



Issue Date: 20 December 2019

BALCA Case No.: 2020-TLN-00003
ETA Case No.: H-400-19234-045157

In the Matter of:

FALLS FRAMING LLC,
Employer.

Appearances: Aaron Bernard, Esquire
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For the Employer

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U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: **NORAN J. CAMP**
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION AND REMANDING

This case arises from Falls Framings’ (“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 program must apply for and

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.

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. If the CO denies 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter will be *reversed*.

I. BACKGROUND

A. H-2B Application.

On August 22, 2019, Employer filed an H-2B Application for Temporary Employment Certification (Form ETA-9142B). Administrative File (“AF”) at 104-59. Employer sought to hire 28 “Helpers – Carpenters” based upon a temporary “Peakload” need, from November 5, 2019 to May 31, 2020. *Id.* at 104. In its Statement of Temporary Need, Employer stated:

Falls Framing LLC was formed to engage in framing and erecting buildings. ... The majority of the framing work will be completed in the late fall, winter and spring months ... when there is less framing work. Thus, Falls Framing LLC will naturally reduce its workforce during the summer. This naturally creates a need for framing construction by Falls Framing LLC from October through the spring and not year-round. ...

Id. at 109. In specifically addressing the “Temporary Need,” Employer stated:

Because Falls Framing LLC will frame a dry fertilizer building, their Peakload need follows the construction project timeline for this type of facility. Framing projects are started after the concrete foundation has been completed. Concrete work in Kentucky for dry fertilizer facilities is done from April to December due to weather conditions After the [concrete] foundation is completed [in October], Falls Framing LLC will begin its work. ... With this Project, the facility must be completed in March 2020. Therefore, this Project, with its dates of need from November 5, 2019 to May 31, 2020, fits squarely into the Peakload need for framers. The H-2B workers will supplement Fall Framing LLC’s permanent workers at this worksite to complete this Project. ...

Id. In specifically addressing the need for 28 workers, Employer stated that they were needed because of “the vast size of the buildings which must be framed.” *Id.*

B. Notices of Deficiency & Responses.

On September 3, 2019, the Certifying Officer issued a Notice of Deficiency, finding that the Application could not be accepted because Employer “did not sufficiently demonstrate the requested standard of temporary need.” AF at 97, 100. Specifically, the CO stated that “it is not clear how one project in its operation establishes a peak need,” and that “the employer has year round work rather than a peak in its business.” AF at 100, 101. The CO found that the 2017 Summarized Payroll which Employer submitted in support “does not appear to demonstrate a peak during the requested dates of need.” The CO required “[f]urther explanation and documentation.” AF at 101.

Employer’s counsel submitted a letter in response, addressing the Notice of Deficiency. I do not address that letter in detail, as I find that the application should have been granted on the basis of the information originally submitted.

II. DISCUSSION

A. Standard of Review.

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 standard of review is not specified in the regulations, and prior BALCA decisions puzzled over what standard to apply. *See ETA v. International Carrier Enterprise, Inc.*, 2020-TLN-00008 at 5 (BALCA Nov. 18, 2019) (noting BALCA decisions have variously considered whether the CO’s decision was “arbitrary and capricious,” whether it was “legally and factually sufficient light of the written record,” or whether it withstood *de novo* review). Employer here argues that the “arbitrary and capricious” standard applies. I need not resolve the issue here, as I find that the CO’s decision is erroneous even under the more stringent “arbitrary and capricious” standard.

Employer bears the burden of demonstrating eligibility for the H-2B program. *See* 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. 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Temporary need generally lasts for less than a year. 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the CO is instructed to deny the Application if the need exceeds nine (9) months. 20 C.F.R. § 655.6(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, 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.*

The issue before me is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for twenty-eight (28) “Helpers – Carpenters” during its alleged peakload period of November 5, 2019 to May 31, 2020.

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B. Resolution.

1. Seasonal or short-term demand for workers.³

In support of its Application, Employer submitted charts showing, for 2017 and 2018, the number of workers, their hours, earnings for permanent helper-carpenters and earnings for temporary helper-carpenters. The 2017 chart shows that helper-carpenters are engaged in work at a higher rate during Employer's alleged peakload periods than during other times of the year. Specifically, total hours during peakload period average 6,026 hours per month (42,180 hours total from November to May 2017), and 5,113 hours per month during the non-peak months (25,563 hours from June to October 2017).

While there are months during the alleged peakload period that total hours worked are lower than months outside the period, the CO has identified nothing in the statute or regulations that prohibits Employer from planning its hiring in the way Employer has, that is, on a multi-month or seasonal basis, rather than month-by-month (or day-by-day or week-by-week). Instead, the CO asserts that "the 2017 Payroll shows that hours worked in non-peak months (June, July, August, September and October) were equal to or higher than hours worked peak months [*sic*] in every peak month except for May." *Id.*

This assertion does not appear to align with the 2017 Payroll itself. While the CO's calculation is correct for January – an outlier month with hours worked (1,606) being lower than any other month, peakload or otherwise – it otherwise appears to be incorrect. Specifically:

- Non-peakload June has lower hours worked (7,526) than peakload March and April (not May);
- Non-peakload July has lower hours worked (4,651) than peakload February, March, April and May;
- Non-peakload August has lower hours worked (4,385) than peakload February, March, April, May and October; and
- Non-peakload September has lower hours worked (2,939) than every other month (peakload or otherwise), other than January.⁴

³ The CO does not challenge the other requirements, namely, that Employer regularly employs permanent workers to perform the services, and that the temporary additions will not become a part of the petitioner's regular operation. Accordingly, I do not address these issues.

⁴ Viewed another way:

- Peakload November and December have more hours worked (4,078 and 3,589, resp.) than non-peakload September;
- Peakload February has more hours worked (6,134) than non-peakload July, August and September;
- Peakload March and April have more hours worked (9,530 and 11,025, resp.) than all non-peakload months; and
- Peakload May has more hours worked (6,219) than non-peakload July, August, September and October.

In short, it appears that the CO based the denial of the Application upon a faulty interpretation of the numbers. The CO does not assert that the numbers are themselves inaccurate or otherwise not to be trusted. Accordingly, the rejection of the Application on this basis is arbitrary and capricious, and cannot stand.

2. Need for 28 temporary workers.

Employer's Application contains sufficient information to justify the need for 28 temporary workers. It sets forth the enormous size of the building to be constructed, and the time frame within which it must be completed. *See* AR at 114-15.

The Notice of Deficiency ("NOD") rejects Employer's explanation without adequately stating why they are deficient. *See* AF at 15-17. Instead, the NOD simply asks for different explanations, summaries and documents. The NOD does not indicate whether the additional requested information is called for by statute or regulation – the cited regulation, 20 C.F.R. § 655.6(a) and (b) makes no mention of it – or even if some resource on DOL's website mentions it.⁵

In any event, Employer's response to the NOD further explains the need for the 28 temporary workers. It also provides the other information requested in the NOD, or adequately explains why that information is not forthcoming.

The CO found that the Employer's response "did not clearly support the employer's request for 28 temporary workers during its requested period of need," on the ground that the need is based upon "a proposal that has not been approved or awarded," there is "no list of projects" in the area, and Employer "has not performed any jobs in Hopkinsville, Kentucky." AF at 16-17. However, the CO offers no explanation for why any of these grounds warrants a denial of the Application.⁶

Accordingly, the denial of the Application on this basis is arbitrary and capricious, and cannot stand.

III. ORDER

For the reasons set forth above, pursuant to 20 C.F.R. § 655.61(e), **IT IS HEREBY ORDERED** that:

1. The CO's denial is **REVERSED**; and

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⁵ The NOD cites <http://www.foreignlaborcert.doleta.gov> (last visited by the court on December 20, 2019), but nothing on that page mentions the additional information the NOD calls for. And, my own foray deeper into the site did not reveal this information.

⁶ Worse, rejecting the Application on this basis risks putting the Employer into a "Catch-22" situation, where it cannot get a signed contract for the job unless it can show that it has DOL approval to hire sufficient temporary workers to get the job done, but it can't get that approval unless it can show that it has a signed contract for the job.

2. This matter is **REMANDED** to the CO for the issuance of the Notice of Acceptance for the 28 requested temporary workers, and for any other appropriate processing in accordance with the regulations.

SO ORDERED.

For the Board:

NORAN J. CAMP
Administrative Law Judge