



Issue Date: 26 March 2012

BALCA Case No.: 2012-TLN-00021

ETA Case No.: C-12017-57343

In the Matter of:

D & D ROOFING, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Ann Allott, Esquire
Allott Immigration Law Firm
Centennial, Colorado
For the Employer

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Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") partial certification of an 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 nonagricultural work within the

United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the 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). Following the CO's partial certification of an application under 20 C.F.R. § 655.32(f), an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.33(a). 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 argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On January 17, 2012, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary peakload labor certification from D & D Roofing, Inc. ("the Employer"). AF 890-917.¹ The Employer requested certification for 50 roofer-helpers from April 1, 2012 to December 31, 2012. AF 890. With its application, the Employer submitted its recruitment report, which shows that the Employer successfully hired four domestic workers as a result of its pre-filing recruitment efforts. AF 902-913.

On January 23, 2012, the CO issued a *Request for Further Information* ("RFI"), notifying the Employer it failed to satisfy the obligations of H-2B employers. AF 886-889. The CO informed the Employer that in accordance with 20 C.F.R. § 655.21(a)(4), the Employer was required to include a statement justifying any increase or decrease in the number of H-2B positions being requested for certification from the previous year. AF 888. The CO noted that the Employer's application for 50 H-2B workers did not explain its increased need from the Employer's prior application for 20 workers. *Id.* The CO required the Employer to submit a statement justifying its increase in the number of H-2B workers requested from the previous year, and submit supporting evidence and documentation justifying the number of workers requested. AF 889.

¹ Citations to the 917-page appeal file will be abbreviated "AF" followed by the page number.

Specifically, the CO required the Employer to submit signed work contracts and/or monthly invoices from previous calendar years showing that work will be performed for each month during the requested period of need, annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed during each month requested, summarized monthly payroll reports for a minimum of one previous calendar year that identify the full-time permanent and temporary employees in the requested occupation and the total earnings received, or other information and documentation to support the number of workers requested. *Id.*

The Employer responded to the RFI on January 30, 2012. AF 483-885. With its RFI response, the Employer submitted a statement of temporary need, a bar chart of the Employer's sales during each month in 2011, a summary of the Employer's monthly payroll reports from 2011, and signed work contracts showing that work will be performed for each month during the requested period of need. The Employer's payroll records show the following number of permanent and temporary roofers during each month in 2011:

Month	Number of Permanent Roofers	Number of Temporary Domestic Roofers	Number of Temporary Foreign Roofers
January 2011	68	0	0
February 2011	61	0	0
March 2011	59	0	0
April 2011	80	0	0
May 2011	84	0	1
June 2011	97	1	8
July 2011	99	1	8
August 2011	90	0	8
September 2011	84	0	8
October 2011	88	0	8
November 2011	94	0	8
December 2011	87	0	0

AF 491-492. Additionally, the Employer submitted a list of 67 contracts or notices of awards of contracts for 2012, showing a total of \$5,626,889 in contracted work. AF 493-494. Although this list included the contract amount for each project, the dates when the work will be performed is not indicated. *Id.* The Employer also submitted many of the contracts included on its list of 2012 projects. While many of these contracts do not specify when the projects are to begin and end, several of them do include these specifications.

The contract for 7-11 Broncos Parkway Plaza indicates that the project began on October 31, 2011 and will be substantially completed by March 1, 2012. AF 500-511. Additionally, the contract for Alameda Plaza, dated October 25, 2011, provides that the contract shall commence by November 21, 2011 and be substantially completed within 13 days of the date of commencement. AF 512-518. The contract for Ammons Park provides that the project will commence approximately November 1, 2011 and take about 13 weeks to complete. AF 528. The contract for Bennigan's at Northglenn Marketplace, dated January 25, 2012, provides that the contract shall commence on the date of the agreement and be substantially completed no more than 60 days later. AF 537. Similarly, the contract for Bowles Crossing Shopping Center is dated January 17, 2012 and provides that the project shall commence on the date of the agreement and be substantially completed within 60 days from the date of commencement. AF 551-560. The Centennial House contract provides that the work will be completed by October 28, 2011. AF 593. The Elkridge Elementary School contract, dated December 2, 2011 anticipates completion of the project in July 2012. AF 674-683. The contract for Goddard School Parker Annex provides that the project shall commence on October 12, 2011, and be substantially completed by March 1, 2012. AF 742-744.

On February 24, 2012, the CO partially certified the Employer's application for five H-2B workers. AF 471-473. The CO reduced the number of temporary workers certified because the Employer successfully recruited and hired four U.S. workers, and because the Employer failed to provide sufficient documentation necessary to support its request to increase the number of worker positions and failed to sustain a need for the 20 workers certified by the CO in 2011. AF 472. The CO noted that while the Employer's bar chart showed its sales totaled \$14,692,943.31 in 2011, its list of projects for 2012

shows that the Employer will generate \$5,626,889.00 in sales. *Id.* Based on this information, the CO found that the Employer did not demonstrate that it needed 30 more workers than last year. *Id.* Additionally, the CO noted that although the Employer received certification for 20 workers last year, its 2011 payroll report shows only nine temporary workers were employed. As such, the CO determined that the Employer has a need for nine helper-roofers. *Id.*

On March 2, 2012, the Employer requested BALCA review, arguing that the Employer has a need for 50 H-2B workers during its peakload season between April 1, 2012 and December 31, 2012. AF 1-470. The Employer argues that the \$5,626,889 in 2012 projects only reflects the contracts made to date, but that the Employer continues to make contracts every day. Additionally, the Employer asserts that it had a need for 20 temporary workers in 2011, but that its certification had been reduced to nine due to the hire of 11 U.S. workers. The Employer contends in 2011, one of the H-2B workers did not go to the Consulate, and only one of the 11 U.S. workers showed up, which left the Employer with a seriously diminished capacity during its 2011 peakload season. The Employer contends that it needs 50 workers for 2012 to adequately support its contractual obligations.

DISCUSSION

The H-2B regulations require an employer to include a statement justifying any increase or decrease in the number of H-2B positions being requested for certification from the previous year. 20 C.F.R. § 655.21(a)(4). If requested by the CO, an employer is required to provide documentation to substantiate its temporary need. 20 C.F.R. § 655.21(b). The regulations grant the CO the discretion to issue a partial certification, reducing either the period of need, the number of H-2B positions being requested, or both, based upon information the CO receives in the course of processing the temporary labor certification application, an RFI, or otherwise. 20 C.F.R. § 655.32(f).

In this case, the CO required the Employer to provide documentation to justify its increase in the number of H-2B positions requested from the previous year. In response, the Employer submitted its 2011 payroll charts, which shows that it employed between 80 to 99 permanent workers, and eight or nine temporary workers throughout its 2011

peakload period of April through December. Additionally, the Employer submitted a chart showing that it Employer had \$14,692,943.31 in sales during 2011 and that it has \$5,626,889 in contracts for 2012. AF 489, 493-494.

The Employer's anticipated revenue for 2012 is significantly lower than the Employer's 2011 revenue, which is inconsistent with the Employer's request for 50 H-2B roofer-helpers. While the Employer argues that it continues to make new contracts each day, the evidence in the record does not support an increased need for roofer-helpers beyond the number certified last year, and it is too speculative to assume the Employer will enter into sufficient contracts to support the need for 50 temporary roofer-helpers. Moreover, many of the 2012 projects that are on the Employer's list will have been completed by the time the Employer's peakload season begins. For example, the 7-11 Broncos Parkway Plaza project, the Alameda Plaza project, the Ammons Park project, the Bennigan's project, the Bowles Crossing Shopping Center project, the Centennial House project, and the Goddard School Parker Annex project are all to be substantially completed prior to the requested April 1, 2012 start date. Accordingly, these projects do not support the Employer's assertion that it needs 50 H-2B roofer-helpers to fulfill its contractual obligations.

Last year, the Employer relied on nine temporary roofer-helpers to support its more than \$14 million operation. I agree with the CO's determination that the Employer did not submit sufficient documentation to support its request for 50 temporary roofer-helpers for its 2012 peakload period. Additionally, I find that the CO properly reduced the number of H-2B positions certified to five because the Employer's recruitment report demonstrates it was able to hire four domestic temporary workers. Accordingly, I find that the CO's partial certification for five H-2B roofer-helpers was proper, and it is hereby **ORDERED** that the CO's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge