

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 April 2019

BALCA Case No.: 2019-TLN-00081
ETA Case No.: H-400-18363-965953

In the Matter of:

SOUTHERN REFRACTORIES, INC.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

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For the Certifying Officer

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION

This case arises from Southern Refractories, Inc.'s ("Employer" or "SRI") 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 (“DHS”). *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 an application for H-2B temporary labor certification from Employer for thirty-five “Brickmasons and Blockmasons” from April 1, 2019 to November 9, 2019. (AF 231-61).³ Employer’s application indicated the job would be performed at multiple worksites in the Tarrant County area of Texas. (AF 234). Employer stated its need was “peakload” and attached an addendum to its application explaining its temporary need for workers. (AF 231, 244-47).

In its Statement of Temporary Need, Employer noted its services are comprised of “[r]efractory repair and installation which includes significant brick work (brick masons), refractory material sales, mechanical repair, and demolition using Brokk equipment.” (AF 244). Employer stated: “Because of the scarcity of companies that perform this type of work, we are

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

frequently called upon to perform maintenance and repairs for customers in a wide geographic area.”⁴ *Id.*

Employer regularly employs permanent workers but stated it has a peak demand necessitating temporary workers from January 9 through November 9. (AF 245). However, Employer explained its application seeks temporary workers from April 1 to November 9 because it had to restart the H2-B process. *Id.* Employer clarified why it experiences a peakload need:

We serve cement and paper pulp plants. Cement plants generally shut down in the colder times of the year and that is when our need to provide them services begins. That is a reflection of the commercial demand for cement since construction projects slow down or stop during certain times of the year. We have to perform our type of work when a plant either shuts down for its annual refurbishing and scheduled maintenance or when production stops due to any type of emergency. The cement companies can only afford to intentionally shut down a plant during their slow period. This is what creates a (peakload) short-term need for us. Our full-time workers are able to handle our non-peakload need.

Id. Employer further noted that “[t]he plants that require our services give us a certain narrow time span in which they expect to come down for repairs. They do not schedule specific dates until a week or two away from the job.” (AF 246). Additionally, Employer cited to the “industry-wide shortage and competition for available workers” as a basis for its short-term peakload need. (AF 247). Employer claims “[t]his shortage of workers severely impacts our business by not allowing us to meet our customers’ schedules and perform the quality of work for which we are noted.” *Id.*

On February 13, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF 223-30). In the NOD, the CO advised Employer that its application failed to meet the criteria for acceptance because it did not establish that the job opportunity was temporary in nature in

⁴ Employer elaborated on the nature of its work:

We specialize in all types of refractory installation which include[s] firebrick work (brick masons), guniting, poured, shotcreted and rammed specialties and all types of ceramic fiber applications. We also provide tear out and removal of linings. We perform this work in refineries, kilns, boilers, stacks, storage facilities, heater, furnaces, incinerators, multi-hearth furnaces, heat treat furnaces and other process vessels. We perform this work under all types of conditions from scheduled maintenance to critical shutdowns such as cat cracker turnarounds for emergency repairs performed on a daily basis.

(AF 245).

accordance with 20 C.F.R. § 655.6(a) & (b).⁵ Pertinent to the first deficiency, the CO cited to the elements required to qualify for a peakload need and noted Employer is relying on weather for its peak in business, “however, the weather in the area of intended employment appears to be favorable to outdoor work year-round.” (AF 228). The CO also determined Employer’s purported industry-wide shortage and competition of available workers does not justify a temporary need. *Id.*

In order to cure the deficiency, the CO requested Employer provide the following: (1) weather documentation supporting Employer’s statement that “weather is a controlling factor on its ability to do its work; (2) supporting documents that substantiate Employer’s purported demand for services during the warmer weather months; (3) a summary listing of all projects for the previous calendar year; (4) 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 Brickmasons, the total number of workers employed, total hours worked, and total earnings received; (5) any evidence that serves to justify the dates of need requested. (AF 228-29).

On February 27, 2019, Employer responded to the deficiencies outlined by the CO, and provided an explanation of its peakload need, a signed declaration from Employer’s President, 2016 and 2017 payroll data, five letters of intent, a 2018 list of projects, weather data, and cement charts. (AF 196-222). Employer clarified and explained that its demand for services increase during the colder weather months because cement plants, a significant part of their customer base, “generally schedule installations in the colder months because the volume of their orders decreases.” (AF 197).

However, Employer pointed out that “[t]his accounts for about half of the season.” (AF 197, 201). As its work at cement plants decreases, Employer’s work for paper pulp processing plants increases. *Id.* While the work for cement plants decreases, that work does not completely stop—Employer still receives emergency calls for maintenance and routine installations. *Id.* Therefore, Employer argues its peak load demand “[s]tarts from a low base in

⁵ The CO identified a second deficiency—Employer’s failure to establish temporary need for the number of workers requested. (AF 229-30). Since I affirm the denial of certification based on the first deficiency, I need not address the CO’s second ground for denial.

the winter/colder months, gradually increases, reaches a peak and stable point, and then gradually decreases back to the base.” *Id.*

On March 4, 2019, the CO issued a Final Determination denying Employer’s application pursuant to § 655.6(a) & (b) for failing to establish that the job opportunity was temporary in nature. (AF 185-95). The CO found Employer’s documentation submitted in response to the NOD insufficient to overcome the deficiency. (AF 190-93). In so finding, the CO noted Employer’s project listings and letters of intent show there is an “ongoing” and/or “unpredictable” need for temporary workers. (AF 191). The CO stated: “It appears the [E]mployer’s work can be performed year round and its need is not temporary.” *Id.*

On March 8, 2019, Employer requested administrative review by BALCA of the denial of its application. (AF 1-183). Upon being assigned to this matter, on April 3, 2019, I held a preliminary telephonic conference where the parties agreed to a briefing schedule in order to expedite this matter. That same day, I issued a Notice of Docketing incorporating the parties’ agreed upon briefing deadline.⁶ On April 9, 2019, the CO and Employer filed their appellate briefs (“CO Br.” and “Er. 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. 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 thirty-five Brickmasons during its alleged peakload period.

Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. 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

⁶ Although I only had an unofficial copy of the appeal file at the time I issued the Notice of Docketing, I subsequently received the official file on April 10, 2019.

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).

Under the 2015 IFR, “temporary need” should be interpreted in accordance with (1) the DHS’s definition of that term, and (2) the DOL’s experience in the H-2B program. 80 Fed. Reg. at 24,055. “The DHS regulations define temporary need as a need for a limited period of time, where the employer must ‘establish that the need for the employee will end in the near, definable future.’” *Id.*, quoting 8 C.F.R. § 214.2(h)(6)(ii)(B). DOL defines temporary need, except in the event of a one-time occurrence, “as 9 months in duration” *Id.* The IFR notes that “[a] maximum employment period of 9 months establishes the temporariness of the 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 period position” *Id.* at 24,056.

In denying certification, the CO found inadequate the documentation the Employer submitted in response to the NOD. It did not demonstrate a true peak load need from April 1 to November 9. (AF 190-93). While Employer’s application sought temporary workers from April 1 to November 9, I will focus on its entire purported peakload period of January 9 to November 9. (AF 245); (Er. Br. at 7-8). In its brief, Employer argues the CO “failed to identify the correct legal standard, failed to respond cogently to the major issues and evidence of record, and to engage in reasoned decision making.” (Er. Br. at 12).

Employer first takes issue with the CO’s conclusion that based on the 2018 list of projects, work is performed “beginning as early as January 2, 2018 and ending as late as December 19, 2018,” suggesting that the work “can be performed year round and its need is not temporary.”⁷ *Id.* at 15; (AF 190-91). Employer argues: “Such reasoning betrays a fundamental misunderstanding of the peakload need standard . . . [A] peakload need implies a year-round need which needs to be temporarily supplemented in the busy season.” (Er. Br. at 15-16). While I

⁷ Employer also argues the CO wrongly focused on an observation that its work is performed year-round. See (Er. Br. at 15-17). I find Employer misstates the CO’s reasoning in the Final Determination. It is evident the CO denied the application based on Employer’s inability to establish it has a temporary peakload need. See (AF 190-93). The CO determined the evidence showed a “permanent need for additional workers.” (AF 193).

do not disagree with this description of a peakload need, the CO made clear, especially in her analysis of the payroll data, that the decision to deny the application was based on documentation failing to show a “peak in operations during the requested dates of need.” *See* (AF 191-92).

The CO correctly found that Employer’s five letters of intent and 2018 list of projects were not supportive of a need for temporary workers on a peakload basis. (AF 190-91, 193). Although the letters of intent from customers indicate a need for Employer’s services between January and November, these letters do not prove a short-term demand for its services in that timeframe. The letters are not legally binding and simply show an intention to use Employer’s services between January and November.

The letters fail to provide an entire picture of the work Employer is contracted for this year. Without this, I cannot detect based on the letters alone whether Employer is contracted for the same or similar amount of work in the alleged off-peak months. In fact, two out of five of Employer’s customers’ point out that there is not a specific date or schedule of the work given the nature of their business. (AF 207-08). Employer also acknowledged that its customers use its services for emergency calls for maintenance. (AF 197, 245). In recognizing this aspect of Employer’s services, the CO reasonably found the letters of intent demonstrate an “ongoing” or “year-round” need for additional staff, rather than a short-term need for additional temporary workers. *See* (AF 191).

Employer’s 2018 job list does not help establish a temporary peak load need from January 9 through November 9. As the CO pointed out, Employer’s 2018 list of projects show work being performed throughout the year from January to December. (AF 190, 213). According to the chart, the largest project (IKN) began in an alleged off-peak period on November 15, 2017 and ended on February 12, 2018. (AF 213). Ten other projects also began in Employer’s purported off-peak period (November 10 through January 8). *Id.* Based on the 2018 project list, it appears a substantial amount of work began in the off-peak period negating any claim that Employer truly experiences a short-term demand between January 9 and November 9. *Id.*

The CO likewise found Employer’s 2016 and 2017 payroll data did not show a “consistent peak” during the requested dates of need on the application. (AF 191). The number of hours worked by Employer’s permanent staff in December 2016, an off-peak month, was the third highest number that year. (AF 204). The CO also determined the 2017 payroll record shows

“the use of temporary workers in 11 of the year’s 12 months, representing the need for permanent workers.” (AF 192).

In addition, the CO noted the 2017 payroll data shows permanent staff “working overtime hours in December, which is a month in the . . . state nonpeak period.” (AF 193). Employer argues the CO improperly “placed heavy significance on the 2017 payroll and its departure from SRI’s standard pattern. SRI, however, explained multiple times that the change arose from the sale of the company, a one-time, extraordinary event that will not be repeated in the foreseeable future.” (Er. Br. at 17). In December 2017, permanent staff worked more hours than in the alleged on-peak months of March, July, August, September.⁸ (AF 205). Employer explained that “[p]eople were hesitant and unsure about using our services,” which “caused a work stoppage for our company.” (AF 205); *see* (Er. Br. at 17). Nonetheless, I find the CO rationally determined the 2017 payroll data did not support the Employer’s alleged peakload need period because the data suggested a need for increased labor year-round. *See* (AF 193).

Employer claims its short-term demand for services is tied to the weather in Texas.⁹ (AF 197, 201, 245). In explaining this to the CO, Employer stated its demand for services from cement plants increases during the colder months. *Id.* As the demand from cement plants decreases, Employer’s business increases based on its work for paper pulp processing plants. (AF 197, 201). However, Employer noted its work for cement plants never stops because it has “emergency calls for maintenance and routine installations during the warmer months.” (AF 197, 201, 245). Employer views this pattern of work as a “traditional” peakload demand: “It starts from a low base in the winter/colder months, gradually increases, reaches a peak and stable point, and then gradually decreases back to base.” (Er. Br. at 7).

⁸ Employer noted that payroll data shown in November correlates to work performed in October. (AF 205).

⁹ It appears the CO misunderstood Employer’s explanation about how weather affects its alleged peak in its business operations. *See* (Er. Br. at 4-5). As noted in Employer’s brief, the CO mistakenly stated in the NOD: “The employer has stated what weather is a determining factor for its peak in business; however, the weather in the intended area of employment appears to be favorable to outdoor work year-round.” (AF 228). Employer, however, noted its Brickmasons work inside of cement kilns. (Er. Br. at 5). The CO also erroneously noted in the Final Determination that “[T]he payroll [in 2017] shows temporary workers working in its area of intended employment during the coldest month of the year, January, which does not support the [E]mployer’s statements regarding weather constraints in its operations.” (AF 192). According to Employer’s Statement of Need, its work *increases* in the winter months due to the shutdown of cement plants. (AF 245). Although the CO mischaracterized Employer’s statements about how weather affects its business, I find it to be harmless error. The fact still stands, and the CO correctly concluded in the Final Determination, that Employer’s documentation submitted in response to the NOD supports a year-round need for additional workers, rather than a short-term demand or temporary peakload need for workers.

Employer cannot evade its burden to show that it “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.” § 214.2(h)(6)(ii)(B) (emphasis added). Most significant, Employer’s purported annual ten-month temporary need for increased labor from January 9 to November 9 undermines its claim that the job opportunity is temporary in nature. *See* 80 Fed. Reg. at 24,056. “Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.” *Id.*

Employer asserts that “[a]t a certain point, [its need for additional labor] declines to a level that permanent workers can handle the remaining work.” (AF 201-202); (Er. Br. at 8). However, I cannot discern a peak in the demand for services at any point of the year based on the evidence in the record before me. As the CO pointed out, Employer’s 2017 payroll data suggests a permanent need for additional workers year-round. *See* (AF 191-93). It appears Employer needs additional workers on a permanent basis because it recognizes its work increases in *both* the cold and warm months of the year.¹⁰ *See* (AF 197, 201, 245). There is no apparent explanation from Employer as to why the demand for its services slows down between November 10 and January 8.

Notably, Employer’s 2018 list of jobs show that just under a third of projects began in the alleged off-peak period. (AF 213). According to the list, two of the largest projects (Martin Marietta and IKN) began in alleged off-peak period. *See id.* At best, the data Employer provided strongly suggests a year-round need for additional workers, rather than a definite peak period of need for temporary workers.

Further damaging its argument, Employer admits its work throughout the entire year is subject to its customers’ needs which are seemingly unpredictable.¹¹ *See* (AF 197, 201, 207-08, 245-46). In 2017, Employer indicated customers stopped using their services and it therefore did

¹⁰ In light of this, I do not find the weather or cement data significant to my determination as Employer purportedly needs additional workers in both cold and warm weather. *See* (AF 197, 201). While Employer initially indicated its peakload demand was due to cement plants shutting down in cold weather, it later added, in its NOD response, that its work for paper pulp processing plants increase as its work for the cement plants decrease. (AF 197, 201, 245). This demonstrates that Employer’s need for additional staff is actually year-round.

¹¹ In its Statement of Temporary Need, Employer wrote: “In our industry, the plants that require our services give us a narrow time span in which they expect to come down for repairs. They do not schedule specific dates until a week or two away from the job.” (AF 246).

not use any “temporary” workers in the month of September. *See* (AF 205). Employer noted the significant decrease in September 2017 “reflect[ed] the sale of the business – an event outside of SRI’s regular operations which is unlikely to recur in the foreseeable future.” (Er. Br. at 8). Ultimately, Employer’s supporting documentation does not corroborate any definable or concrete peak in its business or need for services during the year.¹² Accordingly, the CO did not err in denying temporary labor certification pursuant to § 655.6(a) & (b).¹³

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

¹² As I previously noted, a recurring period of ten months is inconsistent with the IFR’s definition of a temporary need. *See* 80 Fed. Reg. at 24,056.

¹³ Employer argues the CO’s denial of labor certification was arbitrary because it “ignored SRI’s [a]pplication history.” (Er. Br. at 18-19). This argument fails. As noted by the CO, “prior certification does not create precedent that future applications must be certified.” (CO Br. at 7) (citations omitted). 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 Construction*, 2018-TLN-00040, PDF at 13 (Feb. 2, 2018); *Rollins Sprinkler & Landscape*, 2017-TLN-00020, PDF at 4-5 (Feb. 23, 2017). Even if I were able to consider the past applications, the CO’s denial of labor certification would be affirmed based on Employer’s evidence submitted in response to the NOD related to this appeal.