

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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OALJ Case Nos.: 2019-TLN-00101; 2019-TLN-00103

ETA Case Nos.: H-400-18353-092887; H-400-18353-252481

In the Matters of:

NATIONWIDE STRUCTURAL, LLC,
Employer.

Certifying Officer: Leslie Abella
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Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIALS OF CERTIFICATION

These cases arise from Nationwide Structural, LLC's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny its applications 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 Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) 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 January 7, 2019, ETA received two applications for H-2B temporary labor certification from Employer for employment of 120 “Construction Laborers” to perform work at multiple worksites in the Williamson County area of Texas and 120 “Construction Laborers” to perform work at multiple worksites in the Harris County area of Texas between April 1, 2019 and December 1, 2019.³ (AF1 at 1005, 1008); (AF2 at 1021, 1024).⁴ Employer’s applications stated its need for temporary workers was “peakload.” (AF1 at 1005, 1014-15); (AF2 at 1021, 1030-31). In its Statements of Temporary Need, Employer indicated that its services include

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).

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 For case number 2019-TLN-00101, Employer described the job duties for the Construction Laborer position as follows: “Perform tasks involving physical labor using hand and power tools of all types. May clean and prepare sites, form setting, mixing and pouring cement, reinforce, grading, digging, and loading and unloading materials. Must lift up to 25lbs.” (AF1 at 1007). For case number 2019-TLN-00103, Employer listed the following job duties for a Construction Laborer: “May clean and prepare sites, form setting, mixing and pouring cement, reinforce, grading, digging and loading and unloading materials. Must lift up to 25lbs.” (AF2 at 1023).

⁴ Citations to the Appeal Files are abbreviated as “AF1” for case number 2019-TLN-00101, and “AF2” for case number 2019-TLN-00103, followed by the page number.

concrete construction. (AF1 1014); (AF2 at 1030). Employer explained its need for temporary workers:

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 it 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 dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work, we are unable to engage in much business during the winter months, of approximately December 1st to April 1st, because the cold and wet weather is not conducive to form setting, mixing and pouring cement, reinforce, grading, and digging. Also, construction in general slows down and the need for laborers is substantially reduced.

(AF1 at 1014); (AF2 at 1030).

On February 27 and 28, 2019, the CO issued Notices of Deficiency (“NOD”). (AF1 at 998-1004); (AF2 at 1014-20). Pertinent to the first deficiency, the CO notified Employer that its applications failed to meet the criteria for acceptance because it did not establish that the job opportunity was temporary in nature in accordance with 20 C.F.R. § 655.6(a) & (b).⁵ (AF1 at 1002-03); (AF2 at 1018-19). In so finding, the CO stated Employer’s temporary need is based on Texas weather which is “favorable to year-round outdoor work.” (AF1 at 1002); (AF2 at 1018).

To cure this deficiency, the CO requested Employer provide the following information: (1) a statement describing its business history, activities, and schedule of operations through the year; (2) an explanation and documentation supporting its allegation that work during December 1 and March 30 slows “because cold and wet weather in . . . Texas is not conducive to the duties outlined in its application”;⁶ (3) If applicable, documentation to support a building

⁵ Because I affirm the denials of certification on this ground, I need not address the CO’s additional reasons for denying Employer’s applications.

⁶ The CO noted this documentation must include “weather data and industry data regarding the job duties and effects of climate on those duties.” (AF1 at 1002); (AF2 at 1018).

schedule/season;⁷ (4) a detailed explanation as to the activities of Employer's permanent workers in the same occupation during the alleged non-peak period; (5) a summary listing of all projects in the areas of intended employment for 2018, including start and end dates for each project and worksite addresses; (6) summarized monthly payroll reports for 2017 and 2018 that identify for each month, and separately for full-time permanent and temporary Construction Laborers, the total number of workers employed, total hours worked, and total earnings received; and (4) any other relevant evidence to justify its peakload need. (AF1 at 1002-03); (AF2 at 1018-19).

On March 12, 2019, in response to the deficiencies outlined by the CO, Employer provided statements to substantiate its peakload need along with supporting documentation. (AF1 at 22-997); (AF2 at 23-1012). Employer explained:

There are three components of weather that contribute to the seasonality that makes our worker needs peakload: Rain days, daylight hours and temperature. We are unable to pour concrete while it is raining (and even when the chance of rain is 30% or greater, these unworkable days are ignored for the purpose of this application), nor when the temperature is below 40 degrees Fahrenheit. Seasonal daylight hours limit the time we are able to work in.

(AF1 at 29); (AF2 30-31). In addition, Employer noted that “[b]uilding also follows the same peak load cycle due to cyclical financing and beginning-of-the-year bidding for March and April contracting.” (AF1 at 30); (AF2 at 31-32).

With respect to its application requesting 120 Construction Laborers for projects in the Williamson County area of Texas, Employer indicated it has been awarded contracts for Turn-Key Concrete Construction for \$2,084,985.00, Turn-Key Concrete Construction for \$1,160,000.00, and Turn-Key Concrete Construction for \$2,808,491.00 “all of which are scheduled to begin in the April/May time frame”⁸ (AF1 at 30). As for its application requesting 120 Construction Laborers for projects in the Harris County area of Texas, Employer noted it has been awarded contracts for Turn-Key Concrete Construction for \$3,596,043.00, Turn-Key Concrete Construction for \$3,701,000.00, and Turn-Key Concrete Construction for

⁷ The CO indicated this documentation must be from an independent source and can include supportive letters from building trade organizations in the areas of intended employment. (AF1 at 1002); (AF2 at 1018).

⁸ Employer noted: “We have been allocated 8 total contracts so far in 2019 and we kept them working a full 40-hour work week during the duration of their stay, and our current and future workload is no less than it was in 2018.” (AF1 at 31).

\$1,850,000.00 “all of which are scheduled to begin in the April/May time frame”⁹ (AF2 at 32). Relevant to both applications, Employer noted it was asked to do work on “multiple other projects that we cannot yet commit to because we cannot confirm our manpower levels, which is why we are requesting workers for that time period to cover our peakload needs.” (AF1 at 30); (AF2 at 32).

In addition, Employer stated the “unprecedented growth and improved economy has . . . caused a shortage of labor in our area[s] because most laborers gravitate to high paying jobs in the cities.” (AF1 at 31); (AF2 at 32). Employer alleged those two factors along with its growing business and decreased local labor creates an increased need for H2-B workers. *Id.* However, Employer indicated the economy is “subject to change with historic ups and down.” *Id.* Therefore, it “cannot anticipate needing [temporary workers] in the future when the economy changes. As such, these workers are not part of our regular operations . . . [W]e cannot anticipate our need for them more than from year to year.” *Id.* Employer stated if the economy changes, and U.S. workers become available, “we will not need these peak-season” workers. *Id.*

On March 19 and 20, 2019, the CO issued Final Determinations denying Employer’s applications pursuant to § 655.6(a) & (b) for failing to establish that the job opportunities were temporary in nature. (AF1 at 2-8); (AF2 at 2-8). The CO found Employer’s documentation submitted in response to the NODs insufficient to establish a peakload need for temporary workers. (AF1 at 6-8); (AF2 at 6-8).

Thereafter, Employer requested administrative review of the denial of both applications before BALCA. (AF1 at 1); (AF2 at 1). Upon being assigned to these matters, I issued on April 18, 2019, a Notice of Docketing, Order of Consolidation and Briefing Schedule allowing the parties to file briefs within seven business days. On April 24, 2019, Employer and the CO filed appellate briefs (“Er. Br.” and “CO Br.,” respectively).

DISCUSSION

The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.

⁹ Employer noted: “We have been allocated _13_ total contracts so far in 2019 and we kept them working a full 40-hour work week during the duration of their stay, and our current and future workload is no less than it was in 2018.” (AF2 at 32).

20 C.F.R. § 655.61(a), (e). The issue before me is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for Construction Laborers during the alleged peakload period.

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload, or intermittent. *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). Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify for 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.

Id.; *see, e.g., Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Prods. LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014).

In support of its applications, Employer provided letters of intent and subcontract agreements. (AF1 at 33-150); (AF2 at 34-166). These letters of intent and subcontract agreements do not definitively specify actual start and end dates for work. (AF1 at 7, 33-150); (AF2 at 34-166); *see also* (CO Br. at 6). Without explicit work schedules, I cannot discern the amount of work Employer is contracted for in its alleged peakload period as opposed to the purported off-peak months.¹⁰ *See Erickson Constr. dba Erickson Framing CA LLC*, 2016-TLN-00036, PDF at 5 (May 6, 2016) (affirming denial of certification where an employer failed to provide contracts specifying start and end dates for work). Therefore, it is not clear based on the intent letters and contracts whether Employer truly experiences a short-term peakload demand from April 1 through December 1.¹¹

¹⁰ Employer merely noted that it has been awarded projects which “are scheduled to begin in the April/May” timeframe. (AF1 at 30); (AF2 at 32).

¹¹ In its appellate brief, Employer notes it “benefited from DOL labor certifications for one-hundred twenty construction laborers for the prior five years running—essentially the same ‘need’ supported by the same/similar proof” (Er. Br. at 2). Therefore, Employer argues its current applications “should have been granted on their faces, without call for supplying additional supporting documentation.” *Id.* at 3. Mere approval of an employer’s prior application(s) does not satisfy an employer’s burden to establish a temporary need, and it is not an automatic ground for reversing a CO’s denial of certification. *See, e.g., BMC West LLC*, 2018-TLN-00093, PDF at 8-9 (July 12, 2018); *Cooper Roofing and Solar*, 2018-TLN-00080, PDF at 5-6 (Mar. 27, 2018); *Jose Uribe Concrete*

The payroll records also do not aid Employer in establishing a peakload need from April 1 through December 1. In the Final Determinations, the CO noted the 2017 and 2018 payroll records were incomplete and not in summary format. (AF1 at 7); (AF2 at 8). Upon review of the 2017 payroll data, Employer only submitted reports for its employees in June, July, August and September. (AF1 at 151-216, 344-553); (AF2 at 167-232, 360-569). Likewise, the 2018 payroll reports only include data for the months of April, May, June, July, September and October. (AF1 at 217-343, 554-803); (AF2 at 233-359, 570-819). The payroll data is not summarized by month with the total number of hours worked and earnings received for temporary and permanent Construction Laborers separately. (AF1 at 151-803); (AF2 at 167-819). In fact, the payroll does not indicate the employees' positions at the company. *Id.* As the CO pointed out, the payroll does not give a full picture of Employer's annual operations and therefore it is of no value. (AF1 at 7); (AF2 at 8); (CO Br. at 5).

Employer also included with its NOD responses weather data and information. (AF1 at 804-87); (AF2 at 820-903). Even assuming this data sufficiently corroborates Employer's statements about its inability to do concrete work in cold and rainy weather during its off-peak period of December through March, this alone is not enough to satisfy its burden. While weather is certainly a factor to consider, Employer was required to submit documentation correlating weather to its decrease in demand for services during the purported off-peak months. *See BMC West LLC*, 2018-TLN-00095, PDF at 15 (July 5, 2018); *Jose Uribe Concrete Constr.*, 2018-TLN-00044, PDF at 11-12 (Feb. 2, 2018). However, there is no evidence in the records before me demonstrating that its demand for services actually slows down due to weather conditions between December and March. Employer's documentation wholly fails to illustrate any recognizable increase or peak in demand for concrete construction services between April 1 and December 1.¹²

Construction, 2018-TLN-00040, PDF at 13 (Feb. 2, 2018); *Rollins Sprinkler & Landscape*, 2017-TLN-00020, PDF at 4-5 (Feb. 23, 2017). Therefore, ETA's Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers, made effective on September 1, 2016, which is non-regulatory, does not aid Employer as the record does not contain any of its previously approved applications. Even if I were able to consider past applications, the CO's denial of labor certification would be affirmed based on Employer's inadequate evidence submitted in response to the NODs related to these appeals.

¹² Employer also submitted the following in support of its applications: annual tax information, including IRS Forms 1120, articles of incorporation, agreements for sale of ownership interest, purchase agreements, Texas Ordinary Certificates of Acknowledgement, waivers of notice, special meeting minutes, proxies for special meeting, and

Based on the foregoing, I find Employer's documentation does not corroborate a peak in its business or need for services during the year. Accordingly, the CO did not err in denying Employer's applications for temporary labor certification pursuant to § 655.6(a) & (b).

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, MA

assignments of interest. (AF1 at 888-996); (AF2 at 904-1012). These documents do not help Employer establish it has a peakload demand for construction concrete services from April 1 through December 1.