

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: 25 April 2017

OALJ Case No.: 2017-TLN-00032
ETA Case No.: H-400-17009-516837

In the Matter of:

GM TILE LLC,
Employer

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Armando Garcia
LeFelco
Las Vegas, Nevada
For the Employer

Leticia Sierra
Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

On March 6, 2017, GM Tile LLC (the “Employer”) filed with the Board of Alien Labor Certification Appeals (“BALCA”) a request for administrative review of the Certifying Officer’s (“CO”) initial Final Determination in the above-captioned H-2B temporary labor certification matter. On March 13, 2017, I remanded the matter after the CO filed an unopposed *Motion for Remand* requesting that the Employer’s H-2B application be remanded for additional processing.¹

¹ The initial request was docketed as 2017-TLN-00025.

On March 28, 2017, BALCA received a request from the Employer for administrative review of the CO's second final determination issued on March 24, 2017. Judge Larry Merck issued a *Notice of Docketing and Expedited Briefing Schedule* on March 30, 2017.² BALCA received the Appeal File ("AF") on April 5, 2017.

The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis.³ Employers who seek to hire foreign workers under this program must apply for and receive a labor certification from the U.S. Department of Labor.⁴ Applications are reviewed by a CO of the Office of Foreign Labor Certification of the Employment and Training Administration (ETA). If the CO denies certification the employer may seek administrative review before BALCA.⁵

STATEMENT OF THE CASE

On January 9, 2017, the Employer submitted an application for temporary labor certification to ETA. (AF 99-123.) The Employer requested certification for four helpers to tile setters as seasonal employees for the period from April 1, 2017 to December 15, 2017. (AF 99.) In its application, the Employer provided the following explanation regarding its temporary need for these workers:

Due to the economy getting much better, there has been an upswing in the number of winter visitors in the Phoenix metro area that are buying second homes. Most of these folks want their second homes ready with their new tile installed. We have noticed that the early goal for most home owners with a remodeling project is to build and ready their home for early spring season so they can rent their homes for baseball's Spring season in Arizona. Even more, since most homes are empty starting April and with new orders at hand, there is more work coming our way during April which can last until mid-December. Our task is to finish new tile and bath projects for their arrival in late fall early winter.

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 know that we will almost hit dead stop during the Holidays (no one want us doing work during that time of the year); and tile installing remodeling projects must be

² This matter was assigned to the undersigned after the Employer's initial request for administrative review. It was briefly assigned to Judge Merck after the Employer's March 28, 2017 request for review, but subsequently reassigned to the undersigned.

³ See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), 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).

⁴ 8 C.F.R. § 214.2(h)(6)(iii).

⁵ 20 C.F.R. § 655.61(a).

finished before Christmas time. Furthermore, the perfect remodeling crews are composed of a foreman two lead men and four helpers during peak load period. We currently have the U.S. skilled man power and we can take care of business during the slow season; however, we exhausted all avenues to find general helpers and, now that the economy is picking back up, we can't find the additional four (4) supplemental helpers needed in the Phoenix Metropolitan area to complete our work crew for our coming peak load time of need.

(AF 113.)

On February 21, 2017, the CO issued a Notice of Deficiency (NOD), (AF 78-84), noting that the Employer failed to establish the temporary nature of the jobs, (AF 81), and failed to submit an acceptable job order, (AF 82). The CO requested that the Employer provide additional information regarding temporary need. Specifically, the CO requested "attestations regarding temporary need" and a statement of temporary need that contains:

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. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; and
4. An explanation as to why the requested dates of need have significantly changed from the employer's prior application.

(AF 81.) The CO also requested that the Employer submit "documentation that justifies the chosen standard of temporary need," including monthly payroll reports for the previous calendar year or "[o]ther evidence and documentation that similarly serves to justify the chosen standard of temporary need." (AF 82.) Finally, the CO requested that the Employer submit amended job order language or an amended job order that includes the worksite located in Maricopa County. (AF 83.)

The CO issued a Non-Response Denial dated March 5, 2017, denying the Employer's application. (AF 69-77.) The Employer filed a request for administrative review of the CO's determination on March 6, 2017. (AF 49-52.) The CO received the Employer's response to the NOD on March 8, 2017,⁶ which included a letter of explanation dated March 7, 2017, a summarized monthly payroll report, and a job itinerary. (AF 53-68.) As noted above, I remanded the matter for additional processing on March 13, 2017 after the CO filed an

⁶ The Employer contends that the CO received its response on March 7, 2017, and therefore it was not untimely. (Employer Brief at 2). However, since the CO ultimately considered the Employer's response, whether it was timely filed is no longer relevant.

unopposed *Motion for Remand*.⁷ The CO received the *Order of Remand* on March 14, 2017. (AF 47-48.)

On March 24, 2017, the CO issued a second final determination denying the Employer's application. (AF 33-46.) The CO found that the noted deficiencies had not been corrected. (AF 36.) The CO explained that the Employer did not establish that the job opportunity is temporary in nature because the Employer's assertion of the peak months conflicts with a prior certification that requested four employees to be Helpers of Tile Setters from January 15, 2016 through October 15, 2016. (AF 36-38.) The CO found that "[t]he employer's two application[s] viewed together show the employer has requested temporary workers for each month of the year; therefore, reflecting a permanent need for workers." The CO rejected the Employer's proffered explanation that its need dates changed because of a lack of workers, stating that "an overall labor shortage in trade occupations does not support a temporary need," and that temporary need is where "the labor itself rests on the nature of the underlying need for the duties of the position." The CO also stated that since the work is unaffected by weather, "it remains unclear why the employer's work is tied to certain seasons of the year." And, further, that the Employer failed to provide an explanation. (AF 38.)

The CO analyzed the 2016 payroll summary provided by the Employer and found that it does not support the requested dates of temporary need. (AF 38-39.) The CO pointed out that the Employer employed all four of the requested temporary workers for only "one month of its previously stated need" and did not use more than one temporary worker during the other months of stated need. (AF 38.) The CO also found that

Of significant importance is that the payroll does not reflect its workers working full-time hours during any month of its requested period of need. The employer has four permanent Tile Installation workers and at its highest peak in hours worked month (July), one temporary worker was employed. However, during July, the employer's five workers worked an average of 34.9 hours per week, which is below full-time hours.

(AF 38-39.)

On March 28, 2017, BALCA received the Employer's request for administrative review of the CO's NOD. (AF 1-32.) As stated above, Judge Merck issued a *Notice of Docketing and Expedited Briefing Schedule* on March 30, 2017 but the matter was subsequently reassigned to the undersigned. BALCA received the Appeal File on April 5, 2017. The CO filed its brief ("CO Brief") on April 14, 2017. The Employer filed its brief ("Employer Brief") on April 21, 2017.⁸ For the reasons set forth below, I affirm the denial of the temporary labor certification.

⁷ The CO explains in its brief that it requested a remand so that it could consider the Employer's response to its request for additional information, which arrived after the CO's issuance of the denial. (CO Brief at 2.)

⁸ While Employer's brief was due seven business days from receipt of the appeal file, I considered it before issuing this decision and order. See 20 C.F.R. § 655.61(c).

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. 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 the Employer actually submitted to the CO before the date the CO issued a Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361. BALCA must affirm a CO's determination denying an application unless it was arbitrary or capricious. *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

An applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). While an applicant need only submit a detailed statement of temporary need at the time of the application's filing, failure to provide substantiating evidence or documentation in response to the CO's Request for Information "may be grounds for the denial of the application." 20 C.F.R. § 655.21(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, at 7 (Jan. 10, 2011); *Andy and Ed, Inc.*, 2014-TLN-00040, at 2 (Sep. 10, 2014); *Eagle Indus. Prof'l Services*, 2009-TLN-00073 at 5 (July 28, 2009). The employer must establish the temporary nature of its need for the worker to perform the labor or service. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLN-00044 at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to satisfy the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013). Likewise, an employer may not satisfy its burden to establish the temporary nature of the need by simply providing reams of data without analysis. An employer is not required to prove the particular requirements of each and every job or position, but it must establish a bona fide temporary need. *Tampa Ship, LLC*, 2009-TLN-00044 at 6 (May 8, 2009).

In the instant case, the Employer claimed a peakload need. To establish a peakload need, the Employer must demonstrate 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 petitioner's regular operation.

8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The CO asserts that the record supports its determination that the Employer has not established a temporary need. (CO Brief at 2-3.) I agree. The Employer's submissions do not

establish a temporary need for workers during the requested period of April 1, 2017 to December 15, 2017. The Employer explains that it

specialize[s] in tile installation of ceramic/porcelain, granite, marble, quartz, glass, limestone, quartzite and travertine tile. We provide our services to new home builders and current home owners as well as custom installation. We operate throughout the entire year, Monday to Friday from 7:00 am to 3:00 pm.

(AF 62.) The Employer states the following in response to the CO's request for additional information regarding why the nature of the job and the number of foreign workers requested reflects a temporary need:

The construction industry has a yearly cycle, which has occurred year after year. This cycle is a peakload in which late-December and January are the slowest with the least amount of work or activity. The work and activity begins to peak in February, then reaches its high point during the summer months and shoulders back down towards the end of the year.

(AF 62-63.) The Employer provides a chart plotting the number of permits starting by month from 2014-2016 in Phoenix-Mesa-Scottsdale Metropolitan Area. The Employer does not provide the source for the chart or the data that it is based on. The chart appears to reflect low points of under 2,500 permits each January, with permit numbers rising steadily to a peak in December. The December 2014 peak appears to be at 20,000 permits; the December 2015 peak appears to be around 23,000 permits; and December 2016 appears to be around 28,000 permits. The Employer contends that "[t]hese starts are a direct reflection of our peakload because we are subcontracted companies that create this event." The Employer also points to its payroll report to "show that we regularly employ permanent workers." The Employer contends that its "need for the duties to be performed by the temporary additions to staff is temporary, specifically will end on December 15." (AF 63.)

The Employer explains that its dates of need changed from its prior certification "because the demand for our services for 2017 will begin a little later than in 2016. This is mainly due to the other trades being so backed up, due to lack of workers." (AF 64.) However, the Employer argues in its brief, contrary to its asserted explanation, that it "stated that December 15 was the end to our peakload in our previous certification as well." (Employer Brief at 2.) The Employer further states

In 2016, we filed late and per regulation the earliest we could request was July 3, 2016. We stated in our 2016 statement of need, "Our need is recurrent each year and we know we are filing late per regulation to file 75 days before the start date of need. I must remark that in this petition our date of need, and only for this petition, is from July 3 to December 15." For 2017, we filed on time for a start date of April 1, 2017. Our dates of need and the number of workers did not change from our previous certification, our peakload months are still the same.

(Employer Brief at 2.)

The Employer points out that peakload need is different from seasonal need and that peakload may change from year to year. The Employer contends that “the construction industry has a definite peakload, as shown” in the chart it provided. The Employer describes that it is “a trade within the construction industry and [its] peakload is established by the increased demand for [its] services by the home builders and homeowners.” (AF 64.)

The Employer expounds that “the construction industry has about twice the turnover rate that the national average and increasing as the economy gets better.” The Employer avers that it needed “at least 11 to 13 workers” during peakload, but that it “averaged 4.6 during our peakload.” The Employer also asserts that its “monthly wages paid can fluctuate” because the amount it is paid for each job is different. However, the Employer acknowledges that “one cannot truly identify a peakload from” its summarized monthly payroll report because they “didn’t have the workers” needed to perform their services. (AF 65.) The Employer also includes a “monthly headcount” of employees, (AF 67), and a “job itinerary 2017 report” with a chart showing a list of jobs and months, with number of units marked in some months. (AF 68.)

In response, the CO notes that the Employer’s chart of permits “is unsourced and covers the construction industry as a whole, not GM Tile’s own workload, as required to demonstrate peakload need.” The CO further observes that the payroll report “suggests that there is insufficient work to support four additional tile setter helpers, and hours fluctuate significantly throughout the year, such that there is no evidence of a “peak” or sustained demand for GM Tile’s services.” (CO Brief at 3.) The Employer submits that payroll reports are only helpful for understanding business trends “when a business [is] stable during its reporting period,” and that its business is “significantly affect[ed]” by turnover.⁹ (Employer Brief at 2.) The CO contends that the Employer’s submitted job itinerary “cannot be evaluated, as it is not explained, and there is no way to tell what the data means or how it was calculated.” The CO maintains that the Employer “provided no contracts, project descriptions, or other evidence of upcoming commitments, to support its request for four H-2B workers, or any other number of temporary workers.” (CO Brief at 3.)

I find that the Employer has not established that it has a peakload requirement from April 1, 2017 to December 15, 2017. The summarized monthly payroll report, as acknowledged by the Employer, does not reflect any peakload. Additionally, I agree with the CO’s assertion that the Employer has not given an adequate explanation of why its claimed peakload requirement for temporary workers has changed from its previous certification requesting workers for a peak from mid-January through mid-October. *See* AF 124-131 (certification of workers from the requested period of January 15, 2016 to October 15, 2016¹⁰). Its submission of an unsourced

⁹ The Employer also appears to suggest that the payroll report would reflect a different number of hours worked if submitted at this time. (Employer Brief at 2-3.) I have not considered this information, as it was not in the Appeal File or provided to the CO before the final determination. 20 C.F.R. § 655.61.

¹⁰ Although the Employer contends in its brief that its stated peakload has not changed from its previous certification, (Employer Brief at 2), the Appeal File reflects temporary workers requested January 15, 2016 to October 15, 2016 because the season comprising “[m]id October thru the first two weeks of January” is a “slow season.” (AF 124).

chart showing permits per month from 2014-2016, even assuming its accuracy, does not reflect a change in permit patterns during those years,¹¹ and the Employer does not offer an explanation of why 2017 would be different. Additionally, the CO is correct in her declaration that data showing an overall trend in the construction industry is insufficient to establish a peakload specific to an individual employer,¹² particularly in this case, where the Employer's monthly payroll report directly contradicts the existence of a peakload in the Employer's business. Finally, the Employer does not provide any additional sufficient evidence to suggest a need for temporary workers.¹³ I agree that the Employer's job itinerary report does not provide the information necessary to establish a temporary need. Although it suggests that the Employer has pending contracts, it does not provide sufficient detail to establish a need for temporary employees.¹⁴

ORDER

Considering all of this information, I find that Employer has failed to establish temporary peakload need. Employer's evidence is simply insufficient to establish a temporary need for workers. On the contrary, Employer's information seems to undermine its claimed period of peakload need. Accordingly, I find that the CO's determination was not arbitrary or capricious and hereby AFFIRM the denial of the temporary labor certification in this matter.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

¹¹ The slight rise in permits given did not deviate from the pattern of when those permits are given.

¹² See *BMC West Corporation*, 2016-TLN-00039 at 5 (May 18, 2016) (finding that general statistics regarding the construction industry are insufficient to establish a specific employer's peakload need).

¹³ The Employer's assertion that there is a high employee turnover rate in the construction industry weighs against establishing a temporary need. Turnover is an ongoing issue and the Employer's payroll report, reflecting less than full-time hours for workers, suggests that employee turnover has not interfered with its ability to perform work. See *Refuse Materials, Inc.*, 2016-TLN-00052 at 6 (June 30, 2016) (stating that "[t]he high turnover rate militates against establishing a temporary need as turnover is an ongoing issue" and the employer has been able to meet contractual obligations regardless of turnover).

¹⁴ Projected employee hours are not given. Although the number of units to be completed may be correlated with the number of hours that temporary employees are needed, it is necessary to explain that relationship.