



Issue Date: 29 March 2016

BALCA Case No.: 2016-TLN-00020
ETA Case Nos.: H-400-15316-816355

In the Matter of:

MAGNUM BUILDERS OF NM, INC.

Employer.

Appearances: Stephen J. Slatton
President
Magnum Builders of NM, Inc.
Albuquerque, NM
For the Employer

Joseph Gilliland, Esq.
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 November 18, 2015² the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Magnum Builders of NM, Inc., (“Employer”) for 40 “Helper Framers” as seasonal workers in residential construction to be employed from February 1, 2016 through October 31, 2016 (AF³ 51-61). The position is classified as O*Net Code 47-3012, Helpers - Carpenters and is to be performed “unknown multiple worksites” within the Albuquerque, New Mexico metropolitan statistical area (AF 70). 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 Framer in residential construction setting is required in Section F.b Items 4 and 5. The Employer retained Foreman Workforce Solutions as its job contractor (AF 62-79).

On November 27, 2015 the CO issued a “Notice of Deficiency” (AF 45-50) indicating the following deficiencies:

“Deficiency 1: Failure to establish temporary need for the number of workers requested.

... The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. The employer did not include adequate attestations to justify the number of workers requested. It is unclear how employer determined the number of workers requested.

... The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing an explanation as to why the requested number of workers has significantly changed from the employer’s last application. AND The employer must submit 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 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; or
2. Other evidence and documentation that similarly serves to justify the number of workers requested.

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.

Deficiency 2: Failure to submit an acceptable job order

... The employer must submit the job order to the State Workforce Agency (SWA) serving the area of intended employment at the same time it submits the Application for Temporary Employment Certification and a copy of the job order to the CNCP. The employer submitted a copy of the self-published job order with its application to CNCP; however, the New Mexico SWA has confirmed that the employer has not placed a job order for the requested position.

... In order to be in compliance with the regulation, the employer must submit its job order to the SWA serving the area of intended employment”

On December 14, 2015 the Employer filed its response to the “Notice of Deficiency” (AF 18-44). The Employer addressed Deficiency 2 by submitting a copy of the SWA job order dated November 30, 2015.

The Employer addressed Deficiency 1 by submitting a list of “Confirmed Projects 2016” (AF 22). The list indicated potential residential framing construction on 768 lots in Albuquerque, New Mexico; 544 lots in “R.R.”; 2 lots in “S.F.” and 1 lot in “Grants.” The Employer does not further identify the “R.R.” or “S.F.” city identities in the project list. It is noted that there is a Red River and Rio Rancho in New Mexico, as well as a Grants, New Mexico and Santa Fe and San Felipe Pueblo, New Mexico. It is officially noticed that Albuquerque is a metropolitan statistical (MSA) encompassing the counties of Sandoval, Bernalillo, Valencia and Torrance; Grants is an MSA for Cibola County; and Santa Fe is the MSA for Santa Fe County. Rio Rancho is in Sandoval County of the Albuquerque MSA. The Employer also submitted a list of “Unconfirmed Projects 2016” indicating potential work on 137 lots in the Albuquerque MSA and 7 lots in other MSAs (AF 29). The Employer also submitted “Payroll Audit Overtime Detail” for the periods 10/21/14 – 12/31/14; 1/1/15-3/31/15; 4/1/15-6/30/15; and 7/1/15-9/30/15 (AF 30-33) These payroll audits indicated that no overtime was paid to the identified workers at any time during the 10/21/14 to 9/30/15 timeframe. The income/expense statements submitted (AF 38-41) provided no relevant information on the need for 40 Helper Framers.

In its December 14, 2015, response the Employer described the residential building cycle as mainly planning during early November to January, some construction of showroom homes in February and March, very busy April to October building spec homes ordered by builders and home sold to buyers, then repairs and pick-up work into the next cycle. The Employer reported

—
“We currently have sufficient skilled man power, around 75 in head count, and we can take care of business with these [sic] men force during the slow season. The bottom line is that we need these 40 helpers to come and complete our current work crews for our peak load period that typically begins in early spring and ends in October based on our yearly schedule of operations. We must attest that we are not party to any collective bargaining agreement governing the job classification that is subject to the H-2B labor certification application and that the job offer represents a bona fide job opportunity. All U.S. and Guest workers will be screened equally.

Our work has doubled from 2015 to 2016 (as shown in our 2015 financial report and our 2016 confirmed contracts report). The economy is picking up; furthermore the additional 40 supplemental helpers will be necessary in order to complete the work that has been contracted to us. Additionally, we have also attached our pending contracts report which we will not be able to accept without this temporary supplemental foreign workforce.

... We work in a fast pace environment and the stick frame homes must be built on a short schedule during the yearly temporary schedule. Furthermore, the perfect framing 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). We currently have sufficient skilled man power, around 75 in head count, and we can take care of business with these [sic] men force during the slow season; however, we exhausted all avenues to find framer helpers and, now that the economy is picking back up, we can't find the additional forty supplemental helpers needed in the Albuquerque Metropolitan area to complete our work crews for our peak load time of need.”

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

By the “Non Acceptance Denial” issued on February 24, 2016, the CO denied the application for 40 Helper Framers requested by Employer (AF 3-7). The CO noted that the Employer’s response to the November 27, 2015 “Notice of Deficiency” was due on December 11, 2015 and received on December 17, 2015. The CO stated “The CNCP is unable to issue an acceptance in this case because the noted deficiency still remains” related to the “Failure to establish temporary need for the number of workers requested.”

The CO noted that in response to Deficiency 1, the Employer “submitted a letter of explanation, two lists which include a simple list of projects, Payroll Audit Overtime details, and a financial summary for the period of January 1, 2015 through October 31, 2015.” The CO stated –

“The submitted letter and documentation did not adequately explain how the employer determined it requires 40 Helper-Carpenters. In the employer’s letter of explanation it states that it requires the temporary workers requested to be able to accept pending contracts it has submitted with the application. However, the employer did not illustrate how these mentioned contracts constitute work obligations that would be fulfilled by the forty workers requested. The lists of projects do not indicate an amount or estimate of work hours required for completion. Also, projects outside the employer’s area of intended employment were included in the list.

Additionally, the employer’s letter indicates that it employs 75 staff, but its payroll audit overtime detail did not list this number of workers. The audit overtime only listed for a portion of these workers, between 9 and 15 workers, during portions of 2014 and all of 2015. These audits also indicate that none of the workers were required to work overtime hours during these periods, which indicates the employer already has sufficient staff to handle its work obligations.

The employer’s documentation and explanation did not establish a temporary need for the number of workers requested. Therefore, the employer did not overcome the deficiency.”

On March 5, 2016, the Employer filed a formal request for administrative review of the denial determination.

In response to the “Notice of Docketing” issued on March 15, 2016, counsel for the CO filed a written brief on March 22, 2016, and the Employer’s President filed a written brief on March 23, 2016. The Employer attached a one sheet document captioned “Building Permit Data for Albuquerque, NM” for the period 2010 through January 2016, and an eight page document captioned “Magnum Subcontract Labor Weekly Pay Log.” 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 filed briefs may be considered as argument in the case, 20 CFR §655.61(e). Accordingly, the documents attached to Employer's March 23, 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 §655.15 or other requirements of the H-2B program, the CO issues an RFI [Request for Further Information] 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 RFI, including not providing all documentation within the specified time period, will result in a denial of the application. 20 CFR §655.11(g)

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)

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

The Employer states that the audit overtime report submitted in response to the initial deficiency notice only listed a portion of the workers for 2014 and 2015 because “most of the workers are subcontracted ... The Payroll Audit Overtime Detail only shows our house staff.” The Employer stated that “most of the workers are subcontracted” and attached to its brief on notice of the administrative review, the “reports showing a weekly payout to our subcontracted employees.”

The Employer submits that it is “the major framing subcontractor in Albuquerque, New Mexico and now with this economy upswing we have ran (sic) out of potential workers in our area.” As noted above, the attachments to Employer’s brief may not be considered as part of the AF evidence during administrative review.

The Employer states that “The H-2B workers will be working in the Albuquerque, New Mexico Metropolitan Area [and] our permanent staff will handle all jobs outside our metropolitan area.” The Employer submits that “the number of workers requested was determined by the number of jobs contracted as submitted under the 2016 Confirmed Contracts and from the 2016 Unconfirmed Contracts which we will only be able to accept if we acquire the necessary workforce.” This is the same argument submitted with its response to the deficiency notice.

The evidence in the AF fails to establish that the Employer has a need to increase its workforce by 40 Helper Framers during the requested 8 month period. While the Employer stated 2 to 3 Helper Framers work with each construction team, there is no indication of the number of construction teams employed in 2015 and the residential framing units completed by those teams during the various months of that that period and whether any of those teams were required to work overtime to achieve the number of units completed during the various months of 2015. There is no evidence establishing an accurate increase in the number of units that are to be completed during February to October 2016 over the same period in 2015 which would tend to substantiate a need for any H-2B Helper Framers during February to October 2016, let alone justify a total number of 40 H-2B Helper Framers for that period.

After deliberation on the AF, this Administrative Law Judge finds that, while the Employer subjectively projected a need for additional Helper Framers to permit the company “to maintain and accept more work, to grow,” the Employer has failed to meet its burden of establishing a peakload need for the requested 40 H-2B residential construction Helper Framers for the period from February 1, 2016 through October 31, 2016 in the Albuquerque, New Mexico Metropolitan Area. Accordingly, the CO properly denied the Employer’s November 18, 2015, *H-2B Application for Temporary Employment Certification*.

ORDER

It is hereby ORDERED that the Certifying Officer’s DENIAL of the Employer’s November 18, 2015, Application for Temporary Employment Certification is AFFIRMED.

ALAN L. BERGSTROM
Administrative Law Judge