



Issue Date: 06 February 2018

BALCA Case No.: 2018-TLN-00054

ETA Case No.: H-400-17320-042914

In the Matter of:

C&H Concrete, LLC,

Employer.

Certifying Officer: Chicago National Processing Center

Before: PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to C&H Concrete's request for administrative review of the Certifying Officer's (CO) denial of temporary 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. 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 a labor certification from the Department of Labor. 8 C.F.R. § 214.2(h)(6)(iii). Applications for temporary labor certification are reviewed by a CO of the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration (ETA). If the CO denies certification, in whole or in part, the employer may seek administrative review. BALCA must affirm, reverse, modify, or remand the CO's determination within 7 business days of submission of the CO's brief or 10 business days after receipt of the Appeal file, whichever is later. 20 C.F.R. § 655.61.

BACKGROUND

C&H Concrete, LLC (C&H or Employer) is a concrete supplier for the construction industry in Las Vegas, Nevada. C&H Concrete filed an Application for Temporary Employment Certification with the Office of Foreign Labor Certification, requesting certification for 30

“Helper-Laborers” to satisfy its peakload labor need from February 1, 2018 to November 1, 2018. AF 11-16.

On November 24, 2017, the CO issued a Notice of Deficiency to C&H for (1) failing to establish temporary need for the number of workers requested, (2) failing to submit an acceptable job order, and (3) failing to submit a complete and accurate ETA Form 9142. AF 28-36. On December 8, 2017, in response to the Notice of Deficiency, C&H submitted payroll summaries from 2015-17 and a Las Vegas Housing Market Letter to demonstrate a need for temporary workers. AF 17, 20-26.

The CO issued a Final Determination denying certification on December 25, 2017. AF 2. Finding that the documents did not support C&H’s purported need for any temporary workers, the CO wrote:

[T]his payroll showed that the permanent employees on the employer’s staff rarely reached over 40 hours of work in a month. Since 160 hours a month indicates full employment, it appears that the employer is incapable of fully employing its permanent workers, let alone the 30 additional temporary workers it is requesting. Furthermore, the employer’s payroll indicates it did not use the certification it was previously approved for in application H-400-151314-094718. The employer did not account for why it was unable to utilize the 15 workers for which it previously received certification.

The employer also submitted “The Las Vegas Housing Market,” which appears to be a general industry publication. This type of document is not helpful for determining an increase in the employer’s number of workers requested because it does not speak to the employer’s specific circumstance, just the industry as a whole.

AF 5. C&H Concrete appealed the CO’s decision to BALCA on January 5, 2018. AF 1. On January 26, 2018, the Office of the Solicitor informed the Court that it would not file a brief in this case. By unopposed motion received January 30, 2018, Employer’s counsel requested an extension for time until February 5, 2018 to file a brief in this case, and that request was granted.

At 6:11 p.m. on February 5, 2018, well after close of business, Employer filed a motion to remand this matter on the grounds that it had provided incorrect wage information, and wants the opportunity to present the correct information to the CO. Employer asserted that it had not had an opportunity to discuss the remand motion with counsel for the CO. The motion will be denied, however, because (1) it came after the deadline for submission of the Employer’s closing brief, (2) it was filed too late for a response by the CO, and the regulations require that I issue the decision based on the record that is available to the CO. 20 C.F.R. § 655.61(e). Because the motion to remand will be denied, I will deem Employer to have waived its right to submit a written brief.¹

DISCUSSION

The Employer bears the burden of establishing that its temporary need is justified as peakload as defined by the Department of Homeland Security. An employer seeking certification

¹ The Solicitor copied my assistant on an email objecting to remand. As nothing has been filed formally, I did not consider the Solicitor’s email in denying the remand request.

under the H-2B program must “establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.”² An employer’s need is temporary if it is: a onetime occurrence; a seasonal need; a peakload need; or an intermittent need.³ An employer establishes a “peakload need” if it shows 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.”⁴ The employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity.⁵

The Employer submitted payroll records from years 2015-17 in support of its application. The records, summarized in the tables below, reveal that the average “permanent” worker at C&H Concrete rarely worked more than 40 hours in a month. AF 20-22.

2015			
Month	Total Workers	Total Hours Worked	Average Number of Hours Worked Per Worker Per Month
January	61	1309	21.45902
February	63	2161	34.30159
March	73	2528	34.63014
April	81	2838	35.03704
May	84	3181	37.86905
June	92	3501	38.05435
July	96	3787	39.44792
August	93	3594	38.64516
September	88	2972	33.77273
October	82	2641	32.20732
November	72	2476	34.38889
December	75	2407	32.09333

2016 – Permanent Workers			
Month	Total Workers	Total Hours Worked	Avg. Number of Hours Worked Per Worker Per Month
January	74	2086	28.18919
February	82	2821	34.40244
March	91	3717	40.84615
April	111	4409	39.72072
May	144	5371	37.29861
June	174	6406	36.81609

² 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B).

³ 20 C.F.R. § 655.6(b).

⁴ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

⁵ 20 C.F.R. § 655.11(e)(3) and (4).

July	199	6951	34.92965
August	223	7576	33.97309
September	227	7882	34.72247
October	232	7883	33.97845
November	211	7173	33.99526
December	197	6348	32.22335

2016 – Temporary Workers			
Month	Total Workers	Total Hours Worked	Avg. Number of Hours Worked Per Worker Per Month
January	0	0	0
February	0	0	0
March	0	0	0
April	0	0	0
May	0	0	0
June	0	0	0
July	5	640	128
August	5	800	160
September	5	760	152
October	5	800	160
November	5	200	40
December	0	0	0

2017			
Month	Total Workers	Total Hours Worked	Avg. Number of Hours Worked Per Worker Per Month
January	138	4074	29.52174
February	129	4019	31.15504
March	131	4460	34.0458
April	133	4345	32.66917
May	127	4234	33.33858
June	128	3341	26.10156
July	129	4210	32.63566
August	119	3940	33.10924
September	115	4594	39.94783
October	120	3244	27.03333
November	116	4114	35.46552
December	119	3496	29.37815

Since 160 hours per month per worker indicates full employment, it appears that the CO was correct in stating that Employer is incapable of fully employing its permanent staff.

In addition, on January 6, 2016, Employer was certified for 15 Helpers-Production Workers for the period from February 1, 2016 through October 31, 2016. Employer's payroll records, however, demonstrate that it added only five temporary workers during that certification period, and those for the months of July-November (four months during the certification period, and one month afterward). Employer did not provide any evidence that it added any temporary workers in 2015 or 2017. The evidence is insufficient to demonstrate a historical peakload need for the nine-month period requested.

Finally, although Employer submitted statements from two builders (AF 46-47) that the builders intended to use Employer during the period between February and October of 2018, their statements are couched in generalities and, by their own terms, show that no contract has yet been awarded to C&H Concrete by either. Likewise, the industry survey submitted by Employer (AF 23-26) contains a summary of real estate closings for new construction in 2017, and includes a projection that there will be an increase in such closings in 2018. That projection is nothing more than speculation, and there is no evidence that the number of building permits has in fact increased, or that Employer has been awarded any contracts related to the purported increased number of new residential homes.

Accordingly, Employer has failed to establish a peakload need for 30 Helper-Laborers for the period between February 1 and October 31, 2018.

ORDER

1. Employer's motion for remand is DENIED; and
2. The Certifying Officer's denial of C&H Concrete's application is AFFIRMED.

For the Board:

PAUL C. JOHNSON, JR.
Administrative Law Judge

PCJ, Jr./ksw
Newport News, Virginia