 4 (Apr. 25, 2017).

To meet its burden, the employer "must establish that its need for non-agricultural services or labor is temporary." 20 C.F.R. § 655.6(a). The employer's need is temporary if the application demonstrates a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 20 C.F.R. § 655.6(b). Under the Department of Homeland Security's regulations, to prove a "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." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The employer must also prove the "number of worker positions ... [is] justified." 20 C.F.R. § 655.11(e)(3).

In this case, the CO denied Employer's application for temporary labor certification for failure to prove a temporary need and for failure to prove the number of workers it requested was justified. Employer argues that "it is evident that the [CO] made factual and legal errors and reached a conclusion to deny the case, then neglected to consider the probative evidence, and misconstrued the definition of 'temporary' need pursuant to the applicable regulations to reach the correct decision." (Employer's Second Appeal Brief, p. 2). Employer contends the CO "acted *arbitrarily, capriciously, or unlawfully* in denying Employer's application for temporary labor certification, because it overlooked, disregarded, dismissed, mischaracterized and failed to consider significant evidence in support of Employer's temporary peakload need." *Id.* (emphasis in the original).

Temporary Need

³ Employer filed a second brief on February 6, 2019. When an employer seeks administrative review of a CO's unfavorable determination, the request for review must set forth the particular grounds for the request and 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)(2), (5). There is no regulation that permits an employer to file additional briefs. As specified in the Notice of Assignment/Scheduling Order, *the Solicitor* is permitted to file a brief within 7 business days of receipt of the Appeal File. *See* 20 C.F.R. § 655.61(c). Though I am not obliged to consider the second brief, I will do so anyway.

In the Final Determination, the CO discussed the evidence related to Employer's peakload need for temporary workers. In the Notice of Deficiency, the CO had requested documentation demonstrating that weather is a controlling factor on its ability to do its work or that it experiences an increased demand for services during warmer weather months, Employer failed to do so. In its Appeal Brief, Employer writes:

According to Titus Works, in the area of intended employment, most construction related trades see the drop in the demand for various services during the winter months (mid-November to mid-January), and follow a similar temporary peak cycle for this type of work. In fact, if you walk into any hardware supply store, such as Lowe's or Home Depot, you will witness that during the winter months there is less business going on. In fact, during the winter months, there is less demand for such services, and as a consequence, there is less work, and without the peak workload, they don't need the temporary peak load workers. Although Texas does not experience the cold winter and snow of the northern states, it does in fact have seasonality that is evident in the peak load nature of most construction trades. And, since Titus Works provides underground utilities, for both residential and commercial work, as the customer and market demand is reduced, so is the need for peak load workers, while their permanent workers remain year round.

(Employer's Second Appeal Brief, p. 3) (emphasis omitted).⁴ It is the Employer's burden to establish such facts by way of competent evidence. The CO made clear that Employer could prove weather is a controlling factor in its peakload need through "supportive letters from building trade organizations in the employer's area of intended employment." (AF 114). In its response to the Notice of Deficiency, Employer submitted a letter indicating that mud prevents Employer from performing utility work, and that mud is less of a problem during the summer months because "the hot [Texas] sun will dry the site much faster than during the winter." (AF 41). In that same letter, Employer indicated it had a drop in business in September and October because they were "very wet months." *Id.* Those months, however, fall within Employer's supposed peakload need, and are not considered winter months.

The CO explained that the 2017-2018 project listings did not include start and end dates of each project or the work site addresses. The CO's assertion that the listings did not include the worksite addresses is incorrect, but the CO correctly states that Employer's listings did not include the start and end dates. (AF 42-46, 56-59). In its letter, Employer explained:

Our projects do not have defined end dates. We typically do the vast majority of our work before the building is started. Then we go to another project. When the building is almost complete (sometimes up to a year later) we return – typically to do minor adjustments. While the main part of our work can take up to several months, the final adjustments take anywhere from a couple hours up to a week.

(AF 42). The CO requested the information to determine whether Employer experienced an increase in demand for its services during the requested period of February through November.

⁴ Employer's briefs are littered with bolded text, underlining, italics, and small caps. Such formatting renders the filings very difficult to read. If everything is emphasized, then nothing is.

Without the start and end dates of such projects, the CO cannot determine whether Employer in fact experiences an increase in demand for its services during this time. Employer's explanation that its projects do not have defined end dates does not hold up to scrutiny. Employer does not perform services at a given worksite continuously and indefinitely. Rather, it performs the majority of its services at a project site, leaves, and then returns to finish the project at a later day. In other words, there are defined start and end dates; Employer's projects simply have more than one start and end date.

The CO explained that the 2017 monthly payroll summary demonstrated that its permanent workers worked more hours during its non-peak month of December and that its temporary workers did not work full-time hours during the peak month of February. And the 2018 monthly payroll summary demonstrated that its temporary workers did not work full-time hours during the peakload month of May. Employer responded that "Titus Works was certified by DOL for a temporary peakload period of February 15, 2017 to November 17, 2017; therefore, the H-2B workers did not work a full month." (Employer's Second Appeal Brief, p. 6). Employer does not refute the CO's other assertions. And the CO asserted the 2019 Projected Payroll Report was of no use because the Department is unable to evaluate unsubstantiated future data projections. My review of the appeal file does not reveal any evidence to substantiate Employer's 2019 projections.

The CO furthermore explained that Employer's 2017-2018 monthly payroll summaries failed to clearly identify the occupation for which the data represents. The CO is correct. The summaries distinguish between "permanent laborers" and "temporary laborers," but from these charts alone, it is not clear whether they would be considered "Construction Laborers." (AF 49, 55). In the Notice of Deficiency, the CO specifically requested "[s]ummarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment for Construction Laborer, the total number of workers or staff employed, total hours worked, and total earnings received." (AF 114) (emphasis in the original). Employer failed to do what the CO asked. I note that Employer included charts titled, "2017 Staffing Levels – Permanent & Temporary Construction Workers," and "2017 Staffing Levels – Temporary, Permanent & Total." (AF 60, 61). When these charts are reviewed alongside the 2017 monthly payroll summary, the charts suggest that the 2017 monthly payroll summary reflected the number of permanent and temporary Construction Laborers employed by Employer in 2017. (AF 60, 61). The appeal file does not contain a similar set of charts for 2018.

The CO explained that Employer's 2018 quarterly tax returns failed to demonstrate a peakload need for workers during the requested period. The CO is correct again. The returns indicate it paid: 11 employees \$90,064.60 in wages the first quarter (January – March); 14 employees \$108,537.01 in wages the second quarter (April – June), and 12 employees \$109,792.09 in wages the third quarter (July – September). (AF 53-54). First, the tax returns do not cover the entire requested period of February through November. Second, the tax returns do not distinguish between permanent and temporary workers, let alone between permanent and temporary Construction Laborers. And third, a moderate increase of wages paid does not establish a short-term increase in demand for Employer's services.

The CO explained the contracts and letters of intent submitted by Employer reflected general business relationships but failed to point to a specific peak or need in services. Based on

my review of the contracts and letters of intent, I agree with the CO's assessment. The letters of intent all echo the same conclusory language that they intend to use Employer to provide underground wet utilities services during the peak season of February to November, without further detail or explanation. The contracts do not provide any information as to when Employer is to begin such projects. Employer's brief does not explain how the documents could be interpreted otherwise or point to any information that the CO overlooked, disregarded, dismissed, mischaracterized, or failed to consider.

Accordingly, the CO's determination that Employer failed to establish a peakload need is affirmed.

Number of Workers Requested

In the Notice of Deficiency, the CO had requested "[a]n explanation with supporting documentation of why the employer is requesting five Construction Laborers for Austin, Texas during the dates of need," as well documents, such as contracts or letters of intent, that specify the number of workers and dates of need, and "[s]ummarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment for Construction Laborers, the total number of workers or staff employed, total hours worked, and total earnings received." After reviewing Employer's response to the Notice of Deficiency, the CO determined that Employer failed to establish a temporary need for the requested five Construction Laborers.

Employer provided the following explanation for its request for five Construction Laborers:

In order to determine the number of temporary Construction Workers, we base it on objective factors, such as our current permanent workforce levels, upcoming workload needs based on confirmed and upcoming projects, customer intent letters, which give us insight into our workload needs and workforce levels, and prior year's workload demands. Based on the information available to us at this time, we have determined our 2019 temporary peakload need to be for five (5) Construction Workers to meet our workload and workforce needs.

(AF 37). Employer, however, failed to offer the objective evidence upon which this determination was supposedly based.

In the Final Determination, the CO asserted that the letters of intent submitted by Employer did not indicate the number of workers required to complete the projects and the CO opined it was unclear if there is a true need for services or if the employer is performing the majority of the services due to the availability of temporary workers during the stated time frame. The CO also asserted the contracts submitted by Employer reflected a general business relationship but failed to indicate the number of workers required to complete the projects. The CO also discussed Employer's 2017-2019 payroll documents and criticized them for the same reasons set forth in the previous section. As discussed above, based on my review of the documents, I find no reason to disturb the CO's conclusions and Employer's brief does not explain how the documents could be interpreted otherwise or point to any information that the CO overlooked, disregarded, dismissed, mischaracterized, or failed to consider.

Accordingly, the CO's determination that Employer failed to establish a temporary need for five Construction Laborers is also affirmed.

ORDER

In light of the foregoing, IT IS ORDERED that the denial of labor certification in this matter is AFFIRMED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./PML/ksw
Newport News, Virginia