

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 01 March 2013

OALJ Case No.: 2013-TLN-00036

ETA Case No.: H-400-13006-497249

In the Matter of:

TEXAS EXPRESS PLUMBING, INC.,
Employer

Certifying Officer: Chicago National Processing Center

Before: **STEPHEN M. REILLY**
Administrative Law Judge

**DECISION AND ORDER AFFIRMING 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 non-agricultural 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); 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).

PROCEDURAL HISTORY

This case involves Texas Express Plumbing, Inc.'s (TEP) January 6, 2013 Application for Temporary Labor Certification filed with the Employment and Training Administration ("ETA"). (AF at 58-68).¹ TEP sought H-2B visas for 25 Plumber Helpers for the period from February 18, 2013 through December 13, 2013. TEP applied for these visas under the peakload standard. (AF-58).

¹ Citations to the Administrative File are abbreviated as "AF."

On January 11, 2013 ETA notified TEP that it could not render a final determination and issued a Request for Information (RFI). ETA identified five deficiencies with the application. (AF 50-57). These include:

1. Failure to satisfy obligations of H-2B employers by not clearly defining the duties of the helpers;
2. Failure to make clear that TEP was not a job contractor;
3. Failure to establish that the nature of the employer's need is temporary;
4. Concerns regarding pre-filing recruitment requirements; and,
5. Failure to submit a complete and accurate recruitment report.

ETA gave detailed direction regarding what information should have been filed in response to the RFI.

On January 18, 2013, TEP filed its response to the RFI. This response included an explanatory cover letter and more than 30 pages of documents. (AF 13-47). On January 31, 2013, ETA issued its denial of certification indicating that four of the deficiencies had been resolved, but one remained uncorrected. ETA determined that TEP “Fail[ed] to establish that the nature of the employer's need is temporary.” (AF 9).

On February 14, 2013, TEP filed a Petition for Review seeking to reverse the ETA decision.

DISCUSSION

TEP applied for the certification under the “peakload” standard. Under this standard 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).

In the RFI, ETA noted that TEP:

failed to explain the nature of the temporary need based on the employer's business operations. The employer states, “The months of mid- February to mid-December are favorable for building construction in Texas and prove to be our busiest season. These months provide warmer weather for housing construction.” It is unclear why mid-February through March and November to mid-December are more favorable than mid-December to mid-February.

(AF-53). ETA instructed TEP to include a detailed Statement of Temporary need in its response. The statement needed to contain:

1. A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need.

(AF 53). ETA instructed TEP to include at least the following documentary evidence in the response:

1. Signed work contracts and/or monthly invoices from previous calendar year(s) 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.;
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.;
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; or
4. Other evidence and documentation that similarly serves to justify the chosen standard of temporary need.

(AF-54).

In response to the RFI, TEP filed more than 30 pages of documents including: Sales Experience Chart for January-June 2012, Sales by Customer Summary for January 1- June 20, 2012, Sales Experience Chart for 2011, Sales Data for 2011, Sales by Customer Summary for 2011. This sales data showed a fluctuation in sales in previous years. This sales information failed to convince the Certifying Officer that this workload was temporary. The requested payroll data, which was not provided, might have shed light on the business patterns and facilitated the CO's determination whether this 10 month timeframe was, in fact, a seasonal or short-term demand.

Accompanying TEP's petition for review were 235 pages of Sales by Customer Summaries for 2012 as well as other documents. Because they were not before the CO I did not examine these documents. However, after a cursory review, even if these documents were admitted, I am not convinced they would have led to different results.

I considered the Petition for Review very carefully. I find it unconvincing. It tells TEP's view of the facts. However, it fails to support its statements with citation to the record. In addition, TEP did not discuss how these facts, if supported, would demonstrate that TEP's need is temporary.

CONCLUSION

I find that Texas Express Plumbing failed to demonstrate that it met the requirements for certifying its application for H-2B visas for 25 employees. Specifically it failed to establish that TAP's need is temporary.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is hereby **AFFIRMED** and Texas Express Plumber's Petition for Review is **DENIED**.

SO ORDERED.

For the Board:

STEPHEN M. REILLY
Administrative Law Judge