

U.S. Department of Labor

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

BALCA Case Nos.: 2020-TLN-00073
2020-TLN-00074

ETA Case Nos.: H-400-20185-694203
H-400-20185-694248

In the Matter of:

PLANT PROCESS EQUIPMENT, INC.
Employer.

Appearance: Ronda Butler Harkey
The Woodlands, TX
For the Employer

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER
REVERSING IN PART AND REMANDING
FINAL DETERMINATION

For reasons that are unknown, the Certifying Officer (“CO”) mischaracterized the facts and misapplied the applicable law in denying acceptance of an application for temporary alien labor certification from Plant Process Equipment, Inc. (the “Employer”) under the H-2B non-immigrant program.¹ I find that the Employer established a temporary peakload need, but I remand for the CO to consider precisely how many workers to certify, and for further processing.

BACKGROUND

¹ 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). 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.

Employers who want to hire foreign workers under the H-2B program must get a labor certification from the Department of Labor. A CO in the Office of Foreign Labor Certification (“OFLC”) reviews each Application for Temporary Employment Certification (“Form 9142”). Following a 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).

Here, in two separate applications,² the Employer applied for certification for 40 Pipe Fitters and 45 Welders to work on construction projects in the counties of Nueces, Victoria and Calhoun, Texas.³ The Employer asserted a peakload need for these workers, *see* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), lasting from October 1, 2020 through June 30, 2021. *Id.*

The Employer submitted a table of hours and earnings by its (small) permanent and its temporary workforce of Pipe Fitters and of Welders covering 2016; 2017; 2018; 2019; and 2020, showing a dramatic and temporary increase in the number of employees, hours worked, and pay, for up to nine consecutive months in each year since 2018.⁴ The Employer also explained by letter from its prime contractor, Kiewit Offshore Services, how the Employer will employ these requested workers to meet a temporary need for pipe fitting and welding work on one large set of projects for Kiewit.⁵ Critically, for reasons that will become apparent below, the Employer has foremen and supervisory staff who manage the day-to-day work of its employees as a subcontractor to Kiewit and will do so on this large project.⁶

The CO issued Notices of Deficiency to the Employer in July 2020, to which the Employer replied.⁷ Nevertheless, the Employer’s applications were denied.⁸

In the denial, the CO stated that the Employer had failed to prove a temporary peakload need.

[I]t is not clear how one contract in its operations establishes a peak need.

Thus, the letter of intent submitted by the employer is consistent with a business operation that regularly secures contracts to perform services or labor on an ongoing basis, albeit through individual contracts. The employer’s regular operations securing and fulfilling this type of contract suggests that the workers requested are, more appropriately, part of the employer’s regular operations and not a supplemental workforce due to its temporary need.⁹

² References to the appeal files are abbreviated with “2020-TLN-00073 AF” for the Pipe Fitters file, and “2020-TLN-00074 AF” for the Welders file, followed by the page number.

³ 2020-TLN-00073 AF 301-09; 2020-TLN-00074 AF 307-18.

⁴ 2020-TLN-00073 AF 326-28; 2020-TLN-00074 AF 352-54.

⁵ 2020-TLN-00073 AF 329; 2020-TLN-00074 AF 356.

⁶ 2020-TLN-00073 AF 253 (“supervision and labor”), 313-17, 329-48; 2020-TLN-00074 AF 258, 319-23, 357-89.

⁷ 2020-TLN-00073 AF 294-300; 2020-TLN-00074 AF 300-06.

⁸ 2020-TLN-00073 AF 213-21; 2020-TLN-00074 AF 213-21.

⁹ 2020-TLN-00073 AF 219; *accord* 2020-TLN-00074 AF 219.

The CO then reviewed the Employer's 2019 and 2020 payroll reports, showing the end of the temporary need for Welders and Pipe Fitters in June 2019; the resumption of that need in October 2019, and the end in June 2020.¹⁰ The CO then quoted (without citation) the applicable definition of temporary peakload need, *see* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), and continued:

[T]he employer's payroll records indicate that Plant Process Equipment, Inc., employed three to five permanent pipefitters in 2019 and four to five permanent pipefitters in 2020. The Employer is requesting 40 temporary workers. The percentage increase of adding 40 temporary Pipe Fitters to its permanent Pipe Fitters is an increase of 800% to 1333.33%. Based on these figures, the employer's request for temporary H-2B workers does not appear to be a need to supplement its permanent staff, as required to demonstrate a temporary peakload need.

Further, while the employer stated, "[b]ecause the KOS project is not ongoing and indefinite, PPE will only provide pipe fitters for the project through June 2021, leaving no continued need for PPE pipe fitter services after such date", the employer will, in fact have a continued need for pipe fitters because, as it itself stated, it regularly employs permanent workers in this occupation.¹¹

For those reasons, the CO denied certification. This request for administrative review followed.

DISCUSSION

A review of the black-letter law here is useful. In my review, I may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties; and the Employer's request for administrative review, which may only contain legal arguments and evidence that were actually submitted to the CO before the date the CO issued a Final Determination.¹² After considering the evidence of record, I must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

BALCA judges review the CO's determination in an H-2B applications under the deferential "arbitrary and capricious" standard. *Jose Uribe Concrete Const.* 2019-TLN-00025 (Feb. 21, 2019); *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brook Ledge, Inc.*, 2016-TLN-00033, *4-5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the "arbitrary and capricious" standard, the reviewing judge or panel looks to see if the initial decision maker examined "the relevant data and articulate[d] a satisfactory explanation for its

¹⁰ 2020-TLN-00073 AF 220; *accord* 2020-TLN-00074 AF 220.

¹¹ 2020-TLN-00073 AF 221; *accord* 2020-TLN-00074 AF 221 (referencing 13-17 permanent welders, the request for 45 Welders under the H-2B program, and a 263.7% to 346% increase in employed Welders as a result).

¹² Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. The Employer's request for review must set forth "the grounds for the request" and is by regulation the Employer's sole opportunity to make "legal argument." 20 C.F.R. § 655.61(a)(3), (5). Pursuant to 20 C.F.R. § 655.61(f), the assigned BALCA judge should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

action including a rational connection between the facts found and the choice made.” *Three Seasons*, 2016-TLN-00045, *19 (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)). “If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious.” *Id.*¹³

An employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, *5 (Jul. 28, 2009). The CO may only grant an application to admit H-2B workers for temporary nonagricultural employment if an employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

The 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).

Employment is temporary when the employer establishes that the need for the employee will end in the near, definable future. 8 C.F.R. 214.2(h)(6)(ii)(B). Temporary need must “be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 CFR 214.2(h)(6)(ii)(B), Interim Final Rule (IFR), Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24055 (April 29, 2015). The agencies categorize and define temporary need into the following four standards: one-time occurrence, seasonal, peakload, or intermittent. 8 C.F.R. § 214.2(h)(6)(ii)(B), 20 C.F.R. § 655.6.

For a peakload need, an employer 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

¹³ At least one judge has recently concluded that *de novo*, rather than arbitrary and capricious, is the correct standard to apply in an administrative review of an H-2B determination. *Best Solutions USA, LLC*, 2018-TLN-117, *3 n.2 (ALJ May 22, 2018). However, the weight of the case law, as well as a close reading of the H-2B regulations and the H-2A regulations next door in 20 C.F.R., favor arbitrary and capricious review. In the H-2A program, in which the rules predate the current H-2B rules, an employer may elect either an administrative review or a *de novo* hearing following a denial of certification by a CO. 20 C.F.R. § 655.171. In adopting the current H-2B rules, DHS and DOL stated that the new 20 C.F.R. § 655.61 “does not provide for *de novo* review.” 80 Fed. Reg. 24042, 24081. Whether that was meant to either set a standard of review or simply to state the obvious, that the new rule did not allow for hearings as the H-2A rules do, is not clear. Therefore, I read the plain language and the case law to mean both: there are no *de novo* hearings, nor do CO determinations get reviewed *de novo* under administrative review.

seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The 2015 IFR, which was jointly issued by DHS and DOL, adopted by reference the DHS definition of "temporary need" at 8 C.F.R. § 214.2(h)(6)(ii)(B), but added an additional bright-line rule for CO's to apply and codified it at 20 C.F.R. § 655.6. "Except where the employer's need is based on a one-time occurrence, the CO will deny [a certification] where the employer has a need lasting more than 9 months." 80 Fed. Reg. at 24113. As noted above, *supra* n. 1, an appropriations rider passed by Congress on December 18, 2015, and renewed with each appropriation since, requires that the DOL apply solely the DHS definition of "temporary need," without the 9-month bright-line rule.

The preamble to the 2015 IFR identified considerations that are relevant to applying the DHS definition of "temporary need" in 8 C.F.R.; in particular, the twin commands that an employer must prove that it "needs to supplement its permanent staff . . . on a *temporary basis* due to a *seasonal or short-term demand*" and also, "that the temporary additions to staff will *not become a part of the petitioner's regular operation.*" 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added).¹⁴ The DHS and DOL wrote:

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position. . . . Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time off due to a slow-down in work activity.

80 Fed. Reg. at 24056. The agencies continued:

[S]ince temporary need on a peakload basis is not tied to a season, . . . an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis.

Id.

On this record, I agree with the Employer that it has shown a permanent year-around workload and permanent staff, and that its need for workers is greater for the 9 months from October through June, as its need is driven by its prime contractors' (in this application, Kiewit's) demands for its services during that time. The Employer does not control its employing prime contractors' demands; these are factors driving the peaking of its peakload need.

Moreover, I am astonished at the rationale offered by the CO. First, the facts cited by the CO prove on their face the existence of a temporary need. The Employer has a relative handful

¹⁴ Regulatory preambles provide some of the most probative interpretive guidance, though of course the plain language of the regulation ultimately controls. For a discussion of the utility of preambles, *see generally* Kevin M. Stack, *Preambles as Guidance*, 84 Geo. Wash. L. Rev. 1252 (2016).

of Welders and Pipe Fitters, and has signed a contract for a project with a defined end date that requires a much larger number of these workers to complete. The CO calculated the percentage increase in the Employer's number of Welders and Pipe Fitters and then asserted that "[b]ased on these figures, the employer's request for temporary H-2B workers does not appear to be a need to supplement its permanent staff." This makes no sense. First, there is no express authority in the applicable regulations for using a percentage increase in a class of workers as a metric in assessing these applications. Second, even accepting this metric, it tends to prove, not disprove, the existence of a peakload need. If an employer needs a three-fold or ten-fold increase in its workforce to meet a fixed-term contract, that is evidence *in its favor* here.

The CO goes on to use, as a strike *against* the Employer, the fact that "the employer will, in fact have a continued need for pipe fitters [and welders] because, as it itself stated, it regularly employs permanent workers in this occupation." Yes, the Employer does state as much, and it does so *because it is required to in its application by the definition of peakload need*, the very definition quoted by the CO in the denial. See 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). If the Employer did not show employment of permanent workers, it would not meet the peakload need standard, and would be (correctly) denied. The CO applied a "heads I win, tails you lose" analysis on this issue.

On both of these points, there is no rational connection between the facts and the conclusion, and the conclusion is therefore arbitrary and capricious.

It appears that the CO reviewed this Employer's application with an eye to the standards applicable to a "job contractor" under the 2015 IFR. Job contractors may not apply for H-2B workers by asserting a peakload need. See 20 C.F.R. § 655.6(c); *see also* 80 Fed. Reg. at 24055. A "job contractor" is "a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor *and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.*" 20 C.F.R. § 655.5 (emphasis added). It is true that the Employer here is operating as a subcontractor to a larger prime contractor, contracting its services on a temporary basis, and that its temporary workforce will be much larger than its permanent workforce. But the uncontested record here shows that the Employer is a long-standing, bona fide welding and pipe-fitting company – not one person with a pickup truck and a checkbook – and has and will exercise "direct day-to-day supervision and control" of its temporary workforce in carrying out its contract with Kiewit. Employer is not a job contractor, merely providing labor to another "Employer-Client," and it is "counter to the evidence before the agency" and therefore arbitrary and capricious to disqualify the Employer through a back-door application of the job contractor standard.

Now, reasonable people can debate the details and the overall wisdom of temporary nonimmigrant worker visa programs, and their relative merit *vis a vis* large-scale permanent immigration as existed in the United States prior to 1924.¹⁵ It would be permissible for Congress or the agencies to adopt a smaller number of months than nine as a bright-line rule or as a

¹⁵ For a thought-provoking discussion of the advantages and challenges of promoting large-scale immigration to the United States in the 21st century, *see* Matthew Yglesias, *One Billion Americans* (2020).

guideline for assessments of “temporary need.” A layperson might quite reasonably view temporary as less than half of the year, but that is not Congress’s, DHS’s, or DOL’s adopted view. Similarly, it would be permissible for Congress to bar successive, year-after-year, certifications for “temporary” workers, but Congress plainly has not done so against the backdrop of the H program regulations allowing successive peakload or seasonal applications. But CO’s, and BALCA ALJ’s, play the hands we are dealt by the policymakers.

Critically, this case differs from *Jose Uribe Concrete Construction*, 2019-TLN-00025. As I wrote in *Jose Uribe*:

[O]n this record, in no meaningful way can the Employer’s need be said to be “temporary,” which is the *sine qua non* of employment of workers through the H-2B program. The best reading of the record is that year in and year out, since at least 2016, the Employer has shown a *permanent* need for up to 12 concrete finishers, with a relatively brief slowdown in work during the holiday period from Thanksgiving through Christmas and into the new year. This is exactly the scenario envisioned by the DHS in 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), which directs that an employer must prove its temporary peakload need is “seasonal or short-term” and “that the temporary additions to staff will *not become a part of the petitioner’s regular operation.*” (emphasis added). It is also the scenario envisioned by DHS and DOL in the 2015 IFR preamble, cited above, in which an employer misuses a temporary worker program to fill a permanent need, with successive applications for periods of time approaching a year. Other immigration programs exist to fill permanent employment needs with non-U.S. workers. Or, the Employer could raise its wages and offer benefits to attract U.S. workers away from its local competition, or to attract workers to Texas from other parts of the country, or pay overtime to its existing permanent employees.

2019-TLN-00025 at *6. Since the regulations require CO’s and BALCA ALJ’s to distinguish between temporary need and permanent need, the length of time requested is critical. For better or for worse, 10 or 11 months of a 12-month year is more like a permanent need, *see* 80 Fed. Reg. at 24056, especially where the break falls over Thanksgiving, Christmas and New Year’s Day, as it did in *Jose Uribe*. On the other hand, 9 months is, within the meaning of the regulations, sufficiently temporary (though not under current law a bright line rule). *Id.*

However, as noted by the CO, there is no persuasive evidence-based explanation in the record as to why precisely 40 Pipe Fitters or 45 Welders are necessary. *See Titus Works, LLC*, 2019-TLN-00023, at *6 (affirming denial); *see* 20 C.F.R. § 655.11(e)(3). The regulation requires *inter alia* that an employer prove “that it needs to supplement its permanent staff at the place of employment,” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added), and that the number of workers is “justified.” 20 C.F.R. § 655.11(e)(3). The importance of justifying, with proof, the number of workers needed is that overall the effect of having temporary nonimmigrant workers do work rather than permanent workers is to effectively set the H-2B wage as a ceiling, rather than – applying Labor Economics 101 – forcing an employer in real time to share profits with a mobile U.S. workforce in the form of higher wages in order to hire or retain them. This is, manifestly, not the stated intent of the H-2B program.

ORDER

For the foregoing reasons, the Certifying Officer's final determination that the Employer failed to prove that its need was temporary is REVERSED.

The Certifying Officer's final determination that the Employer failed to establish a need for 40 Welders and 45 Pipe Fitters is REMANDED for further action consistent with this opinion.

For the Board:

EVAN H. NORDBY
Administrative Law Judge