Issue Date: 14 October 2021

BALCA CASE NO.: 2021-TLN-00079
ETA Case No.: H-400-21209-488534

In the Matter of:

AG&P Americas Inc.
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Judge Francine L. Applewhite

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to AG&P Americas Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination regarding the Employer’s H-2B temporary labor certification.1 The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States.2 Employers that seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“DOL”).3 Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

H-2B Application

The Employer is a global company that provides supervised subcontracted work teams for construction projects.4 In July 2021, the Employer filed this ETA 9142B, Application for Temporary Employment Certification (“Application”), with the CO. The Employer requested

3 8 C.F.R. §214.2(h)(6)(iii).
4 AF 49-50, 69-70. Citations to the Appeal File are abbreviated as “AF.” The Employer submitted its response to the Notice of Deficiency (“NOD”) twice. Accordingly, references to the Employer’s response will include citations to both submissions.
certification of 25 “Pipe Welders” from October 21, 2021 to July 1, 2022 based on a seasonal need. The Employer supported its application with a Statement of Temporary Need written by Kiewit Offshore Services (“KOS”), citing an acute shortage of skilled workers to meet their increased workload as pandemic restrictions begin to lift.

**Notice of Deficiency**

On August 5, 2021, the CO issued a Notice of Deficiency (“NOD”) in response to the Employer’s application. The CO listed six deficiency grounds: 1) Failure to establish the job opportunity as temporary in nature (20 C.F.R. § 655.6(a) and (b)); 2) Failure to establish temporary need for the number of workers requested (20 C.F.R. § 655.11(e)(3) and (4)); 3) Failure to justify the dates of need requested (20 C.F.R. § 655.6(a) and (b)); 4) Confirmation of job contractor status (20 C.F.R. § 655.19(a) and (b), 655.5); 5) Failure to submit an acceptable job order (20 C.F.R. § 655.16, 655.18); and 6) Failure to submit a complete and accurate ETA Form 9142 (20 C.F.R. § 655.15(a)).

**Employer’s Response to NOD**

On August 17, 2021, the Employer submitted its response to the NOD. The Employer submitted a letter with narrative responses to each deficiency, a job order, and a bar graph representing Global Plant Services’ unmet need for Pipe Welders. The Employer gave the CO permission to revise its application from 25 to 50 Pipe Welders, for intermittent rather than seasonal need, and from the original proposed dates of October 21, 2021 through July 1, 2022 to October 21, 2021 through March 1, 2024.

**CO’s Final Determination**

On September 21, 2021, the CO issued a Final Determination denying the temporary labor certification. The CO found that three deficiencies remained unsatisfied by the Employer’s response: 1) Failure to establish the job opportunity as temporary in nature; 2) Failure to establish temporary need for the number of workers requested; and 3) Failure to submit an acceptable job order.

As for the first deficiency ground, the NOD required that the Employer submit the following additional information:

1. A detailed explanation that describes why the statement of temporary need in Section B.8 of the ETA Form 9142 appears to belong to an employer other than the petitioning employer;

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5 In its response to the NOD, the Employer gave the CO permission to amend the application from 25 to 50 Pipe Welders for an intermittent need from October 21, 2021 to March 1, 2024. The Employer’s application at AF 90 reflects these later amendments, not the original request.
6 AF 95.
7 AF 78.
8 AF 49, 69.
9 AF 72. This graph misstates the company’s name as “Global Plant Solutions.”
2. A statement describing the employer's business history and activities (i.e. primary products or services);
3. Schedule of operations throughout the year. The employer must state the time period each year when it does not need the services or labor;
4. A summary listing of all projects in the area of intended employment for its previous calendar year. The list should include start and end dates of each project and worksite addresses;
5. Summarized monthly payroll reports for the 2018, 2019 and 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Pipe Welders*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
6. An explanation of the data in submitted payroll documentation; and
7. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.10

In the Final Determination, the CO stated that the Employer’s response did not provide supporting documentation to establish its temporary need for workers under the intermittent standard. Although the Employer referred to an attached letter of support, no such letter was attached. The CO stated that it remained unclear whether or not the request represented a bona fide job opportunity. Overall, the CO noted that the application showed a shortage of skilled workers in the area for each field, but did not demonstrate a need for temporary workers on an intermittent basis.

As for the second deficiency ground, the NOD required that the Employer submit the following additional information:

1. An explanation with supporting documentation of why the employer is requesting 25 *Pipe Welders* for Pasadena, TX during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for *Pipe Welders* such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for 2018, 2019 and 2020 previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
4. An explanation of the data in submitted payroll documentation; and

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10 AF 82.
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.\(^{11}\)

In the Final Determination, the CO stated that the Employer failed to address why it needed 50 Pipe Welders and that it was not clear why the Employer needed the workers intermittently. The CO also noted that the Employer failed to attach all requested documentation, including payroll information, and that it did not attach the letter of support to which it referred in its response.

As for the third deficiency ground, the NOD required that the Employer submit the following additional information:

1. The employer must amend Section B.5 and B.6, of ETA Form 9142 to indicate 10/21/2021 through 7/1/2022;
2. The Job Order must include a worksite address that is consistent with Section, F.b.1-6 of the ETA Form 9142;
3. The Job Order must indicate that the employer will provide on-the-job training so that it is consistent with Section F.d.3 of the ETA Form 9142;
4. Indicate the amount for daily subsistence will be at least $13.17 per day during travel to a maximum of $55.00 per day with receipts; and
5. The Job Order must include the State SWA Contact Information.

The NOD went on to say, “The employer’s NOD response must include corrected language which remedies this deficiency so that the Chicago NPC can provide this information to the SWA; OR The employer may submit an already-amended job order that contains all of the required content of 20 CFR 655.18 as listed above.”\(^{12}\)

In the Final Determination, the CO noted that the Employer did not submit a job order with an address that was consistent with Section F.b.1-6 of the ETA Form 9142.

Based on these three deficiencies, the CO denied the Employer’s application for temporary foreign workers.

**Procedural History**

On September 23, 2021, the Employer filed a Notice of Appeal appealing the CO’s Final Determination. On September 28, 2021, I issued a Notice of Docketing and Order Establishing Briefing Schedule. The Appeal File was received on October 1, 2021.

**Applicable Law**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at

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\(^{11}\) AF 83.

\(^{12}\) AF 84.
5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA 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).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; see also Cajun Constructors, Inc., 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); Andy and Ed. Inc., dba Great Chow, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); Eagle Industrial Professional Services, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the 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 is required to establish that its need for the workers requested is “temporary.” Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

(A) Definition. Temporary services or labor under the H-2B classifications refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. 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.


The Employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; Alter & Son Gen. Eng’g, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); BMGR Harvesting, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peak-load, or intermittent need. An employer establishes an “intermittent need” if it shows 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.” 8 CFR 214.2(h)(6)(ii)(4).
The Employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); North Country Wreaths, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); Roadrunner Drywall, 2017-TLN-00035 (May 4, 2017).

Discussion

An employer’s failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.13

In the NOD, the CO clearly identified information and evidence that would provide a reasonable basis upon which to analyze the application. According to the CO, the Employer did not provide information and documentation sufficient to overcome its noted deficiencies.

Specifically, for Deficiency 1, the Employer stated that it would attach a letter of support to clarify its temporary need under the intermittent standard, but it failed to do so. The Employer did provide adequate information describing its business history and activities, but it did not submit a schedule of operations throughout the year, a summary of all projects in the area of intended employment for its previous calendar year, or summary payroll reports as requested by the CO.

For Deficiency 2, the Employer submitted abstract bar graphs representing its clients’ staffing shortages, but failed to provide payroll documents or any other documentation such as contracts or letters of intent that could explain why it needed the number of workers it requested.

For Deficiency 3, the Employer failed to submit a job order with an address consistent with Section F.b. 1-6 of the ETA form 9142.

The Employer has not met its burden of showing that it is entitled to temporary labor certifications for the requested laborers. The Employer was provided with a NOD and in response, the Employer submitted additional evidence. However, the CO determined that the responsive evidence did not cure the deficiencies. After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer did not provide sufficient information and documentation to overcome its deficiencies. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the Denial is AFFIRMED.

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13 20 C.F.R. §655.32(a).
ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is AFFIRMED.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge
Washington, D.C.