



Issue Date: 18 November 2019

BALCA CASE NO.: 2020-TLN-00008

ETA CASE NO.: H-400-19249-053104

In the Matter of:

INTERNATIONAL CARRIER ENTERPRISES, INC.,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification program for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.¹ The Certifying Officer in the Office of Foreign Labor Certification denied the application of International Carrier Enterprises, Inc. (“International Carrier”) seeking temporary labor certification for fifty workers under the H-2B non-agricultural program. International Carrier appealed this decision. The matter is now properly before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to Section 655.61(a) for review of the Certifying Officer’s denial.² Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer.

I. Procedural and Factual Background

International Carrier is a trucking company located in Villa Park, Illinois. (Appeal File (“AF”), at 132.) International Carrier submitted an H-2B Application for Temporary Employment Certification with the United States Department of Labor seeking certification for fifty full time truck drivers. (AF at 132-148.)³ The application states that International Carrier needs the truck drivers on a temporary basis starting November 21, 2019, and ending April 15,

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

² The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d). Here, the Chief ALJ designated a single member of the Board to hear this appeal.

³ For purposes of clarity, the undersigned has omitted the “P” prefix on each page number of the Appeal File.

2020, due to a seasonal need.⁴ (Id. at 132) These individuals would drive either a tractor-trailer or a truck with at least 26,000 pounds of gross vehicle weight to haul freight. (Id. at 134.)

In support of its application, International Carrier contends that the temporary workers are necessary to accommodate a seasonal need – the Christmas shopping season. (Id. at 132.) According to International Carrier, the Christmas shopping season runs until after Christmas to accommodate the return of gifts. (Id.) Specifically, the application states:

The number of jobs requested is due to a seasonal need which is the Christmas shopping season which also includes the return of gifts in masse which occurs after Christmas. Employer has the number of trucks for these 50 drivers. The law defines a seasonal need as a need that is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” [sic] The Christmas shopping season and its accompanying return of gifts season is the very definition of seasonal need tied to an event-Christmas-that is recurring.

(Id.) The application as a whole contained limited additional information. (See id. at 132-48.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency, setting out five deficiencies. (Id. at 122-31.) First, International Carrier failed to establish that the job opportunity is temporary in nature. (Id. at 462-3.) The Certifying Officer found that:

The employer is basing its seasonal temporary need for truck drivers on the Christmas/Return season. However, the end date of need is April 15, 2020. It is unclear how the employer came up with this date since Christmas is December 25, 2019. It seems extreme that the Christmas returns busy season goes up to April 15, 2020. In addition, it was not stated what the employer does during the off season months from April 16th to November 20th each year.

(Id. at 125.) The Certifying Officer instructed International Carrier to submit additional documentation supporting its application and specified the specific information needed. (Id. at 125-26.)

Second, the Certifying Officer found that International Carrier failed to establish a temporary need for the number of workers it requested. (Id. at 126.) The Certifying Officer noted that the application failed to explain how International Carrier arrived at the requested fifty workers. (Id.) The Certifying Officer instructed International Carrier to submit additional documentation supporting its request for fifty workers. (Id. at 126-27.)

⁴ The application sets out two different end dates for the temporary need. (AF at 132.) The end date listed in Box B.6 is January 31, 2020. (Id.) Box B.8., which sets out the statement of temporary need, describes the period of need running through April 15, 2020. (Id.) Similarly, the end date is listed as April 15, 2020, elsewhere in the application. (AF at 142.) Although it is not clear which end date International Carrier intended to include in the application, the company subsequently amended the end date to match the date originally set forth in Box B.6. (AF at 2.)

Third, the Certifying Officer found that International Carrier failed to submit a job order that complied with the applicable regulations. (Id. at 128.) The Certifying Officer noted eleven specific areas of information that the job order failed to contain. (Id.) Accordingly, the Certifying Officer directed International Carrier to submit an amended job order that included this information. (Id. at 130.)

The fourth and fifth deficiencies both involve ETA Form 9142. (Id. at 130-31.) The Certifying Officer found that International Carrier failed to submit a complete and accurate ETA Form 9142. (Id. at 130.) According to the Certifying Officer, a portion of Section D was not completed by the proper individual. (Id. at 130-31.) Similarly, the Certifying Officer found that International Carrier did not accurately complete another section of the form, which addressed employer provided housing. (Id.) The Certifying Officer directed International Carrier to amend the form to remove the agent's information and include the information of another person in Section D and to amend Section F to indicate the terms and deductions for employer-provided housing. (Id. at 130-31.)

In response to the Notice of Deficiency, International Carrier submitted additional documentation in support of its application. In response to the first deficiency, International Carrier amended its application from an end date of April 15, 2019, to January 31, 2020. (Id. at 12.) As to the second deficiency, International Carrier responded with a reference to a website link that addressed the steps United Parcels Service took during 2017 to address the increase of package deliveries during the holiday season. (Id.) International Carrier also indicated that the entire trucking industry sees an uptick in activity during the holiday season to account for both the increase in deliveries from manufactures to stores and the increase in package deliveries. (Id. at 12-13.) The response also stated that:

Obviously, this makes it one of the busiest times of the year and many companies have to supplement their year-round labor by hiring seasonal and part-time staff who can make up for any extra work. With that said, there is still a huge shortage of truck drivers and the industry often faces a challenge with the ever-increasing demand of our customer-driven economy. Likewise [International Carrier] has substantially increased demand for loads and drivers during the Christmas/return season as is applicable to the trucking company.

(Id. at 13.)

In response to the third and fourth deficiencies, International Carrier provided additional information and amended its application related to the eleven deficiencies noted by the Certifying Officer in the job order and amended its application as to items 1-14 of Section D. (Id. at 13-14.) Finally, as to the fifth deficiency, International Carrier amended its application to N/A from yes on the section of the form regarding employer provided housing. (Id. at 14.)

International Carrier also submitted additional documents in response to the Notice of Deficiency, which it contends demonstrates "income stream, number of trucks, and historical revenues" in response to the first two deficiencies. (Id. at 12-13.) These documents include: (1) a future depreciation report that appears to list the various tractors, trucks and other heavy

equipment owned by International Carrier; (2) International Carrier's tax returns for 2017 that set forth its yearly income, profit and receipts for 2013-2017 and the projected amounts for 2018; (3) a list of payments for various third parties between October 1, 2018, and March 1, 2019. (Id. at 16-60, 72-121.)

After receipt of the additional documentation from International Carrier, the Office of Foreign Labor Certification issued its Final Determination on October 10, 2019. (Id. at 63-69, 5-11.) The Certifying Officer denied International Carrier's application, finding that two of the five deficiencies previously identified in the Notice of Deficiency remained. (Id.) The additional information submitted by International Carrier did not cure the first and second deficiencies. (Id.)

As to the first deficiency, the Certifying Officer found that International Carrier failed to offer any explanation as to how the company determined the end date of need related to the Christmas season. (Id. at 9, 67.) The Certifying Officer noted that "[t]he end date of need change calls into question the true dates of need. The employer has not sufficiently demonstrated that the dates of need requested on the application as [sic] true and accurate and represents bona fide job opportunities." (Id. at 9, 67.) In addition, the Certifying Officer noted that the sales receipts and other information submitted by International Carrier do not support its period of temporary need. For example, the Certifying Officer found that the tax returns represent the employer's entire operations and were not specific to the occupation of truck driver and, thus, were not useful in determining temporary need. (Id. at 10, 68.)

As to the second deficiency, the Certifying Officer explained:

In response to the NOD, the employer submitted a statement of explanation, a list of sales, a future depreciation report and pages from 1120s Tax return. However, the employer did not submit summarized monthly payroll, a report of the number/pattern of deliveries, or a summarized monthly list that indicates the number of truck loads that leave the main worksite for deliveries to other locations as directed in the NOD.

The employer's explanation and documentation of its temporary need did not overcome the deficiency. The employer provided a future depreciation report from Fiscal Year 2017 which list the trucks that could be depreciated. However, this document represent [sic] the employer's entire operation and is not specific to the requested occupation; and therefore, was not useful in determining temporary need.

(Id. at 11, 69.) As a result, the Certifying Officer denied the application. (Id.)

International Carrier then filed a timely Notice of Appeal of the Final Determination. (Id. at 1-4.) On November 4, 2019, the appeal file was uploaded, triggering the clock for both the filing of briefs and the issuance of this decision. Neither Employer nor the Certifying Officer filed 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 the undersigned as a designated member of the

Board of Alien Labor Certification Appeals for the issuance of this Decision within the parameters of Section 655.61.

II. Legal Standard

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 undersigned notes that the Immigration and Nationality Act and the applicable regulations do not specify a 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, at *4 (Feb. 21, 2019) (Nordby, ALJ) (collecting cases). Other members have rejected this standard and applied a less deferential standard. Best Solutions USA, LLC, 2018-TLN-00117, at *3 n.2 (May 22, 2018) (Barto, ALJ) (determining whether the basis provided for the applications denial was legally and factually sufficient in light of the written record); Saigon Restaurant, 2016-TLN-00053, at *5 (July 8, 2016) (King, ALJ) (applying a de novo standard of review). The undersigned, however, need not address this issue at this time as the result reached in this matter would be the same regardless of whether the undersigned applied an arbitrary and capricious standard or a de novo standard.

III. Discussion

The employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; Jose Uribe Concrete Constr., 2019-TLN-00025, at *4. The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of the foreign workers "will not adversely affect the wages and working conditions of U.S. workers similarly employed." 20 C.F.R. § 655.1(a); see also 8 C.F.R. § 214.2(h)(6)(i)(A).

The regulations require that an employer seeking certification must establish that its need for the laborers is temporary, irrespective of whether the position itself is permanent or temporary, and that the need for the labor will end in the "near, definable future." 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(A)-(B). A need is temporary where the employer provides justification to the Certifying Officer that the laborers are needed for either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 20 C.F.R. § 655.61(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). Temporary need is limited to periods of up to three years for a one-time event and one year or less for seasonal need, peakload need, and intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Where the employer contends that its need for laborers is due to a seasonal need, the employer must demonstrate to the Certifying Officer “that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). The employer must specify the period of time during each year in which it does not need the laborers or services. Id. The regulations specify that “employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.” Id. In addition to demonstrating that the need for laborers is temporary within the meaning of the regulations, the employer must also justify in its application the number of workers sought and the period of temporary employment. 20 C.F.R. § 655.11(e)(3).

Where the Certifying Officer issues a Notice of Deficiency, the failure of the employer to provide all required documentation will result in the denial of the employer’s application. 20 C.F.R. § 655.32(a). The Board, however, has previously held that if the employer explains why it is unable to produce the documentation requested in the Notice of Deficiency and provides alternative evidence, the Certifying Officer may not deny the certification without first considering whether the alternative evidence satisfies the employer’s burden. International Plant Services, LLC, 2013-TLN-00014, at *6 (Dec. 21, 2012) (Johnson, ALJ).

The undersigned agrees with the Certifying Officer that the record fails to establish a temporary need for fifty truck drivers, and the Certifying Officer correctly determined that International Carrier failed to satisfy its burden of establishing that its need for fifty drivers was temporary as a result of the seasonal need from November 21, 2019, to January 31, 2020. As the Certifying Officer highlights in the denial, the documents submitted by International Carrier fail to establish a temporary need for fifty drivers. The tax returns only demonstrate International Carrier’s yearly income, profit, payroll, and other yearly data points. The depreciation report demonstrates the total number of trucks and other pieces of heavy equipment International Carrier owns. These documents do not demonstrate any seasonal need by International Carrier for drivers, and the yearly figures are not instructive in determining whether International Carrier sees a spike in business transporting packages around the Christmas season and whether it increases its payroll during this period of time to accommodate its increased business demand.

While the undersigned has no doubt that there is a general increase in package delivery and shipments around the Christmas holidays, International Carrier has failed to provide any documentation as to how this general increase in the volume of package deliveries nationwide impacts its need for labor, much less why it needs fifty drivers, and why it needs those drivers for the exact date requested. The record does not even contain a reference to how many drivers International Carrier regularly employs on a full time basis, much less any indication that this number of permanent employees is insufficient to meet its work flow during the time period requests. In short, the record before the undersigned does not support a finding that International Carrier needs fifty drivers to supplement its permanent staff on a temporary basis due a seasonal or short-term demand as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Moreover, the lengthy excel spreadsheet covering the time period of October 1, 2018, through March 1, 2019, fails to provide any clarity on the issues before the undersigned. The time frame of the data in the spreadsheet does not correspond to either the date of need in the

initial application or the amended date of need. Without a proper summary or explanation of the data contained in the spreadsheet or a break down as to how the numbers during the time period set forth in the spreadsheet compared to other periods, the document is of little value to the undersigned or the Certifying Officer.

If International Carrier sees an increased demand in business around Christmas that requires it to hire additional drivers to address an increase in the volume of package deliveries, it should easily be able to demonstrate that increased business. However, as the Certifying Officer correctly determined, the documents submitted in response to the Notice of Deficiency, and the record as a whole, do not support the request for fifty temporary drivers based on a seasonal need from November 21, 2019, to January 31, 2020. Accordingly, the undersigned **AFFIRMS** the decision of the Certifying Officer.

IV. Conclusion

Upon a review of the record and the relevant legal authority, the undersigned finds that International Carrier Enterprises, Inc. failed to satisfy its burden of demonstrating that it is entitled to a temporary labor certification under the applicable regulations. Accordingly, the undersigned **AFFIRMS** the decision of the Certifying Officer denying the temporary labor certification.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge