

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case Nos.: 2017-TLN-00035
2017-TLN-00036
2017-TLN-00037
2017-TLN-00038

ETA Case Nos.: H-400-17002-380633
H-400-17005-930367
H-400-17003-934159
H-400-17003-095606

In the Matter of:

ROADRUNNER DRYWALL CORP.,
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 four consolidated H-2B temporary labor certification matters.¹

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. 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).

STATEMENT OF THE CASE

Employer provides drywall and painting services in the southwestern United States. (AF1 97-98).² In January 2017, Employer submitted the following applications³ for Temporary Employment Certification⁴:

Case Number	Application	Worker	Requested	Period of Need
2017TLN00035	01/02/17	Drywall Installer	50	04/01/17-11/30/17
2017TLN00036	01/02/17	Drywall Installer	25	04/01/17-12/15/17
2017TLN00037	01/02/17	Drywall Taper	75	04/01/17-11/30/17
2017TLN00038	01/03/17	Painter Helper	20 ⁵	04/01/17-12/15/17

In January and February 2017, the CO issued Notices of Deficiency (“NOD”) in each of the four cases.⁶ Each NOD articulated two⁷ deficiencies: (1) failure to establish the job opportunity as temporary in nature under 20 C.F.R. § 655.6(a)-(b) and (2) failure to establish temporary need for the number of workers requested under 20 C.F.R. § 655.11(e)(3)-(4).⁸ In February 2017, Employer responded in each case, providing additional documentation of the workload throughout the year, past payrolls, a job itinerary for 2017, and labor market research.⁹ In March 2017, the CO denied Employer’s Applications based on the same deficiencies identified in the NOD, noting that Employer’s responses did not cure these deficiencies.¹⁰

² Citations to the Appeal File are abbreviated as “AF,” with the cases 2017-TLN-00035, 2017-TLN-00036, 2017-TLN-00037, and 2017-TLN-00038 noted as “AF1” through “AF4,” respectively. For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted. Citations to the CO’s brief will be abbreviated as “CO Br.”

³ AF1 at 89; AF2 at 88; AF3 at 98; AF4 at 80. Along with each application, Employer filed Appendix B to ETA Form 9142B; an *H2B Work Visa Client Service Agreement* dated December 30, 2016; an undated *Statement of Need*; a *Foreign Recruitment Agreement* dated December 30, 2016; a *Referred Foreign Worker Agreement* dated December 30, 2016. See, e.g., AF4 at 80-97.

⁴ AF1 at 82; AF2 at 81; AF3 at 91; AF4 at 73.

⁵ The CO’s Brief states that Employer applied for 40 painter helpers, but review of the applications in the administrative file does not support that assertion.

⁶ AF1 at 75; AF2 at 67; AF3 at 64 AF4 at 72.

⁷ The application for 20 painter helpers also contained a deficiency for failure to submit an acceptable job order that was subsequently cured. AF4 at 16-22.

⁸ AF1 at 78-81; AF2 at 70-73; AF3 at 75-78; AF4 at 67-72.

⁹ AF1 at 64-74; AF2 at 48-66; AF3 at 53-71; AF4 at 55-63.

¹⁰ AF1 at 16-28; AF2 at 16-27; AF3 at 15-25; AF4 at 13-22. I note that Employer requested a status update on its response to the Notice of Deficiency on February 24, 2017 for all four cases. AF1 at 43; AF2 at 35; AF3 at 40; AF4 at 37. Employer repeatedly requested status updates through March 15, 2017 for at least three of the cases but received no response from the CO until the denial of the Applications. AF1 at 36; AF3 at 33; AF4 at 30.

PROCEDURAL HISTORY

On April 1, 2017, BALCA received requests for administrative review of the CO's denials in these matters. See, e.g., AF1 at 1. On April 4, 2017, the CO through counsel filed a motion to consolidate these four claims, and I issued a Notice of Assignment and Consolidation Order on April 12, 2017, instructing the CO to transmit the Appeal Files and granting the parties seven business days after receiving the Appeal Files to submit briefs. The Appeal File was transmitted on April 12, 2017. On April 24, 2017, the CO timely filed a consolidated brief for all four cases. CO Br. at 1.

SCOPE OF REVIEW

I may only consider the Appeal File prepared by the CO, any legal briefs submitted by the parties, and 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).¹¹ Upon considering the evidence of record, I may take one of the following actions: (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

There are two issues on appeal: (1) whether Employer has established a temporary need for these workers; and (2) whether Employer's request represents a bona fide job opportunity for which Employer has a justified need for 170 workers. Employer bears the burden of proof for establishing eligibility for a temporary alien labor certification. 8 U.S.C. § 1361.

Employer has not established need that is truly temporary.

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of four standards: one-time occurrence, seasonal, peakload, or intermittent.¹²

¹¹ The proper standard of review is not identified in statute or regulation. With reference to two previous BALCA decisions, the CO through counsel suggests that I should defer to the CO unless the decision is arbitrary and capricious. *But cf. Albert Einstein Medical Center*, 2009-PER-00379 *et seq* (November 21, 2011) (en banc) (holding that "BALCA's review of the CO's legal and factual determinations when denying an application for permanent alien labor certification is de novo, limited in scope by 20 C.F.R. § 656.27(c)."). I need not resolve that issue because the outcome in this matter would be the same regardless of whether I engaged in de novo review of the CO's decisions or deferred to the CO by application of the so-called arbitrary and capricious standard of review.

¹² 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).

Here, Employer alleges peakload temporary need in support of all four Applications.¹³ Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(B). 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.” *Id.* § 214.2(h)(6)(ii)(B)(3).

The CO found that Employer failed to establish temporary need because Employer argued that its demand increases in February, peaks in the summer months, and continues through December.¹⁴ Given this explanation for the peakload from April through at least November, the CO noted, “It is unclear why the start date of need is not in February . . . and why the end date of need is not at the end of December.”¹⁵ The CO also noted that Employer has submitted many different applications in the past which assert dates of need ranging from February 8th and July 11th to September 15th and December 31st.¹⁶ The CO requested further information and documentation.

In response, Employer provided more information on the company, its need for the workers, a “Job Itinerary” [hereinafter Itinerary] for 2017, general reports from the construction industry regarding labor needs, and payrolls from 2015 and 2016.¹⁷ Each Itinerary includes a “List of Contracted Jobsites Projections for 2017” and compares these numbers to those from 2016, but provides no specific information on the contracts themselves, how Employer schedules its work, or which contracts must be completed in which month.¹⁸ Employer argued that the Itinerary demonstrates peakload needs and the payroll report shows the employment of permanent workers.¹⁹

These assertions by Employer are unpersuasive for at least four reasons. First, a mere increase in employment from 2016-2017 does not establish a temporary need, but demonstrates “just the general growth of the business.”²⁰ Second, the CO properly

¹³ AF1 at 82; AF2 at 81; AF3 at 91; AF4 at 73.

¹⁴ AF1 at 78-79; AF2 at 70-71; AF3 at 75-76; AF4 at 67-68.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AF1 at 64-74; AF2 at 48-66; AF3 at 53-71; AF4 at 41-63.

¹⁸ AF1 at 74; AF2 at 57; AF3 at 62; AF4 at 63.

¹⁹ *See, e.g.*, AF3 at 60.

²⁰ *See, e.g.*, AF3 at 8.

noted that “it remains unclear if the employer schedules its itinerary on the expectation of the arrival of its temporary workforce and thus the arrival of its workers creates the peak and not the actual job.”²¹ Employer commented in each application that it was likely to be behind schedule from January through March and that the temporary workers would be used to catch up on its projections from those months, as well.²² Employer also noted, “It is also possible to pick up more projected units for 2017 going forward if we have enough total workers and drywall installers.”²³ These statements support the fact that Employer seems to schedule its work around the arrival of the temporary workers. Without further information, I am unable to evaluate whether the numbers provided on the Itinerary indicate a true peakload or merely represent anticipatory scheduling by Employer for the period when Employer would like to hire supplemental workers. Finally, the Itineraries for painter helpers and for tapers actually establish a peak from April through September, which does not align with the requested peakload period.²⁴ Accordingly, the Itineraries provided do not establish need that is truly temporary.

Also unpersuasive is document styled “The Labor Market Research Report on Construction in Arizona,” which concludes, “All employers indicate a shortage of qualified workers and a difficulty with retention of skilled employees.”²⁵ As the CO observed, many comments in this Report from various construction companies actually support a permanent, rather than a temporary, need.²⁶ In answering “Are these positions year round or just during a specific season?” and other questions, the comments include:

- “Year round. Summer is when they’re busiest because of all the school contracts and what not, but they always hire year round.”²⁷

²¹ AF1 at 9; AF2 at 22; AF3 at 8; AF4 at 22.

²² AF1 at 68; AF2 at 53; AF3 at 57; AF4 at 58.

²³ AF1 at 68; AF3 at 57; AF4 at 58.

²⁴ AF3 at 52; AF4 at 63. I further note that the Job Itinerary for the painter helper position is labeled “Drywall Taper,” but appears to show different numbers from the Itinerary provided for the taper position. This is not the only inconsistency observed on the Itinerary documents. For example, the table provided in the Itinerary for Drywall Installers indicates that the total number of projects anticipated for 2017 in the “Phoenix Metropolitan Area” is 3,238. However, when the vertical and horizontal columns containing total numbers of “Contracted Jobsites” are added, the total is actually 4,713. See AF1 at 74. Arithmetical errors of this magnitude in the key exhibit concerning Employer workload significantly detract from the credibility of the document and the weight, if any, it should be accorded.

²⁵ AF1 at 55.

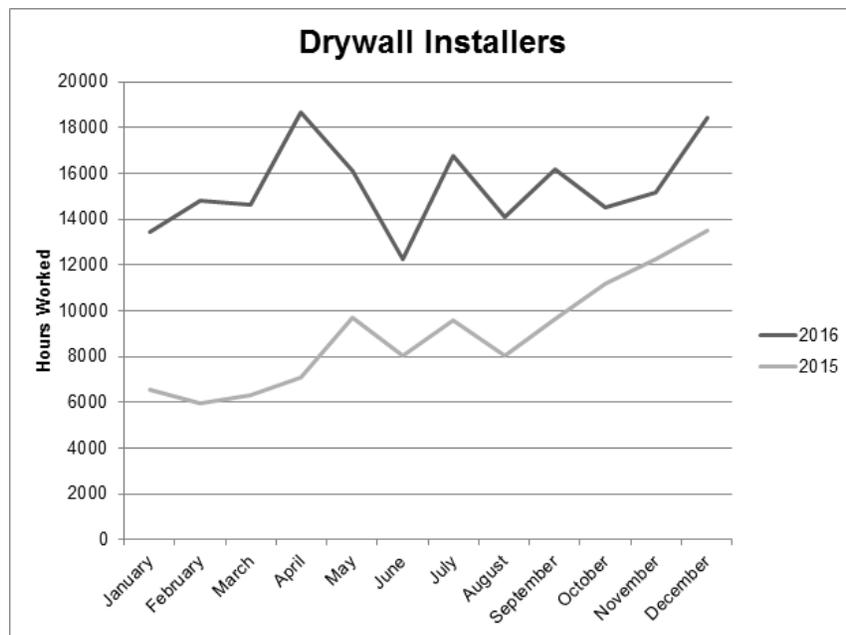
²⁶ AF3 at 8.

²⁷ See, e.g., AF1 at 56. I note that AF4 does not include this Report, but it does include statements by Employer that there is a general employee shortage in the industry. AF4 at 59-60.

- “They stay busy year round, though summer is usually busier. . . . Always hire for permanent work, never seasonally or for fix terms.”²⁸
- “Year round. . . . They do not hire temporary workers; they want their employees to stick around.”²⁹
- “Specific job and year around [sic]. . . . Busy all year.”³⁰
- “Year round. It takes a lot of time and money to train the laborers; being so, they try to keep them for as long as possible. . . . They tend to hire more in the summer months, but are always hiring year round.”³¹

If these and other comments in the Report indicate any peakload, it would seem to be in the summer months. But nowhere in the Report does it suggest, let alone establish, a peakload between the months of April and December. Accordingly, the Research Report does not establish temporary need.

Finally, Employer provides its payroll reports from 2015 and 2016. As the CO noted, the number of hours worked in 2016 does not support the claim of temporary need. For example, the graph below illustrates that the number of hours worked by Drywall Installers each month in 2016 is actually reduced for much of the period described by Employer as “peakload.”



²⁸ AF1 at 57.

²⁹ *Id.* at 58.

³⁰ *Id.* at 59-60.

³¹ *Id.* at 61.

Also informative by way of example is the payroll for drywall installers, sorted not in chronological order but by total hours worked per month.³²

Month	Work Hours 2016	Work Hours 2015
June	12242.83	8045.25
January	13477.50	6582.75
August	14095.00	8048.00
October	14510.25	11193.00
March	14640.50	6303.00
February	14814.50	5962.03
November	15189.75	12291.00
May	16101.00	9728.00
September	16196.25	9639.00
July	16787.75	9581.00
December	18419.00	13533.50
April	18688.00	7079.00

Although the 2016 numbers appear to support Employer’s assertion of increased demand in April and December, other monthly numbers simply do not support Employer’s asserted peakload. The summer months vary drastically, with June and August some of the lightest months, but July one of the busiest. January, February, and March are not readily distinguishable from the rest of the year, notwithstanding Employer’s assertion that these months are a “lull.” In 2015, the clear peakload was in October through December. For the taper and painter helper positions, the 2016 monthly payrolls show a clear peak in the second half of the year.³³ Without further information, such as data on the number of hours worked by temporary versus permanent employees or the types of jobs performed by different kinds of employees, the monthly summary does not on its face support Employer’s attestation of peakload need from April through December.

Employer’s provided reasoning for its peakload need is also unpersuasive. Employer explains that the demand “has increased for 2017 and we are currently seeing the largest permit activity for new homes since 2007.”³⁴ It provides various news

³² AF1 at 73; AF2 at 47.

³³ AF4 at 50.

³⁴ AF1 at 69; AF2 at 53; AF3 at 58; AF4 at 59.

articles stating that the construction industry is facing a severe shortage in workers. However, these statements, if true, support a permanent need for workers rather than a temporary one. The fact that Employer asserts a “temporary” need that lasts for at least nine consecutive months out of the year further supports the conclusion that the need for workers is permanent. Accordingly, I find that Employer has failed to establish temporary peakload need for the months asserted as required by 20 C.F.R. § 655.6(a)-(b).

Employer’s filing history also supports the conclusion that its needs are virtually year-round and permanent. In a recent application filed on November 17, 2016, Employer requested certification for 75 Drywall Tapers from February 15, 2017, to November 15, 2017, based upon an alleged peakload temporary need during that period.³⁵ Similarly, Employer filed an application on November 10, 2016, requesting certification for 75 Drywall Installers from February 8, 2017, to November 8, 2017, based upon an alleged peakload temporary need during that period, as well.³⁶ On November 4, 2016, Employer also requested 20 painter helpers from February 1, 2017, to October 31, 2017, on the same basis.³⁷ BALCA affirmed the denial of these applications on January 23, 2017, but not before Employer had already submitted the instant applications for a slightly different period of purportedly peakload temporary need. The two groups of applications do not reflect different job duties to be performed, as each requests the same occupations be authorized for hire. The applications do not pertain to separate or distinct business entities operated by Employer or different geographical areas, nor is there evidence that Employer is using different employees for each distinct period of alleged need. The fact of similar, nearly contemporaneous applications for overlapping periods of alleged need is not, in and of itself disqualifying, but it is evidence suggestive that Employer’s needs span even more of the calendar than that covered by the instant applications, and tends to show that these needs are permanent.

**Employer has failed to justify the number of positions, the period of need,
and the bona fide nature of these job opportunities**

Employer must establish that “[t]he number of worker positions and period of need are justified; and [t]he request represents a bona fide job opportunity.” 20 C.F.R. § 655.11(e)(3)-(4); see *North Country Wreaths*, 2012-TLN-00043, slip op. at 6 (Aug. 9,

³⁵ See *Roadrunner Drywall Corporation*, 2017-TLN-00019 (January 23, 2017).

³⁶ See *Roadrunner Drywall Corporation*, 2017-TLN-00018 (January 23, 2017).

³⁷ See *Roadrunner Drywall Corporation*, 2017-TLN-00017 (January 23, 2017).

2012). Here, the CO properly determined that Employer failed to establish either of these requirements.

Employer proffers its payroll reports as evidence that it has historically employed permanent and temporary workers, while the Itineraries are tendered as evidence of its “peakload need.”³⁸ However, Employer’s provided evidence is unspecific and lacks explanation, as previously noted above. In addition to these deficiencies, several additional points that bear upon the credibility of Employer’s request must be addressed, as well.

It is uncontroverted that Employer has used temporary workers in the recent past. That being noted, the number requested for this period during 2017 far exceeds the maximum number of temporary workers employed in any given month in 2016. For example, Employer requests 75 Drywall Installers and 75 Drywall Tapers for 2017, but did not use more than 23 of either category during any single month in 2016.³⁹ No explanation is provided for a threefold increase in the number of requested workers other than a generalized assertion that the anticipated number of jobs in 2017 exceeds the capacity of its permanent workforce.⁴⁰

There is also the question of the relationship between Employer’s use of temporary workers and its permanent workforce. Review of the payroll reports provided by Employer reveals that its use of temporary Installers and Tapers in 2016 generally coincided with a reduction of the number of permanent employees on payroll. For example, Employer had an average of 94 permanent employees working as Drywall Installers during those months in 2016 in which no temporary workers were employed. In the months when temporary workers were used, the permanent employee headcount dropped to an average of 78 permanent Installers, a reduction of over 17%.⁴¹ Similarly, Employer had an average of 73 permanent employees working as Drywall Tapers during those months in 2016 in which no temporary workers were employed; that number dropped over 16% to an average of 61 permanent employees during the months in which temporary Tapers were employed.⁴²

³⁸ See, e.g., AF1 at 71 (explaining significance of payroll and itinerary).

³⁹ See AF1 at 73 (describing installer headcount); AF 3 at 52 (describing taper headcount).

⁴⁰ Employer requests the same number of Painter Helpers that it utilized in 2016, but does not provide specific payroll information for their past utilization, which interferes with meaningful analysis of whether Employer’s need is bona fide and the numbers requested are justified. See AF4 at 63. It is also unclear why the need for Installers and Tapers would increase so much but the need for Painter Helpers would remain static; explanation would have been useful. But in light of the non-temporary nature of Employer’s need for these workers, CO’s denial of Employer’s application for Painter Helpers is appropriate.

⁴¹ See AF1 at 73.

⁴² See AF3 at 52.

The effect of this practice can be seen by comparing the total staff actually employed by Employer and the staff that would have been available to complete work if permanent staff was not reduced during periods of temporary worker utilization. In the case of Tapers, had Employer sustained its average of 73 permanent Tapers during the months in 2016 in which it added an average of 20 temporary workers, its average total staff of Tapers would have been 93, an increase of almost 28% over Employer's permanent staff alone. Instead, the actual average total Taper staff during those months in 2016 when temporary workers were utilized was just slightly more than 80 employees, an increase of just 10% over Employer's average permanent staff level. This disparity is unexplained by Employer, and I cannot determine whether the permanent staff decreased at these times through ordinary attrition or by other means. The use of temporary nonimmigrant workers is authorized only "if unemployed persons capable of performing such service or labor cannot be found in this country" See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Given that statutory context, as well as the fact that Employer bears the burden of proof in this proceeding, this significant explanatory gap calls into question the bona fide nature of these requests and the justification for the worker positions being requested.

Considering the evidence as a whole, I find that Employer has failed to establish by a preponderance of the evidence any temporary peakload needs, bona fide job opportunities, or a justified need for the number of worker positions requested. Accordingly, the CO did not err in denying the labor certification applications based on 20 C.F.R. §§ 655.11(e)(3)-(4) and 655.6(a)-(b).

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's **DENIAL** of labor certification in this matter is **AFFIRMED**.

SO ORDERED.

For The Board:

WILLIAM T. BARTO
Administrative Law Judge