

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 26 April 2019

BALCA Case No.: 2019-TLN-00117
ETA Case No.: H-400-19009-255961

In the Matter of:

ALEMAN CONCRETE LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Aaron Bernard, Esq.
The Bernard Firm, P.L.C.
Ames, Iowa
For the Employer

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

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Aleman Concrete 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 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 seeking to utilize this program must apply for

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through

and receive labor certification from the U.S. Department of Labor using Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

BACKGROUND

On January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 388 - 400.³ Employer requested certification for 15 Construction Laborers from April 1, 2019 until December 1, 2019. AF 388. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

In the late spring and early summer, the company experiences an increased demand in concrete work as the weather warms to allow more cement construction. The construction season booms during the months of April through December and slows down during the months of January through March. Since these construction laborers are only needed during this temporary peakload need, they will not become permanent employees and are not a part of Aleman Concrete LLC’s regular operation.

AF 388.

On February 28, 2019, the CO issued a Notice of Deficiency (“NOD”) citing six deficiencies in Employer’s application. AF 377 – 387.

First, the CO identified a “failure to establish the job opportunity as temporary in nature,” and stated that the employer “did not sufficiently demonstrate the requested standard of temporary need.” AF 381. The CO noted that the employer stated that it experiences an increase in business in the spring and early summer; however, no documentation was provided to support this claim. Also, the employer stated that the warm weather cement construction industry has an effect on the employers peakload temporary need; however, the employer has not provided any documentation pertaining to cement construction industry during warm weather conditions within the area of intended employment.

subsequent appropriations legislation, including the current continuing resolution. See *Further Extension of Continuing Appropriations Act, 2018*, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (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 References to the 400-page appeal file will be abbreviated with an “AF” followed by the page number.

To correct Employer's failure to establish temporary need for the number of workers requested, the CO requested that the Employer submit supporting evidence and documentation to support the number of positions being requested, including, but not limited to:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period;
3. Explanation and supporting documents that substantiate that cement construction in Midland, Texas cannot be performed under certain weather conditions;
4. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
5. Summarized monthly payroll reports for the two calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Construction Laborers*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 381 – 382.

Second, the CO identified a "failure to establish temporary need for the number of workers requested" and requested further information and documentation to demonstrate that Employer's request for 15 Construction Laborers is true and accurate and represents bona fide job opportunities. Specifically, the CO requested that Employer provide:

1. An explanation with supporting documentation of why the employer is requesting 15 Construction Laborers for Midland, Texas during the dates of need requested;
2. Documentation supporting the employer's need for 15 Construction Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 382.

Third, the CO identified “multiple areas of intended employment” noting that the employer must specify any additional worksite locations within Section F.c. of the ETA Form 9142 if it is requiring travel from the principal place of employment to various job sites.

The CO requested the employer submit an amended ETA Form 9142 that complies with the requirement that all H-2B workers will perform the same services or labor on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. It must also be consistent with the ETA Form 9141 and if applicable, the employer must provide evidence that any additional worksite locations are within normal commuting distance and are in the same area of intended employment, as defined by 20 CFR 655.5.

AF 383.

Fourth, the CO identified a “failure to submit an acceptable work order” because the employer did not submit a copy of a job order with its application to the Chicago NPC. The CO requested the employer complete the following:

1. Submit a job order that includes all required information to the Chicago NPC; and
2. Submit its job order to the Texas SWA serving the area of intended employment.

AF 385.

Fifth, the CO identified a lack of “disclosure of foreign worker recruitment” noting that the employer’s application did not include any agreements between itself or its attorney and an agent or recruiter engaging in the recruitment of H-2B workers. The CO requested Employer provide the following:

The employer and its attorney must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*, including the identity and location of all persons and entities hired by or working for the recruiter or agent. All agreements must contain the required language prohibiting seeking or receiving payments from prospective employees as indicated at 20 CFR 655.20(p).

OR

The employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H-2B workers under this *Application for Temporary Employment Certification*.

AF 386.

Sixth, and finally, the CO identified a “failure to submit a complete and accurate ETA Form 9142” noting that employer submitted an ETA Form 9142, *Application for Temporary Employment Certification*, and an ETA Form 9141, *Prevailing Wage Determination*, which are inconsistent. The CO specified that the employer FEIN listed in ETA Form 9142 is not consistent with the FEIN listed in ETA Form 9141. Additionally, the offered overtime wage rates are inconsistent. Lastly, the employer did not submit ETA Form 9142B, Appendix B, which must be submitted with each new application. The CO requested Employer amend the following:

1. Section C., Item 12 (Employer FEIN) – Must list the correct FEIN of the employer; and
2. Section G., Item 1a. (Overtime Wage) – Must list the correct overtime wage rate of \$26.42 per hour.

AND

The employer must also submit a complete ETA Form 9142B, Appendix B. Appendix B must be dated and contain the original signatures of the employer and, if applicable, its agent or attorney.

AF 387.

After a ten day extension, Employer responded to the NOD on March 19, 2019, including in its response a written statement detailing the employer’s business history and activities and schedule of operations throughout the year, an explanation of the activities of the employer’s permanent workers during non-peak period, average high and average low temperatures of individual days in stated non-peak period, 283 pages of individual invoices, two subcontractor agreements, and summarized monthly payroll reports for 2017 and 2018. AF 28 – 371.

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer did not meet the regulatory requirements and issued a Final Determination denying the Employer’s application for temporary labor certification. AF 18 – 27. The CO denied Employer’s application because Employer failed to correct two of the stated deficiencies in the NOD. Specifically, the CO noted that the Employer failed establish the job opportunity as temporary in nature and failed to establish temporary need for the number of workers requested.

The CO determined that Employer did not sufficiently demonstrate the requested standard of temporary need. AF 10 – 13. The CO further explained the reasoning for the denial:

In the written response provided, the employer references the Texas DOT 2014 Standard Specifications Item 360, Concrete Pavement (which a copy was also provided in response to the NOD letter). The employer and specifications stated the following:

“Do not place concrete when the ambient temperature in the shade is below 40 degrees F and falling unless approved. Concrete may be placed when the ambient temperature in the shade is above 35 degrees F and rising or above 40 degrees F. Protect the pavement with an approved insulating material capable of protecting the concrete for the specified curing period when temperatures warrant protection against freezing.”

The employer provided weather records from AccuWeather.com for Midland, Texas indicating the high and low temperatures from January through April. The weather records show that in 2018, over a three month period from January through March, there were only five days recorded with a high temperature under 40°F, which according to the specifications indicated above, concrete pavement should not be performed. The employer stated, “Midland, Texas regularly experiences weather which can impact concrete placement and curing from January and March.” The employer’s statement may be true for five days in the employer’s stated nonpeak period but it is not true for the far majority of the days in its stated nonpeak period.

The employer also provided summarized monthly payroll reports for 2017 and 2018. The most recent payroll report (2018) indicates that the employer had more work being performed during its non-peak months (December through March), than it did during its peakload months (April through November). Furthermore, the employer uses between two and five temporary workers throughout the year, pointing to a need for additional permanent workers. Finally, beginning in August, the employer’s permanent workforce was reduced from three to one worker. The employer’s payroll does not support a peakload need from April 1 through December 1.

In its response, the employer explained, “[t]he employer regularly works in Midland, Texas and throughout West Texas. Therefore, the company is providing invoices of some of its past projects to show its peakload need.” However, the employer was directed to provide a summary listing of all projects in the area of intended employment for the previous two calendar years. The list was to include start and end dates of each project and worksite addresses. Instead, the employer submitted 283 pages of invoices representing “some of its past projects”, which do not include worksite location or date of service. Thus, the individual invoices were not used to assess the employer’s temporary peakload.

Therefore, the employer did not overcome the deficiency.

AF 11 – 13.

The CO also determined that the Employer did not indicate how it determined that it needs 15 additional workers during the requested period of need. AF 13 – 15. Further explanation and documentation was required in order to establish the Employer’s need for a total of 15 workers. The CO wrote:

The employer provided summarized monthly payroll reports for 2017 and 2018. The most recent payroll report (2018) indicates that the employer had more work being performed during its non-peak months (December through March), than it did during its peakload months (April through November). Furthermore, the employer uses between two and five temporary workers throughout the year, pointing to a need for additional permanent workers. Finally, beginning in August, the employer's permanent workforce was reduced from three to one worker. The employer's payroll does not support a peakload need for 15 Construction Laborers from April 1 through December 1.

In its response, the employer explained, "[t]he employer regularly works in Midland, Texas and throughout West Texas. Therefore, the company is providing invoices of some of its past projects to show its peakload need." However, the employer was directed to provide a summary listing of all projects in the area of intended employment for the previous two calendar years. The list was to include start and end dates of each project and worksite addresses. Instead, the employer submitted 283 pages of invoices representing "some of its past projects", which do not include worksite location or date of service. Therefore, the invoices were not used to assess the employer's temporary need for 15 Construction Laborers.

The employer provided a letter from Christopher M. Butler, President of CM Butler Construction and two Subcontractor Agreements; however, none of the documents contain information that would support the need for 15 Construction Laborers from April 1 through December 1.

Therefore, the employer did not overcome the deficiency.

AF 14 – 15.

On April 11, 2019, Employer requested administrative review of the CO's Final Determination/Denial. AF 1-17.

APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). 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 the 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).

Employer is required to establish that its need for the workers requested is "temporary." Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

- (A) Definition. Temporary services or labor under the H-2B classifications 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.
- (B) Nature of petitioner's need. 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.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a "peakload need" if it shows it "regularly employs permanent workers to perform the services 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 demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

If I affirm the CO's denial on any singular basis, I need not look further to other denial reasons to decide whether those would also be affirmed.

DISCUSSION

The CO denied certification because the Employer failed to correct two of the six deficiencies noted in the NOD. Specifically, the CO determined that the Employer failed to justify the temporary need for the number of workers requested and failed to establish that the job opportunity is temporary in nature. AF 18 – 27.

Regarding the CO's determination that Employer failed to establish the job opportunity as temporary in nature, Employer argues that the CO only did a cursory glance of Employer's weather data and provided specifications for when concrete should not be placed and cured. Employer argues that the CO only does an analysis of 2018's high temperature data. When looking at historical averages, which Employer states is a better indicator of what to expect from year to year, there were a total of 53 days that fit the description of when concrete should not be placed, which is contradictory to the 5 days the CO found. Additionally, Employer argues the CO did not look at specifications for curing concrete, which requires even higher temperatures.

I find Employer's opinion that historical average temperatures should have been used for the CO's analysis over average high temperatures unconvincing and lacking reason. However, the specifications for curing concrete do require higher temperatures than placing concrete. According to the specifications, curing concrete takes 3 "curing days" which can be described as a 24-hour period where the temperature in the shade is over 50 degrees Fahrenheit for at least 19 hours. This rules out significantly more days from January through March in which concrete can be cured.

Next, Employer argues that the CO "arbitrarily only looks at 2018 [payroll information] when determining there is not a peakload need." Employer notes that the 2017 data shows that the permanent workers have total earnings that are lowest from January through March, then earnings from April through December are higher than any earnings received in January through March. Employer states that the total hours worked in 2018 is directly related to the number of workers Employer has, and this must be taken into account when analyzing the data.

Employer further argued:

The CO failed to analyze the sales data provided for 2018 and use that information when analyzing the payroll data. Further, the CO did not require an explanation of the payroll data; it only requested summarized reports of the data. The CO did not explain what it was looking for in the payroll data. Without knowing what the CO was looking for, the Appellant did not know it needed to provide an additional explanation for every inconsistency in the data which can easily be attributed to common situations for employers and which was already explained in the Statement of Temporary Need. The analysis of the data by the CO does not [take] into account the realities of working with real people and not perfect employees and is not based in the real world.

AF 3.

I find the 2018 payroll data of little assistance in analyzing temporary need, as the majority of Employer's high demand time period of April through December in 2018 was serviced by only one permanent employee whereas the non-peakload season had three permanent workers. In looking at the 2017 payroll information which Employer argues was not taken into consideration by the CO, the hours worked by permanent employees do not seem to have a definite peak or non-peakload season. True, the busiest month was 1258 hours worked in June, but the second highest was 882 hours worked in January, which is during Employer's alleged non-peakload time of year. Additionally, the second lowest number of hours worked was in April which Employer claims is a month of temporary peakload need. Though I agree with Employer's argument that total hours being directly related to total number of workers must be taken into account when analyzing the data, I do not find the payroll information provided by Employer supportive of the requested standard of temporary need.

Employer argues that the CO should have used the invoices to assess the employer's temporary need as it falls into the requested category "Other evidence and documentation that similarly serves to justify the dates of need being requested for certification."

The CO requested, among other things, that Employer submit a summary listing of *all* projects in the area of intended employment for the previous two calendar years. The list was to include start and end dates of each project and worksite addresses. Instead, Employer submitted 283 pages of invoices representing "some of its past projects." Though dates are provided on each invoice, there is no explanation or summary of the information or reason for submission. Some invoices are for labor such as "dirt work" or "brick layer services", and some are for materials such as columns or city sidewalk. Though these invoices could very well fall into the category of "Other evidence and documentation that similarly serves to justify the dates of need being requested for certification," I do not find that they justify the dates of need requested.

The Employer failed to provide a summary listing all projects in the area of intended employment for the previous two calendar years and provided no explanation as to why this information was not provided. The summary listing all projects was reasonably necessary to demonstrate when throughout the year Employer has a peakload need for temporary workers. As noted above, to establish a peakload need, the law requires an employer to establish that it is temporarily supplementing its regularly employed labor force due to a seasonal or short-term demand. Employer failed to provide this information to the CO as requested.

I find that the record demonstrates that the CO's denial of certification based on the Employer's failure to demonstrate a temporary need was not arbitrary and capricious or otherwise not in accordance with law. The Employer provided documentation in the form of a written statement detailing the employer's business history and activities and schedule of operations throughout the year, an explanation of the activities of the employer's permanent workers during non-peak period, average high and average low temperatures of individual days in stated non-peak period, 283 pages of individual invoices, two subcontractor agreements, and summarized monthly payroll reports for 2017 and 2018. The CO noted in its Final Determination that the documentation presented by Employer did not serve to validate the Employer's temporary peakload need. The CO stated that Employer's documentation failed to

support its statement of temporary need. I agree with the CO. Nothing in the documentation provided by Employer demonstrates a peakload season from April through December, and Employer failed to explain how the documentation supported such a need. It is Employer's burden to prove the need and it did not. The CO's denial of certification on this basis was not arbitrary and capricious or otherwise not in accordance with law.

CONCLUSION

For the reasons above, I find that the evidence presented by the Employer fails to support its temporary need for an additional 15 workers for the 2019 year. Based on the facts presented, I find that the CO's decision to issue a denial of Employer's application was not arbitrary and capricious or otherwise not in accordance with law.

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED**.

SO ORDERED.

For the Board:

CARRIE BLAND
Administrative Law Judge

Washington, D.C.