

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 January 2020

BALCA Case No.: 2020-TLN-00020

ETA Case No.: H-400-19324-157519

In the Matter of:

LL ALVAREZ, LLC,
Employer.

Appearances: Llinsish F. Alvarez
LL Alvarez, LLC
Audubon, NJ 08106
Employer

No Appearance For the Certifying Officer

Before: Christopher Larsen
Administrative Law Judge

DECISION AND ORDER OF REMAND

This case arises from the request of LL Alvarez, LLC (“Employer”), 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

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 H, 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

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”). 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). Employer has done so. By designation of the Chief Administrative Law Judge, I am BALCA for purposes of this administrative review. 20 C.F.R. §655.61, subsection (d).

When an employer requests review of the denial of its application, BALCA’s scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination. 20 C.F.R. § 655.61(a)(5). I must review the CO’s determination based solely only on the Appeal File, the request for review, and any legal briefs submitted. 20 C.F.R. § 655.61(e). I must either affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

The CO did not timely file a brief in support of her position.

BACKGROUND

Employer filed its application for temporary labor certification on or about November 20, 2019, seeking to hire three nonimmigrant workers to support its landscaping business. AF 85-102.³ The CO identified five “deficiencies” in the application (AF 59-84), ultimately denying the application by reason of two of them: first, the CO concluded Employer had failed “to establish the job opportunity as temporary in nature” (AF 8-11); and second, had failed “to satisfy the obligations of H-2B employers” (AF 12-13).

DISCUSSION

I consider each of the CO’s bases for denial in turn.

1. “Temporary” Nature of the Job

For purposes of the H-2B program, a “temporary” job is something other than what the proverbial man-in-the-street might consider a “temporary” job. Under 8 C.F.R. § 214.2, subsection (h)(6)(ii)(B):

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 I abbreviate references to the appeal file with “AF” followed by the page number.

(B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. . . . The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) Seasonal need. The petitioner must establish 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. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The 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.

(3) Peakload need. The petitioner 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.

(4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

Employer argues its need for temporary employees is seasonal (AF 85, Item B 7), and the CO appears to have evaluated the application accordingly (AF 8-12).

The regulatory definition of "seasonal need" – like those of the other three kinds of temporary employment – is as remarkable for what it does *not* say as for what it does. There is, for example, no express limit on the duration of a seasonal

need. The prospective employer must expressly specify the period or periods when it does not need the additional labor, and that period or periods cannot be 1) unpredictable, 2) subject to change, or 3) a vacation period (or periods) for the employer's permanent employees. Here, the Employer argues it does not need additional labor during the months of December and January (AF 85, 1-2). There is no suggestion that the December-January time period is unpredictable or subject to change, and not even the CO suggests it is considered a vacation period for Employer's permanent employees.

Instead, the CO advances two different justifications for concluding Employer has failed to establish a seasonal need. The first is that "a labor shortage, no matter how severe, does not justify a temporary need" (AF 79; *see also* 55).⁴ The CO cites no regulation or other authority for this proposition, and does not qualify it in any way. Taken at face value, it appears to be the regulatory equivalent of Joseph Heller's *Catch-22*, because when labor is in ample supply, there is no reason for an employer to seek temporary labor certification. Arguably, any application for temporary labor certification will coincide with a "labor shortage" of some kind. Such a rule is not an adequate basis for denial.

The CO's second justification is based on an analysis of a schedule of operations, customer inquiries, and monthly invoices from 2018 and 2019, all provided by Employer, which in the CO's view do not demonstrate a seasonal need (AF 10-12). The CO's analysis apparently did not include a review of payroll records "provided in a format that does not allow the Department of Labor to effectively review" (AF 11-12). But Employer reports he failed to submit all of his customer invoices from 2018 and 2019:

I just picked one receipt per month for the two years and a few emails and text messages from the hundreds of invoices and messages that I have in my records because it is so much information that I have to go through.

My business is growing and my sales increase every year.

(AF 3). What is more, the CO reports she did not have invoices for the months of January and December (AF 10). Thus, the CO's analysis is based on a rather

⁴ In the original Notice of Deficiency (AF 79), as well as in the Final Determination (AF 55), the CO follows this statement with the observation "The employer has not explained what events cause the seasonal need and the specific period of time in which the employer will not need the services or labor." The Employer might have given a more detailed explanation, but Employer told the CO he needed additional workers from February through November to handle service requests his permanent employees could not complete alone (AF 61). It stands to reason the demand for landscaping services in New England would slow in December and January, and the original application gives every indication that Employer does not need temporary workers in December and January (AF 85). I see no reason for the CO's bewilderment on these points.

arbitrary sampling of data, rather than on a representative sample, or a complete record.

The Employer may bear some responsibility for its incomplete response, but at the same time, the CO's request for additional information, set forth in the Notice of Deficiency (AF 80), does not unambiguously ask for *all* invoices from 2018, *all* signed service contracts from customers in the previous calendar year, and does not specify a particular format for the requested payroll information. Since the Employer appears reasonably to have believed it had responded fully to the CO's request, it should have an opportunity to supplement its response before the CO summarily denies its application. On remand, the CO must allow Employer to submit, at a minimum, more complete invoices for 2018, and any additional signed sales contracts for the 2018 calendar year it wishes to provide. The CO must also suggest a more desirable format for the payroll records, and allow the Employer 1) to re-submit payroll data in an acceptable format and 2) to submit a new explanation of the data in the payroll records, if Employer wishes to do so. The CO must then consider all information submitted by the Employer and determine whether it demonstrates a temporary seasonal need for workers during the months of February through November.

2. Failure to Satisfy Obligations of H-2B Employers

In the Notice of Deficiency, the CO observed Employer had specified in its job order that foreign workers should not have a criminal or DUI record. Noting Employer's obligation not to impose less favorable requirements on domestic workers, the CO directed Employer to amend its application to indicate it required a background check of domestic workers, and to state whether the check was performed pre- or post-hire (AF 83-84). The Employer responded that it requires a pre-hire background check of all employees (AF 73-74). The Employer reports it also sent an amendment request to SWA, but did not request the CO amend the application because "the Officer did not request an authorization language *[sic]* to amend my ETA Form 9142" (AF 5).

Since Employer intended to amend its application, and since the CO will be reconsidering Employer's application anyway, I direct the CO to make the appropriate amendment to Employer's application to indicate Employer requires a pre-hire background check of all employees and further to consider Employer's application as amended.

ORDER

The CO's decision to deny temporary labor certification is vacated. This matter is remanded to the CO for further consideration consistent with the directions set forth in this Decision.

SO ORDERED.

For the Board:

CHRISTOPHER LARSEN
Administrative Law Judge