DECISION AND ORDER AFFIRMING DENIALS OF CERTIFICATION


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 these matters is affirmed.

STATEMENT OF THE CASE

Employer filed two Applications, seeking to hire 45 full-time Welders and 45 full-time Pipefitters from November 1, 2021 to July 31, 2022, in Ingelside, Texas and several other Texas locations, based on a temporary peakload need. (TLN-1, AF 244-324; TLN-6, AF 246-326). In its Statement of Temporary Need, Employer explained that it is an engineering and equipment fabrication company, and that the COVID-19 pandemic “greatly impacted [its] business due to client projects being placed on hold or cancelled,” which in turn forced Employer to reduce their operations to remain in business. (TLN-1, AF 272; TLN-6, AF 274). Employer stated that it is currently experiencing an influx of “new fast-track short term projects,” resulting in a substantial increase in workload and short term demand, requiring the need for H2B workers. (TLN-1, AF 272; TLN-6, AF 274-75). Employer stated that Kiewit Offshore Services (“KOS”) has a project that will begin in November and end in July, and that Bay Ltd. has also requested that Employer provide welders and pipefitters due to large client projects. (TLN-1, AF 273; TLN-6, AF 275). Employer stated that its permanent workers are “maxed out working at its manufacturing facility . . . on the in-house industrial fabrication projects that were place[d] on hold due to the COVID-19 pandemic,” and given the pending contracts with KOS and Bay Ltd., it will require additional temporary workers on a short-term basis. (TLN-1, AF 272; TLN-6, AF 275).

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.

3 References to the Appeal File in Claim No. 2022-TLN-00001 is cited as “TLN-1, AF” followed by the page number, and references to the Appeal File in Claim No. 2022-TLN-00006 are cited as “TLN-6, AF” followed by the page number.
The CO issued a Notice of Deficiency (“NOD”), stating that Employer did not “sufficiently demonstrate the requested standard of temporary need,” as required by 20 C.F.R. § 655.6(a) & (b).\(^4\) (TLN-1, AF 235-43; TLN-6, AF-241). Specifically, the CO stated:

The employer does not indicate that its regularly employed workers will perform services or labor for its new projects. Therefore, it is unclear if additional temporary workers will supplement permanent staff at the area of intended employment due to a seasonal or short-term demand. As a result, the employer did not sufficiently demonstrate how its need meets the regulatory standard.

(TLN-1, AF 239; TLN-6, AF 241-42). The CO requested additional information and documentation to cure the deficiency. (TLN-1, AF 240; TLN-6, AF 241).

Employer filed a Response to the NOD, asserting that the KOS project is much larger than it typically projects and has a “very tight contractual schedule.” (TLN-1, AF 194-95; TLN-6, AF 196-97). According to Employer, it normally executes long-term projects with a much longer duration than that of the KOS contract, and therefore it can plan and staff such projects with its permanent workers, whereas the KOS contract is immediate and short-term. (TLN-1, AF 195; TLN-6, AF 197). Employer stated that its permanent workers already have a full project schedule and are at capacity, resulting in a short-term peakload need for H-2B workers. (TLN-1, AF 195; TLN-6, AF 197). Employer stated, however, that it will “provide project management, supervision, and safety managers on the KOS project to manage the workers.” (TLN-1, AF 195; TLN-6 at 197). Employer cited to its project schedule and payroll records as evidence that it “regularly employs permanent workers to perform the work or labor at the place of employment,” and asserted that the short-term demand is evidenced by its letters of intent and an executed contract with KOS. (TLN-1, AF 195; TLN-6, AF 197). Employer concluded that the peakload need is based on the specific short-term, large contract from KOS. (TLN-1, AF 196; TLN-6, AF 199).

The CO issued a Final Determination, denying certification based on a failure to establish a peakload need pursuant to 20 C.F.R. § 655.6(a) & (b). (TLN-1, AF 178-87; TLN-6, AF 183-88). The CO stated that Employer describes two distinct employment situations – “one employing permanent workers for its typical project work at its in-house manufacturing facility . . . located in Corona, California . . . and another for temporary workers to perform off-site fabrication for several

\(^4\) The CO identified additional deficiencies, which were not ultimately relied upon in the final determination, and will not be discussed herein.
projects located . . . in Ingleside, Texas . . . and the additional [Texas] worksites identified [in the Application].” (TLN-1, AF 185; TLN-6, AF 185). According to the CO, the in-house fabrication work and the off-site fabrication projects are located in entirely different MSAs and represent separate employment situations. (TLN-1, AF 185; TLN-6, AF 186). The CO continued:

Although the employer contends that its contractual obligation to provide labor for the Kiewit and Bay LTD projects represent[s] a peakload temporary need, the employer failed to establish that it regularly employs permanent workers to perform the services or labor at the place of employment in accordance with the peakload definition….

[I]t appears that the employer is seeking to secure an entire labor force supply of [pipefitters and welders] to be able to fulfill future contracts to supply supplemental labor to its clients during the period from November 1, 2021 to July 31, 2022. (TLN-1, AF 185-86; TLN-6, AF 186-87). The CO discounted the summary listing of all projects for the previous two calendar years, as it did not contain start and end dates or worksites for each project as required by the NOD, and instead only indicated the general year of each project. (TLN-1, AF 186; TLN-6, AF 187). The CO found that the incomplete data does not support a peakload need from November 1 through July 31. (TLN-1, AF 186; TLN-6, AF 188). The CO further stated that the payroll data from 2019-2021 does not show a discernable pattern of activity to establish a peakload need. (TLN-1, AF 186-87; TLN-6, AF 188).

Employer timely requested administrative review of the denial of its Applications before the Board. (TLN-1, AF 1-177; TLN-6, AF 1-178). In its Request, Employer argued that it will have permanent employees at the client’s site in Ingleside, including supervisors and safety coordinators, and that it previously had permanent workers at the Ingleside place of employment, through its subsidiary, Industrial Equipment Solutions. (TLN-1, AF 5; TLN-6, AF 6). Employer stated that “supplementation is necessary because much of its permanent staff has shifted focus to the projects delayed by the ongoing pandemic,” but “it will still devote permanent staff for the projects at issue.” (TLN-1, AF 9; TLN-6, AF 10). Employer reiterated that its peakload need is based on a short-term demand as a result of the KOS project and stated the need is not a seasonal need as suggested by the CO. (TLN-1, AF 9; TLN-6, AF 10-11).

The matter was referred to BALCA and assigned to me. On October 18, 2021, I issued a Notice of Docketing and Expedited Briefing Schedule allowing the parties to file briefs within seven business days. Neither party filed an appellate brief.
DISCUSSION

At issue on appeal is whether Employer has adequately documented a temporary, peakload need for 45 Pipefitters and 45 Welders from November 1, 2021 to July 31, 2022. The scope of the Board’s review is limited to the appeal file prepared by the CO, and 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). After considering the evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

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)(ii); 20 C.F.R. § 655.6(b). To qualify for peakload need, an employer must establish that (1) “it regularly employs permanent workers to perform the services or labor at the place of employment”; (2) “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 (3) “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).

The CO’s primary reason for denial in this case was that Employer failed to establish the first element of a peakload need – that it regularly employs permanent workers to perform the services or labor at the place of employment. The CO found that because Employer indicated that all of its permanent staff is engaged in completing in-house projects at its manufacturing facility in Corona, California, the temporary workers sought in its Applications will not be supplementing permanent staff in the area of intended employment, i.e. Ingleside, Texas, and other nearby Texas sites, as required by the regulations for a peak load need. I agree with the CO’s conclusion.

Employer argues that its payroll summary reports establish that it regularly employs permanent welders and pipefitters. (TLN-1, AF 195; TLN-6, AF 198). While this data does establish the general existence of a permanent workforce, it is silent as to the location of the permanent employees, and it therefore does not establish that Employer regularly employs
permanent employees \textit{in the area of intended employment} as required by the regulations. Employer additionally relies on its project list for the years 2019-2021, but this information similarly does not aid Employer in establishing the presence of permanent staff in the area of intended employment. The project list does not identify the worksite locations for the projects (which the CO specifically requested in the NOD), making it impossible to confirm whether there were any projects in the area of intended employment.

By Employer’s own statements, its permanent staff is “maxed out” and “at capacity” working at its manufacturing facility in California, suggesting that there is no permanent staff in the area of intended employment. Employer did state in its documentation that it will have some permanent staff at the KOS worksite in Ingleside, specifically project managers, supervisors, and safety coordinators, and that it previously had permanent workers at the Ingleside place of employment, through a subsidiary company. (TLN-1, AF 5, 9; TLN-6, AF 5-6, 10). Employer, however, provided no evidence to support these statements, and even taking Employer at its word, the statements are still insufficient to establish it has permanent staff in the area of intended employment. The fact that Employer’s \textit{subsidiary} had permanent workers in the area of intended employment \textit{in the past} does not establish that Employer regularly employs permanent staff in the area of intended employment. Similarly, the fact that it will provide supervisors, project managers, and safety coordinators for the specific KOS project does not establish that it \textit{regularly} employs workers in the Texas locations cited in its Applications.

In its request for review, Employer appears to contend that the NOD did not provide adequate notice that the presence of permanent employees in the area of intended employment was at issue, stating:

\begin{quote}
The DOL references Technical America’s in-house work performed by its permanent workers at its Corona manufacturing facility while the temporary workers Technical America is seeking to employ will be working in Ingleside, Texas and nearby MSAs which is not in the same area of intended employment. Unfortunately, the DOL did not seek prior further clarification on the NOD if unclear on this point; the DOL simply made this point in its Denial.”
\end{quote}

(TLN-1, AF 5; TLN-6, AF 5-6). Contrary to Employer’s position, I find that NOD placed Employer on notice that the existence of a permanent staff in the area of intended employment was at issue. The CO unambiguously stated in the NOD: “The employer does not indicate that its regularly employed workers will perform services or labor for its new projects. Therefore, it is unclear if additional temporary workers will supplement permanent staff at the area of intended
employment due to a seasonal or short-term demand.” (TLN-1, AF 239; TLN-6, AF 240). Further, to cure the deficiency, Employer was directed to provide a project list for “all projects in area of intended employment” with worksite addresses, as well as any “other evidence and documentation that similarly serves to justify the dates of need being requested for certification.” (TLN-1, AF 240; TLN-6, AF 241) (emphasis added).

Lastly, Employer cites to, and I acknowledge, the recent BALCA case, *Pennum Inc.*, 2021-TLN-00063 (BALCA Sept. 16, 2021), involving nearly identical facts as the present appeal. (TLN-1, AF 9; TLN-6, AF 10). In *Pennum*, the employer was likewise a fabrication company that sought temporary welders, cutters, solderers and brazers to complete large contracts with KOS and Bay, Ltd., in Ingleside, Texas and various other Texas locations, from October 1, 2021 to July 31, 2022. As in this case, the employer argued that many projects were delayed due to COVID, causing its permanent staff to be “maxed out” working on these projects. The CO denied certification in part because the workers in Ingleside, Texas would be working in a different area of intended employment than the employer’s permanent workers who were working in-house in California, and in its request for review, the employer argued that it will in fact have supervisors, safety coordinators, and other permanent workers assigned to the KOS project, and had permanent workers in Ingleside in the past. The ALJ in *Pennum* reversed the CO’s denial, finding that the employer established that it regularly employs workers at the Texas locations. In reading the decision as a whole, it appears that the ALJ relied on the employer’s statements that it will have some permanent staff at the worksite, to find that the employer regularly employs permanent workers at the place of intended employment. However, I have found above that Employer’s similar statements in the case before me are insufficient to meet its burden of establishing that it regularly employs permanent employees in the area of intended employment.

After reviewing all of the documentation provided in this matter and for the reasons discussed above, I find that Employer has failed to establish a peakload need as defined by 20 C.F.R. § 655.6(b), as it has not proven that it regularly employs permanent workers in the area of

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5 The ALJ in *Pennum* relied heavily on *Industrial Equipment Solutions, Inc.*, 2018-TLN-00147, 00148 (July 13, 2018) in rendering his opinion, but in that case, there was “no disagreement that the Employer regularly employs permanent workers to perform the services or labor at the place of employment,” and therefore it has limited persuasive value on this issue.

6 To the extent that the ALJ in *Pennum* also relied on payroll data generally showing permanent employees, as previously discussed, simply establishing the existence of permanent workers does not meet the peakload standard that Employer regularly has permanent staff in the area of intended employment.
intended employment.

ORDER

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

SO ORDERED.

JONATHAN C. CALIANOS
District Chief Administrative Law Judge

Boston, Massachusetts