



Issue Date: 07 November 2019

BALCA Case No.: 2020-TLN-00004
ETA Case No.: H-400-18365-843086

In the Matter of:

PARK RANGE CONSTRUCTION, INCORPORATED ,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Sheila A. Gray
Labor, Made Easy
4701 Mockingbird Lane
Kingston, OK 73439
For the Employer

Rebecca Nielson
Office of the Solicitor
Division of Employment and Training Legal Services
200 Constitution Ave.
Washington, D.C. 20001
For the Certifying Officer

Before: William S. Colwell
Associate Chief Administrative Law Judge

**DECISION AND ORDER DIRECTING THE CO TO GRANT
TEMPORARY LABOR CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO's") denial of 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 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 Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or the "Board"). 20 C.F.R. § 655.33(a). 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. § 655.33(a), (e).

STATEMENT OF THE CASE

Park Range Construction, Incorporated ("Employer") is a general contractor in Englewood, Colorado that is a "structural repair specialist, [which] primarily serves commercial [and] residential clients." AF³ at 60, 65. Employer submitted an H-2B application for seven Helpers—Production Workers because Employer's

permanent workers are able to handle the workload between October 27th and March 31st, and temporary workers are not needed during this period. [Employer] need[s] 7 full-time temporary production helpers during our peakload period of April 1 to October 26, 2019 to perform unskilled duties requiring physical labor including hand-cleaning/clearing work areas and equipment, lifting, carrying, and holding tools and/or equipment, such as brooms, buckets, trash bags, dustpans, raw materials, fittings, oil grease, coolant, welding rods, and similar items needed by productions workers.

AF at 65. Employer also mentions that it previously filed an application with a start date of February 1, 2019, but the visa cap was met and Employer did not receive any visas. *Id.* The current application is a refiling with a start

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 (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 Citations to the Appeal File are abbreviated as "AF." For purposes of clarity, the "P" prefix on each page number of the Appeal File has been omitted (*e.g.*, "P60" becomes "60").

date of April 1, 2019, to seek the same temporarily workers from the previous filing. *Id.*

On February 7, 2019, the CO issued a Notice of Deficiency, finding one deficiency. AF at 56. Specifically, the CO found that

[t]he employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.

Specifically, the employer's current application . . . is requesting certification for seven Helper, Production Workers from April 1, 2019 to October 26, 2019. The employer also received certification for seven Helper, Production Workers from January 26, 2019 to October 26, 2019 in its previous application The employer is therefore requesting a total of 14 workers for its 2019 season. However, the employer only requested a total of seven workers for its 2018 season

The employer did not indicate how it determined that it needs seven additional workers during the requested period of need. Further explanation and documentation is required in order to establish the employer's need for a total of 14 workers.

AF at 56.

On February 8, 2019, Employer responded by amending its ETA Form 9142. AF at 41-51. The amended form explained

[Employer] refiled with an April 1 start and, though [Employer] received certification, the cap was met before [it] received [its] workers. Now, [Employer] wish[es] to revert to the usual February 1st start date. However, to ensure our workers' safety [Employer] wish[es] to institute a new six (6) day equipment usage and safety training period, making [Employer's] start date of need January 26, 2019.

AF at 48.

On February 13, 2019, the CO issued a Notice of Acceptance which accepted the application for processing and instructed Employer to comply with listed requirements, including submission of a recruitment report. AF at 33, 37-39. On March 4, 2019, Employer submitted a complying recruitment report. AF at 29-31. On March 5, 2019, Employer accepted Employer's application and granted certification for seven Helper—Production Workers from April 1, 2019, to October 26, 2019. AF at 1, 26.

On September 26, 2019, Employer filed an extension of the work period to December 13, 2019 for five of the visas. AF at 6. Employer explains that

[b]ecause of weather conditions in Colorado, employer endeavors to have all contracts completed by the end of October. Colder temperatures in Colorado in November and December drastically slow the setting of concrete production. Employer has continued to try to hire production workers throughout the summer but has not been successful due to the shortage of workers for landscaping, farming and construction. In addition to the unforeseeable delay of receiving workers 78 days after the start date of need, as well as receiving 5 nonimmigrant workers rather than the 7 needed workers, employer also has the unforeseeable issue of dealing with the colder temperatures in November and December to complete its contracts.

Employer will need all its full time permanent U.S. workers and the 5 H-2B non-immigrant workers to complete its 5 remaining contracts.

Id. Employer then lists the contracted jobs, the contract price, start date, and planned completion dates. AF at 8. Employer then attached a Google search of "average weather in Colorado in December" run on September 26, 2019, showing average high and low being 42°F and 16°F, respectively. AF at 9.

On September 27, 2019, the CO issued a Final Determination denying employers request for extension because

The employer has not sufficiently demonstrated that an extension is necessary due to weather conditions or other reasons beyond the control of the employer that could not be reasonably foreseen.

. . . .

The requested extended end date of December 13, 2019 would extend the total work period into the months of November and December, which as the employer has indicated would not be ideal for work in the area of intended employment. Therefore, this extension request is denied.

AF 26-27.

On October 25, 2019, BALCA received Employer request for review of the CO's Final Determination. Employer reiterates that

[b]ecause of weather conditions in Colorado, employer endeavors to have all contracts completed by the end of October. Colder temperatures in Colorado in November and December drastically slow the setting of concrete production. Workers must first complete the production which must be done outside-which is drastically slowed as temperatures turn colder-before workers can start the inside production. In addition to the unforeseeable delay of receiving workers 78 days after the start date of need, as well as receiving 5 nonimmigrant workers rather than the 7 needed workers, employer also has the unforeseeable issue of dealing with the colder temperatures in November and December to complete its contracts.

AF at 2.

I held a conference call with the parties on November 4, 2019, and the parties indicated neither Employer nor Division of Employment and Training Legal Services would submit briefs for this case.

STANDARD OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. §655.33(e). After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

DISCUSSION

The regulation governing extensions of H-2B work visas provides relevant part that "[a] request for extension must be related to weather conditions or other factors beyond the control of the employer . . . and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer." 20 C.F.R. § 655.60.

Here, Employer offers two interrelated bases for the request for extension, unforeseen delay in receipt of workers which pushed the contract projects into colder months that slowed the construction process. The CO simply concludes these reasons are insufficient for an extension without any further explanation. I disagree. While delays in the regular processing of applications and receiving a decision by the CO are foreseeable, being approved for immigrant workers but having to refile because of the visa cap is not. Similarly, Employer adequately explains how the construction projects being pushed into colder months slows concrete setting, which is a significant part of Employer's work.

Taken together, Employer establishes its qualification for an extension under § 655.60.

ORDER

Accordingly, I direct the CO to **GRANT** the temporary labor certification.

SO ORDERED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC/aje