



Issue Date: 01 May 2019

BALCA CASE NO.: 2019-TLN-00102

ETA CASE NO.: H-400-18352-055460

In the Matter of:

H.R. MARC CO., INC.,
Employer.

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

H.R. Marc Co., Inc. (“Employer”) requests review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. This program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor (“DOL”), Employment and Training Administration (“ETA”).

The CO, acting for the Secretary of Labor (20 C.F.R. § 655.2(a)), may issue a labor certification only after determining that there are not enough qualified and available U.S. workers to perform the work in question and that employment of foreign workers will not adversely affect wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. § 1361.

If the application is denied, the employer may request review by the Board of Alien Labor Certification Appeals (“BALCA”), as happened here. 20 C.F.R. § 655.61(a). By designation of the Chief Administrative Law Judge, I am BALCA for purposes of this appeal. 20 C.F.R. § 665.61.

This Decision and Order is based on the written record, which consists of the Appeal File (“AF”) and Employer’s request for review. Neither party filed a brief within the time allowed under 20 C.F.R. § 655.61. I affirm the Certifying Officer’s denial of a labor certification to Employer.

Procedural Background

Employer applied for the H-2B Temporary Employment Certification based on an asserted peakload temporary need for 30 worker positions. (AF, p. 1426.) Employer is engaged in the construction business in Texas. Their services include concrete construction. (AF, p. 1436.) The temporary workers would do construction labor and “may clean and prepare sites, dig ditches and trenches, shovel concrete, set forms, and load and unload materials.” (AF, p. 1428.) Employer has the “most need for temporary peak load workers” from April 1, 2019, to December 1, 2019. (AF, p. 1436.)

The ETA issued a Notice of Deficiency (“NOD”) and requested additional information to support Employer’s assertion of an identifiable and predictable peakload need. (AF, pp. 1419-1425.) The requested information included a statement describing employer’s business history, activities, and schedule of operations, a summary listing of all projects in the area of intended employment for the previous two years, summarized monthly payroll reports, and other evidence and documentation to justify the dates of asserted need. (AF, p. 1424.) Employer was also notified that the application was deficient in that it did not sufficiently demonstrate that the number of workers requested is true and accurate and represents bona fide job opportunities. Additional information to establish the number of workers was requested. (AF, p. 1424-25.) Employer’s response to the NOD included invoices and payroll for calendar years 2017 and 2018, letters of intent and contracts for 2019, sales summaries, tax forms, and some weather data. (AF, pp. 22-1418.) Employer gave “permission to amend the application to request a total of 18 workers” if DOL did not consider the documents submitted in support of the application to justify the need for 30 workers. (AF, p. 29.)

The Final Determination denying Employer’s application was issued on March 13, 2019, and Employer’s Notice of Appeal followed. The case was assigned to me for decision on April 17, 2019.

Standard of Review

The regulations do not specify the deference that the BALCA should accord to a CO’s determination, nor is there a consensus in the cases as to the appropriate standard of review. *See, e.g., J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015), *Jose Uribe Concrete Construction*, 2019-TLN-00025 (Feb. 21, 2019) [arbitrary and capricious standard]; *Roadrunner Drywall Corp.*, 2017-TLN-00035 (May 4, 2017), *Sands Drywall, Inc.*, 2018-TLN-00007 (Nov. 28, 2017) [*de novo* review]; *Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) [hybrid approach].

In the present case, I need not reach this issue. I would affirm the denial of the application even were I to accord the CO’s decision no deference and review the matter *de novo*.

Discussion

Temporary Nature of Need

An employer seeking certification under the H-2B program 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).¹ An employer’s need is temporary if it is either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 20 C.F.R. § 655.6(b). An employer establishes 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 employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity. 20 C.F.R. § 655.11(e)(3) and (4).

In its application, Employer made the following temporary need statement:

Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 1st, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months.

In the Notice of Deficiency, the ETA stated that “the Texas climate is conducive to working year round outdoors.” In response to the request to provide additional information from Employer in order to evaluate its assertion of temporary need, Employer provided additional documentation, including periodically-issued FEMA Region 6 Weather Threat Briefings, dated December 6, 2018, to March 4, 2019. (AF, pp. 1335 - 1418.)

Employer also submitted a letter in which it noted that it applied for the same dates and the same number of workers last year. Employer stated that it is a concrete subcontractor and, while its customers have “varied demands for the delivery of our services all year round, this demand usually significantly decreases during the winter months.” (AF, p. 28.) Because most of Employer’s services are provided outdoors, it can be complicated by “weather, especially cold weather. Cold weather production factors include the limits of casting concrete only when it is above 40 degrees.” (*Id.*) Employer also cites to the lack of daylight hours as a hindrance to efficiency, as well as workers being less productive in winter. (AF, pp. 28-29.)

Employer’s payroll records show that they employed four permanent employees as construction laborers for all twelve months of calendar year 2017 and between 24 and 33 temporary employees in nine months from March to November. (AF, p. 30.) For calendar year 2018, Employer reported through August that they employed three permanent employees as

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).

construction laborers for all eight months and 15 temporary employees from April to August. (*Id.*) No data from the last four months of 2018 is given.

The CO provided weather data from a website in the Final Determination and noted that that data indicates the temperature in the geographic area of employment “rarely falls below 40 degrees,” which is the temperature alleged by Employer to prohibit the work of casting concrete. (AF, pp. 17-18.) Even without considering this weather data, I determine that Employer has not met its burden to establish that its alleged temporary need for peakload workers meets the legal requirements for certification.

Employer’s generic assertion that the notoriously harsh winters of Texas create a peakload need for workers in all other seasons is unsupported by evidence or analysis. *See Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer only made unsupported assertions about how weather conditions and contract patterns cause job openings to fluctuate). Employer does not establish that weather conditions in December, January, February, and March prevent continuing business operations. In fact, in March 2017, Employer utilized 24 temporary workers as construction laborers, but used none in March 2018 and requested none for March 2019. (AF, p. 17.) Apparently, the weather in March 2017 allowed enough work for 4 permanent and 24 temporary employees, while the weather in April through August 2018 allowed enough work only for 3 permanent and 15 temporary employees.

Employer also asserts that the lack of daylight hours in the winter hinders efficiencies, which is another generic assertion unsupported by evidence or analysis. In 2019, the winter solstice, which is the shortest day of the year, falls on December 21st, only three weeks into Employer’s alleged slow season of fourth months. There are as many daylight hours on the spring equinox (around March 21st) as there are on the fall equinox (around September 21st), yet March is allegedly within the slow season while September is not.

Employer does not mean to simply supplement its permanent staff to meet a temporary need. A better description of Employer’s use of foreign workers is as a business model designed to reduce the overall costs of its workforce. In 2017, it exponentially increased its permanent workforce of 4 laborers by adding 33 temporary workers for six months, 31 for two months, and 24 for one month. In 2018, there was a similar dramatic increase in the workforce when 15 temporary workers joined 3 permanent laborers. Employer has a permanent year-round workload and permanent staff, and multiplies its workforce of construction laborers for eight to nine months of every year. Employer appears to have chosen this way of doing business and has not established that the choice is forced by considerations of weather or daylight. In no meaningful way can Employer’s need be considered temporary. As prohibited by the regulation, 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). And yet, that appears to be exactly what has been happening here.

Employer has not established that its need for labor is temporary.

Response to Notice of Deficiency

Where the Certifying Officer issues a Notice of Deficiency, the failure of the employer to provide all required documentation will result in the denial of the employer's application. 20 C.F.R. § 655.32(a). The Board, however, has previously held that if the employer explains why it is unable to produce the documentation requested in the Notice of Deficiency and provides alternative evidence, the Certifying Officer may not deny the certification without first considering whether the alternative evidence satisfies the employer's burden. *International Plant Services, LLC*, 2013-TLN-00014 (Dec. 21, 2012). The employer cannot satisfy its burden by simply providing documentation without also showing how the information in the documents justifies its temporary need for foreign workers. *Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) ("An employer cannot just toss hundreds of puzzle pieces—or hundreds of pages of document—on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers").

The Notice of Deficiency specifically requested that the Employer provide certain documents, which Employer failed to do. Although requested, a summary listing of all projects was not included in the nearly 1,400 pages of documentation submitted in Employer's response. The documentation included hundreds of pages of invoices and contracts, but was not organized or summarized in any way that was requested. In addition, the NOD requested documentation to support Employer's asserted need for 30 temporary workers and, while letters of intent for 2019 were supplied, they did not include the number of workers needed for each project or the specific dates of need. Employer did not explain why it was unable to produce the documentation requested in the NOD, but just submitted its voluminous documentation in the apparent hope that the CO would somehow find somewhere in those pages a legitimate temporary need for workers.

Employer did not provide all documentation required by the NOD.

Number of Temporary Workers Needed

Employer has also offered no detailed or persuasive explanation based on evidence in the record as to why thirty, as opposed to any other number of temporary workers, are necessary. 20 C.F.R. § 655.11(e)(3); *Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019). In fact, Employer's own statement - that it would accept certification for 18 workers if its documentation did not support a finding of need for 30 - tends to prove that Employer itself cannot justify the need for a certain number of temporary workers. (AF, p. 29.) As noted above, the letters of intent for 2019 projects were deficient in that they did not specify the number of workers needed.

The explanation given by Employer includes a statement that they cannot find U.S. workers to take the jobs because U.S. workers want year-round and better paying jobs. (AF, p. 29.) As noted by the CO, payroll documentation shows that both permanent and temporary workers worked overtime during Employer's peak and non-peak months in 2017 and 2018, which may point to "a possible need for additional permanent workers." (AF, p. 20.) The record contains no evidence supporting Employer's assertion that they "cannot find" U.S. workers but, regardless, neither a problem with recruitment and retention of workers nor a general labor shortage constitutes a temporary need in this context.

Under Employer's approach, temporary foreign workers would be utilized by employers during periods of economic and wage growth when domestic workers are able to demand more stability and better pay. This approach violates the basic tenet of the temporary work program in that it would adversely impact the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a); 8 C.F.R. § 214.2(h)(6)(i)(A). As Judge Nordby recently explained in *Jose Uribe Concrete Construction*, "the Employer could raise its wages and other benefits to attract U.S. workers away from its local competition, or to attract workers to Texas from other parts of the country, or pay overtime to its existing permanent employees." 2018-TLN-00015. In this case, Employer has met the vast majority of its workforce needs for at least the past two years by relying on temporary foreign workers. U.S. workers who are similarly employed would be negatively impacted by the competition in the workforce from laborers who are not employed full-time and year-round with benefits and compensation that attach to such status. Without certification, Employer may be compelled to develop ways to meet its workforce needs without such detrimental effect on U.S. workers.

Employer's conclusory statements of its need for 30 or 18 workers does not meet its burden to justify the number of workers it seeks.

Order

For these reasons, the decision of the Certifying Officer denying Employer's application for temporary labor certification is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

SUSAN HOFFMAN
Administrative Law Judge