BALCA Case No.: 2022-TLN-00008

ETA Case No.: H-400-21225-519932

In the Matter of:

Hines Building Supply-Us LBM LLC

Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from the request of Hines Building Supply-Us LBM LLC ("Employer") for review of the Certifying Officer’s (“CO”) decision to deny its 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 non-agricultural 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 (“DHS”). 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).

The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural 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 (“DHS”). 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).

BACKGROUND

On August 12, 2021, ETA received an application for temporary employment certification from Employer. AF 98–202. Employer requested certification for “Helpers – carpenters.” AF

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2 On April 29, 2015, the Department of Labor and DHS 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.
4 In this Decision and Order, “AF” stands for “Appeal File.”
200. Employer identified the nature of temporary need as “peakload” and the intended period of employment from October 26, 2021 to December 31, 2021. AF 98

Included with Employer’s application was a “Statement of Temporary Need.” AF 191–94. In its Statement of Temporary Need, Employer wrote the following:

Hines Building Supply needs to supplement its permanent staff temporarily due to a peakload seasonal demand. Hines Building Supply experiences an increased demand for its trusses and insulated wall panels during the warm weather months. This demand increases from April through December of each year due to the need for more trusses and wall panels during this period of time. Cold weather inhibits construction, and thus more trusses and wall panels are ordered during the warm weather months of the year. The trusses and wall panels bought from Hines Building Supply must be built on top of concrete foundations. When weather warms, it allows for concrete construction which is not possible, or is extremely difficult and cost prohibitive during cold weather. During the winter, freezing temperatures do not allow for proper concrete setting. See Exhibit B, Cold Weather Concreting. Furthermore, the winter snow makes access to rural construction sites very difficult. Thus, the construction of most buildings does not begin until springtime in Illinois.

It is only after concrete is poured that the wall panels and trusses will be needed. Therefore, the need for Hines Building Supply’s wall panels and trusses increases during the warm weather months. As a result, our need for more workers and more hours also increases during this time. The hours only pick back up in April once concrete starts being poured again and Hines Building Supply’s products are again needed.

When our orders decrease, from January through March, we will no longer need Ten (10) additional workers to handle the workload because our permanent workers will be able to handle all of the orders. This is a reduction in requested numbers due to the Covid-19 pandemic and related workload changes. The H-2B temporary additions to staff will not become a part of Hines Building Supply’s regular operation because Hines Building Supply is actively trying to recruit U.S. workers. It is only because Hines Building Supply has not found workers for this peakload season that Hines Building Supply needs these workers. Therefore, the need for these workers will end on December 31, 2021, when the demand for Hines Building Supply’s products decreases. This end date is slightly earlier to coincide with the end of a pay period. Please see Exhibit C for more information regarding hiring and retention records over the past couple years.

AF 191–92.

On August 20, 2021, the CO issued a Notice of Deficiency (“NOD”). AF 88–91. The NOD identified three deficiencies in Employer’s application: (1) a denial of the waiver of the time period requirement, (2) failure to establish the job opportunity as temporary in nature, (3) failure
to establish temporary need for the number of workers requested, and (4) job order assurances and content issues. For the first deficiency, citing to 20 C.F.R. § 655.17, the CO wrote: “The employer’s request for a waiver of the time period requirement has been denied. The employer must amend Section B, Item 5, on the ETA Form 9142 to a date no less than 75 days from the application filing date of October 26, 2021.” AF 92. For the second deficiency, citing to 20 C.F.R. § 655.6(a) and (b), the CO wrote that Employer did not demonstrate the requested standard of temporary need:

While the employer indicates that concrete construction is extremely difficult and cost prohibitive, the employer’s peakload need occurs during the cold winter months of November and December when concrete pouring is not ideal based on Exhibit B submitted by them employer. According to www.weather-us.com, within Dekalb County IL, during its peak month of November, average temperatures range from 44 to 31.6 °F. In December, average temperatures range from 32.7 to 22.5°F. The employer’s appears to be seeking to complete work dates of need where it is not conducive for concrete pouring during its peakload need. Further explanation is needed to indicate how the employer determines its peakload need during the dates of need requested for Helpers—Carpenters.

AF 93–94. The CO directed Employer to submit the following information to fix the deficiency:

1. A statement describing the employer's business history, activities (i.e. primary products or services), and schedule of operations throughout the year;
2. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
3. Summarized monthly payroll reports for the 2019 and 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Helpers--Carpenters, 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 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.

AF 94. For the third deficiency, citing to 20 C.F.R. § 655.11(e)(3) and (4), the CO wrote:
The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. In its current application, H-400-21225-519932, the employer is requesting certification for 10 Helpers--Carpenters from October 11, 2021 through December 31, 2021. The employer did not indicate how it determined that it needs 10 Helpers--Carpenters during the requested period of need. Further explanation and documentation is required in order to establish the employer’s need for the 10 Helpers--Carpenters.

Id. The CO directed Employer to submit the following documentation to correct this deficiency:

1. An explanation with supporting documentation of why the employer is requesting 10 Helpers--Carpenters for Dekalb County IL during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 10 Helpers—Carpenters 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 one previous calendar year 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
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 95. For the fourth deficiency, citing to 20 C.F.R. § 655.18(a)(1), the CO wrote:

In order to be in compliance with the above regulations, the employer must indicate the correct period of intended employment, and complete work shift; consistent with job order 8440688 and its ETA Form 9142 H-2B application. The employer’s NOD response must include corrected information 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 language indicated above.

AF 97.

On September 2, 2021, Employer submitted its response to the NOD. AF 38–87. Employer included the following with its response: its NOD response letter, job order, company information, cold weather concreting, and employee schedule. Id.
On September 22, 2021, the CO issued its Final Determination. AF 24–35. The CO concluded that two deficiencies remained: 1) failure to establish the job opportunity as temporary in nature, and 2) failure to establish temporary need for the number of workers requested. Id. Regarding the first deficiency, the CO identified that that Employer did not submit “[s]ummarized monthly payroll reports for the 2019 and 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Helpers – Carpenters, the total number of workers or staff employed, total hours worked, and total earnings received,” or “[a] summary listing of all projects in the area of intended employment for the previous two calendar years indicating the start and end dates of each project and worksite address.” AF 30 (emphasis omitted). The CO also identified that Employer appeared to be exhibiting a year-round labor shortage and its needs were not peakload in nature. AF 32–33. Regarding the second deficiency, the CO identified that Employer did not submit “[s]ummarized monthly payroll reports for the 2019 to 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Helpers – Carpenters, the total number of workers or staff employed, total hours worked, and total earnings received,” and “[c]ontracts, letter of intent, etc. that specify the number of workers and dates of need for the job opportunity.” AF 34 (emphasis omitted). The CO identified that “[i]t appears the employer’s calculated need for ten additional workers is based on a need to fill job positions as of June 29, 2021 and not during its period of need: October 26, 2021 through December 31, 2021,” that “while the employer indicates that new projects come in daily, it did not submit the requested list of projects from the previous calendar years . . . to justify how it calculated a need for ten additional workers from October 26, 2021 through December 31, 2021,” and that “the Department is not clear on how many workers are needed to complete each project as the employer did not submit the requested contracts and letters of intent for the job opportunity.” AF 34–35.

On October 7, 2021, Employer submitted its Request for Administrative Review. AF 1–23. In its appeal, Employer argued that 1) it had a peakload season tied to concrete construction, and 2) it justified the number of workers with the best available evidence. AF 5–6. Employer identified that the regulatory definition of peakload need did not mean that a peakload may not occur on a periodic basis and provided further explanation as to why it believed it met the peakload requirements:

It is unclear why the CO asserts that cold weather in November and December would precludes (sic) Hines from supplying materials which are fabricated inside a manufacturing plant to be used on the interior and exterior of buildings after the concrete is poured. Looking at the record at a whole clearly illustrates that the Company does not construct buildings but rather supplies building materials throughout the construction processes.

The Notice of Deficiency requested a summary listing of all projects in the area of intended employment from the previous two calendar years indicating the start and end dates of each project and worksite addresses. This again seems to indicate a deep misunderstanding for the nature of the Company’s business. The Company supplies building materials out of a facility. This type of information is not typically kept by building supply companies but rather by construction companies. It is illogical for Hines to require customers to provide data related to construction
project begin dates, end dates, or even worksites (unless delivery is requested). Hines simply fulfills orders for different components such as roof trusses, floor trusses, wall panels, doors, and trim. If a customer orders doors from Hines, why would Hines retain the start and end dates and worksite of the construction project? This court has previously acknowledged that concrete pouring may be the precursor to a company’s work while the actual season does not take place until months after. Similarly, although Employer does not pour the concrete and is a step removed from the seasonal limitation that creates Employer’s yearly cyclical work cycle, the Employer has demonstrated that it has a need for seasonal employment under Section 655.103(d).

AF 4–5. Employer also further asserted that the regulations provided flexibility with the kind of documentation it may use to support its purported need for workers requested:

The regulations require that the number of workers be justified. However, the regulations do not require any level of specificity for the calculations. Here the Employer justified its need by providing its current vacancies, retention issues and history, as well as obviously the opinion of the Area Operations Manager Randy Bonacorsi who has more than 20 years of experience in building supplies, and has been working in the same region for the duration of this time.

AF 6.

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. Id.

Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO’s determinations. Brazen & Greer Masonry, Inc., 2019-TLN-00038 (Mar. 6, 2019); The Yard Experts, Inc., 2017-TLN-00024 (Mar. 14, 2017); Brooks Ledge, Inc., 2016-TLN-00033 (May 10, 2016).

Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. See Judulang v. Holder, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has 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.” 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). In reviewing the CO’s
A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.* Inquiry into factual issues “is to be searching and careful,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis” that the CO has not provided. *State Farm*, 463 U.S. at 43; see also *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

**DISCUSSION**

Pursuant to the applicable regulation, Employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary, and that the number of worker positions and period of need are justified, and that request represents a bona fide job opportunity. 20 C.F.R. §§ 655.6(a) and (b); 20 C.F.R. §§ 655.6(e)(3) and (4).

To qualify as a peak load need, the 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The CO, in its denial, determined that the Department was unable to analyze how Employer determined that it had a peakload need from October 26, 2021, through December 31, 2021, or how Employer’s list of workers employed within multiple positions year-round justified its peakload need for that period. The CO thus determined that Employer was not experiencing a true peakload need, but rather, a labor shortage within the intended area of employment.

Employer argues that the need for its supply trails the concrete industry, so its need is not precluded by the cold weather that impacts the concrete industry. It also asserts that while the regulations require that the number of workers be justified, they do not require any level of specificity for the calculations, and it justified its requested number of workers by providing its current vacancies, retention issues and history, and the opinion of an Area Operations Manager.

The CO’s determination was not arbitrary and capricious. Based on the information that was before the CO at the time of the final determination, it is understandable how the CO could find that Employer had not justified its peakload need, or that the CO found Employer did not establish that it regularly employed permanent workers within the relevant position. As the CO pointed out, Employer’s list of workers employed within multiple positions did not demonstrate that Employer had any permanent staff employed as “Helpers – Carpenters.” AF 76–82. It is unclear if any of those workers hired are engaged in work as “ Helpers – Carpenters” full time. Additionally, it understandable as to why the CO was unable to discern why Employer specifically needs ten workers, as in its response to the Notice of Deficiency, Employer simply says that its
attached documents “clearly depict the need for at least eight (8) workers,” rather than explaining
the need for 10 workers specifically. AF 43.

It is also understandable how the CO determined that Employer’s requested period of need
did not align with a seasonal need. While Employer explains in its brief that its business trails the
concrete industry with its need, Employer’s Statement of Need that was before the CO prior to its
determination did not address that. Rather, its explanation in its Statement of Need, the language
used by Employer makes it appear that its need for workers increases with the warmer months
concurrent to the concrete pouring industry:

It is only after concrete is poured that the wall panels and trusses will be needed. Therefore, the need for Hines Building Supply’s wall panels and trusses increases during the warm weather months. As a result, our need for more workers and more
hours also increases during this time. The hours only pick back up in April once concrete starts being poured again and Hines Building Supply’s products are
needed again.

AF 191. While it is possible that Employer’s true need trails behind the concrete industry, as it
asserts in its brief, the CO did not have the information before it prior to issuing its denial, the
CO’s determination that Employer did not establish a need for 10 “Helpers – Carpenters,” as
required by 20 C.F.R. §§ 655.6(a)–(b) and 20 C.F.R. §§ 655.6(e)(3)–(4), is not arbitrary and
capricious.

**CONCLUSION AND ORDER**

The Certifying Officer did not act in an arbitrary and capricious manner in denying
Employer’s Application for Temporary Employment Certification (Form ETA-9142B). Accordingly, the Certifying Officer’s denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey