

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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



Issue Date: 05 January 2016

BALCA Case No.: 2016-TLN-00016
ETA Case Nos.: H-400-15300-421513

In the Matter of:

ERICKSON FRAMING AZ LLC,
Employer.

Certifying Officer: Charlene G. Giles
Director, Chicago National Processing Center

Appearances: Monica Rodriguez
Foremen Workforce Solutions
Phoenix, Arizona
For the Employer

Jeffrey L. Nesvet, Associate Solicitor
Vincent C. Constantino, Senior Trial Attorney
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
For the Certifying Officer

Before: Paul R. Almanza
Administrative Law Judge

**DECISION AND ORDER VACATING DENIAL OF CERTIFICATION
AND DIRECTING GRANT OF PARTIAL CERTIFICATION**

This case arises from a request for review of the Certifying Officer's ("CO") decision to deny 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);¹ 20 C.F.R. § 655.6(b).² Following the CO's denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a). For the reasons explained below, I vacate the CO's Final Determination denying certification and direct the CO to grant partial certification.

STATEMENT OF THE CASE

On October 27, 2015, the Department of Labor's Employment and Training Administration ("ETA") received an *Application for Temporary Employment Certification* from Erickson Framing AZ LLC (the "Employer"). AF 10, 34-63.³ The Employer requested certification for forty Helpers – Production Workers from January 15, 2016, to October 15, 2016. AF 34.

On November 3, 2015, the CO issued a *Notice of Deficiency* ("NOD"), notifying the Employer that its application "fails to meet the criteria for acceptance." AF 26-33. The CO identified two deficiencies: (1) "[f]ailure to establish the job opportunity as temporary in nature" in violation of 20 C.F.R. §§ 655.6(a) and (b); and (2) "[f]ailure to submit an acceptable job order" in violation of 20 C.F.R. § 655.16 and 655.18. AF 30-32. In the *Non Acceptance Denial* issued on November 25, 2015 (the "Final Determination"), the CO based the denial of certification on the first of these two deficiencies. AF 6-11.⁴

With respect to the deficiency on which the CO based the denial of certification, in the NOD the CO required the Employer to "submit a revised statement of temporary need containing an explanation as to why the requested dates of need have significantly changed from the employer's prior application" and also to

[s]ubmit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to, the following:

1. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and

¹ The definition of peakload temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

² On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 *et seq.* (Apr. 29, 2015). The rules provided in the IFR apply to applications "submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015." IFR, 20 C.F.R. § 655.4(e). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

³ Citations to the 63 page appeal file will be abbreviated "AF" followed by the page number.

⁴ Indeed, although the NOD clearly identified two deficiencies, AF 30-33, the CO indicated in the Final Determination that there was only one deficiency: "[t]he CNPC is unable to issue an acceptance in this case because the noted deficiency still remains." AF 10. I need not further discuss the second deficiency as the CO has stated, "[t]he other issue noted in the NOD is no longer at issue in this proceeding." CO's Brief, at 4 n. 3.

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

2. Other evidence and documentation that similarly serves to justify the period of intended employment being requested for certification.

AF 30-31.

By email of November 10, 2015, the Employer submitted a response to the NOD. AF 12-25. In relevant part, the Employer stated:

[O]ur need for temporary employees is due to a peak load event which typically begins, for our truss manufacturing division, in Mid-January and extends to Mid-October of each year.

As supporting evidence, please find attached the summary monthly payroll report from the 2014 calendar year. This report shows information in the designated occupation of Production helpers for our truss manufacturing yard division, hours worked and wages paid. As you can see, this summarized monthly payroll information shows a definite peak load. There are no temporary workers in our 2014 season since all of our U.S. workers are hired permanently due to the fact that there are not many willing to stay in our industry and we offer them an inviting environment so they can stay permanently; unfortunately we have been having issues finding the supplemental workforce that can help our permanent U.S. workers get the job done now the economy in our industry and demand for our trusses has increased. Furthermore in this new initiative, our effort is to help supplement our truss manufacturing yard permanent workforce during its peak load.

Developers will use the months of late October to early January as their home planning and new model building months where only a few slabs are poured which is typically [a] slow season for us. Framers are one of the first trades to start getting busier in early January in the Phoenix, AZ area due to the fact that we are one of the first ones in action right after concrete slabs start pouring. The early goal for most developers is to build and ready homes at subdivisions for the showroom season which is in the spring season. With orders in hand, then we get even busier during April and through-out the summer months and all the way through mid-October because we need to fulfill the demand [for] sold and additional spec homes demanded by builders for year-end closings and public reporting.

AF 14 (with few exceptions, such as the explanation that Employer's 2014 employees were all permanent U.S. workers, this explanation is similar to that provided in the application, *see* AF

34, 40). The summary payroll report submitted by Employer for calendar year 2014 shows the Employer's production helper workforce varied as follows (as noted above, all were permanent U.S. employees in 2014):

| Month (2014) | Permanent U.S. Workers | Total Hours Worked ⁵ |
|--------------|------------------------|---------------------------------|
| January | 164 | 5,328 |
| February | 167 | 6,106 |
| March | 174 | 6,406 |
| April | 182 | 6,592 |
| May | 248 | 11,223 |
| June | 245 | 10,819 |
| July | 252 | 10,535 |
| August | 235 | 9,682 |
| September | 235 | 7,386 |
| October | 172 | 5,151 |
| November | 184 | 5,756 |
| December | 132 | 3,568 |

AF 16 (information concerning temporary workers (zero throughout 2014) and total wages paid (ranging from a low of \$58,385.00 in December to a high of \$183,909.00 in May) omitted).

In the Final Determination, the CO found that,

In response to the NOD, the employer failed to support its need for temporary workers during its entire period of intended employment.

Specifically, the employer requested a period of need of January 15, 2016 to October 15, 2016. As supporting documentation, the employer submitted a summarized monthly payroll report for calendar 2014. The payroll report shows fairly consistent hours worked during September through April. Furthermore, the payroll report indicates the employer employed more workers, had more hours worked, and higher total wages paid during the non-peak month of November than in the requested peak months of October and January. It is only during the

⁵ It appears this column reflects weekly hours worked, rather than monthly. For example, for January, the chart states 5,328 hours were worked by 164 employees. This comes to 32.48 hours per employee, an amount that may be appropriate for a weekly total but that would not be appropriate for a monthly total. Similarly, for May, the chart states 11,223 hours were worked by 248 employees, or 45.25 hours per employee; this may be an appropriate weekly total, but not an appropriate monthly total. While Employer would be well advised to ensure its entries on a monthly payroll report are accurate, I find that Employer's data showing the relative differences in the hours worked among the various months of 2014 based on weekly amounts in those months rather than the total monthly hours worked is still helpful in determining the peakload need even though this data does not appear to show the total number of hours worked in each month. Accordingly, when referring to monthly hours worked in this decision, I focus on the relative differences among the months as reflected by the Employer's 2014 payroll report as an aid in determining which months are in Employer's peakload period and which are not.

months of May through August that the report illustrates a true peakload need. The employer has not justified the entire period of intended employment being requested. Therefore, the employer did not overcome the deficiency.

AF 11.

On December 8, 2015, the Employer requested administrative review of the denial of certification on the grounds that it “needs this guest work force [the 40 workers requested from January 15 to October 15, 2016] to facilitate the peakload need.” AF 3, 5. The Board received the request for review on December 8, 2015, and the appeal file on December 15, 2015.⁶ On December 23, 2015, the Board received a brief on behalf of the CO.

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. §§ 655.61(a), (e). A review of the record compels a conclusion that the CO erred in not granting partial certification as authorized by 20 C.F.R. § 655.54.

The Employer Failed to Establish Temporary Need for the Workers Requested in January, February, March, April, and October

Based on the information provided in the application and in the response to the NOD, the CO was correct in determining that the Employer did not establish a temporary need for forty Helpers – Production Workers from January 15, 2016 to April 30, 2016 and from October 1-15, 2016. Simply put, the narrative explanation provided in the response to the NOD did little more than repeat the explanation in the application. As the CO found the explanation in the application insufficient, the narrative response to the NOD did not provide additional information that could help the CO understand why the requested temporary need period was justified.

Moreover, while the Employer provided additional information in its response to the NOD in the form of its summary payroll report for calendar year 2014, AF 16, that new information did not establish the Employer had a peakload need for the entire period requested. Specifically, the Employer’s payroll report shows that it employed more workers, and had more hours worked, in the non-peakload month of November than in the peakload months of October and January.⁷ The greater number of employees and hours worked in November 2014 as opposed to January and October 2014 undercuts Employer’s assertion that its peakload need begins on January 15 and ends on October 15.

⁶ “The appeal file was submitted to the ALJ and to the employer on the filing of this appeal...” CO’s Brief, at 1 n.1.

⁷ I recognize that the Employer asserts that its peakload period includes only the second half of January and the first half of October. It stands to reason, however, that during a non-peakload month, an employer should have fewer employees, and fewer hours worked, than during a month that is split between peakload and non-peakload periods.

Moreover, the Employer's payroll report shows that it employed more workers in the non-peakload month of November than in the peakload months of February, March, and April. AF 16. The employer's payroll report also shows that while more hours were worked in February, March, and April than in November, the gap in hours was comparatively small, especially when one considers that the Employer had between 167 (February) and 184 (November) workers during these months: there was a difference of 350 hours between February and November, and a difference of 836 hours between April and November. The greater number of employees in November 2014 as opposed to February, March, and April 2014 undercuts Employer's assertion that it has a peakload need in February, March, and April. While more hours were worked in February, March, and April 2014 than in November, I do not find the difference in hours by itself sufficient to establish a peakload need for February, March, and April, particularly as Employer had fewer employees during those months than in the non-peakload month of November.

Accordingly, I find that the CO did not err in concluding that Employer did not establish a peakload need for the period of January 15 to April 30, 2016, and the period of October 1-15, 2016.

Employer Has Established a Peakload Need in May, June, July, August, and September

In the Final Determination, the CO recognizes that the Employer has established a peakload need for certain months, stating that "[i]t is only during the months of May through August that the report [AF 16] illustrates a true peakload need." AF 11. The CO did not err in finding that the Employer established a peakload need in those months, but did err in not finding that Employer also established a peakload need in September.

In the month of September 2014, Employer had 235 employees, who collectively worked 7,386 hours. This is a significantly higher number of employees than in the highest non-peakload month (November, with 184 employees). While the number of hours worked in September was only 794 hours more than the number of hours worked in April, the highest non-peakload month, I do not find the difference in hours sufficient in itself to compel a conclusion that Employer did not establish a peakload need in September based on the number of employees.

Although the CO denied the Employer's request for certification in its entirety, that denial is inconsistent with the CO's finding that "[i]t is only during the months of May through August that the report [AF 16] illustrates a true peakload need." AF 11. The quoted sentence indicates the CO found that the Employer had established a temporary need from May through August 2016. In other words, the CO's findings demonstrate that the stated deficiency of "failure to establish the job opportunity is temporary in nature" pursuant to 20 C.F.R. §§ 655.6(a) and (b) does not exist with respect to the May 1, 2016, through August 31, 2016 portion of the Employer's requested period of need. Additionally, my review of the record indicates that the CO erred in not finding that Employer also established a peakload need for the month of September 2016. As a result, between the CO's own findings as expressed in the Final Determination and my findings concerning September 2016, the stated deficiency of "failure to establish the job opportunity is temporary in nature" pursuant to 20 C.F.R. §§ 655.6(a) and (b)

does not exist with respect to the May 1, 2016, through September 30, 2016, portion of the Employer's requested period of need.

Pursuant to 20 C.F.R. § 655.54, the CO has the discretion to issue a partial certification by reducing the requested period of need. There is no indication in the record that the CO considered exercising her discretion to issue a partial certification. I have given consideration to remanding this matter to the CO under 20 C.F.R. § 655.61(e)(3) so that she CO may determine whether to exercise this discretion. Under the specific facts of this case, however, I find it appropriate to modify the CO's determination under 20 C.F.R. § 655.61(e)(2) and direct that the CO grant partial certification for the requested workers for the period from May 1, 2016 through September 30, 2016. The facts that led me to this conclusion are: (1) the CO found that the deficiency that was the basis for the denial of certification does not exist with respect to the May 1, 2016, through August 31, 2016, portion of the Employer's requested period of need; (2) as explained above, I find this deficiency does not exist for the September 1-30, 2016, portion of the Employer's requested period of need; and (3) as this matter was previously before the CO, she already had the opportunity to determine whether to exercise the discretion afforded under 20 C.F.R. § 655.54 to "issue a partial certification[] reducing ... the period of need ... based upon information the CO receives during the course of processing the [application]" and chose not to exercise that discretion despite having found the Employer established a peakload need for part of the requested period.

ORDER

In light of the foregoing, it is hereby **ORDERED** that: (1) the Certifying Officer's denial of labor certification is **VACATED**; and (2) the Certifying Officer shall **GRANT** Erickson Framing AZ LLC's application for forty Helpers – Production Workers for the period from May 1, 2016, to September 30, 2016.

SO ORDERED.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.