



Issue Date: 28 April 2020

BALCA Case No.: 2020-TLN-00036
ETA Case No.: H-400-20002-225138

In the Matter of:

DFW FRAMING & CONSTRUCTION, INC.,
Employer.

Before: Jerry R. DeMaio
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from DFW Framing & Construction, Inc.’s (“Employer” or “DFW”) 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 2, 2020, DFW filed an application for H-2B temporary labor certification with the ETA. AF 227-267.² The application sought to certify the employment of 25 “carpenter helpers” for employment in the United States from April 1, 2020, through December 15, 2020. AF 227. On February 26, 2020, the CO issued a Notice of Deficiency (“NOD”) outlining the reasons why Employer’s application should not be accepted for consideration. AF 219-26.

The CO listed two deficiencies in the NOD. Deficiency 1 was identified as a failure to establish the job opportunity as temporary in nature, under 20 CFR § 655.6(a) and (b). AF 223-24. Deficiency 2 was identified as a failure to establish temporary need for the number of workers requested, under 20 CFR § 655.11(e)(3) and (4). AF 224-25. The CO requested additional supporting evidence and documentation for each deficiency. *Id.* In response, on March 4, 2020, Employer filed a letter and attachments addressing the identified deficiencies. AF 28-218. Among its attachments, Employer submitted payroll records, a monthly sales

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.

report, a chart of the jobs performed, emails with customers and copies of contractor agreements. *Id.*

On April 7, 2020, the CO issued a final determination denying the application. AF 17-25. In the final determination, the CO retained Deficiency 1 and pointed out several shortcomings in the evidence submitted by Employer. *Id.* On April 9, 2020, Employer requested an administrative review of the denial by the Board. AF 1-16. On April 15, 2020, a Notice of Docketing was issued allowing the parties to file briefs within seven business days. On April 23, 2020, Employer filed a brief, which included much of the same arguments made in their request for review by the Board. AF 2-8. On the same date, the CO also filed a brief.

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 in this case is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for 25 carpenter helpers 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*, 2014-TLN-00008 (Feb. 5, 2014). Here, Employer's purported period of peakload need is from April 1, 2020, through December 15, 2020. AF 227.

In each area of concern the CO raised, however, Employer failed to substantiate this need. First, Employer provided emails demonstrating "intent to award" notices for various projects. AF 164-175. The CO found these notices problematic because the terms of each project was not listed and they are not yet awarded contracts. AF 23. Employer argues on appeal that they provided the requested information and, therefore, their peakload need is established. AF 4-5. After review, I agree with the CO and find that the "intent to award" notices, while requested by the CO after the NOD, do not establish the purported peakload need. Employer also submitted a signed contract with DR Horton and History Maker Homes, but as the length of the contract is not listed, the contract likewise does not support a peakload need from April to December. AF 176-218.

Second, the payroll records Employer submitted also did not substantiate their claim. Employer provided payroll records for 2017, 2018, and 2019. AF 42-163. Yet, as the CO noted, the most recent report, from 2019, does not support a peakload need from April to December. AF 23. Employer explained that they were not able to hire H2-B workers in 2018 in time for their purported peakload need, but as the CO pointed out in the final determination, the use of H2-B workers does not necessarily justify a peakload need and a peakload need should be demonstrated outside of the H2-B program. AF 23. Furthermore, Employer's 2019 payroll records show steady hours worked throughout the year, only making a significant peak in July 2019. AF 23, 42-163. Accordingly, Employer's payroll records do not support their purported peakload need.

Third, the graphs and charts submitted by Employer also do not support a peakload need. The CO noted:

The employer provided a graph illustrating the home sales in McKinney, Texas from 2018 up to January of 2020, which depicts a peak in home sales in the area of intended employment (McKinney, Texas) from February through December. However, the employer has not explained how its business activity is tied to the increase in home sales in McKinney, Texas.

AF 24. Employer also provided a graph demonstrating home sales in 2018 and 2019 in Dallas-Fort Worth, but again, Employer has failed to connect these home sales to their business. AF 39. Additionally, Employer submitted a graph depicting home sales in Dallas-Fort Worth-Arlington, Texas, in 2018 separated by quarter. AF 25, 39. The CO noted that this chart, while somewhat difficult to read, demonstrates a steady growth, rather than a peakload need. AF 25. Upon review of the record, I agree with the CO.

Finally, Employer submitted a list of jobs performed in 2018 and 2019, which also does not support a peakload need, as no start or end dates for the projects were included. AF 45-163.

The Appeal File does not support Employer's temporary need. In short, Employer is unable to substantiate its purported short-term peakload need between April 1, 2020 and December 15, 2020. *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, Employer failed to meet its burden of establishing a need for temporary workers on a peakload need basis and the CO's denial of Employer's application will be upheld.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts