



Issue Date: 05 June 2020

BALCA CASE NO.: 2020-TLN-00046

ETA CASE NO.: H-400-20002-224621

In the Matter of:

DESTIN VIP CLEANING LLC,
Employer.

Appearance: Richard Alvoid, Esquire
Pensacola, FL
For the Employer

Edward Waldman
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Susan Hoffman
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Destin VIP Cleaning, LLC’s (“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

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Further Consolidated Appropriations Act, 2020, Pub. L. No. 116 -94, Division A, Title I, § 111 (2019).

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.

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” or “Application Form”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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).

In this case, BALCA received the Administrative File (“AF”) from the Certifying Officer on May 26, 2020. The Certifying Officer did not file a legal brief on appeal, and the time for doing so has expired. 20 C.F.R. § 655.61(b). Accordingly, this proceeding is now before me as a designated member of the Board of Alien Labor Certification Appeals. 20 C.F.R. § 655.61. This Decision and Order is based on the written record which consists of the AF and Employer’s request for review. I affirm the CO’s denial of a labor certification to Employer.

Procedural Background

On January 2, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. (AF pp. 262-461.)³ Employer stated that it currently has seven employees and “some temporary workers on the basis of independent contractors who are storing goods for in [sic] the Panama City, FL area in the off season.” (AF p. 273.) Employer stated that it “has had a strong presence in the Florida panhandle area” but did not state what its business is, or whether it provides any services besides storage and stocking. (*Id.*)

Employer attached as “Evidence of Peakload Need” (AF p. 274) the following: tourist information indicating that the best time to visit Panama City Beach, FL is May through October (AF p. 277), accounting of bank deposits by month for 2019, which show significantly higher deposits (over \$1,000,000) in July, August, and September, but showed January to have a higher deposit than April (AF p. 288-298), a chart showing monthly revenue for October 2018 through October 2019⁴ (AF p. 299), and payroll registers for 2018 and 2019 (AF pp 300-436).

Employer also attached, as “Evidence of Company’s Viability” the following: its business registration and tax receipt (AF pp. 440-442), a list of workers and their immigration status from the October 2018-October 2019 payroll (but their positions and periods of employment are not indicated) (AF pp. 443-448), a job order for the job (AF p 449-445), and a completed Application for Prevailing Wage Determination (AF pp. 456-461).

³ References to the administrative file will be abbreviated with an “AF” followed by the page number.

⁴ This chart shows October 2018 and 2019, December 2018, April 2019, and January 2019 to be the lowest months; the numbers fell below \$60,000 only in those months. Later, Employer said this particular chart was mislabeled as a revenue chart and is in fact a payroll chart. (*See* AF pp 25, 29, 299.)

The Office of Foreign Labor Certification issued a Notice of Deficiency on February 14, 2020. (AF pp. 253-256.) The Certifying Officer (“CO”) noted four deficiencies in the application, and requested that Employer submit additional information. Two of the deficiencies were Employer’s failure to establish the job opportunity as temporary in nature and failure to establish temporary need for the number of workers requested.

On February 20, 2020, Employer submitted its response to the Notice of Deficiency. (AF pp. 13-251.) The response provided additional documentation and/or explanation as to each of the four noted deficiencies.⁵

The Office of Foreign Labor Certification issued its Final Determination on March 24, 2020. (AF pp. 1-10.) The Certifying Officer denied Employer’s application, finding that two of the four deficiencies previously identified in the Notice of Deficiency remained: failure to establish the job opportunity as temporary in nature, and failure to establish temporary need for the number of workers requested. Employer requested review on March 31, 2020, and included a brief with its request.⁶ The case was assigned to me, the AF was filed on May 26, 2020, and I issued a *Notice of Docketing* on May 27, 2020.

Standard of Review

The Board’s scope of review in the H-2B program is limited. When an employer requests review under Section 655.61(a), the Board considers “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The Board may not consider new evidence that was not before the Certifying Officer. *See* 20 C.F.R. § 655.61(a)(5). The Board’s authority to act is similarly limited; the Board may either affirm the determination of the Certifying Officer, reverse or modify the determination, or remand the matter back to the Certifying Officer for further action. 20 C.F.R. § 655.61(e). Finally, Section 655.61(f) provides for expedited review of any request for administrative review by the Board. 20 C.F.R. § 655.61(f).

The regulations do not specify the deference that the BALCA should accord to a CO’s determination, nor is there a consensus in the cases as to the appropriate standard of review. Some members of the Board have applied an arbitrary and capricious standard. *See e.g., Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019) (collecting cases). Other members have rejected this standard and applied a less deferential standard. *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) (whether the basis for denial was legally and factually sufficient); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016) and *Sands Drywall, Inc.*, 2018-TLN-00007 (Nov. 28, 2017) (*de novo* standard of review). In the present case, I need not reach this issue. I would affirm the denial of the application whether I applied an arbitrary and capricious standard or reviewed the matter *de novo*.

⁵ Employer addressed the third and fourth deficiencies noted by the CO in the Notice of Deficiency by giving permission for the CO to make certain amendments to its Application Form, and by providing an explanation of job contractor status. (AF pp. 25-27.) Apparently the CO found these actions sufficient to resolve any deficiency, as the CO did not raise these deficiencies in the Final Determination.

⁶ References to the Employer’s brief will be abbreviated with an “Emp. Brief” followed by the page number.

Discussion

An employer must establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012). An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. § 655.11(e)(3) and (4); *see Titus Works, LLC*, 2019-TLN-00023 (Feb. 8, 2019); *Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017); *see also Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013).

Employer applied for temporary labor certification for 200 full-time stock clerks. (AF pp. 262-461.) The Application Form states that the laborers are needed on a temporary basis starting April 1, 2020, and ending November 1, 2020, because of temporary seasonal need due to the tourist season along the Gulf Coast of Florida. (AF p. 262.) On its Application Form, Employer also stated that it has contracts for the workers to work at two Walmart locations, one in Lynn Haven, Florida, and one in Panama City Beach, Florida. (AF p. 273.) No actual contracts are in the record. Employer stated that it currently has seven employees and “some temporary workers on the basis of independent contractors who are storing goods for in [sic] the Panama City, FL area in the off season.” (AF p. 273.)

The application includes a letter, dated December 20, 2019, from the Lynn Haven store stating that it generally hires between 20 and 60 persons for the position of stock clerk. (AF p. 437.) There is also a letter from the Panama City Beach store, dated December 9, 2019, stating that staffing levels vary from 30-120 persons depending on the time of year and business needs. (AF p. 438.) These letters, which are not contracts as alleged by Employer in its Application Form, do not specify the timeframe during which Employer provides them with this staffing or the specific number of workers to be supplied by Employer. There is no information in these letters showing that Employer is obligated to provide each Walmart store with 100 workers during the months of April to November.

In the Notice of Deficiency, the CO found a “Failure to establish temporary need for the number of workers requested”, citing 20 C.F.R. § 655.11(e) (3) and (4). (AF p. 258.) The CO stated that Employer did not indicate how it determined that it needed 200 stock clerks. (*Id.*) The CO also stated that the payroll documents Employer submitted are not summarized records and lack certain details. (*Id.*) The CO requested that Employer submit additional information and documents including an explanation of why Employer requested 200 stock clerks, documentation supporting that need, such as letters of intent or contracts, payroll documents that identify for each month (and separately for full-time permanent and temporary workers) total number of workers, total hours worked and total earnings received, and an explanation of the data included in the payroll documents. (*Id.*)

In response to the Notice of Deficiency, Employer re-submitted a chart showing payroll expenses between October 2018 and October 2019, which it states was previously mislabeled as documentation of monthly revenue. (*See* AF pp 25, 29, 299.) Employer also submitted payroll records (AF pp. 31-240) and charts showing payroll summary for 2018 (AF p. 246) and 2019 (AF p. 241) as well as a profit and loss statement labeled November - December 2019. (AF p. 30.) Employer submitted eight total bar graph summaries, which separately showed total hours worked and total wages earned by permanent and temporary employees in 2018 and 2019. (AF

pp. 242-250.) Employer also submitted a letter of intent from the Walmart store in Panama City, dated February 19, 2020, stating that they planned to hire 60 full-time stock clerks for April 1 - November 1, 2020. (AF p. 251.) Employer stated that all of these documents were meant to show both temporary need and the number of workers requested. (AF p. 25.)⁷

None of this evidence, even coupled with the evidence submitted with Employer's application, justifies the need for 100 temporary workers for each of the two Walmart stores. Neither of those stores has indicated a need for more than 60 workers. Employer has shown no contractual obligation to provide the stores with the requested number of workers. None of Employer's documentary evidence, such as payroll summary reports or profit/loss statements and charts⁸, is sufficient to overcome the actual lack of evidence as to Employer's stated need for 200 temporary workers.

In an affidavit attached to its response to the Notice of Deficiency, Employer stated "in the past, DESTIN VIP CLEANING, LLC has fulfilled the need of around 100 stockers per store with both permanent and temporary employees, therefore we found our request of 200 workers accurate in lieu of previous services provided to these Walmart stores. Based on the foregoing I ratify our need of temporary workers." (AF p. 25.) Employer argues its affidavit shows that "previous experience dictates the need of 200 stock clerks" and that it is "aware that the practice and experience in the business during peakload season will require the 200 Stock Clerks." (Emp. Brief pp. 9-10.)

Yet, Employer offers no evidentiary support for its statement or argument. If, in fact, Employer had staffed each Walmart store with 100 temporary workers during previous periods of peakload need, it could have submitted documentation verifying that circumstance, such as contracts with the stores. Further, its statement of ratification conflates its provision of "both permanent and temporary workers", as if that is not a distinction of importance here. In fact, the CO specifically requested payroll information separately for full-time permanent and temporary workers, which was not provided. The argument that I should just rely on its previous experience and awareness of seasonal need is singularly unpersuasive.

Employer has offered no detailed or persuasive explanation based on evidence in the record as to why 200, as opposed to any other number of temporary workers, is necessary. Such a showing is required. 20 C.F.R. § 655.11(e)(3); *Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019). I decline to issue a partial certification for fewer workers as Employer requested, as it has not provided any actual proof of need of a defined number of temporary workers for the period requested. *See* Emp. Brief p. 10. Further, the regulations allow only the CO, not the ALJ, to issue such a partial certification. 20 CFR § 655.54.

Employer failed to justify its need for the number of temporary workers for which it was requesting labor certification. Because my determination to affirm the CO's denial of

⁷ Employer asserted in its cover letter that it was also submitting its most recent tax return and a "previous agreement subscribed with [Walmart]". (AF p. 25.) No such documents are included

⁸ Employer submitted more than 200 pages of payroll documents in response to the Notice of Deficiency, but that information was not organized or summarized in any kind of way to provide insight into or evidence showing the necessity for the number of workers requested.

certification can be based solely on this failure, I need not reach the issue of whether Employer has met its burden to prove the temporary nature of its need.

Order

Upon an independent review of the record and the relevant legal authority, I find that Employer did not meet its burden to prove that it is entitled to a temporary employment labor certification under the applicable regulations. Accordingly, the final determination of the Certifying Officer denying Employer's application for temporary labor certification is **AFFIRMED**

For the Board:

Susan Hoffman
Administrative Law Judge