



Issue Date: 03 June 2016

**BALCA Case No.:** 2016-TLN-00047  
**ETA Case Nos.:** H-400-16048-244246

*In the Matter of:*

**ERICKSON CONSTRUCTION,**  
*Employer.*

**Certifying Officer:** Leslie Abella Dahan  
Chicago National Processing Center

**Before:** PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

### **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This proceeding is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Erickson Construction's request for administrative review of the Certifying Officer's (CO) denial of temporary labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(H)(ii)(b).

Employers who seek to hire foreign workers under this program must apply for and receive a "labor certification" from the U.S. Department of Labor (DOL). 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration (ETA) pursuant to the procedures and standards codified at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.61. BALCA "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." § 655.61(e).

### **BACKGROUND**

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<sup>1</sup> On April 29, 2015, the DOL and the DHS jointly published an *Interim Final Rule* to replace the regulations at 20 C.F.R. Part 655, Subpart A. See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). The 2015 IFR bifurcates the application process. Under the bifurcated process, a prospective H-2B employer must first file an *H-2B Registration* (ETA Form 9155) establishing its need for service or labor is temporary in nature, and then file an *Application for Temporary Employment Certification* (ETA Form 9142B). Section 655.11(j), however, provides until the DOL has implemented the registration process, the CO is to adjudicate temporary need during the application process. DOL has not yet implemented the registration process; thus, the CO evaluates temporary need during the application process, using the requirements of § 655.11(e).

The Employer is a construction company with 40 years of experience specializing in wood trusses and framing of homes for developers. The Employer is based in Chandler, Arizona and provides its building services in multiple locations in Arizona, California, and Nevada. The Employer operates year round and currently has more than 260 workers. AF 360.<sup>2</sup>

On February 17, 2016, the Employer filed an H-2B application with the ETA seeking 40 full-time workers to be employed as Carpenter Helpers for the period from May 2, 2016 through October 31, 2016. *Id.* The Statement of Temporary Need filed in support of the application stated that home construction in Northern California places an increase in demand for framing services in early February extending through October with a decrease in demand from November through January. *Id.* The application further states a framing crew consists of seven to eight men. The Employer's 260 workers are sufficient for the slow season, but it needs an additional forty supplemental helpers to meet its peak load demand for the Sacramento metropolitan area. AF 366.

On April 14, 2016, the CO issued a *Notice of Deficiency* (NOD) notifying the Employer that its application did not comply with all the requirements of the H-2B program. AF 353. In particular, the CO cited §655.11(e)(3) and (4):

The CO will review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

- (3) The number of worker positions and period of need are justified; and
- (4) The request represents a bona fide job opportunity.

The CO determined that the Employer failed to establish that its request for 40 workers is true and accurate and represents bona fide job opportunities. AF 356. Specifically, the CO indicated that in addition to the present application requesting 40 workers from May 2, 2016 through October 31, 2016, the Employer has a separate pending application also requesting 40 workers from February 1, 2016 through October 31, 2016. Thus, the Employer is actually requesting a total of 80 workers for its 2016 season. AF 356.

The CO requested additional information indicating the total number of workers the Employer is requesting for 2016, and why an additional 40 workers are needed for the same worksite with similar dates of need. The CO also requested supporting documentation such as contracts or letters of intent that specify the number of workers needed and the dates of need. AF 356.

The Employer responded to the NOD on April 28, 2016. AF 24-351. The Employer submitted graphs indicating the "actual unit counts" for January 2014 – February 2016 and projected units for the remainder of 2016, a bar graph illustrating the increase in issuance of building permits for 2016, a list of contracted jobsites, statistical information related to the construction industry, newspaper articles on Sacramento's housing market, the Employer's Sacramento job itinerary, and five contracts/master agreements with home construction companies.

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<sup>2</sup> Citations to the Appeal File are abbreviated as "AF" followed by the page number.

The CO issued a *Final Determination* denying certification on May 23, 2016. AF 9-23. The CO acknowledged that the Employer submitted contracts for construction services, a list of worksites, and a statement explaining its request for an additional 40 workers. The CO noted the Employer's concurrent application for 40 workers was certified, but determined the provided documentation did not substantiate the need for an additional 40 workers requested in the present application. AF 8.

The Employer filed a request for review with BALCA on May 24, 2016. AF 1-8. BALCA received the Appeal File on May 25, 2016. BALCA issued a Notice of Docketing on May 26, 2016, notifying the parties that the appeal had been docketed and providing the parties an opportunity to submit briefs on an expedited basis. The Employer submitted a letter response by email on June 1, 2016, along with copies of the emails sent to the CO on April 28, 2016 (acknowledged by the CO on April 29); these emails are already included in the Appeal File. AF 24-27. The CO did not submit a brief.

### **DISCUSSION**

The 2015 Interim Final Rule (IFR) provides that an employer's request for administrative review must: (1) clearly identify the particular determination for which review is sought; (2) set forth the particular grounds for the request; (3) include a copy of the CO's determination; and (4) may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. § 655.61.

The Employer requests review of its denial of 40 temporary workers on the basis it presented evidence of its peak load need. Section 655.11(e)(3) and (4) require justification for the number of workers for the period of need for a bona fide job opportunity.

The Employer already received certification for 40 temporary workers at the same job location for nearly the same period of need. The documentation the Employer submitted in response to the CO's NOD did not demonstrate an actual need for 40 more workers, but rather it shows the Employer anticipates market conditions will result in more home construction. The anticipation of a greater demand for its services, even based on 40 years of experience and market research, is still speculative and does not represent a bona fide job opportunity as required by § 655.11.

The contracts/master agreements the Employer submitted do not include an actual number of units to be constructed. The contracts are for framing homes in new developments, and the initiation of work on each unit is contingent on a purchase order. The agreements were made in 2014 and 2015, but the Employer did not indicate how many units it constructed for each developer or how many workers were utilized in previous years. The agreements the Employer submitted in support for its request for 40 workers, in addition to the 40 already approved, were in place and remained unchanged for nearly a year in some instances and more than a year in others. The information provided does not substantiate the need for twice the number of workers originally requested. The Employer did not demonstrate the number of workers it requested and period of need are justified; and the Employer did not demonstrate its request represents a bona fide job opportunity as required by § 655.11(e)(3) and (4).

In its letter dated June 1, 2016 in response to the Notice of Docketing, Employer argues that the CO implicitly and improperly found its April 28 response to the CO's Notice of Deficiency was untimely as it was received on April 29, one day late. Employer argues that it actually submitted its response on April 28, and the CO incorrectly determined that it was received on April 29. Although the Employer is correct – its emails show that they were transmitted in the late afternoon of April 28 – this argument does not help the Employer, because the CO considered its April 28 response, whether or not it was untimely, in finding that the Employer had not shown the need for the additional 40 workers. Employer's June 1 submission does not address that bottom-line issue.

Accordingly, the denial of certification will be affirmed.

**ORDER**

In light of the foregoing, the Certifying Officer's *Final Determination* denying certification is hereby AFFIRMED.

For the Board:

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

PCJ,JR./JDP/jcb  
Newport News, Virginia