



Issue Date: 23 January 2017

BALCA Case Nos.: 2017-TLN-00019

ETA Case No.: H-400-16322-100113

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 62.² Employer's work covers multiple kinds of construction projects, ranging from apartments 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 17, 2016, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* ("Application") with the CO. AF 55. Employer filed Appendix B to ETA Form 9142B; an *H2B Work Visa Client Service Agreement* dated November 17, 2016; a *Statement of Need* (undated); a job order form (undated); a *Foreign Recruitment Agreement* dated November 17, 2016; and a *Referred Foreign Worker Agreement* dated November 17, 2016 with its Application. AF 56-74. Employer requested certification for 75 Drywall Tapers from February 15, 2017 to November 15, 2017, based on alleged peakload temporary need during that period. AF 48.

Notice of Deficiency

On November 29, 2016, the CO issued a Notice of Deficiency ("NOD"). AF 35. The CO listed three deficiency grounds: 1) that employer did not include adequate attestations to justify the number of workers and period of need, as well as failing to establish that the request represents bona fide job opportunities; 2) 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); and 3) that Employer failed to submit an accurate Application as required under 20 C.F.R. § 655.15(a). AF 38-40.

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 need. AF 38. Specifically, the CO noted that Employer's prior application for 45 Drywall Tapers from the prior year extended from August 31, 2016 through October 31, 2016, compared to Employer's current application for 75 Tapers from February 15, 2017 to November 15, 2017. *Id.* The CO requested additional attestations, as well as supporting evidence and documentation, to justify Employer's chosen standard of temporary need. *Id.*

As to the second deficiency ground, the CO explained that the Employer had not sufficiently demonstrated that the number of workers requested was true and accurate and represented bona fide job opportunities. AF 39. The CO noted that Employer's attestations were currently insufficient to support its request for 75 Drywall Tapers. *Id.* The CO requested that Employer include a detailed statement to establish why it now needed the Drywall Tapers, and why it needed them from February to October. *Id.*

For both the first and second deficiency, the CO requested as evidence "[s]ummarized monthly payroll reports for a minimum of one year prior, identifying for each month and

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").

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 38-39 (emphasis added). In the alternative, the CO requested evidence that “similarly serve[d] to justify the chosen standard of temporary need.” AF 38-39.

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 40. The CO noted modification was required. *Id.* The CO also explained that it required written permission from Employer before it could make any modifications on Employer’s behalf. *Id.*

Employer Response

On November 30, 2016, Employer responded to the NOD. AF 29. Employer authorized the CO to modify the Application so as to state the correct county. AF 32. As to the first and second deficiency grounds, Employer included a *Signed Summarized Monthly Payroll* document and a Job Itinerary for 2017. AF 33-34. Employer also provided more information regarding its peakload temporary need, claiming an increase in demand for Employer’s services, caused by increased building permit activity in Arizona, necessitated the additional temporary workers. AF 31. Employer further explained that its prior request for workers had a truncated timespan, as Employer had file its application late. AF 30. Employer noted, as well, that Phoenix was “currently seeing the largest permit activity for new homes since 2007.” AF 29-30.

CO’s Final Determination

On December 22, 2016, the CO issued a Non Acceptance Denial of Employer’s Application. AF 2. The CO found that Employer’s response had failed to cure the deficiencies. AF 5.

The CO determined that the information provided by Employer failed to establish that February 15 through November 15 constituted Employer’s peakload need period. AF 6-7. First the CO determined that Employer’s submitted evidence, which had been included in two separate applications,³ was merely a general summary of total earnings, hours, and workers. AF 7. Second, the CO explained that the monthly payroll summary did not support Employer’s peakload period. AF 7-8. The CO listed the months on Employer’s monthly summary by number of hours worked, noting that the three months that were not accounted for in the Application did not represent the months with the least hours worked. AF 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 7. Considering this information, the CO found that Employer had not established that its peakload temporary need spanned the dates requested on the Application.

The CO also found that Employer’s evidence did not justify the number of workers requested. AF 8-9. The CO noted that it was “clear that the employer did not use its 45 certified

³ H-400-16309-039647 requesting 20 painter helpers from February 1, 2017 through November 1, 2017 and H-400-16322-100113 requesting 75 Drywall Installers from February 8, 2017 through November 8, 2017. AF 5.

Drywall Tapers” from its previous withdrawn application. AF 9. The CO clarified that Employer had only used 25-41 temporary during the past year. *Id.* Additionally, the CO compared the summarized payroll information to the amount of workers requested across Employer’s two other applications for H-2B workers. AF 6-7. The CO determined that Employer’s records did not adequately explain why it now required 170⁴ temporary workers, compared to the prior year’s amount of 25 to 41 workers. AF 8-9; *see also* AF 33. Given the scant and generalized information provided by Employer, the CO determined that Employer did not overcome the deficiency. *Id.*

The CO also found that Employer’s job itinerary did not justify the additional workers or adequately support the period of peakload need. AF 9. Specifically, the CO explained that the itinerary “did not provide an explanation” the data in the itinerary, 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.*

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.⁵ The Appeal File was sent by expedited mail on January 5, 2017. On January 17, 2017, the CO filed a joint brief for Case Nos. 2017-TLN-00017, 2017-TLN-00018, and 2017-TLN-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).

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

⁵ 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.

DISCUSSION

There are two issues on appeal: 1) whether Employer's request represents a bona fide job opportunity for which Employer has a justified need for 75 workers; and 2) whether Employer has established a temporary need for those workers. I address each issue in turn.

I. Employer's Request for Temporary Workers Is Invalid Under 20 C.F.R. § 655.11(e)(3)-(4).

Under the regulations, a "CO will review H-2B applications for completeness" as well as four additional factors: 1) whether the job qualifies as non-agricultural; 2) whether the employer's need for services is temporary in nature; 3) whether "[t]he number of worker positions and period of need are justified;" and 4) whether "[t]he request represents a bona fide job opportunity." 20 C.F.R. 655.11(e). Should Employer fail to meet any of the four factors, the application is denied. Employer bears the burden of establishing these factors. 8 U.S.C. § 1361; *see also North Country Wreaths*, 2012-TLN-00043, slip. op at 6 (Aug. 9, 2012).

In this case, the CO determined that Employer had failed to establish either that the number of worker positions and period of need were justified or that the request represented bona fide job opportunities. AF 5-6, 8-9. To support her conclusion, the CO paid particular attention to two applications that Employer filed simultaneously with this application, as well as Employer's prior withdrawn application for Drywall Tapers from the previous year. AF 8-9. Upon reviewing the evidence in this case, I agree with the CO that Employer has not established a justified need for 75 Drywall Tapers.

Employer has requested 170 foreign temporary workers for 2017 across three applications. *See* AF 6. Of those workers, 75 are Drywall Installers, 75 are Drywall Tapers, and 20 are painter helpers. *Id.* According to Employer's own summarized monthly report, Employer had, on average, 36 temporary workers (in months for which it used temporary staff) last year. AF 34. Even at its highest, Employer's temporary staff numbered only 41. *Id.*

Employer claims that it requires 75 Drywall Tapers due to increased demand for its services. AF 31. Employer notes that it has seen an increase of 30% in demand for its services for February 2017. *Id.* Further, Employer notes that 75 workers represent only "a 16.3 % increase to [its] permanent staff of 440 (see Summarized Monthly Payroll Report)." *Id.* Finally, Employer links to an online news article that notes increasing housing market demands, but which only compares current permit activity to 2007 levels. *See id.* (*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>).

The evidence does not support Employer's contentions. First, Employer's Summarized Monthly Payroll Report shows variable permanent staff numbers, ranging from 244 to 447. AF 34. On average, the Employer has 328 permanent staff working each month. Using this average number, 75 Drywall Tapers would represent a 23% increase in staff. However, when included as

part of 170 additional requested workers, those workers represent a 52% increase in total average staff.

Employer attempts to justify this increase by providing a Job Itinerary for 2017. AF 33. Employer's Job Itinerary lacks sufficient information to allow for proper evaluation. The Job Itinerary is titled "Phoenix Metropolitan Area Stock/Unit Summary/Monthly." AF 33. It 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.

Assuming *arguendo* that the Job Itinerary lists only actual, finalized contracts for work, Employer's Job Itinerary still fails to explain the nature of the jobsites, the size of the construction sites, or when the contracts have to be completed. Without such information, my only point of comparison to the prior year is the total number of jobsites. AF 33. I do not see how the 21%⁶ upswing in projected jobsites from 2016 to 2017 necessitates, on its own, an almost 400% increase in the total number of temporary workers requested by Employer. The Drywall Tapers, alone, constitute a 100% increase in the *total* number of average temporary workers Employer employed last year.

Employer's monthly summary is also of little use in evaluating its application. In fact, the monthly summary actually undermines Employer's argument. Employer's average number of temporary staff, for months in which temporary staff was employed, ranged from 25 to 41 individuals. AF 33. On average, Employer employed only 36 temporary workers. *Id.* Employer seeks to more than double that amount for a position that it did not use temporary labor to fill last year. AF 33, 8-9. Without further evidence, such a drastic increase in temporary workers is not justified.

Even were I to credit Employer's prior, withdrawn application for 45 Drywall Tapers as an accurate depiction of Employer's need for workers, Employer has still only shown a 21% increase in the number of jobs from 2016 to 2017. A 21% increase in the number of average temporary workers employed by Employer from 2015-16 would only amount to 55 temporary Drywall Tapers. Thus even the best case scenario for Employer is insufficient to justify its request.

Additionally, the per capita work hours of Employer's workers do not appear to represent full-time employment. *See* CO Br. 16. Employer provides little information as to its workforce, beyond the general summary. However, based on the information available, Employer's workforce, on average, does not work full time. Employer's 312 June employees worked the highest number of average hours at 137.40 in a month. *See* AF 33 (dividing the number of employees for that month by the total hours). However, assuming an eight hour work day, that only amounts to 17.18 days of work a month (compared to 20 eight hour days over a four week

⁶ Employer's Job Itinerary shows 3,238 total jobs projected for 2017, compared to 2016's 2,673.

period). As Employer provides no information to account for this discrepancy, it is unclear why Employer cannot call its workforce full time to meet its demand.

Employer's provided evidence is unspecific, lacks explanation, and has multiple, unaddressed inconsistencies. Further, the evidence is silent as to why Employer withdrew its application for 45 Drywall Tapers last year, yet now needs 75 Drywall Tapers for this year. Accordingly, I find that the CO correctly determined that Employer had not justified the number of requested temporary workers, or established that the job opportunities offered were bona fide.

II. Employer Has Not Established Temporary Need.

Even if Employer had managed to justify its requested number of temporary workers, Employer has failed to establish temporary need.

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 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*, slip op at 6 ("the CO is not required to take [Employer] at its word.") Failure to furnish information may be grounds 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 48; *see also* AF31. 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 38-40. Employer responded by providing a brief statement on the Phoenix, Arizona housing market, Employer's Job Itinerary for 2017, and the Summarized Monthly Payroll Report. AF 29-34. This evidence is insufficient to establish Employer's peakload temporary need.

As mentioned in the previous section, Employer's Job Itinerary is of little use, as its data is both unexplained and unspecified. *See* Section I, *supra*.

Employer's 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. at 8; AF 7; *see* also AF 33. The months of January, November, and December, which are highlighted above, are not included in Employer's application. Months with an asterisk are those during which Employer used temporary staff last year. *See* AF 33.

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 had more hours than five other months (and nearly identical hours to March and June). Without further information, such as data on the number of hours worked by temporary vs. permanent employees or the types of jobs performed by different kinds of employees, the monthly summary does not support Employer's attestation of peakload need.

Further, though Employer appears to have 447 permanent employees, its monthly employee numbers vary from 244 to 447 workers. *See* CO Br. 16; AF 33. 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 33. As Employer provides no information to account for these discrepancies, it is unclear why Employer cannot call the remainder of its workforce to meet its demand during those months.

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 30. Employer noted that Phoenix Arizona is "currently seeing the largest permit activity for new homes since 2007." AF 29-30 (*citing "Worker Shortage"*). Employer also provided Census data on building permits provided throughout the United States. AF 63-64.

Employer's cited sources, however, do not provide enough information to support Employer's peakload need. Employer's cited news article provides no reference data, beyond the 2007 labor market, with which to compare the 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 the evidence as a whole, 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.

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.