U.S. Department of Labor Board of Alien Labor Certification Appeals

Issue Date: 20 June 2016

BALCA Case No.: 2016-TLN-00050
ETA Case Nos.: H-400-16035-844147

In the Matter of:

ERICKSON CONSTRUCTION.

Employer.

Appearances: Reed Graham
Chief Operating Officer
Erickson Construction
Chandler, AZ
For the Employer

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Attorney
U.S. Department of Labor
Office of the Solicitor of Labor
Washington, D.C.
For the Certifying Officer

Before: ALAN L. BERGSTROM
Administrative Law Judge

DECISION AND ORDER - AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to the Employer's request for review of the Certifying Officer's denial in the above-captioned H-2B temporary labor certification matter. 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, "if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor." 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a)[1] Employers who seek to hire foreign workers under this program must apply for and receive a "labor certification" from

[1] The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and are effective as of April 29, 2015.

the U.S. Department of Labor ("DOL"). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer ("CO") of the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration ("ETA"). 20 CFR §655.50 If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53

STATEMENT OF THE CASE

On February 4, 2016[2] the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Erickson Construction ("Employer") for 20 "Helper Carpenters" as peakload workers in residential construction to be employed from April 19, 2016 through November 30, 2016 (AF[3] 249-264). The position is classified as O*Net Code 47-3012, Helpers - Carpenters and is to be performed within the Reno–Sparks, Nevada metropolitan statistical area (AF 253). No specific educational requirement was specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment is required in Section F.b Item 3; but, indicated 3 months of experience as a Helper Carpenter in residential construction setting is required in Section F.b Items 4 and 5 (AF 253). The Employer retained Foreman LLC (d/b/a Foreman Workforce Solutions) as its job contractor (AF 252, 26-29).

On April 5, 2016 the CO issued a "Notice of Deficiency" (AF 243-247) indicating the following deficiencies:

> "Deficiency 1: Failure to establish temporary need for the number of workers requested.
>
> … The employer did not sufficiently demonstrate the requested standard of temporary need or period of intended employment.
>
> The employer is requesting 20 Helper-Carpenters from April 19, 2016 through November 30, 2016, based on a peakload need. In order to establish a peakload need, 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 petitioner's regular operation.
>
> … However, the employer has not provided documentation to substantiate how it determined it had a need for temporary workers during the dates of need requested.
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> … The employer must submit supporting evidence and documentation that justifies the standard of temporary need. The employer's response must include, but is not limited to, the following:
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> 1. Summarized monthly payroll reports for a minimum of three previous calendar years 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

[2] Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

[3] "AF" refers to the Appeal File and is followed by the pertinent page number of the relevant page in the Appeal File.

the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;

2. Annualized and/or multi-year work contracts or work agreements from calendar years 2014 and 2015 of the employer's work; and,
3. A letter of explanation with accompanying milestone schedule for the employers requested period of intended employment that distinguishes how the employer determined it would require this period of intended employment to complete the work discussed over the previous period it agreed to in its initial contract.
4. Other evidence and documentation that similarly serves to justify the requested dates of need.

On April 19, 2016 the Employer filed its response to the "Notice of Deficiency" by e-mail, the final e-mail being transmitted at 1:07 AM, Tuesday, April 19, 2016 to "TLC, Chicago – ETA SVC; Raul Betancourt; Raul Leon; Fernando Felix (AF 24-241).

The Employer addressed Deficiency 1 by submitting "Signed Summarized Monthly Payroll for 2013, 2014 and 2015" (AF 34-39). Also submitted was a list of "Jobsites for April through December 2016" (AF 40-42) and supporting subcontract agreements, contract amounts, and invoices for the related jobsites with Ryder NV Management, LLC (AF 53-85), D.R. Horton CA2, Inc. (AF 86-124), Capstone Communities, Inc. (AF 125-171), Silverado Dayton Valley, Inc. (AF 172-208). The employer also provided statistical charts from the Builders Association of Northern Nevada (AF 43-52). The Employer provided no additional detailed information that was identifiable to work with BRG Homes, Diloreto Construction, Evolv DMC, Inc., and Silver Crest Homes. The jobsites listed by cross streets lack specificity to identify the locations by city, county or state.

The payroll records indicated that no temporary employees were retained throughout the January 2013 through December 2015 timeframe. The Employer's information did not indicate any overtime paid to the full-time employees during that same timeframe. The Ryder NV Management, LLC, October 13, 2015, contract submitted indicated the Employer was to complete "all labor for rough framing, siding, exterior trim from foundation under-floor through roof framing" for the "Canoleil" project of units "A through E" in nine buildings located in the City of Sparks, County Washoe, State of Nevada. The D.R. Horton CA2, Inc., November 19, 2015, "Additional Work Amendment" added interior framing, exterior trim, and related work for the November 18, 2015 contracted "Aurora II – 5602" project in the Aurora 2 subdivision. No specific information was provided which set forth the location of the Aurora 2 subdivision or the number of units involved. The Capstone Communities, Inc., August 27, 2015, contract was for framing, stairs, exterior trim and siding of three residential home types within the Sienna Vista community. No information was provided which set forth the location of the Sienna Vista community or the number of units involved. The Silverado Dalton Valley, Inc., March 1, 2013, "Master Trade Agreement" was for "rough carpentry" to be performed at the Silverado at Dayton Valley, City of Dayton, County of Lyon, State of Nevada, for construction of three residential home plans with varying elevations. No information was provided which set forth the number of units involved.

In Item B.9 of the ETA 9142B application, the Employer stated that "Erickson covers markets with multiple locations in Arizona, California and Nevada. Building on 40 years of experience our company sales are over 20 million. We operate throughout the entire year, Monday through

Friday from 7:00 am to 3:00 pm, and our need for temporary employees is due to a peak load event which begins in April and Extends to November each year." In Item F.c, the Employer states that the worksite address is 3595 Airway Drive, Suite 407, Reno, Nevada with multiple worksites within the "Nevada BLS Areas RENO-SPARKS, NV MSA." The state "On-line Job Order" submitted with the application indicated that "workers must present themselves to primary worksite at 3595 Airway Drive, Suite 407, Reno, Nevada, daily, then they will be sent off by company's transportation to other worksites throughout (sic) Reno Metropolitan Area … April 19 to November 30, 2016."

It is officially noticed that the "Reno, NV" metropolitan statistical area includes the counties of Storey and Washoe; Sparks, Nevada is a city located in Washoe County a few miles east of Reno, Nevada; and Lyon County, Nevada is in the "Fernley, NV" micropolitan statistical area which is within the "South Nevada" non-metropolitan statistical area.[4]

In its April 14, 2016, response to the Notice of Deficiency, the Employer stated –

> "Our schedule of operations depends on developers that will typically use January through March as their financial, home planning and new model building months where only a few slabs are poured which will denote a slow season for us. Most builders imposed themselves yearly goals. With orders at hand, we start getting busy in April and peak through the summer months, then begin to shoulder back down in November. Finally, December through March can be slow again and it will usually be used for repairs and pick up work.
>
> The reason for our temporary need for this supplemental workforce is because we typically slow during the end and start of the year. Our typical slowdown is marked by the following three facts:
>
> I. New home owners do not like us in their newly build subdivisions during the Holidays
> II. Shorter sun light with much colder days
> III. Public builders tend to slow down for accounting, reporting and planning purposes.
>
> … The explanation to our 20 supplemental H-2B worker Foreign Labor Certification petition is due to an increment in our typical hot work season; it is a fact that now that the U.S. economy is booming in our part of the country, we have more demand for our framing services. We need more men to come and supplement our permanent work crews. In order to run at full capacity during our hot demand season, we need to create more crews (our perfect crews are composed of seven to eight men – depending on the size of the project; one foreman, one lead man, three skilled carpenters and two or three helpers); and our plan is to promote some of our permanent experienced workers to crew leaders when this supplemental workforce arrives."

No further relevant information was submitted in response to the "Notice of Deficiency."

By the "Non Acceptance Denial" issued on May 27, 2016, the CO denied the application for "20 Helpers-Production Workers" requested by Employer in ETA Case Number H-400-16035-844147 (AF 9-15). The CO provided an "Attachment to Non-Acceptance Denial Letter" for ETA Case Number H-400-16020-219241 involving the same Employer but concerning a request for 30 "Helpers - Production Workers" for the period April 5, 2016 to October 25, 2016. In the attachment the CO only addressed the Employer's February 4, 2016 application for "20 Helpers – Production Workers" and stated –

[4] http://www.bls.gov/oes/current/msa_def.htm ; http://www.mapquest.com

> "In response to the NOD, the employer submitted documentation which included contracts, payroll, lists of job sites, a list of account distributions during 2015, as well as a statement explaining temporary need. A review of the employer's submitted documentation does not substantiate its peakload temporary request.
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> In reviewing the contracts, the employer's business appears to rely on obtaining and maintaining contracts on a year-round basis. The contracts provided were signed on March 2013, August 2015, October 2015 and November 2015. The contracts show the employer's business operation requires the signing of contracts throughout the year with no apparent "peak" in the labor and services requested in this application.
>
> The employer's payroll shows it has not employed temporary workers in the past and its permanent workforce has fluctuated for the past three years. Specifically, the occupation listed in the payroll documents (field only) is not the occupation title as indicated in the employer's Application. The employer's 2015 payroll shows more "field only" workers were employed in January through March 2015 (outside the employer's dates of need) than in September 2015 and November 2015 (both within the employer's requested dates). Also, in 2014, the employer had more permanent "field only" workers in March (outside the employer's requested dates) than in April 2015 (when the employer's "peak" season begins) than in June 2014. The employer also hired as many permanent "field workers" in March 2014 as it did in June 2014. The employer's payroll shows a clear pattern of fluctuation which indicates the employer's business "peaks" are based on the amount of contracts it currently has with contractors and builders.
>
> The employer also provided a list of job sites from April through December 2016 but did not provide comparative documentation for the months of January through March. The account distribution provided did not support the dates of need. It did not support or indicate an evident "peak" for any sustained period during the requested dates of need. Furthermore, "Account Distribution" documents do not support the dates of need as they do not indicate a discernable "peak" for any sustained period during the requested dates of need. All other documentation either did not reference the employer or adequately support the requested dates.
>
> The documentation provided does not substantiate the employer's stated increase in construction activity during this period. Therefore the employer did not overcome the deficiency. … Based on the foregoing reason, the employer's application is denied."

On June 2, 2016, the Employer filed a formal request for administrative review of the denial determination.

In response to the "Notice of Docketing" issued on June 7, 2016, counsel for the CO filed a written brief on June 15, 2016, and the Employer's Chief Operations Officer filed a written brief with additional documents on June 15, 2016. The Employer's extensive additional documentation repeated much of the filing contained in the AF as well as added - a subcontract agreement with BRG Homes LLC; an addendum to a subcontract with Silver Crest Homes; a Master Trade Agreement with Silverado Village 8, LLC; a subcontract agreement with Evolv Development, Management & Construction, Inc.; a construction agreement with Di Loreto Construction, Inc.; and an April 5, 2017 (sic) letter from the President, Builders Association of Northern Nevada. The Parties are advised that in a request for administrative review, the Employer may include "only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued," 20 CFR §655.61(a)(5). During the administrative review only the material contained within the appeal file upon which the denial determination was made may be considered as evidence while the Employer's legal argument in

its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 CFR §655.61(e). Accordingly, the documents attached to Employer's June 15, 2016 filing are not considered.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job "must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment," 20 CFR §655.20(e). Additionally, the employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary … The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by [the Department of Homeland Security] regulations.

These regulations provide that in order for an employer to establish a "peakload need," 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 [employer's] regular operation." 8 CFR §214.2(h)(6)(ii)(B)(3)

Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an H-2B Registration or Application for Temporary Employment Certification where the employer has a need lasting more than 9 months." 20 CFR §655.6

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. Failure to comply with an NOD, including not providing all documentation within the specified time period, will result in a denial of the application. 20 CFR §655.31(b)(4).

Upon appeal to BALCA, only that documentation upon which the CO's final determination was made (the AF), the request for BALCA review (which may not contain evidence that was not submitted to the CO for consideration in the underlying determination) and submitted legal briefs, may be considered. 20 CFR §655.61(e)

The Employer argues that they timely submitted the documentation requested in the NOD and that untimeliness "is not a reason for the denial of our petition." After review of the AF, this presiding Judge finds that untimely filing of documents in response to the NOD was not the basis of denying the Employer's application by the CO. The Employer also assumed that the CO did not consider the correct information in this case because the attachment to the denial letter

carried the caption of another case number involving the Employer's request for 30 temporary workers in California and not the subject 20 workers in Nevada. Review of the AF and the CO's detailed analysis in the attachment indicates that the rationale set forth in the attachment to the denial letter was based on the documentation in the AF for the requested 20 workers in Nevada and not any request for workers in California.

The CO submits, based on the information submitted by the Employer in the AF, that the Employer's business does not have an apparent peak in its business or need for additional labor as alleged, based on the Employers business fluctuation from contracts obtained throughout the year; the documented prior expansion of "its own permanent labor force [which] previously expanded beyond the 300 workers currently on its payroll"; and any increase in workload "could be comfortably handled by its permanent workforce, because its payroll records reveal that a significant percentage of its permanent workforce is employed part-time." The CO also refers to the lack of specific production schedules on the contracted worksites and the lack of labor staffing required to meet a production schedule on the contracted Nevada worksites. In essence, the CO argues that the Employer failed to objectively establish an increase in production requirements during the dates of need justifying an increase in field labor teams that would support an additional 20 Helpers – Carpenters during the requested dates of need.

Failure to establish temporary need for the number of workers requested.

After deliberation on the evidence set forth in the AF, this presiding Judge finds that the evidence fails to establish that the Employer has a need to increase its workforce by 20 Helper - Carpenters[5] during the requested 7-1/2 month period of need. While the Employer stated 2 to 3 Helper - Carpenter work with each construction team, there is no indication of the number of construction teams employed in any of the months from January 2013 through December 2015; no indications of the number of residential framing units completed by those teams during the various months of that period, and no indication that any of those teams were required to work overtime to achieve the number of units completed during the various months from January 2013 to December 2015. There is no evidence establishing an accurate increase in the number of units that are to be completed during April 19, 2016 through November 30, 2016, the requested dates of need set forth in the ETA 9142B, over the same period in 2013 through 2015 which would substantiate a need for any additional H-2B Helper - Carpenters during April to November 2016 requested date of need.

After deliberation on the AF, this Administrative Law Judge finds that, while the Employer subjectively projected a need for additional Helper – Carpenters, the Employer has failed to meet its burden of establishing a peakload need for the requested 20 H-2B residential construction Helper - Carpenters for the stated dates of need from April 19, 2016 through November 29, 2016, in the Reno, Nevada, Metropolitan Statistical Area pursuant to 8 CFR §214.2(h)(6)(ii)(B)(3). Accordingly, the CO properly denied the Employer's February 4, 2016, *Application for Temporary Employment Certification*.

[5] The O*Net classification number and title in the ETA 9142B are for "Helper – Carpenters", though the Parties use "Helper – Production Worker" interchangeably.

ORDER

It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's February 4, 2016, Application for Temporary Employment Certification is AFFIRMED.

Digitally signed by Alan L. Bergstrom
DN: CN=Alan L. Bergstrom, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

ALAN L. BERGSTROM
Administrative Law Judge

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