



Issue Date: 23 January 2017BALCA Case No.: 2017-TLN-00017

ETA Case No.: H-400-16309-039647

In the Matter of:

ROADRUNNER DRYWALL CORPORATION

Employer.

Certifying Officer: Leslie Abella Dahan
Employment and Training Administration
Office of Foreign Labor Certification
Chicago National Processing Center

Appearances: Armando Garcia, Esq.
LeFelco
Las Vegas, Nevada
Representative for Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Roadrunner Drywall Corporation’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non Acceptance Denial in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. *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). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department” or “DOL”). 8 C.F.R. § 214.2(h)(6)(iii). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the “2008 Rule” found at 73 Fed. Reg. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. *See* 20 C.F.R. 655.4(e) (explaining transition procedures).

STATEMENT OF THE CASE

H2-B APPLICATION

Employer engages in construction work, specifically drywall and paint services. AF 60.² Employer's work covers multiple kinds of construction projects, ranging from apartment and homes to schools, churches, and commercial properties. *Id.* Employer is located in Phoenix, Arizona, though it performs jobs for entities throughout Arizona and Nevada. *Id.* On November 4, 2016, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* ("Application") with the CO. (AF 4). Employer filed Appendix B to ETA Form 9142B; an *H2B Work Visa Client Service Agreement* dated November 3, 2016; a statement of temporary need (undated); a job order form (undated); a *Foreign Recruitment Agreement* dated November 3, 2016; and a *Referred Foreign Worker Agreement* dated November 3, 2016 with its Application. AF 53-71. Employer requested certification for 20 painter helpers³ from February 1, 2017 to October 31, 2017, based on alleged peakload temporary need during that period. AF 46.

Notice of Deficiency

On November 16, 2016, the CO issued a Notice of Deficiency ("NOD"). AF 40. The CO listed three deficiency grounds: 1) that Employer had failed to establish the job opportunity as temporary in nature as required under 20 C.F.R. § 655.6(a) and (b); 2) that Employer had violated 20 C.F.R. § 655.20(e) by offering more favorable terms of employment to H-2B workers than those offered to U.S. applicants; and 3) that Employer failed to submit an accurate application as required under 20 C.F.R. § 655.15(a). AF 43-45.

As to the first deficiency ground, the CO explained that the Employer's application did not contain sufficient information to establish the requested period of employment. AF 43. Specifically, the CO noted that Employer's prior application for 25 painter helpers from the prior year extended from April 6, 2016 to December 15, 2016, compared to Employer's current application from 20 painter helpers from February 1, 2017 to October 31, 2017. *Id.* The CO requested additional attestations, as well as supporting evidence and documentation, to justify its chosen standard of temporary need. *Id.* This was to include: "[s]ummarized monthly payroll reports for a minimum of one year prior, identifying 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 earnings received." AF 43-44 (emphasis added). In the alternative, the CO requested evidence that "similarly serve[d] to justify the chosen standard of temporary need." AF 44.

As to the second deficiency, the CO explained that the Application included a post-hire drug test and a 50-pound lifting requirement. AF 44. However, Employer's job order did not

² Citations to the Appeal File are abbreviated as "AF." For purposes of clarity, the "P" prefix on each page number of the Appeal File has been omitted (*i.e.* "P60" is instead cited as "60").

³ The Application specifically lists the position as "SOC (O*Net/OES) occupation title Helpers—Painters, Paperhangers, Plasterers, and Stucco Masons," occupation code 47-3014. AF 46. However, all parties refer to the occupation as "painter helpers" in their correspondence, and, for the sake of brevity, I will do the same.

mention the requirements. AF 44. Accordingly, the CO requested an amended job order form contain the requirements listed on the Application. AF 44.

As to the final deficiency, the CO explained that Employer had written down the incorrect county in Section F.c., Item 4 of the Application. AF 44-45. The CO noted modification was required. AF 45. The CO also explained that it required written permission from Employer before it could make any modifications on Employer's behalf. AF 45.

Employer Response

On November 29, 2016, Employer responded to the NOD. AF 31. Employer authorized the CO to modify the Application so as to include the correct county, and Employer included an amended job order form. AF 33-34, 36-39. As to the first deficiency ground, Employer included a Signed Summarized Monthly Payroll document and a Job Itinerary for 2017. AF 32-33, 34-35. Employer also provided more information regarding its peakload temporary need, noting that a 30% increase in demand for its services, which coincided with increased building permit activity in Arizona, necessitated the temporary workers. AF 31-32.⁴ Employer further noted that it had been unable to find domestic workers to supplement its permanent staff, which continued to be Employer's "biggest challenge." AF 32.

CO's Final Determination

On December 22, 2016, the CO issued a Non Acceptance Denial of Employer's Application. AF 1. The CO found that Employer's response had failed to cure the first deficiency. AF 4. The CO determined that the information provided by Employer had failed to list separate hours and earnings of temporary employees and permanent employees. AF 5. Rather, Employer had provided merely a general summary of total earnings, hours, and workers. AF 5-6. The CO based this determination in part upon two other applications⁵ filed by Employer, each of which included the exact same summarized payroll information. AF 5-6 (concluding that, because the same summary had been included for multiple positions, that the summary must list the work hours and earnings for all worker positions, instead of just helper painters).

The CO also explained that the monthly summary did not support Employer's peakload period. AF 6-7. The CO listed the months on Employer's monthly summary by number of hours worked, noting that January, November, and December, the months outside the alleged peakload period, did not represent the months with the least hours worked. AF 6-7. In fact, the CO noted that Employer had more hours worked in December than it did in September, October, or February. AF 6-7. Further, the CO noted that the hours worked were "not significantly higher from month to month, further questioning the employer's need for its workers." AF 6. Considering this information, the CO found that Employer had not established that its peakload temporary need spanned the dates requested in the Application.

⁴ In its response, Employer erroneously stated that it had "requested 25 workers for peakload." AF 32. Upon inquiry by the CO, Employer issued a revised response replacing the 25 value with 20. AF 17-18, 22.

⁵ H-400-16317-405193 requesting 75 Drywall Installers from February 8, 2017 through November 8, 2017 and H-400-16322-100113 requesting 75 Drywall Tapers from February 15, 2017 through November 15, 2017. AF 5.

The CO also found that Employer’s Job Itinerary did not provide adequate explanation for the alleged peakload need. AF 7. Specifically, the CO explained that the itinerary “did not provide an explanation” as to what the document actually entailed, and that it was “unclear” if the information consisted of “projections in the entire Phoenix Metropolitan building market, binding commitments between the employer and contractors, or . . . submit[ed] proposals for projects.” *Id.*

Finally, the CO compared the company-wide payroll information to the amount of workers requested across Employer’s three applications for H-2B workers. AF 6. The CO determined that Employer’s records did not adequately explain why it now required 170⁶ temporary workers, compared to the prior amount of 25 to 41 workers. AF 5-6; *see also* AF 35.

PROCEDURAL HISTORY

On December 23, 2016, BALCA received a request for administrative review of the CO’s Final determination in this matter. On January 3, 2017, I issued a Notice of Assignment and Expedited Briefing Schedule, granting the parties “no later than the close of business . . . on the seventh business day after they receive the appeal file” to file briefs.⁷ The Appeal File arrived by expedited mail on January 5, 2017. On January 17, 2017, the CO filed a joint brief for Case Nos. 2017-TLN-00017, 00018, and 00019. CO’s Brief (“CO Br.”) at 1. The CO’s brief reiterated its contentions about peakload need, including an additional argument that the data clearly showed that Roadrunner’s workforce was consistently employed less than full-time, and thus the “modest increases in work that Roadrunner referenced in its NOD response could be handled by recalling its permanent workforce on a full time basis.” CO Br. at 16.

SCOPE OF REVIEW

BALCA’s standard of review is limited in H-2B cases. 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 actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon 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).

DISCUSSION

The sole issue on appeal is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of 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). The burden of proof to establish eligibility for a temporary

⁶ 75 Drywall Installers, 75 Drywall Tapers, and 20 painter helpers. AF 5.

⁷ In my Notice of Assignment and Expedited Briefing Schedule, I consolidated 2017-TLN-00017, 00018, and 00019 for hearing. Upon review of the facts in each case, I find that there are sufficient factual differences that the best interests of justice are served by issuing a separate decision for each case.

alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. At filing, an employer need only submit a detailed statement of temporary need with their application. 20 C.F.R. § 655.21(a). However, should the CO request supporting evidence for an employer's application, the employer must "timely furnish the requested supplemental information or documentation." *Id.* § 655.21(b); *North Country Wreaths*, 2012-TLN-00043 slip op at 6 ("the CO is not required to take [Employer] at its word.") Failure to furnish information may be ground for denial of the application. *Id.*

Of the four types of temporary need identified in the H-2B regulations, Employer alleges peakload temporary need. AF 46; *see also* AF 32. Generally, the regulations state that temporary need lasts for less than a year, though certain circumstances can warrant extensions of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). Additionally, to qualify for peakload need, an 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 petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In this case, the CO found that Employer had failed to provide sufficient information to prove temporary need, and in response the CO requested additional information. AF 43-44. That information included a brief statement on the Phoenix, Arizona housing market, Employer's Job Itinerary, and a Summarized Monthly Payroll Report. AF 32-34. This evidence does not establish Employer's temporary need for employment.

First, Employer's Job Itinerary lacks explanation of its contents. The Job Itinerary is titled "Phoenix Metropolitan Area Stock/Unit Summary/Monthly." AF 34. This document contains a "List of Contracted Jobsites Projections for 2017," laid out in a table. *Id.* The table appears to list customers and monthly orders, but the chart contains no information explaining how the data was calculated. *Id.* As the CO aptly explained, "[i]t is unclear if these forecasts are from projections in the entire Phoenix . . . building market, binding commitments between the employer and contractors, or from [Employer's] submittal of proposals for projects." AF 7. Without further information, I am unable to properly evaluate the Job Itinerary, because I do not know what its projections represent.

Second, Employer's 2015 Summarized Monthly Payroll Report actually seems to refute the Employer's claim of temporary need. To illustrate this point, I reproduce the CO's list of months by hours worked, below:

Month	Hours Worked
September*	24,743
January	28,420
October*	29,972
November*	30,113
February	32,533
December	32,697
March	33,035

June*	33,784
August*	36,155
May*	36,366
April*	42,867
July*	42,881

CO Br. 7-8; AF 6-7; *see* also AF 35. The months of January, November, and December, which are highlighted above, are not covered by the Employer’s application. Further, months with an asterisk are those in which Employer used temporary staff. *See* AF 35.

These numbers paint a different picture than the one provided by Employer. These numbers suggest that Employer’s peakload months are November through August, with a comparative lull in September and October. Of particular note is the month of December, which, despite having no temporary staff, had more hours than five other months (and nearly identical hours to March and June). Without further information, *e.g.* separate information on the number of hours worked by temporary vs. permanent employees, the Summarized Monthly Payroll Report does not support Employer’s attestation of peakload need.

Additionally, though Employer appears to have 447 total permanent staff, its monthly staff numbers fluctuate wildly. *See* CO Br. 16; AF 35. Even during alleged peakload months, like February, March, and April, Employer actively employs 100 less individuals than its maximum 447 employees. CO Br. at 16; AF 35. As Employer provides no information to account for these discrepancies, it is unclear why Employer cannot call its full workforce to meet its demand during those periods.

Finally, Employer’s provided reasoning for its peakload need is unpersuasive. Employer explains that the demand for its services “is increasing for 2017, specifically starting in February of 2017, by 30%.” AF 31. Further, Employer notes that Phoenix Arizona is “currently seeing the largest permit activity for new homes since 2007.” AF 31-32 (*citing* Sona Wasu, *Construction Worker Shortage in Arizona; Businesses Luring Workers with Good Pay, Promise of Raises* [hereinafter “*Worker Shortage*”], ABC News (Aug 11, 2016), <http://www.abc15.com/news/region-phoenix-metro/central-phoenix/construction-worker-shortage-in-arizona-businesses-luring-workers-with-good-pay-promise-of-raises>).

Employer’s cited sources, however, do not provide enough information to support Employer’s attestation of peakload need. Employer’s cited news article provides no reference data, beyond the 2007 labor market, with which to compare current market growth. *See Worker Shortage* (providing only a statement that the construction market “continues to be on the upswing”). Further, Employer’s links to Census data regarding new housing permits show patterns in permit issuance that do not reflect Employer’s peakload, such as continued instances of decreased permits in September with accompanying increases in permit activity in December. *See New Privately Owned Housing Units Authorized Unadjusted Data for South and West Regions*, U.S. CENSUS BUREAU (last visited Jan 9, 2017). <https://www.census.gov/construction/bps/pdf/table1c.pdf>.

Considering all of this information, I find that Employer has failed to establish its eligibility for a temporary alien labor certification. Employer's evidence is simply insufficient to establish a temporary need for workers. On the contrary, Employer's information seems to undermine its claim of peakload months. Accordingly, the CO's grounds for denial are valid.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.