



Issue Date: 21 February 2019

BALCA Case No.: 2019-TLN-00025
ETA Case No.: H-400-18331-941046

In the Matter of:

JOSE URIBE CONCRETE CONSTRUCTION,
Employer.

Appearance: Sam Haddad, Esq.
Austin, TX
For the Employer

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

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Jose Uribe Concrete Construction’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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (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.

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. § 655.53, 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 or about November 27, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from the Employer. AF 79-126.³ The Employer applied for temporary labor certification for seven full-time concrete finishers to work on residential and commercial construction projects in the Gatesville, TX, area. AF 59. The Employer asserted a peakload need for these seven workers, *see* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), lasting from February 11, 2019, through November 22, 2019. *Id.* The Employer explained that its peak load period begins in February due to “customer & market demand for our services, weather conditions such as warmer temperatures & increased daylight,” and ends in mid-November, “due to a reduction in daylight hours & onset of fall weather” resulting in lessened “customer & market demand.” AF 59-61.

The Employer submitted letters from three construction companies stating that they had used the Employer as a subcontractor for the past 10 to 17 years, and projected doing so again during their February to November peak construction season in 2019. AF 104-106. The Employer also submitted invoices from work completed from January through October 2018, AF 107-118, and H-2B certifications for concrete finishers in the three prior years, 2016, 2017, and 2018. AF 56-58.

On December 7, 2018, the OFLC CO issued a Notice of Deficiency to the Employer, setting out two deficiencies in the Application and requesting additional information. AF 74-78. The CO found that the Employer’s initial application did not sufficiently demonstrate temporary need or peakload need: “The employer did not sufficiently explain the events that create the seasonal or short term demand for its services. The employer did not explain how its need is temporary in nature.” *Id.* The CO noted that the lowest average low temperatures in Gatesville, TX, at 40 degrees, do not preclude construction. *Id.* The CO also found that the Employer did not adequately explain its need for seven concrete finishers, *id.*, as opposed to more or fewer. The CO requested several categories of documentation. AF 77-78.

On December 20, 2018, the Employer submitted a response. AF 28-73. The Employer submitted (or-resubmitted) “Temporary Peak Load Need Statements, Customer Intent Letters, Employer’s 2019 Annual Workload Projections for Concrete Work, summarized payroll records, purchase orders, invoices and customer list.”⁴ The 2019 Annual Workload Projections listed projects planned for each month, and then estimated that five permanent and seven temporary

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

⁴ Some of these documents submitted in response to the Notice of Deficiency duplicated documents already submitted with the initial application. *Compare* AF 28-73 *with* AF 101-118.

finishers would be needed in each month save for January and December, in which only the five permanent finishers were needed. AF 30-32. The same data was presented in chart form. AF 33. No specific information was provided as to how the Employer reached its estimates of five permanent and seven temporary concrete finishers needed in each month for the jobs listed. The Employer did submit an additional statement from Jose Uribe, in which he described the February through November peakload construction period in his area. AF 34-35.

We have permanent concrete finishers during the year who fulfill our workforce needs during the times of the year when we have a reduced, or non-peak workload, and we only need the additional workers to help us meet the increased demand for our services during our peak load period during the year. When our peak load period winds down, then the temporary workers return home and the permanent workers meet our workforce needs until our next peak load period begins. Therefore, we have a definable temporary peak load period of need.

AF 34.

The Employer also provided payroll data for 2016, 2017, and 2018, which each were years in which it was approved for H-2B temporary concrete finishers. The payroll data shows, as one might expect, higher payroll during the months in which the Employer was employing additional, temporary, concrete finishers.

In his cover letter to the Notice of Deficiency response, counsel for the Employer noted that similar documentation had been found sufficient to certify the Employer for seven H-2B temporary concrete finishers in 2016, 2017 and 2018.

The Employer's Application for Temporary Employment Certification was denied on January 8, 2019, for the same reasons that resulted in the Notice of Deficiency. AF 14-18. This request for administrative review followed.

DISCUSSION

BALCA's review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties; and the Employer's request for administrative review, which may only contain legal arguments and evidence that were actually submitted to the CO before the date the CO issued a Final Determination.⁵ After considering the

⁵ Under 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 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.

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).

Review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brook Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard, the reviewing judge or panel looks to see if the initial decision maker 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." *Three Seasons*, 2016-TLN-00045, *19 (quoting *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)). "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious." *Id.*

I recognize that at least one judge has recently concluded that de novo, rather than arbitrary and capricious, is the correct standard to apply in an administrative review of an H-2B determination. *Best Solutions USA, LLC*, 2018-TLN-117, *3 n.2 (ALJ May 22, 2018). However, the weight of the case law, as well as a close reading of the H-2B regulations and the H-2A regulations next door in 20 C.F.R., favor arbitrary and capricious review.⁶

The Employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 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).

The Employer's request for review must set forth "the grounds for the request" and is by regulation the Employer's sole opportunity to make "legal argument." 20 C.F.R. § 655.61(a)(3), (5). However, by order dated February 13, 2019, at the Employer's request I allowed the Employer to submit additional briefing no later than noon Pacific time on February 19, 2019. The Employer did so, and I reviewed and considered its brief. The CO also filed a brief, which I received on February 13, 2019, and considered.

⁶ In the H-2A program, in which the rules predate the current H-2B rules, an employer may elect either an administrative review or a de novo hearing following a denial of certification by a CO. 20 C.F.R. § 655.171. In adopting the current H-2B rules, DHS and DOL stated that the new 20 C.F.R. § 655.61 "does not provide for de novo review." 80 Fed. Reg. 24042, 24081. Whether that was meant to either set a standard of review or simply to state the obvious, that the new rule did not allow for hearings as the H-2A rules do, is not clear. Therefore, I read the plain language to mean both: there are no de novo hearings, nor do CO determinations get reviewed de novo under administrative review. Because of the weight of the case law here, CO determinations receive arbitrary and capricious review. Many thanks to OALJ San Francisco law clerk Rebecca Vorpe for her research memorandum analyzing this issue.

The Employer must establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) An Employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. § 655.11(e)(3) and (4); *see Titus Works, LLC*, 2019-TLN-00023 (Feb. 8, 2019); *Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017); *see also Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013).

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. 8 C.F.R. 214.2(h)(6)(ii)(B). Temporary need must “be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 CFR 214.2(h)(6)(ii)(B), Interim Final Rule (IFR), Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24055 (April 29, 2015). The agencies categorize and define temporary need into the following four standards: one-time occurrence, seasonal, peakload, or intermittent. 8 C.F.R. § 214.2(h)(6)(ii)(B), 20 CFR 655.6.

For 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 2015 IFR, which was jointly issued by DHS and DOL, adopted by reference the DHS definition of “temporary need” at 8 C.F.R. § 214.2(h)(6)(ii)(B), but added an additional bright-line rule for CO’s to apply and codified it at 20 C.F.R. § 655.6. “Except where the employer’s need is based on a one-time occurrence, the CO will deny [a certification] where the employer has a need lasting more than 9 months.” 80 Fed. Reg. at 24113. As noted above, *supra* n. 1, an appropriations rider passed by Congress on December 18, 2015, and renewed with each appropriation since, requires that the DOL apply solely the DHS definition of “temporary need,” without the 9-month bright-line rule. And to be clear, I am not applying a 9-month bright line.

However, the preamble to the 2015 IFR identified considerations that are relevant to applying the DHS definition of “temporary need” in 8 C.F.R.; in particular, the twin commands that an employer must prove that it “needs to supplement its permanent staff . . . on a *temporary basis* due to a *seasonal or short-term demand*” and also, “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) (emphasis added).⁷ The DHS and DOL wrote:

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a

⁷ Regulatory preambles provide some of the most probative interpretive guidance, though of course the plain language of the regulation ultimately controls. For a discussion of the utility of preambles, *see generally* Kevin M. Stack, Preambles as Guidance, 84 Geo.Wash. L. Rev. 1252 (2016).

permanent position. . . . Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time off due to a slow-down in work activity.

80 Fed. Reg. at 24056. The agencies continued:

[S]ince temporary need on a peakload basis is not tied to a season, . . . an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis.

Id.

On this record, I agree with the Employer that it has a permanent year-around workload and permanent staff, and that its need for workers is greater during the months of February through November as its need is driven by general contractors' demands.

However, on this record, in no meaningful way can the Employer's need be said to be "temporary," which is the *sine qua non* of employment of workers through the H-2B program. The best reading of the record is that year in and year out, since at least 2016, the Employer has shown a *permanent* need for up to 12 concrete finishers, with a relatively brief slowdown in work during the holiday period from Thanksgiving through Christmas and into the new year. This is exactly the scenario envisioned by the DHS in 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), which directs that an employer must prove its temporary peakload need is "seasonal or short-term" and "that the temporary additions to staff will *not become a part of the petitioner's regular operation.*" (emphasis added). It is also the scenario envisioned by DHS and DOL in the 2015 IFR preamble, cited above, in which an employer misuses a temporary worker program to fill a permanent need, with successive applications for periods of time approaching a year. Other immigration programs exist to fill permanent employment needs with non-U.S. workers. Or, the Employer could raise its wages and offer 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.

There is one DOL ETA guidance document, cited by the Employer in correspondence with the CO, AF 19-20, that acknowledges that "many employers use the H-2B visa program on a predictable and recurring, seasonal business cycle, and these job opportunities were previously granted labor certification. Thus, the nature of the need for the services to be performed has been and may continue to be determined temporary." Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need," September 1, 2016.⁸ The guidance states that "an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need." *Id.* That is fine, so far as it goes, but this guidance document cannot displace the plain language of the definition of temporary peakload need. Also, this guidance document

⁸ Available at

https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H2B_Submission_of_Documentation_Temporary_Need_082016.pdf

applies to all H-2B certification applicants, including those who may obtain certifications based on seasonal or peakload need for only a few weeks or months per year, i.e., truly temporary.

I also reviewed and considered the analysis of the very similar facts presented to this forum by this Employer in *Jose Uribe Concrete Construction*, 2018-TLN-00040 (ALJ Feb. 2, 2018). With the utmost respect to my BALCA colleague, in my view we must give meaning to each of the portions of the definition of temporary peakload need, including “short-term demand” and “will not become a part of the petitioner’s regular operation.” I agree with the statement that it is “unreasonable to ignore the fact that the Employer had been granted certification in four previous years.” 2018-TLN-00040 at *13. On these facts, that additional fact tends to show that the Employer’s need is permanent, not temporary.

In addition to my findings on the lack of “temporary” need, as noted by the CO there is also no detailed and persuasive evidence-based explanation in the record as to why seven, as opposed to three, five, or eight or any other number of temporary workers, is necessary. The general contractors’ letters are conclusory on this point, as are the Employer’s statements. *See Titus Works, LLC*, 2019-TLN-00023, at *6 (affirming denial).

ORDER

For the foregoing reasons, the Certifying Officer’s final determination that the Employer failed to prove its need was temporary, and failed to establish a temporary need for seven workers, was not arbitrary and capricious, and the denial of certification is **AFFIRMED**.

For the Board:

EVAN H. NORDBY
Administrative Law Judge