BALCA Case No.: 2022-TLN-00041

ETA Case No.: H-400-22001-800754

In the Matter of:

ALCAN MANAGEMENT, LLC,
Employer.

Appearance: Kyle Farmer, Esq.
Farmer Law, PC
Austin, TX
For the Employer

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER
REVERSING AND REMANDING FINAL DETERMINATION

The Certifying Officer (“CO”) denied an application for temporary alien labor certification from Alcan Management, LLC, (the “Employer”) under the H-2B non-immigrant program. Employer timely appealed. I find that the CO’s decision was arbitrary and capricious and remand for further processing.

I. BACKGROUND AND FINDINGS OF FACT

Employers who want to hire foreign workers under the H-2B program must obtain 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

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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); 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 have 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.
review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

On January 1, 2022, the Employer filed a completed Form 9142 requesting 25 Herbicide Applicators to work in counties throughout Alabama. AF 40-51.\(^2\) The Employer asserted a seasonal need for these workers, see 8 C.F.R. § 214.2(h)(6)(ii)(B), lasting from April 1, 2022 through October 31, 2022. Id.

By Notice of Deficiency dated January 10, 2022, AF 33-39, the CO requested more information regarding the asserted seasonal need for 25 Herbicide Applicators:

The employer must submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. The employer’s response must include, but is not limited to, the following:

1. An explanation with supporting documentation of why the employer is requesting 25 Herbicide Applicator workers for Rainsville, Alabama during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 25 Herbicide Applicator workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Herbicide Applicator, 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
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 37. The CO also requested information related to areas of intended employment. AF 38.

On January 20, 2022, Employer responded with the requested information. AF 24-32. Employer explained that the H-2B workers would spray herbicide on brush along utility lines during the peak growing season. AF 24-25. Outside the growing season, Employer’s permanent employees can manage the workload. AF 25.

Employer provided four line graphs that illustrate the payroll and hours worked of their permanent staff, as well as the payroll and hours worked of temporary employees and contract laborers Employer hired during the growing seasons of 2019 and 2020 to perform herbicide spraying. AF 26-27. Employer explained that it intended to bring the work in-house with the use of H-2B workers. AF 25. Employer employed two permanent and six temporary workers, and

\(^2\) References to the appeal file are abbreviated with “AF” followed by the page number.
contracted for the use of 25 additional workers. AF 26-28. Employer stated: “[a]s for the temporary workers, we know the number of temporary workers in 2020 and 2021 in this area to perform this work was twenty-five workers through a subcontractor. The work contracts with our clients are the similar this year as the prior two years, except starting in April instead of May, we have no available staff to handle this work; thus [sic] we know we will need twenty-five temporary workers.” Id.

Reviewing the graphs, in 2019, Employer’s temporary worker payroll increased from about $8,000 in April to a high in excess of $50,000 in August, before declining to about $15,000 in December. AF 27. There does appear to be an error in Employer’s submissions, in that it provided 2019 Earnings Received twice, instead of providing Total Hours Worked in 2019 despite the title of the graph. Id.

In 2020, Employer’s contract labor payroll rose from $40,000 in April to in excess of $140,000 per month in May through August, before declining to zero in November and December. AF 26. Employer’s temporary employee payroll shows a similar peak during the summer growing season. Id. In both 2019 and 2020, Employer’s permanent employee payroll remained relatively constant. Id. The data was signed and attested to by an employee of Employer. AF 29.

Employer also provided two letters of intent from companies stating that they would hire Employer, and explaining Employer’s need for 25 Herbicide Applicators beginning April 1, 2022. AF 31-32. The letters state that the need runs through December 31, 2022, though Employer’s application only requests the workers through October 31. Id.

Employer also amended its application to clarify and narrow the area of intended employment. AF 28-29.

On January 27, 2022, the CO issued a final determination denying the Employer’s application. Having a reviewed the Employer’s response to the Notice of Deficiency, the CO provided the following reasons for denying the application:

The employer indicates that it determined the number of workers requested based on the number that it has historically been required to hire by its subcontractor. However, the employer did not provide any documentation to support the number of workers hired by its subcontractor in the previous years.

The employer submitted two letters of intent from its intended clients, stating the client’s intention of using the employer’s services. However, the employer must note that both the letters were initially submitted along with its initial application and both the letters indicate the dates of worker requirements from April 1, 2022 through December 31, 2022, which is outside of the employer’s requested period of need. The NOD also instructed the employer to provide additional documentation that support the employer’s need to hire 25 Herbicide Applicators. However, this documentation was not provided.

The NOD instructed the employer to submit summarized monthly payroll reports for two previous calendar years that identified, 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 with an explanation of the data in submitted payroll documentation. However, the employer did not submit payroll documentation in the format requested in the NOD.

Instead, the employer provided its 2020 Contractor Payroll Report graph, 2020 Employee Payroll Report graph, 2019 total Hours Worked by Month graph, and 2019 Total Earnings Received graph which did not specify the occupation for which the data represents nor was summarized in a way that clearly supports the employer’s number of workers requested. The employer’s payroll documentation is not sufficient to establish that the employer has a temporary need for 25 workers during the requested period of need from April 1, 2022 to October 31, 2022. Therefore, the employer did not overcome this deficiency.

AF 15.

Employer timely appealed and included legal briefing in its request for review. The Solicitor of Labor did not file a brief on behalf of the CO.

II. DISCUSSION

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. 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 the 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. 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 application 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, slip op. at 19 (Jun. 15, 2016); Brook Ledge, Inc., 2016-TLN-00033, slip op. at 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 action including a rational connection between the facts found and the choice made.” Three Seasons, 2016-TLN-00045, slip op. at 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. 3

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, slip op. at 7 (Jan. 10, 2011); Andy and Ed. Inc., dba Great Chow, 2014-TLN-00040, slip op. at 2 (Sep. 10, 2014); Eagle Industrial Professional Services, 2009-TLN-00073, slip op. at 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-00003-5 (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).4 The agencies categorize 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 seasonal need, an employer “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

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3 Some judges have 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, slip op. at 3 n.2 (ALJ May 22, 2018); Fairfield Construction, Inc., 2020-TLN-00055, slip op. at 7 n.19 (Aug. 20, 2020) (following Best Solutions). However, the weight of the case law, as well as a close reading of the H-2B regulations (as well as the similar H-2A regulations) favors 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.

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.” 8 C.F.R § 214.2(h)(6)(ii)(B)(2). The regulation requires inter alia that an employer asserting a seasonal need prove that the number of workers is “justified.” 20 C.F.R. § 655.11(e)(3).

I find the CO’s conclusions regarding Employer’s need, in the course of denying the application, to be arbitrary and capricious. First, the CO asserted that the employer did not “provide any documentation to support the number of workers hired by its subcontractor in the previous years.” I am not bound by formal rules of evidence in this matter. I find that the attestation of the Employer’s employee, in addition to the data submitted and the explanation offered, is sufficient and uncontested documentation of the number of workers hired in previous years. In addition, the regulation requires simply that the Employer justify the number of seasonal workers requested; the number of workers hired in prior years is one piece of evidence but is not itself required.

Second, the CO faulted the Employer for not submitting documentation in addition to the two letters of intent from its intended clients, to justify 25 Herbicide Applicators. Again, the regulation does not require a minimum number of letters of intent, and I credit the two letters. That the two letters describe the temporary seasonal need as existing through December 31, rather than the applied-for October 31, is not a reason to discount the two letters.

Finally, the CO faulted the Employer for not “submit[ting] payroll documentation in the format requested in the NOD.” The CO asserted that the data “did not specify the occupation for which the data represents nor was summarized in a way that clearly supports the employer’s number of workers requested.” To the contrary, the Employer’s response to the Notice of Deficiency explained that the data reflected employees and contract workers hired to perform herbicide application. Moreover, the regulation does not require that an employer submit data in any particular format, so long as there is sufficient evidence submitted to carry the employer’s burden to justify the number of requested H-2B workers and the seasonality of need. Based on cases that I have reviewed, the line graphs submitted by the Employer here are unusual, but, in combination with Employer’s narrative explanation the graphs do communicate sufficient information, and do clearly illustrate the seasonal nature of Employer’s temporary need.

Because the explanation and conclusion as to the temporary need for 25 Herbicide Applicators is plainly inconsistent with the evidence before the agency, see State Farm, 463 U.S. at 49, I find the denial of the Employer’s application to be arbitrary and capricious. It is ORDERED that this case is remanded for further processing.

For the Board:

EVAN H. NORDBY
Administrative Law Judge