



Issue Date: 18 June 2013

BALCA Case No.: 2013-TLN-00053
ETA Case No.: H-400-13090-933785

In the Matter of:

MIDWEST POURED FOUNDATIONS, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Opp
Employment USA, LLC
Aberdeen, South Dakota
For the Employer

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For the Certifying Officer

Before: **PAUL R. ALMANZA**
Administrative Law Judge

**DECISION AND ORDER VACATING AND REMANDING
CERTIFYING OFFICER'S DENIAL OF CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial 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 denial of an

application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). For the reasons explained below, the CO’s Final Determination denying certification is VACATED and this matter is REMANDED to the CO with instructions to grant the application.

STATEMENT OF THE CASE

On March 31, 2013, Midwest Poured Foundations, Inc. (the “Employer”) submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). AF 147-160.¹ The Employer requested certification for 50 Construction Laborers to be employed from April 1, 2013, to December 15, 2013. AF 147. In its application, the Employer provided the following information regarding its temporary need for these workers:

Midwest Poured Foundations is a newly-formed cement construction company in Sioux Falls, SD. The biggest challenge for any cement contractor is to find temporary workers who will stay and work the entire peak period. We have a peak load need that runs from April all the way through December. In the northern states the severe cold becomes too extreme to properly pour cement in the winter months and therefore this is the main cement pouring period in the State of South Dakota. There is always a rush to pour as much cement as possible in the summer months when it is warm enough for the cement to be worked and dry properly. This naturally creates a peak load need for cement construction in the State of South Dakota. By December the temperatures cool down so dramatically that the workforce greatly diminishes throughout the winter months due to decreased pouring activity and overall business. Labor shortages are detrimental to any business and we are therefore requesting certification for workers to assist for the entire peak period. We do not anticipate that we will be able to recruit enough local workers to meet our labor needs and therefore are seeking certification under the H-2B program.

AF153. In its application, the Employer also included a letter dated March 11, 2013, from its General Manager Nick Serck² stating that it had completed all required pre-filing recruitment requirements, received three applications, and hired all three applicants for the then-upcoming peak period. AF 160.

Upon reviewing the Employer’s application, the CO determined that the Employer “failed to establish that the number of worker positions being requested for certification is justified and represent [sic] any and all bona fide job opportunities.” AF 143. Accordingly, on April 5, 2013, the CO issued a Request for Further Information

¹ Citations to the 160-page appeal file will be abbreviated “AF” followed by the page number.

² Mr. Serck is identified as Employer’s General Manager at AF 158.

(“RFI”) (AF 143-46) to the Employer seeking “supporting evidence and documentation to establish that the number of worker positions being requested for certification is true and accurate and represents bona fide job opportunities.” AF 145. In the RFI, the CO stated that “the employer did not submit any evidence or documentation to substantiate a need for 50 Construction Laborers from April 1, 2013 to December 15, 2013” and that

The employer’s response must include, but is not limited to, the following:

1. Signed work contracts and/or monthly invoices from previous calendar years(s) [sic] clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6.; or
2. 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 for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6.; and
3. A summarized monthly payroll report for a minimum of one previous calendar year that identifies, 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.

AF 145-46.

By letter dated April 15, 2013, the Employer responded to the RFI with a cover letter thoroughly explaining why it was not able to provide all of the information requested:

The Department has requested various forms of documentation to evidence the employer’s temporary need. It should first be noted that *the employer is a new entity* that was clearly marked on ETA Form 9142. Specifically, *the employer only began operating in September of 2012*. Therefore, trying to verify the employer’s temporary need from past years [sic] documentation is less than relevant at this time. However, for the sake of complying with this request we have submitted copies of paid invoices from September of 2012 through December of 2012, as well as payroll data from all of 2012. It must be noted that since the employer was brand new at this time, and was at its initial stages of operation, it did not have anywhere near the number of total workers requested. Additionally, *it started too late in the year to secure temporary workers for the peak period or utilize the H-2B program*. Therefore there is little within the employer’s previous year’s payroll data that reflects its current

temporary need now that it is fully operational. We have also submitted invoices from April of 2013, showing the ample amount of business the employer has already begun to work this peak period, as well as a rundown of all current bid approvals with current clients for 2013. This bid document greatly and indisputably presents the employer's peak load need for 2013. This document outlines 150 jobs lined up for 2013, totaling over \$3 million in revenue. Of these 150 jobs lined up only 9 ... are outside of the temporary need dates as requested by the employer. Therefore, the employer has lined up just under \$3 million in construction work to be performed in the months of April through December of 2013. It will take a crew of at least 50 temporary workers to meet such a demand.

AF 92 (emphasis added) (AF 91-142 consists of the Employer's entire response to the RFI). The Employer attached 35 invoices dated between September and December 2012 to its response to the RFI (AF 93-127), ten invoices dated April 2013 (AF 128-37), a list of 2013 jobs (AF 138-40), and a summarized monthly payroll report for the previous calendar year (AF 141).

Despite the information the Employer provided in its response to the RFI, on May 23, 2013, the CO issued a Final Determination denying certification, citing Employer's "failure to provide adequate documentation to establish temporary need for number of workers requested," as required by 20 C.F.R. §§ 655.22(n) and 655.23(b). AF 81 (the entire Final Determination is at AF 79-83). In explaining why he found the information provided by the Employer in its response to the RFI was insufficient, the CO wrote:

The employer has not provided adequate documentation in order to substantiate a need for 50 Construction Laborers during the months of April through December. Specifically, *the invoices submitted for 2012 are only for the months September, October, and December* and do not indicate how many workers are needed to complete the work.

Additionally the employer's payroll report for 2012 does not demonstrate a significant increase in need during the requested period of need when the employer indicates it experiences a peak in need for temporary workers. Instead, *the payroll document for 2012 shows permanent workers during September through December only, not April through December as requested.* Furthermore, *at no point during the calendar year were temporary workers employed.*

Also, to justify its temporary need, the employer submitted a list of anticipated job[s] for 2013. However, the job list does not include the number of workers required to complete the work or show a peak need from April through December. Therefore, based on the documentation submitted, the employer has not demonstrated that the requested dates of

need and number of workers have been truly and accurately stated on its application.

The employer did not adequately respond to the RFI and did not provide sufficient documentation to overcome the deficiency listed above, therefore, the application is denied.

AF 81-82 (emphasis added). The employer timely petitioned for administrative review. AF 1-78. The Board issued a Notice of Docketing on May 13, 2013, providing the parties an opportunity to submit briefs on an expedited basis. Both parties timely filed briefs.

DISCUSSION

Scope of Review

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).

In this case, the Employer has submitted additional evidence with its brief – specifically, a letter dated June 3, 2013, from its General Manager Nick Serck and a 2013 profit and loss statement as of June 3, 2013 – that it did not provide to the CO with its application or with its response to the RFI. *See* Employer's Brief dated June 4, 2013; AF 147-60; AF 87-142. The regulation is clear that a request for review “[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a)(5). Moreover, the Board has held that it will not take official notice of any evidence which would undermine the regulation's clear restrictions on the Board's scope review. *See Albert Einstein Medical Center*, 2009-PER-379, slip op. at 9-13 (Nov. 21, 2011) (*en banc*). As the evidence that the Employer submitted with its brief is neither a part of the record upon which the CO based his denial nor an appropriate subject of official notice, I cannot consider it on appeal.

Adequate Documentation to Establish Temporary Need for Workers Requested

20 C.F.R. § 655.22(n) requires the application to “truly and accurately” state “the dates of temporary need, [the] reason for temporary need, and [t]he number of positions being requested for labor certification.” 20 C.F.R. § 655.23(b) requires the CO to determine “whether the employer has ... established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities.”

The CO issued an RFI in this case because, as outlined above, the CO believed the “employer did not submit any evidence or documentation to substantiate a need for 50

Construction Laborers from April 1, 2013 to December 15, 2013.” AF 145.³ The Employer responded with a detailed letter and supporting documentation in the form of 2012 and 2013 invoices, a 2013 job list, and a 2012 payroll summary. AF 91-142.

In its response to the RFI, the Employer provided a reasonable explanation as to why it could not provide all the information requested in the RFI: “*the employer only began operating in September of 2012.*” AF 92 (emphasis added). This brief statement alone undercuts much of the CO’s reasoning in support of the denial of certification as stated in the Final Determination (“the invoices submitted for 2012 are only for the months September, October, and December,” AF 82; “the employer’s payroll report for 2012 does not demonstrate a significant increase in need during the requested period of need,” AF 83; “the payroll document for 2012 shows permanent workers during September through December only, not April through December as requested,” AF 83). The CO utterly failed to acknowledge the Employer’s stated reason for its inability to submit information predating September 2012. More importantly, the CO held the Employer’s failure to submit information that it could not possibly provide (given the fact that it did not operate before September 2012) against the Employer, as demonstrated by the language from the Final Determination quoted above.

The Employer also provided a reasonable explanation in its response to the RFI as to why it did not engage temporary workers in 2012: the Employer “*started too late in the year to secure temporary workers for the peak period or utilize the H-2B program.*” AF 92 (emphasis added). This statement rebuts the CO’s reasoning in support of the denial of certification because, by stating “[f]urthermore, at no point during the calendar year [2012] were temporary workers employed,” AF 83, the CO implied that the Employer’s not having employed temporary workers in 2012 was a factor in determining that the Employer does not need temporary workers in 2013. The CO thus held the Employer’s not having employed temporary workers in 2012 against the Employer even though the Employer provided a valid reason why it did not hire temporary workers that year.

The CO also found that the invoices and 2013 job list the Employer provided were somehow deficient because they did not “indicate how many workers are needed to complete the work” (invoices) or “include the number of workers required to complete the work” (job list). AF 82-83. Nowhere in the RFI was there a requirement that any such documentation (invoices were mentioned specifically, see AF 89) contain information as to how many employees were required to perform each job.⁴

³ An employer is not required to submit any evidence or documentation of temporary need when filing its application. Pursuant to 20 C.F.R. § 655.6(e), an employer need only “maintain documentation evidencing the temporary need and be prepared to submit this documentation in response to a Request for Further Information (RFI) from the CO prior to rendering a Final Determination or in the event of an audit examination.”

⁴ According to Employer’s list of 2013 jobs, out of the 153 jobs listed (while the list itself states it contains 150 jobs, it actually contains 153), only 16 started outside the peakload period. AF 138-40. In other words, 89.5% of Employer’s 2013 jobs fell within the stated

Even though the invoices and job list the Employer provided did not state how many workers were required to perform each job, it is not clear that such evidence is necessary to establish a temporary need under the H-2B regulations. As the Department explained in the preamble to the 2008 Final Rule:

[F]or most employers participating in the H-2B program, demonstrating a seasonal or peakload temporary need can best be evidenced by summarized monthly payroll records 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 employed, the total hours worked. *Such records, however, are not the only means by which employers can choose to document their temporary need. The proposed regulation accordingly leaves it to the employer to retain other types of documentation, including but not limited to work contracts, invoices, client letters of intent, and other evidence that demonstrates that the job opportunity that is the subject of the application exists and is temporary in nature.*

...

The Department also recognizes that conventional evidence such as payroll information may not be sufficient to demonstrate a one-time or intermittent need, or seasonal or peakload need in cases in which the employer's need has changed significantly from the previous year. In such cases, the employer should retain other kinds of documentation with the application that demonstrates the temporary need.

73 Fed. Reg. 78020, 78035 (Dec. 19, 2008) (emphasis added). Thus, while the regulatory history notes that ETA considers payroll records for a full calendar year to be the best type of evidence for demonstrating a seasonal or peakload temporary need, the regulations are flexible enough to permit an employer to present other types of evidence to establish that the job opportunity that is the subject of the application exists and is temporary in nature.

The information the Employer submitted with its response to the RFI more than adequately establishes that it needs 50 construction laborers between April 1, 2013, and December 15, 2013. The Employer provided 35 invoices from September-December 2012 totaling approximately \$297,000, which reflected work the Employer handled with 5 employees one month, 9 for another, and 15 for the last two, or an average of 11 employees per month. Moreover, when considering the numbers of employees Employer

peakload period. Given that only 10.5% of Employer's 2013 jobs were outside its stated peakload period, it is difficult to understand the CO's position that "the employer's RFI response provided further support for denial, such as where it documented that a substantial number of the employer's 2013 projects were scheduled for January-March, outside the stated period of peakload need." CO's Statement of Position dated June 7, 2013, at 5.

had in 2012, it is appropriate to also recognize that as it stated in its response to the RFI, “since the employer was brand new at this time [2012], and was at its initial stages of operation, it did not have anywhere near the number of total workers requested.” AF 92. Given those facts, it is entirely reasonable for the Employer to attest to a need for 50 temporary employees given the 2013 job list containing 153 jobs for the 12 months of 2013 (89.5% of which are in the requested peak load period) totaling approximately \$3.1 million. Accordingly, the Employer has provided adequate supporting documentation that demonstrates that the 50 construction laborer positions it seeks exist and are temporary in nature.

The CO’s Final Determination denying certification focused on the Employer’s failure to provide all the documentation sought in the RFI. As discussed above, however, the regulations provide an employer with flexibility as to the kinds of documentation it may use to support its purported temporary need. Here, the Employer provided evidence and information in response to the RFI that are sufficient to establish its temporary need for the requested positions.

In light of the foregoing, I find that the Employer sufficiently justified its need for 50 Construction Laborers between April 1 and December 15, 2013, and therefore, that the CO erred in denying certification. Accordingly, I hereby remand this matter to the CO with instructions to certify the Employer’s application for temporary labor certification for 50 Construction Laborers.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **VACATED** and **REMANDED** to the Certifying Officer with instructions to **GRANT** Midwest Poured Foundation, Inc.’s application.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge