

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 January 2016

BALCA Case No.: 2016-TLN-00017
ETA Case Nos.: H-400-15295-250682

In the Matter of:

ROWLEY PLASTERING LLC,
Employer.

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

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

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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, the CO's Final Determination denying certification is vacated and I direct the CO to grant partial certification.

STATEMENT OF THE CASE

On October 23, 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 12, 37-65.³ The Employer requested certification for forty Helpers – Production Workers from January 15, 2016, to October 15, 2016. AF 37.

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 29-36. 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 33-36. In the *Final Determination H-2B Temporary Non-Agricultural Program* issued on November 25, 2015 (the "Final Determination"), the CO based the denial of certification on the first of these two deficiencies. AF 8-14.⁴

With respect to the deficiency on which the CO based the denial of certification, in the NOD the CO required the Employer to "submit an updated temporary need statement" including information concerning the "employer's business history and activities," why the employer has a temporary need, and how the application "meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need." AF 33-34. Additionally, the CO required the Employer 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 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 65 page appeal file will be abbreviated "AF" followed by the page number.

⁴ Indeed, although the NOD clearly identified two deficiencies, AF 33-36, the CO only addressed the first deficiency in the Final Determination. AF 12-14. 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.

1. Signed monthly invoices from previous calendar years clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6.; and/or
2. 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.

AF 34.

By email of November 12, 2015, the Employer submitted a response to the NOD. AF 15-28. In relevant part, the Employer stated:

[O]ur need for temporary employees is due to a peak load event which typically begins, for our Lath and Stucco services, 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 helper for our Lath and Stucco services, hours worked and wages paid. As you can see, this summarized monthly payroll information shows a definite peak load which typically begins in January. 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. Also, we are suffering, due to the lack of workers, from workforce poaching syndrome in the industry. Basically what it means is that some of our workforce gets taken by our competitors due to the lack of workers in the market (as shown in July of 2014 where we lost a couple of crews due to our competitors showing up at our worksite and stealing our workforce). This issue exacerbates our workforce problem even more. I just want to remark that in this new initiative, our effort is to help supplement our Plastering, Lath, and Stucco permanent workforce during its peak load and our dates of need are as accurate as possible given our typical peak load season.

Developers in Phoenix Metropolitan area will use the last two months of the year as their home planning and new model building months where only a [sic] jobs are in the works, which is typically [a] slow season for us. Most builders imposed themselves yearly goals, based on a myriad [of] economic variables. Plasterers come right after the framers, who are one of the first trades to start getting busier in early January, due to the fact that we are one of the first ones in action right

after framers begin hammering. 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 throughout 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.

The explanation why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need is because we work in a fast pace[d] environment and the stick frame homes must be built on a short schedule during the yearly temporary schedule provided above. Furthermore, the perfect crews in our field are composed of seven to eight men – depending on the size of the project (one foreman, one lead man, three skilled plasters and two or three helpers). We currently have sufficient skilled man power, and we can take care of business with these men ... during the slow season; however, we exhausted all avenues to find helpers and, now that the economy is picking back up, we can't find the additional forty supplemental helpers needed in the Phoenix Metropolitan area to complete our work crews for our peak load time of need.

AF 18-19 (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 37, 43). The summary payroll report submitted by Employer for calendar year 2014 shows the Employer's 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
January	104	20,008
February	115	18,679
March	128	19,804
April	129	19,463
May	114	21,803
June	101	13,944
July	73	14,553
August	86	12,275
September	79	11,533
October	90	17,196
November	95	15,670
December	89	15,078

AF 16 (information concerning temporary workers (zero throughout 2014) and total wages paid (ranging from a low of \$190,294.50 in September to a high of \$359,749.50 in May) omitted).⁵

In the Final Determination, the CO found that,

In response to the NOD, the employer provided payroll documentation for the position of “General Labor” for the 2014 calendar year. They payroll does not support the employer’s request for 40 temporary workers or its requested dates of need. Specifically, the employer’s payroll shows that it employed zero temporary workers during the 2014 calendar year. Additionally, the employer’s payroll shows a sharp decline in the number of permanent workers employed during the requested dates. Specifically, the employer’s permanent workforce peaked in April 2014 with 129 workers; however, by July 2014 the employer’s workforce dipped to just 73 workers. The only “peak” in the number of workers employed appears to occur between February and May. Also, the employer’s payroll shows that it employed 95 workers in November and 89 workers in December, months that are outside of the employer’s requested dates, which were more than the number of workers employed during the requested period months of July, August, September and October.

Furthermore, the employer’s submitted documents do not make clear the events that cause its peakload need in the Arizona construction business.

The employer did not submit any invoices from previous years to verify that it has an actual peak load need during the requested dates of need.

AF 14.

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 1-7. 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.

⁵ Although the report states the occupation covered is “General Labor,” AF 16, Employer explained in the narrative that the report “shows information in the designated occupation of helper for our Lath and Stucco services....” AF 18.

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.

The Employer Failed to Establish Temporary Need for the Workers Requested in June, July, August, September, 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 June 1, 2016 to October 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 had more hours worked in the non-peakload months of November and December than in the peakload months of June and July. The report also shows that it had only six fewer workers in the non-peakload month of November than in the peakload month of June. I recognize that Employer explained the dip in its number of workers in July 2014 by stating it lost “a couple of crews,” each of which was seven or eight workers. AF 18-19. Even accounting for this loss, however, the number of workers for July would at most have been 89, which is the same as the number of workers for the non-peakload month of December and six less than the number of workers for the non-peakload month of November. These facts undercut Employer’s assertion that its peakload need includes the months of June and July.

Additionally, the Employer’s payroll report shows that it employed more workers, and had more hours worked, in the non-peakload months of November and December than in the peakload months of August and September. The greater number of employees and hours worked in November and December as opposed to August and September undercuts Employer’s assertion that its peakload need includes the months of August and September.

Finally, the Employer’s payroll report shows that it employed more workers in the non-peakload month of November than in the peakload month of October, and that it employed only one more worker in the peakload month of October than in the non-peakload month of December. AF 16. While the employer’s payroll report also shows that 1,526 more hours were worked in October than in November, and 2,118 more hours were worked in October than in December, I do not find that this difference in and of itself establishes a peakload need for the month of October. Simply put, when considering both the number of employees and the total hours worked in the month of October, and comparing that data with the corresponding data for other months on the payroll report, I conclude that the data shows nothing more than October is the month with the highest number of hours worked among the non-peakload months.

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

Employer Has Established a Peakload Need in January, February, March, April, and May

In the Final Determination, the CO appears to recognize that the Employer may have established a peakload need for certain months, stating that “[t]he only ‘peak’ in the number of workers employed appears to occur between February and May.” AF 14. After reviewing the record, I find that the Employer in fact established a peakload need for the period January 15 to May 30, 2016.

In the month of January 2014, Employer had 104 employees, who collectively worked 20,008 hours. This is a significantly higher number of hours than in the highest non-peakload month (October, with 17,196 hours). While Employer had only three more employees in January than in June, the highest non-peakload month, I do not find that small difference undercuts a conclusion that January is a peakload month because only 13,944 hours were worked in June, much less than the 20,008 hours worked in January. Moreover, as Employer has stated its peakload period begins January 15, January’s numbers reflect a month split between non-peakload period and a peakload period. As only the second half of January was a peakload period, and as January’s number of hours worked is the second-highest monthly total even though half of the month was in a non-peakload period, it is appropriate to place more weight on the number of hours worked rather than on the number of employees in determining whether Employer has established a peakload need for the period January 15 to January 31, 2016. Accordingly, I find that Employer has established a peakload need for January 15 to January 30, 2016.

I agree with the CO that the Employer’s monthly payroll report establishes a peak in the number of employees for the months of February, March, April and May. Moreover, I find that the number of hours worked in these four months, ranging from a low of 18,679 in February to a high of 21,803 in May, supports a conclusion that Employer has a peakload need in these four months when compared to the remaining months of the year.⁷ Accordingly, I find that Employer has established a peakload need for the months of February, March, April, and May.

Although the CO denied the Employer’s request for certification in its entirety, that complete denial appears in conflict with the CO’s finding that “[t]he only ‘peak’ in the number of workers employed appears to occur between February and May.” AF 14. The quoted sentence indicates the CO found that the Employer had established a peak in the number of workers it needs from February through May. In other words, the CO’s finding as to the four-

⁷ In her brief, the CO argues that “the employer submitted no agreements, contracts or invoices to support its need for this peakload work force, either during the preceding years or the current period at issue that could demonstrate its temporary need” and that “[r]ather than any substantive documentation, the employer makes only its bare argument.” CO’s Brief, at 6. While of course an employer has the burden to establish temporary need, here the CO instructed the Employer to submit “monthly invoices from previous calendar years ... and/or ... [s]ummarized monthly payroll reports for a minimum of one previous calendar year” to “justify the chosen standard of temporary need.” AF 34 (emphasis added). The use of “and/or” indicates that the CO did not require the Employer to submit both invoices and summarized monthly payroll reports; rather, her use of “and/or” indicates that only one of the two types of documents was required, while it would be permissible to submit both types of documents. Given that the Employer submitted one of the two types of documents the CO specified, that the CO did not require that both types of documents be submitted, and that the document submitted by the Employer is sufficient to establish a peakload need for part of the period requested, on this record I decline to find that the Employer’s failure to submit monthly invoices necessarily means that it failed to submit “substantive documentation” establishing its temporary need.

month-long peak in the number employed workers appears inconsistent with her conclusion 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) exists with respect to the February 1, 2016, through May 31, 2016 portion of the Employer’s requested period of need. Be that as it may, based on the number of workers employed and the total hours worked during these months, I find 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 February 1, 2016, through May 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 period from January 15 to January 31, 2016. As a result, I find 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 January 15, 2016, through May 31, 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 may determine whether to exercise this discretion. On this record, however, I find it appropriate to modify the CO’s determination under 20 C.F.R. § 655.61(e)(2) and direct that she grant partial certification for the requested workers for the period from January 15, 2016 through May 31, 2016. The facts that led me to this conclusion are: (1) the CO’s findings and my review of the record indicate that the deficiency that was the basis for the denial of certification does not exist with respect to the January 15, 2016, through May 31, 2016, portion of the Employer’s requested period of need; and (2) 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 evidence submitted by the Employer indicated a peak in the number of workers employed in February, March, April and May.

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** Rowley Plastering LLC’s application for forty Helpers – Production Workers for the period from January 15, 2016, to May 31, 2016.

SO ORDERED.

For the Board:

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.