



Issue Date: 05 March 2019

BALCA Case No.: 2019-TLN-00041
ETA Case No.: H-400-18333-777119

In the Matter of:

SUMMIT BUILDING SERVICES, LLC.,
Employer.

Before: Jerry R. DeMaio
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Summit Building Services, LLC's ("Employer" or "Summit") request for review before the Board of Alien Labor Certification Appeals ("Board") of the denial of its application for an H-2B temporary labor certification by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA"). 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655.6(b).¹ For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On January 7, 2019, Summit filed an application for H-2B temporary labor certification with the ETA. (AF 230-292).² The application sought to certify the employment of 15 carpenters for employment in the United States from April 1, 2019 through December 31, 2019. (AF 231). On January 17, 2019, the CO issued a Notice of Deficiency ("NOD") outlining the reasons why the Employer's application could not be accepted for consideration. (AF 219-227).

The CO listed three deficiencies in the NOD. Deficiency 1 was identified as a failure to establish the job opportunity as temporary in nature under 20 C.F.R. §§ 655.6(a) and (b). (AF 224). Specifically, the CO noted the Employer had not sufficiently demonstrate the requested standard of peakload need. (AF 224-225). Deficiency 2 was identified as a failure to establish temporary need for the number of workers requested under 20 C.F.R. §§ 655.11(e)(3) and (4). (AF 225-226). Specifically, the CO explained the Employer did not sufficiently demonstrate that

¹ On April 29, 2015, the Departments of Labor and Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures for the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

² Citations to the appeal file are abbreviated "AF" followed by the page number.

the request for 15 workers was “true and accurate and represents bona fide job opportunities.”³ (AF 225).

The CO requested either supplemental documentation or modifications of the application to conform to the relevant regulations. In response, on January 22, 2019, the Employer filed a letter and attachments addressing the identified deficiencies. (AF 46-218). Among its attachments, the Employer submitted an explanation and described its business operations and also submitted a summary list of projects, pending bids in the area, and news articles. *Id.*

On January 28, 2019, the CO issued a final determination denying the application. (AF 37-45). In the final determination, the CO retained two of the original three grounds for denial, Deficiencies 1 and 2, and pointed out several shortcomings in the evidence submitted by the Employer. *Id.* On February 8, 2019, the Employer requested an administrative review of the denial by the Board. (AF 1-45). On February 21, 2019, a Notice of Docketing was issued allowing the parties to file briefs within seven business days. Neither party has filed a brief, though the Employer included arguments in its letter requesting review.

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 first issue in this case is whether the CO properly denied certification on the basis that the Employer did not establish a temporary need for 15 carpenters during its 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.*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014). Here, the Employer’s purported period of peakload need is from April 1, 2019 through December 31, 2019. (AF 231).

³ The third deficiency will not be addressed, as it was not retained upon final determination. *See* (AF 37-45).

In each area of concern the CO raised, however, the Employer failed to substantiate this need. First, the CO noted the NOD response states the Employer needs three field crews at one point and five field crews of seven workers at another. (AF 42). Summit argues in its response to the CO's final determination that the need for five crews was an error, and that any lay person would understand that this was a typo. (AF 6). This argument is not persuasive, as the lack of consistency proved confusing and is not, in fact, apparent to any lay person that this discrepancy was an error.

Second, the CO noted that the documents the Employer submitted during the "construction season" or peakload time and the "low season" do not actually identify the revenue for each month of 2018, but rather an average monthly revenue for the second, third and fourth quarters of 2018. (AF 42-43). The Employer argues it submits its federal tax returns quarterly, so it keeps track of revenue in quarters. (AF 7). Furthermore, the Employer argues the chart submitted in its response to the NOD shows its average monthly revenue is almost three times higher in April to December, as compared to January through March. (AF 7-9).

The CO found that the Employer's documentation "does not clearly show the employer's annual business operations or a peak in business operations during the requested dates of need." (AF 43). I agree with the CO. The Employer submitted "A Detailed Statement from Daniel J. Keifer President of Summit Building Services, LLC." (AF 58-66). The statement contains a chart comparing the average monthly revenue in the alleged low season (January to March) and the construction season (April to December) in 2018 and a three year average from 2016 to 2018. (AF 63). While the Employer's contention that it submitted the data in these quarterly intervals based on their quarterly tax returns is valid, the chart and its underlying methodology is nonetheless confusing. In its request for review by the Board, the Employer discusses the methodology of the chart further, but the information is incomplete and unclear. (AF 7-9). Moreover, these additional numbers and charts included in the request for review by the Board were not before the CO and therefore are not within the scope of the Board's review. *See* 20 C.F.R. § 655.61(a), (e).

Next, the CO noted the Employer submitted documentation showing the average monthly building permits from 2015 to 2019, but did not explain how the annual permit data relates to its requested dates of need and number of workers. (AF 43). Summit submitted copies of building permit data from the U.S. Department of Housing and Urban Development's States of the Cities Data Systems, which, it argues, directly correlates to the demand for Summit's services. (AF 13, 65, 106). The chart the Employer submitted to support this argument demonstrates a greater number of building permits generally issued in 2015 to 2018 in Michigan as a whole and in eight indicated counties during the "construction season" or the alleged period of peakload need, but the information does not relate to Employer's specific situation. (AF 106). Without this link, this information is not helpful in establishing a temporary peakload need.

Next, the CO noted the Employer provided news articles indicating a growing demand for new homes in Michigan and a shortage of qualified workers for residential construction. (AF 43). The CO explained that while this demonstrates growth in residential construction overall, it does not support the Employer's specific temporary need. *Id.* Summit argues this data supports the notion that there are no willing and able U.S. workers available to do this kind

of work. (AF 15). Nevertheless, the CO noted, and the Board has consistently held, that a labor shortage, of any kind, does not justify a temporary need. (AF 43).

Finally, the CO noted the list of pending projects the Employer provided “does not clearly show work to be performed during the [E]mployer’s indicated temporary need.” (AF 43). Specifically, the CO explained:

the Jeffery Williams Insurance Claim and the Rivertown Senior projects will be completed on February 1, 2019 and February 19, 2019, approximately six weeks before the requested start date of need – April 1, 2019. The Charles Street project has an end date of January 20, 2020, which extends beyond the end date of need for this application.

Id. The CO further noted that some of the pending projects and bids in progress have start and end dates listed as “to be announced.” *Id.* The Employer argues that the revenue information provided in their response to the NOD shows that the existing contracts listed as pending will be performed between April and December 2019, the peakload period. (AF 13). This connection is not clearly explained in the response to the NOD nor does the evidence clearly indicate this connection. *See generally* (AF 46-218). Accordingly, the CO’s concern about the pending projects and bids “to be announced” is warranted.

The Appeal File does not support the Employer’s temporary need. In short, the Employer is unable to substantiate its purported short-term peakload need between April and December. *See 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 need). Based on the foregoing, the Employer failed to meet its burden of establishing a need for temporary workers on a peakload need basis and the CO’s denial of the Employer’s application will be upheld. Because denial of certification is upheld based on the Employer’s failure to justify a need for temporary works on a peakload need basis for its dates requested, it is not necessary to reach the issue regarding the Employer’s failure to establish a need for the number of workers requested under 20 C.F.R. § 655.11(e)(3) & (4).

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts