



Issue Date: 29 October 2019

BALCA Case No.: 2020-TLN-00002
ETA Case No.: H-400-19233-044426

In the Matter of:

VALLEY RAIN CONSTRUCTION CORP.,
Employer.

Before: Jonathan C. Calianos
Administrative Law Judge

Appearances: Jaime Thurgood, Lay Representative
Corporate & Employee Services
Phoenix, Arizona
*For the Employer*¹

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification. 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);² 20 C.F.R. § 655.6(b).³

¹ There was no appearance from the Office of the Solicitor, U.S. Department of Labor, on behalf of the Certifying Officer.

² The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). 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).

³ 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

Employers who seek to hire foreign workers under this 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* (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On August 21, 2019, the Employer filed an Application seeking to hire twenty-two full-time “Construction Laborers” from November 4, 2019, to July 31, 2020, based on a temporary peakload need. (AF 72).⁴ In its Statement of Temporary Need, the Employer stated: “For 2019-20, Valley Rain has a large workload occurring November through the end of July . . . that requires staff in excess of their current permanent workforce of 13 construction laborers. . . .The contractual workload has created a peakload need for labor.” (AF 87-88). The Employer provided documentation in support of its Application, including payroll data for 2018 and 2019, a “Labor Shortage” chart, work contracts, and Projected Work by Month for 2019-2020. (AF 96-97, 103-04).

On August 29, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF 63). The CO found that the Employer did not “sufficiently demonstrate the requested standard of temporary

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.

⁴ References to the appeal file will be abbreviated with an “AF” followed by the page number.

need nor support its requested dates of need,” as required by 20 C.F.R. § 655.6(a) & (b).⁵ (AF 66). The CO stated that in past applications, the Employer has requested workers under a peakload need for all 12 months of the year, and therefore “it is unclear how the employer’s peak need changes from year-to-year due to a seasonal or short-term demand in its operations.” (AF 66). The CO also found inconsistencies in the Employer’s Application regarding its peakload need and its general operations compared with its previous applications, and stated that the Employer has not explained the shift in its dates of need. (AF 66-67). The CO further concluded that the Employer’s payroll data did not support a peakload need because the data shows that employees worked the most hours in September, a non-peakload month. (AF 67). The CO requested additional documentation to cure the deficiency. (AF 67).

On September 13, 2019, the Employer filed a Response to the NOD, attaching the requested documentation, including payroll data for 2017, Revenue by Month for 2017-2018, and Job Lists for 2017-2019. (AF 40-61). The Employer explained that its temporary need is from October to July, and the start date is listed as November in this Application because of a late filing. (AF 41). The Employer also stated that “last year’s construction applications should not have listed the construction need lasting into November – this was a filing error we would like to correct.” (AF 41). The Employer continued:

In general, the employer’s main business operation is based around a landscape peakload present in the Phoenix, MSA (February through November). The landscaping industries standard peakload is tied to weather, daylight, and other factors related to the planting and maintenance of plants. The other part of the employer’s business (construction activities) is related to the construction of physical barriers and structures that are needed prior to the landscape related activities. Thus, the hardscape (construction work) “peakload” starts and ends in order for softscape work (landscape work).

(AF 41). The Employer argued the fact that its employees worked the most hours in the non-peakload month of September is irrelevant, stating that the CO “seems to miss that during the non-peakload timeframe the permanent employees are continuing to work and are able to cover the employer’s labor needs during that timeframe but may actually be working overtime to accomplish this.” (AF 41). The Employer claimed that its peakload need is sufficiently

⁵ The CO identified four additional deficiencies in the NOD. These additional deficiencies are not discussed herein as the CO did not rely on them in the Final Determination letter.

documented by its “Work by Month Schedule,”⁶ which shows “a need for temporary labor above and beyond its current workforce’s capacity.” (AF 42) (emphasis omitted).

On September 19, 2019, the CO issued a Final Determination denying certification, based on a finding that the Employer did not establish a peakload need pursuant to 20 C.F.R. § 655.6(a) & (b). (AF 32-39). The CO acknowledged the Employer’s argument that the November end date of need in its previous application was in error, but stated that the Employer did not indicate what the correct end date should have been. (AF 38). The CO further stated that the Employer’s comments that permanent employees worked overtime to cover the labor in the month of September suggests that it has a permanent need for additional workers rather than a peakload need. (AF 38). Lastly, the CO found that the Employer’s additional documentation submitted with its Response to the NOD does not support a peakload need for the dates requested, as the 2017 payroll data does not show an increase in hours from October to July, and the 2017-2018 monthly revenue documentation shows all of the Employer’s least earning months are during its stated peak period. (AF 37).

On October 4, 2019, the Employer timely requested administrative review of the denial of the Application before the Board. (AF at 1-31). The Employer stated that, contrary to the CO’s findings, the payroll and revenue data shows a construction labor shortage that peaks in spring with low volumes in late summer and early fall. (AF 2). The Employer explained that the numbers in the revenue data are “somewhat erratic due to the start and stop nature of multiple small construction contracts and that the Revenue data is company-wide (not limited to construction labor projects).” (AF 2). The Employer also suggested that the hours worked in the payroll data may appear more “level” or “consistent” throughout the year, due to its need to use alternative methods to cover its labor demands, such as the use of subcontractors, reliance on overtime work by permanent employees, and project delays pushing work into non-peakload periods. (AF 2). The Employer again stated that the Work by Month Schedule, laying out contractual commitments and overall labor needs supports its peakload need. (AF 3).

On October 17, 2019, I issued a Notice of Docketing and Expedited Briefing Schedule allowing the parties to file briefs within seven business days. Neither party elected to file appellate briefs in this matter.

⁶ The actual document is labelled “Labor Shortage.” (AF 97).

DISCUSSION

At issue on appeal is whether the Employer has adequately documented a temporary, peakload need for twenty-two “Construction Laborers” from November 4, 2019, to July 31, 2020. 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 arguments and such evidence that was actually submitted to the CO in support of the Application. 20 C.F.R. § 655.61(a), (e).

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload, or intermittent. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). To qualify for 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 seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.

Id.; *see, e.g., Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Prods.*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014). An employer must also demonstrate the number of workers and period of need requested are justified, and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3), (4). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

As an initial matter, to the extent that the parties refer to previous applications filed by the Employer, I do not have documentation of the previous applications for comparison, and the scope of my review is therefore limited to the specific Application before me. Further, while the CO relied on the Employer’s Monthly Revenues for 2017 and 2018 in denying certification, I do not find this information to be helpful in determining a peakload need for construction laborers, based on the Employer’s representation that this data is not limited to construction labor projects, but rather is company-wide. (AF 2).

Upon review of the payroll records from 2017 and 2018, I concur with the CO that this data does not support a peakload need from November to July. For both 2017 and 2018, the payroll data demonstrates that the non-peakload month of September had the highest total number of hours worked for the entire calendar year. (AF 45, 96). Similarly, in 2017, the total hours worked in the non-peakload month of August was higher than six of the nine alleged peakload months, and in 2018, the total hours worked in August were higher than seven of the nine alleged peakload months. (AF 48, 96). The Employer's statement that the higher hours in September were due to permanent employees working overtime to cover its labor needs, suggests a permanent, year-round need rather than a temporary peakload need. (AF 41). The payroll documentation therefore does not establish an increased need for workers during the alleged peakload period.

In its request for review, the Employer provided several explanations for why the hours worked in the payroll data may appear "level" throughout the year, such as the use of subcontractors, reliance on overtime work by permanent employees, and project delays pushing work into non-peakload periods. (AF 2). I cannot give any weight to these explanations, as they are new arguments not presented before the CO. 20 C.F.R. § 655.61(a), (e). I will note, however, that the Employer did not provide to the CO any evidence of project delays or use of subcontractors to support its position, and any overtime work should have already been accounted for in the payroll data's total hours worked.

The Employer relies primarily on its "Work by Month Schedule" to establish a peakload need. (AF 3, 42, 97). This chart shows the number of workers currently available compared to the number of workers needed to complete all of the Employer's jobs, broken down by month, for 2019-2020. (AF 97). While this chart appears on its face to show a need for more workers during the peakload period of November to July, I cannot rely on this chart because the Employer has provided no explanation of how it determined the number of workers it would need to meet all of its labor demands. Without this information, I cannot verify the accuracy of the chart. Accordingly, the Employer cannot establish a peakload need based on its "Work by

Month Schedule.”⁷

After reviewing all of the documentation provided in this matter and for the reasons discussed above, I find that the Employer has not met its burden of establishing it has a peakload period of need for twenty-two construction laborers from November 4, 2019, to July 31, 2020.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

⁷ The Employer provided with its request for administrative review an additional chart labelled “Regular-Overtime & Subouts Chart.” (AF 14). Because this chart was never presented to the CO below, I cannot consider it on appeal. 20 C.F.R. § 655.61(a), (e).