

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: 24 June 2016

Case No.: 2016-TLN-00048
ETA Case No. H-400-16045-679835

In the Matter of

GURO ENERGY, LLC

Employer

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Enrique A. Maciel-Matos
Attorney at Law
The Fowler Law Firm, PC
Austin, Texas
For the Employer

Leticia Sierra, Associate Solicitor
Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for seventy-five temporary nonagricultural workers and an administrative review of the application's denial.¹

2. Findings of Fact.

a. On February 15, 2016, the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) accepted for filing Employer's ETA Form 9142B application for temporary labor certification for seventy-five temporary "door-to-door sales workers, news and street vendors, and related workers" to work from May 2, 2016 through December 1, 2016, based on Employer's claimed peakload need for temporary workers. (AF 157, 313-321)²

b. On April 18, 2016, the CO issued a Notice of Deficiency (NOD). The CO explained the application contained two deficiencies: (1) Employer failed to establish the job opportunity as temporary in nature, as required by 20 C.F.R. § 655.6(a)-(b); and (2) Employer failed to establish a temporary need for the number of workers requested, as required by 20 C.F.R. § 655.11(e)(3)-(4). In accordance with 20 C.F.R. § 655.31(b)(2), the CO permitted Employer to submit a modified application. (AF 157, 303-308)

c. Concerning the first deficiency, the CO explained Employer failed to provide any information concerning its business operations or show how it determined a need for temporary workers during the dates of need requested. The CO required Employer to amend ETA Form 9142, Section B., Item 9., to contain the following:

- 1) A description of the 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 job opportunity and number of foreign workers being requested for certification reflect a temporary 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

¹ On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

² References to the Appeal File are by the abbreviation AF and page numbers.

staff employed, total hours worked, and total earning 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) Other evidence and documentation that similarly served to justify the requested dates of need.

(AF 307-308)

d. Concerning the second deficiency, the CO required Employer to submit further documentation to explain and support Employer's request for seventy-five temporary workers from May 2, 2016 through December 1, 2016. The CO required Employer submit the following:

- 1) A detailed explanation regarding how it determined its need for seventy-five door-to-door sales workers, news and street vendors, and related workers; and
- 2) Additional evidence and/or documentation establishing that the position requested reflects bona fide job opportunities for seventy-five temporary workers.

(AF 308)

e. On April 29, 2016, the CO received Employer's reply to the NOD. Employer also submitted the following: an amended statement of temporary need; a website printout with general information about the companies Exelon and Constellation; an online article describing the average weather and climate in Houston, Texas; the general terms and conditions of a contract for supplier services with Employer and Exelon; Employer's 2015 summary payroll report for door-to-door salespersons; a letter from Employer's president written in support of Employer's application; and a list of job postings for the door-to-door sales position from several websites. (AF 157, 170-302)

f. On May 23, 2016, the CO determined Employer's response to the NOD was unacceptable and denied Employer's application for temporary labor certification based on the same regulations cited for denial set forth in the NOD. (AF 154-161)

g. In part, the CO denied Employer's application based on the letter from Employer's president, which provided:

We are an energy supplier company and these months prove to be our busiest months. Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer, and fall months, from approximately May 2 to December 1, during which time we need to substantially supplement the number of workers for our labor force for these positions.

The CO determined this letter did not provide “any information on its business operations or how it determined it had a need for temporary workers during the dates of need requested.” (AF 158, 297)

h. Employer’s amended statement of temporary need contained the following two statements:

At the outset, please note that our company has a peak load need for workers from February 2nd to December 1st; but we applied late; thereby, requesting a May 2nd start date with and end date of December 1st.

Due to the nature of our work, we are unable to engage in much business during the winter months, approximately December 1 to May 2 because the cold weather is not conducive for our door to door sales persons to be traveling neighborhood to neighborhood asking to speak with a particular home owner.

The CO explained these two statements were contradictory because the first statement indicated the actual period of need as February 2 until December 1 and the second statement indicated Employer lacks business from December 1 until May 2. Thus, the CO explained, the “period of need and the winter months, when business is not in demand, contradict one another.” (AF 159, 177)

i. Employer’s amended statement of temporary need also provided Employer “has never hired persons for these positions with less ability than these foreign nationals possess. Therefore, our company wishes to employ them for a temporary period of nine months as landscape laborers.” In response, the CO explained Employer’s application requested workers from May 2, 2016 until December 1, 2016, which is six months and twenty-nine days of intended employment and “employer did not establish the period of need and the type of temporary workers needed for this job opportunity.” (AF 159, 177)

j. Employer’s amended statement of temporary need also provided:

Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately May 2 to December 1, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predicable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be.

The CO determined this statement showed Employer’s temporary need is contingent

upon the weather, particularly the harsh winter weather. The CO explained that according to Employer's online weather printouts, the average low temperature in December and January is approximately 40 degrees Fahrenheit and the average high temperature during this period is 60 degrees Fahrenheit. The CO concluded this range of temperature was conducive for a door-to-door sales positions and found Employer failed to establish that the job opportunity was temporary in nature. (AF 159, 177)

k. Employer's website printout with general information about Exelon provided:

Our core strategy of balancing power generation with customer load allows us to better manage through changing market and weather conditions. It also means we can offer consistent, high-quality service and stable prices to customers.

Constellation is a leading competitive retail supplier of power, natural gas and energy products and services to businesses, homes, government agencies, municipalities, and utilities. Constellation also is the leading source of wholesale energy in the United States, managing sales, dispatch and delivery from Exelon's generation portfolio.

(AF 161, 186, 193)

l. The attached letter from Employer's president requested the CO to "[p]lease note that due to the nature of our business, as well as our business commitments, it is necessary for our Company to have a stable, continuous workforce as this is an essential element for us to be able to reach our target monetary sales goals." (AF 161, 297)

m. Based on the website printout with general information about Exelon and the letter from Employer's president, the CO determined that Employer demonstrated a permanent, year-round need for the requested workers. The CO further explained Employer requires a "continuous customer interaction, maintenance, monetary exchange, and inquiries that may not have an end-date as long as the customers are receiving services." In relying on the president's statement that a "*stable, continuous workforce is an essential element,*" the CO found Employer failed to demonstrate a specific need for seventy-five temporary workers. (AF 161)

n. On May 26, 2016, Employer requested administrative review of the CO's denial pursuant to 20 C.F.R. § 655.61 and submitted a reply brief in response to the CO's denial of certification. (AF 1-152)

o. On June 2, 2016, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. The CO transmitted the Appeal File on June 6, 2016.

p. Consistent with 20 C.F.R. § 655.61(c), on June 15, 2016, the CO submitted a brief urging BALCA to affirm the CO's decision to deny Employer's ETA Form 9142B application.

3. Applicable Law and Analysis.

a. *H-2B Program.* The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 20 C.F.R. § 655.20.

b. *Standard of Review.* BALCA’s standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO in support of the Employer’s Application. After considering the evidence of record, BALCA must: (1) affirm the CO’s decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof’l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013)(employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Temporary Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). 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 Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer’s need is temporary if the need is limited and will “end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). To demonstrate a temporary need based on peakload need, an employer must demonstrate

[T]hat 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).

e. *Number of Workers and Period of Need Justified.* The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based the following: the number of worker positions and period of need are justified and the

request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4). “[I]t is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word.” *N. Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012).

f. *Analysis.* Employer’s amended statement of need initially indicated a peakload need for temporary workers from February 2, 2016 until December 1, 2016. The amended statement of need also provided that because Employer applied after its “regular” time of temporary need, the requested period of need is from May 2, 2016 until December 1, 2016. However, Employer’s amended statement of need later declared it is “unable to engage in much business” from December 1 to May 2 due to the cold winter weather in Texas. A letter written by Employer’s president also stated that Employer’s peakload need was from May 2 to December 1. Thus, it is contradictory for employer to claim it has a peakload for temporary workers during the same period of time that it also claims it is “unable to engage in much business” due to harsh weather conditions. Additionally, Employer’s amended statement of temporary need provided inconsistent descriptions about the job opportunity. Employer initially declared a need for door-to-door salespersons, but later indicated a need for landscape laborers. Although Employer argues the reference to landscape laborers was “clearly a typographical error,” the employer carries the burden to establish eligibility for temporary alien labor certification. (AF 6) Here, Employer failed to correct this error after the CO issued the NOD and permitted Employer to submit an amended statement of temporary need. *See EDD, LLC d/b/a The Greenery, LLC*, 2016-TLN-00037 (May 9, 2016) (“[I]t is the responsibility of an applicant for temporary labor certification to make sure their application is accurately filled out.”).

Employer stated in its amended statement of need that it has seen an increase in business. (AF 177) Employer explained it recently partnered with Exelon Corporation, a leading competitive energy provider. (AF 178) Employer further explained Exelon assigned the Constellation account to Employer and, thus, Employer now has contracts with increased monetary sales goals. The CO’s NOD instructed Employer to submit an explanation and documentation to establish how it determined the need for the number of requested workers. The CO requested a description of Employer’s business history, the products and services it offers, and a schedule of operations. The CO also requested Employer to submit other evidence and documentation that would assist in justifying the requested dates of need. In response, Employer failed to include any detailed information about its company’s business history, its products and services, and a schedule of operations; rather, Employer only submitted generalized information about the companies Exelon and Constellation. Additionally, Employer claimed it possessed “market research” and “statistics” to establish a lesser need for workers during certain periods of the year; however, Employer also failed to provide this documentation to the CO. (AF 5); 20 C.F.R. 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”).

Employer submitted the general terms and conditions of a contract between Employer and Exelon; however, this contract failed to contain any specific details that the CO could evaluate to determine whether Employer had a temporary need for the requested seventy-five door-to-door salespersons. This contract failed to describe the scope and type of work,

performance schedules, amount of personnel needed, or any actual dates when work would commence and end. *See Erickson Constr. d/b/a Erickson Framing CA LLC*, 2016-TLN-00036 (May 6, 2016) (denial upheld where Employer failed “to provide any contracts specifying actual dates when work would commence and end,” or “furnish information about the scope of work to be done in relation to the amount of time needed to perform the work or the number of workers required.”).

Accordingly, based on the inconsistencies in Employer’s application and failure to present adequate documentation and evidence in support of its application to the CO, Employer failed to carry its burden to establish a temporary peakload need for H-2B workers from May 2, 2016 through December 1, 2016.

Employer declared it had a temporary need for seventy-five door-to-door sales workers from May 2, 2016 through December 1, 2016. Employer’s payroll records show it did not employ any door-to-door salespersons, temporary or permanent, in the previous calendar year from May 2015 through August 2015. At its maximum, Employer employed sixty permanent workers in October 2015. Employer’s request to employ seventy-five temporary workers would more than double the maximum amount of permanent workers it employed in October of the previous calendar year. Employer argues that its need for seventy-five workers is based on a projected goal to complete 12,000 hours and \$135,000 in sales per month. (AF 23) However, as previously discussed, Employer’s contract with Exelon fails to provide any information detailing the specific type of projects or work to be completed, sales goals, or projected staffing estimates. Employer’s declaration to have a temporary need for seventy-five works appears to be based merely on its own subjective estimate to achieve unsupported sales goals. Employer failed to submit evidence in addition to the Exelon contract that justifies Employer’s specific need for seventy-five workers. *See Magnum Builders of NM, Inc.*, 2016-TLN-00020 (Mar. 29, 2016) (denial affirmed where employer “subjectively estimated” need for 40 temporary workers and failed to “substantiate” a need for temporary workers during the claimed period of need). Thus, Employer failed to carry its burden to establish a need for seventy-five temporary workers.

4. Ruling. Employer failed to carry its burden to show its eligibility for H-2B labor certification. The CO’s denial of certification is affirmed in this matter.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge