



Issue Date: 08 November 2018

BALCA Case No.: 2019TLN00006
ETA Case No.: H-400-18242-323928

In the Matter of:

ISCIN, LLC
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Debra Rodriguez
Corpus Christi, Texas
For the Employer

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

Before: Joseph E. Kane
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to ISCIN, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

¹ 20 C.F.R. § 655, Subpart A (codified April 1, 2016). On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR rules apply to this case.

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

The Employer is a construction company located in Ingleside, Texas. (AF 188).⁵ On August 30, 2018, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”), signed appendix B, statement of need, disclosure of foreign recruitment, job order and prevailing wage determination, requesting certification for sixty-seven (67) carpenter helpers⁶ from November 20, 2018, until August 1, 2019 based on a peakload need for temporary labor. (AF 187).

On September 10, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined six deficiencies in the Employer’s Application. (AF 177-186). Specifically, the CO stated that the Employer (1) failed to meet the definition of an employer under the regulations; (2) failed to satisfy the application filing time requirements; (3) failed to establish the job opportunity was temporary in nature; (4) failed to establish temporary need for the number of workers requested; (5) failed to submit an acceptable job order; and (6) failed to submit a complete and accurate ETA Form 9142B. *Id.* As pertinent to this appeal, the CO determined that it could not establish that the Employer was a registered business entity. (AF 180). The CO instructed the Employer to file documentation from the State of Texas verifying its existence at the address provided on the application. *Id.* Additionally, the CO determined that the Employer failed to establish that the job opportunity was temporary in nature. (AF 180-182). The CO requested the Employer provide documentation to establish a peakload need for additional workers. *Id.* Third, the CO stated that the Employer failed to establish a temporary need for the number of workers requested. (AF 182-184). The CO asked the Employer to provide documentation to explain its need for 65 workers. *Id.* Fourth, The CO stated that the Employer failed to submit an acceptable job order. (AF 184-185). The CO asked the Employer to provide an amended job order with the corrected information. *Id.*

On September 17, 2018, 2018, the Employer submitted additional documents in response to the Notice of Deficiency including a summary of its construction jobs from 2017 to 2019, summaries of its payroll reports from 2016 to 2018, weather reports, a letter of intent, a contact agreement for work to be performed, IRS Form W-9 (request for Federal Employee Identification Number), an amended statement of temporary need, an amended ETA Form 9142, a construction service list and a project list, and an updated job order. (AF 144-176).

On October 15, 2018, the CO issued a Non Acceptance Denial (“Denial”) concluding that the Employer (1) failed to meet the definition of an employer under the regulations; (2) failed to establish the job opportunity was temporary in nature; and (3) failed to establish temporary need for the number of workers requested. (AF 126-143). On October 18, 2018, the Employer requested administrative review of the CO’s Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.⁷ (AF 1-125).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

⁶ SOC (O*Net/OES) occupation title “Helpers – Carpenters” and occupation code 47-3012 (AF 187).

⁷ Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within

On October 22, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the CO to file briefs within seven business days of receiving the Appeal File.⁸ On October 30, 2018, BALCA received the Appeal File from the CO. The Employer filed a brief on November 2, 2018. The CO did not file a brief.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments, and evidence that the Employer actually submitted to the CO before the date the CO issued a final determination.⁹ 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.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer's Application to admit H-2B workers for temporary non-agricultural 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.¹²

Status as an Employer

Section 655.5 of the regulations defines an 'Employer' as a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and (3) for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).¹³

seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

⁸ 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 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).

¹² 20 C.F.R. § 655.1(a).

¹³ 20 C.F.R. § 655.5.

In the present case, the CO was unable to verify the Employer existed as the physical address provided in the application and asked the Employer to submit documentation from the State of Texas verifying its address and existence. (AF 131). In response the Employer submitted IRS Form W-9, which it had completed itself. (AF 119). The CO determined that this documentation was insufficient to establish the Employer's existence. (AF 83-84). I agree with the CO that paperwork completed by the Employer is insufficient to establish that it exists at a physical address within the U.S. and thus meets the definition of an Employer under the applicable regulations.¹⁴ Thus, I find that the Employer has failed to overcome this deficiency.

Failure to Establish a Temporary Need for Workers

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.¹⁵ The Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."¹⁶ Pursuant to § 113 of the 2018 Consolidated Appropriations Act, "for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B)." Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

In this case, the Employer alleged a peakload need for 67 carpenter helpers from November 20, 2018, until August 1, 2019.¹⁷ In order to establish a peakload need for temporary workers, the Employer "must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand

¹⁴ In its request for administrative review, the Employer submitted Articles of Incorporation from the State of Texas (AF 20-24) and a letter from the IRS issuing it a FEIN. (AF 25). I am unable to consider these documents as my review of the file is limited to the evidence that the Employer submitted to the CO before the date the CO issued a final determination. 20 C.F.R. § 655.61. Even so, I find that this documentation is insufficient to overcome this deficiency as the Articles of Incorporation do not include or identify the Employer's physical place of business and the IRS form includes a different address than the one provided on the ETA Form 9142. Thus, I am still unable to conclude that the Employer exists at the address in Ingleside, Texas indicated on its application.

¹⁵ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

¹⁶ 20 C.F.R. § 655.6 (a).

¹⁷ Interestingly, prior to filing this application the Employer filed an application on August 1, 2018, where it requested 65 workers between October 20, 2018 and July 20, 2019. (See 2019-TLN-00004). This in and of itself, further shows that the Employer has failed to establish a temporary need as the dates and number of workers continue to change.

and that the temporary additions to staff will not become a part of the petitioner's regular operation."¹⁸

In its Application, under the Statement of Temporary Need, the Employer stated that "it is preferred and greatly appreciated by our employees, that we complete a majority of the outside construction and remodeling work during the fall months due to the increased weather temperatures of summer." (AF 193). In response to the NOD, the Employer submitted an Amended Statement of Need in which it stated that:

During the months of August and September, Vinton, LA experiences the hottest time of the year. The temperatures rise up into the 90s, with heat indexes soaring into the low 100s, creating an extremely hot and unsafe work environment for our employees. Workers may experience safety issues, such as heat exhaustion, during these months if not careful. We take pride in creating a safe and comfortable working environment for all employees, and do not require workers to be out in unfavorable weather conditions. . . Therefore, our contracts are created to begin construction/remodeling work during the time of the year that is best suited for all involved.

(AF 166).

In support, the Employer summarized its payroll reports from 2016 and 2017. (AF 158-163). The documents indicate that for those years the Employer had 24 to 41 permanent employees and hired temporary workers from January to July and October to December. *Id.* Thus, the documentation supports the Employer's assertion that it does a decreased amount of business during August and September. However, there is no evidence in the record that this downturn is caused by decreased market demand or decreased need for construction work. Rather, the Employer chooses to structure its contracts in such a way as to create the downturn in work that it experiences. For instance, the Employer entered into a contract agreement for construction work on May 14, 2018. (AF 171). There is no indication in the record, either in the contract or the letter of intent, to explain why work on the contract could not begin soon after the contract was signed. Instead, the Employer acknowledges that it chooses to delay work until a time when it is cooler outside. The Employer asserts that to work outside in August and September is "unfavorable" but has not presented any documentation to show that working outside in August and September is actually fatal or impossible. Thus, there is nothing in the record to support the Employers' assertion that there is an increased demand for work during the peakload season of November to August it identified, only that the Employer has a preference for not working outside in August and September. I find that the Employer's preference does not create a seasonal or short-term demand that gives rise to the need for temporary workers. After

¹⁸ 8 C.F.R. 214.2(h)(6)(ii)(B)(3); *see also Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peakload standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload, temporary need).

reviewing the record, I concur with the CO that the Employer has failed to establish a “peakload” need for H-2B workers from November 20, 2018 to August 1, 2019.

Failure to Justify a Need for 67 Workers

The final issue on appeal is whether the Employer has demonstrated that it has a need for 67 carpenter helpers and whether its request for those workers represents a bona fide job opportunity. The regulations provide that the CO will “review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors . . . (3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.”¹⁹ In the NOD and Denial, the CO concluded that the Employer failed to justify a need for 67 carpenter helpers and that it was unclear how the Employer determined the number of worker’s requested. (AF 133-134, AF 182-83).

In its response to the NOD, the Employer provided a letter of intent and a summary of upcoming work in which it identified 5 upcoming projects. (AF 172, 169-170). It also identified a “project list” where it indicated that it would need 14 carpenter helpers for each of the 4 upcoming jobs, and 11 at another, for a total of 67 workers. (AF 173-175). After reviewing the record, I find that the Employer has not explained how it determined it would need 67 workers. The 5 upcoming jobs are identified as “carpentry construction/home remodel.” (AF 102). From 2017-2018, the Employer completed 3 jobs it also identified as “carpentry construction/home remodel.” (AF 170). From November 2016 through August 2018, the Employer hired 15 to 27 temporary workers, which breaks down to 3 to 10 workers per job site, not the 11 to 14 the Employer has indicated it needed. (AF 158-163). The Employer stated that the projects for 2018 to 2019 require more work than past projects because they have been hired to repair damages resulting from recent hurricanes. However, there is no documentation in the record to support this statement that the upcoming projects are of a bigger scale or require more work than past projects, especially as they are all identified as the same type of project. BALCA has held that “a bare assertion without supporting evidence is insufficient to carry the employer’s burden.”²⁰

Thus, it is not clear from the record how the Employer fully calculated how many additional workers it would need from November 20, 2018 to August 1, 2019. Therefore, I find that the Employer has not established that the request for 67 carpenter helpers represents a bona fide job opportunity. Accordingly, I find that the CO properly determined that the Employer failed to meet the requirements of 20 C.F.R. § 655.11(e)(3)-(4).

¹⁹ 20 C.F.R. § 655.11(e)(3)-(4).

²⁰ *BMC West Corp.*, 2016-TLN-00039/40, slip op. at 5 (May 18, 2016)(citing to *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013)).

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

JOSEPH E. KANE
Administrative Law Judge