



**Issue Date: 11 February 2015**

Case No.: 2015-TLN-00019

ETA Case No.: H-400-14346-464214

In the Matter of

**POWER HOUSE PLASTERING, INC.**  
Employer

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

The above-captioned case arises from a request for review by Power House Plastering, Inc. (“the Employer”) of a United States Department of Labor (“DOL”) Certifying Officer’s denial of its application for temporary alien labor certification under 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. *See* 8 U.S.C. §1101 (a)(15)(H)(ii)(b); 8 C.F.R. §214.2 (h)(6)(i); 20 C.F.R. part 655, subpart A, available at 73 Fed. Reg. 78,020 (Dec. 19, 2008) (effective Jan. 18, 2009).

The H-2B program permits employers to hire foreign workers on a temporary basis if “unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the DOL, Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2008).<sup>1</sup>

After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision

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<sup>1</sup> All citations to 20 C.F.R. Part 655 refers to the Final Rule promulgated in 2008. Although the Department promulgated a new Final Rule in February 2012, the U.S. District Court for the Northern District of Florida has issued an order enjoining the Department from implementing or enforcing this rule. *See Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the district court’s order. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance*, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). 20 C.F.R. § 655.33(a).

### **STATEMENT OF THE CASE**

On December 12, 2014, the DOL’s ETA received an application for temporary labor certification, ETA Form 9142, from the Employer. *See* Administrative File (“AF”) at P6405-P6425. The Employer requested certification for 50 construction laborers from February 15, 2015 to December 15, 2015. *Id.*

On December 19, 2014 the CO noted deficiencies with the Employer’s H-2B application and issued a request for further information (“RFI”). AF at P6401-P6404. The deficiency noted was a “failure to provide adequate documentation to establish temporary need for number of workers requested.” *Id.* In the RFI, the CO requested that the Employer submit evidence showing that the number of worker positions being requested for certification is true and accurate, and represents bona fide job opportunities. *Id.* Specifically, the CO requested:

(1) Signed work contracts and/or monthly invoices from previous two calendar years(s) clearly showing work will be performed for each month during the requested period of need . . . ;

(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 . . . ;

(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; and

(4) [A] written explanation as to why no documents was [sic] provided to support the number of workers requested in the application.

*Id.*

On December 26 and December 30, 2014, the Employer submitted responses to the RFI via e-mail and mail, respectively. AF P09-P6400. In its response, the Employer included: (1) a monthly payroll summary chart, indicating total wages paid and gross revenue for the 2012 Calendar Year;<sup>2</sup> (2) copies of Master Trade Agreements with US Home Corporation and Pulte Home Corporation, along with letters of intent; and (3) thousands of invoices spanning the period from June 2013 to December 2014. *Id.*

On January 9, 2015, the CO issued a Final Determination, denying the Employer's ETA Form 9142, finding the Employer failed to establish that:

(1) [t]here are not sufficient numbers of qualified U.S. workers available who are available for the job opportunity for which temporary labor certification is sought; and/or (2) [t]he employment of the H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

AF P04-08.

In an attachment to the Final Determination, the CO further described that the Employer did not cure the deficiency contained in the RFI, specifically noting: “[f]ailure to provide adequate documentation to establish temporary need for number of workers requested.” *Id.*

On January 20, 2015, the Board of Alien Labor Certification Appeals (“BALCA”) received a facsimile transmission from the Employer requesting administrative review of the CO's Final Determination.<sup>3</sup> I issued a Notice of Docketing Assignment and Order dated January 27, 2015, directing the Employer and the Solicitor to submit briefs by no later than the fifth business day after receipt of the appeal file. Briefs were received from the Employer on February 2, 2010, and from the CO on February 4, 2010.

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<sup>2</sup> Although the payroll and revenue table submitted to the CO refers to Calendar Year 2012, the actual dates appear to span from December 2013 to November 2014.

<sup>3</sup> The Employer submitted a Request for Administrative Review via e-mail on January 14, 2015.

## POSITION OF THE PARTIES ON APPEAL

### *Employer's Position*

The Employer, unrepresented in this matter, submitted a brief in support of its appeal on February 2, 2015.<sup>4</sup> The Employer argues that it met, or exceeded, all of the RFI requirements, and therefore its application should be approved.<sup>5</sup>

First, the Employer argues that it established a lack of available qualified workers for the positions sought, and that the proposed employment will not adversely impact the working conditions for similarly employed U.S. workers. In support of its position, Employer stated that it adequately advertised the open job position by running two job-advertisements in the most widely circulated area newspaper. However, it found no willing, able, or capable individuals to fill the positions. Further, the Employer asserts that it received a prevailing wage determination, of \$9 per hour, as the first step in its application process.

Next, the Employer argues that it adequately established a peak-load need for temporary employees. The Employer explained that the single family residence industry follows a similar “peakload” need as the landscaping industry, from February until mid-December. Further, the Employer addressed the CO’s concern that the Employer’s only non-peak month, January, saw the higher revenue in 2014 than most other peakload months. The Employer explained that January 2014 saw unusually high revenue and wages due to (1) a surprise up-tick in workload for December 2013 and January 2014, and (2) its operation of a trade school which paid wages during the training period. Further, the Employer explained that the billing cycles and collection delays often results in revenue collection in January for work performed months prior.

Lastly, the Employer asserted that it has a legitimate need for temporary workers, as it was unable to fulfill contracts in 2014 due to labor shortage, and that it may have to forego contracts in 2015 without approval of the additional laborers sought.

### *Certifying Officer's Position*

The CO, through its counsel, submitted a brief in support of his position that the denial should be affirmed on February 4, 2015. The CO argues that the Employer did not adequately respond to the RFI, or document its temporary need.

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<sup>4</sup> In addition to this brief, the Employer also submitted a Compact Disc containing documents including invoices, etc.

<sup>5</sup> However, the Employer concedes that the additional evidence provided to the CO was incomplete. The stated reasons for this incompleteness is timing, as the request fell over holiday vacation, and the Employer’s inexperience, i.e., this is the Employer’s first application for certification of H-2B temporary workers. *See* Employer’s Brief at 6.

First, the CO argues that the Employer's wages paid and gross monthly revenue chart does not support its need for 50 construction laborers during the requested dates of need, February 15, 2015 to December 15, 2015. The CO notes that Employer's gross monthly revenue chart conflicts with the stated need date. Specifically, the CO asserts that the Employer's only non-peak month is January, and that the documents submitted reflect that the gross monthly revenue for January exceeds Employer's employment for the requested peak months (March, May, June, August, September, October, and November).

Next, the CO asserts that the Employer did not adequately show that it had a bona fide temporary need. Specifically, the payroll and revenue report submitted did not establish a peak-load need, as it failed to show how the Employer's temporary need differs from its permanent need. Further, there is "no evidence to demonstrate what its normal workload is, nor how it changes with this alleged new contract." CO's Brief at 4. In addition, although the Employer alleges that a need exists, the documentation does not provide adequate supporting data, and therefore the CO has "no opportunity to evaluate the requested number of workers to determine if there is in actuality a valid temporary bona fide need here." *Id.*

Finally, the CO emphasizes that, although the Employer has sought to show its need for temporary workers, the information submitted does not substantiate its need for temporary workers in a peak-load capacity versus the use of permanent workforce. Further, the documentation does not illustrate the increased workload of the Employer over what would be its normal operating situation.

### **DISCUSSION**

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 job summary posting on the Nevada Department of Employment website for temporary/full-time general laborers from 2/15/2015 to 12/15/2015, dated 11/4/2014; a copy of a newspaper's job listing section, including an advertisement for 50 temporary workers from 2/15/2015 to 12/15/2015; a monthly payroll report from February 2014-January 2015, listing the number of permanent and temporary workers, along with total hours worked and wages paid; a letter from Pulte Homes, dated 1/23/2015, supporting the Employer's request for supplemental employees under the H-2B visa program.

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). Regrettably, as the evidence that the Employer submitted with its brief, as outlined above, 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.

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 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." While an applicant need only submit a detailed statement of temporary need at the time of the application's filing, failure to provide substantiating evidence or documentation in response to the CO's RFI "may be grounds for the denial of the application." 20 C.F.R. § 655.21(b).

In evaluating whether a job opportunity is temporary, "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need," rather, "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982).

In the present case, the Employer attempted to establish a peakload need. To establish a peakload need, "the petitioner 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 staff will not become part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

I find the documentation provided by the Employer to the CO in response to the RFI failed to establish a peakload need. I agree with the CO's assertion in his brief that while the Employer has attempted to show it has a need for temporary workers, the information the Employer submitted in response to the CO's RFI did not substantiate a need for such workers in a "peakload situation versus use of its own permanent workforce." Employer's Brief at 5. None of the information submitted to the CO in response to the RFI addressed whether the Employer regularly employs permanent construction laborers and whether the construction laborers sought would supplement such a permanent staff. The Employer submitted some payroll record which purports to depict its payment of both temporary and permanent workers in 2014 with its appeal

brief. My decision, however, must be based on the evidence in the AF and I cannot consider any new evidence submitted by the Employer with its brief on appeal.

The CO noted that the Employer's records indicated that wages paid in January (its only alleged non-peak month) were higher than those paid in the months of March, April, June, July and September – contradicting the Employer's assertion of peakload need for workers in those months. AF at P12. Here, the Employer offers the explanation in its appeal brief that its higher revenue shown for January in its payroll summary chart submitted to the CO was aberrational due to its trade school operation and billing cycles. Even assuming that to be true, this information was not presented to the CO when the Employer provided its responses to the RFI.

I find the Employer's invoices for work it performed for various builders covering the period from June 2013 to December 2014 do not show the Employer's normal workload and how its temporary need for workers differs from its need for permanent staff. Similarly, the Master Agreements with US Homes and Pulte Homes, as well as the letters of intent from Lennar Homes and Century Homes, do not demonstrate how, if in any way, the Employer's normal workload would change as a result of those Master Agreements or fulfillment of the terms reflected in the letters of intent. Those documents also do not specifically describe the work to be performed for each month of the requested period, i.e., February 15 to December 15, 2015.

This case is analogous to the matter of *Paul Johnson Drywall, Inc.*, 2013-TLN-00061 (September 30, 2013) also cited in the CO's brief. In that case, the Administrative Law Judge affirmed the CO's decision denying an application for H-2B workers in which the employer sought drywall helpers for a period from February to November, which it claimed to be peakload months. In addressing the explanation offered by employer of the trends in construction effecting workload, the Administrative Law Judge noted:

Employer's explanation is certainly plausible; the problem is that it merely explains the erratic and volatile nature of the construction industry in the past few years and its current need for workers. What it does not establish is that its need is temporary, peakload, intermittent, or seasonal.

*Id.* at 4.

In this case, as in *Paul Johnson*, denial of the certification requested was proper.

### **CONCLUSION**

In reviewing the record before the CO, I find that the Employer has failed to demonstrate that its need for H-2B workers is temporary or peakload as is required under 20 C.F.R. § 655.15.

Nothing in this Decision precludes the parties from seeking to resolve this matter. However, on the record before me, I have no alternative but to affirm the CO's denial.

**ORDER**

In light of the foregoing, the Certifying Officer's decision is **AFFIRMED**.

For the Board:

LYSTRA A. HARRIS  
Administrative Law Judge