

**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: 20 March 2018**

**BALCA Case No.:** 2018-TLN-00077  
**ETA Case No.:** H-400-17330-677616

*In the Matter of:*

**GLD CONCRETE, LLC,**  
*Employer.*

Appearance: Kevin Lashus, Esquire  
Kershaw Law Firm  
Austin, Texas  
*For the Employer*

Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Steven D. Bell  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from GLD Concrete, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor 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 United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of

---

<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (2018).

<sup>2</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

### STATEMENT OF THE CASE

Employer, located in Houston, Texas, is a commercial concrete construction company.<sup>3</sup> On January 1, 2018, Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”); (2) Appendix B to ETA Form 9142B; (3) Letters of Intent; (4) DHS Form G-28; (5) job order including email receipt; (6) *Prevailing Wage Determination* P-400-17182-573109; (7) copy of prior notice of certification including Certified Application for Temporary Employment Certification H-400-16356-713191.<sup>4</sup> Employer requested certification for forty construction laborers<sup>5</sup> from April 1, 2018 until December 23, 2018, based on an alleged peakload need during that period.<sup>6</sup>

On January 11, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in Employer’s Application.<sup>7</sup> Specifically, the CO determined that Employer failed to: (1) establish that its job opportunity is temporary in nature; (2) failed to establish temporary need for the number of workers requested; and (3) submit an acceptable job order.<sup>8</sup> Deficiencies (1) and (3) are the sole issues on appeal.<sup>9</sup> Regarding these deficiencies, the CO stated that Employer “did not sufficiently demonstrate the requested standard of temporary need” as it was “not clear if the dates of service are a request of the contractors or the contractors’ use of the employer’s services during this time due to the employer’s availability of a temporary workforce.” The CO requested that Employer submit supporting evidence documenting that it has a temporary need for labor and requested the following clarification:

1. A statement describing the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation and supporting documents that substantiate the employer’s statements that concrete construction work cannot be performed under the attested weather conditions in Texas and that construction in general slows down in the employer’s area of intended employment;
3. A summary of all projects in the area of intended employment that have contributed to the employer’s need for temporary workers at its worksite location(s) during its requested dates of

---

<sup>3</sup> AF 75-6. In this Decision and Order, “AF” refers to the Appeal File.

<sup>4</sup> *Id.* at 75-109.

<sup>5</sup> SOC (O\*Net/OES) occupation title “Construction Laborers” and occupation code 47-2061. AF 75.

<sup>6</sup> AF 75.

<sup>7</sup> *Id.* at 66-74.

<sup>8</sup> *Id.* at 69-74.

<sup>9</sup> *Id.* at 14-20.

need. The list should include the anticipated start and end dates of each project and worksite addresses<sup>10</sup>

The CO also stated that in order to establish that it has a peakload need, Employer must submit signed monthly payroll reports listing the number of full-time permanent and temporary workers Employer has employed each month as construction laborers, including total hours worked and earnings received for two previous calendar years.<sup>11</sup> Alternatively, the CO stated that Employer could submit any other evidence that “similarly serves to justify the dates of need being requested for certification.”<sup>12</sup>

Regarding the third deficiency which was on appeal, the CO found that the submitted SWA job order failed to include the requirement found in Section F.a., Item 5., of the ETA Form 9142 that workers are required to lift up to 45 pounds. The CO thus found that the job order failed to meet the requirement that it “[d]escribe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties,” per 20 C.F.R. § 655.18. The CO required that Employer submit amended job order language including the 45 pound lifting requirement, or submitting an already amended job order including the required language.<sup>13</sup>

Thereafter, on January 22, 2018, Employer filed a response to the CO’s NOD.<sup>14</sup> Regarding the first deficiency, Employer stated that it was requesting the same number of workers over the same dates of need as the previous year, and had attached payroll summaries and anticipated contracts. Regarding the third deficiency, Employer stated that it had amended the job order which was attached.<sup>15</sup>

On February 9, 2018, the CO issued a Non-Acceptance Denial.<sup>16</sup> Although Employer cured one of the three deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing that the job opportunity was temporary in nature and failed to submit an acceptable job order under 20 C.F.R. § 655.18 as it had submitted the same job order previously submitted and failed to include the required language on the lifting requirement.<sup>17</sup> On February 21, 2018, Employer requested administrative review of the CO’s Non-Acceptance Denial, as permitted by 20 C.F.R. § 655.61.<sup>18</sup>

---

<sup>10</sup> AF 70.

<sup>11</sup> *Id.* at 70-1.

<sup>12</sup> *Id.* at 71.

<sup>13</sup> *Id.* at 71-3.

<sup>14</sup> AF 28

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 12-20.

<sup>17</sup> *Id.* at 14-18.

<sup>18</sup> AF 1-11. Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business

On March 7, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On March 7, 2018, the undersigned BALCA judge received the Appeal File from BALCA. The Solicitor declined to file a brief, and Employer filed a brief on March 16, 2018.

## 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 Employer’s request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.<sup>19</sup> 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.<sup>20</sup>

Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>21</sup> The CO may only grant Employer’s Application to admit H-2B workers for temporary nonagricultural employment if Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.<sup>22</sup>

Employer has argued in its brief that it was not required to submit detailed supporting documentation to support its peakload workforce needs based on the September 1, 2016 ETA announcement on the change in process on the submission of applications for temporary labor certification.<sup>23</sup> However, this argument ignores the fact that the same announcement specifically states that other documentation or evidence demonstrating temporary need “must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.”<sup>24</sup>

The Department notes that many employers use the H-2B visa program on a predictable and recurring, seasonal business cycle, and these job opportunities were previously granted labor

---

days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

<sup>19</sup> 20 C.F.R. § 655.61.

<sup>20</sup> 20 C.F.R. § 655.61(e).

<sup>21</sup> 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

<sup>22</sup> 20 C.F.R. § 655.1(a).

<sup>23</sup> *Emp. Bf.* at 5-7.

<sup>24</sup> Employment and Training Administration, Dep’t of Labor H-2B TEMPORARY NONIMMIGRANT VISA PROGRAM: Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating “Temporary Need” (September 1, 2016) [https://www.foreignlaborcert.doleta.gov/pdf/FINAL\\_Announcement\\_H-2B\\_Submission\\_of\\_Documentation\\_Temporary\\_Need\\_082016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf).

certification. Thus, the nature of the need for the services to be performed has been and may continue to be determined temporary. The additional documentation submitted by many employers, which is substantially similar from year-to-year for the same employer or a particular industry, creates an unnecessary burden for employers as well as the CO, who must review all documents submitted with each application.

To reduce paperwork and streamline the adjudication of temporary need, effectively immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B “Temporary Need Information,” Field 9 “Statement of Temporary Need” of the Form ETA-9142B. This written statement should clearly explain the nature of the employer’s business or operations, why the job opportunity and number of workers being requested for certification reflect a temporary need, and how the request for the services or labor to be performed meets one of the four DHS regulatory standards of temporary need chosen under Section B, Field 8 of the Form ETA-9142B. *Other documentation or evidence demonstrating temporary need is not required to be filed with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.* The Form ETA-9142B filing continues to include in Appendix B, a declaration, to be signed under penalty of perjury, to confirm the employer’s temporary need under the H-2B visa classification (Appendix B, Section B.1).<sup>25</sup>

As the CO issued a notice of deficiency, Employer was obligated to provide the requested information.

#### Failure to Submit an Acceptable Job Order

In accordance with 20 C.F.R. § 655.16, Employer must submit a job order to the SWA serving the area of intended employment at the same time it submits the Application for Temporary Employment Certification and a copy of the job order to the CNPC. This job order must satisfy the requirements set forth in § 655.18.<sup>26</sup> § 655.18 requires that:

Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B

---

<sup>25</sup> Submission of Documentation Demonstrating “Temporary Need” at 1-2. (*Emphasis added*).

<sup>26</sup> § 655.16(a)(2).

employers in the same occupation and area of intended employment.<sup>27</sup>

It also requires that it “[d]escribe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties[.]”<sup>28</sup>

In its Non-Acceptance Denial, the CO determined that Employer failed to meet the job order requirements contained in 20 C.F.R. § 655.18.<sup>29</sup> Each job order placed in connection with an *Application for Temporary Employment Certification* must meet various requirements outlined in 20 C.F.R. § 655.18.

As to the job order deficiency, the CO found that Employer “submitted the same job order that it submitted with its original application. The employer did not amend its application to include the 45 pound lifting requirement, consistent with the ETA Form 9142” in compliance with the Notice of Deficiency.<sup>30</sup> Employer failed to address its failure to amend its job order in its brief.<sup>31</sup>

The Notice of Deficiency explained to Employer that the job order needed to meet all of the requirements listed in 20 C.F.R. § 655.18.<sup>32</sup> Thus, Employer was given an opportunity to modify the job order and adhere to the revised regulations before the CO issued a Final Determination. I find that the CO correctly concluded that the job order failed to include information regarding the lifting requirement detailed in ETA Form 9142 as a job requirement, as required by 20 C.F.R. § 655.18(b). BALCA has strictly enforced the H-2B job order requirements.<sup>33</sup> Because the Employer has failed to meet the job order requirement contained in 20 C.F.R. § 655.18(a)(2) and (b)(3), I find the CO properly denied certification. Because I affirm the denial on this ground, I do not reach the other reasons cited by the CO.

---

<sup>27</sup> § 655.18(a)(2).

<sup>28</sup> § 655.18(b)(3).

<sup>29</sup> AF 20.

<sup>30</sup> *Id.*

<sup>31</sup> *Emp. Bf.*

<sup>32</sup> AF. 71-3.

<sup>33</sup> See *Adimar Enterprises, d/b/a Wow Egyptian Fast Food Restaurant*, 2013-TLN-00038 (Mar. 11, 2013) (affirming denial where the job order did not contain a majority of the information required by § 655.17); *A & W Builders of Jacksonville, Inc.*, 2012-TLN-00044, (Aug. 17, 2012) (affirming denial where the employer’s job order did not include the content required by § 655.17 and the employer could have listed this information in the “Job Summary” section of the SWA system;

**ORDER**

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

Steven D. Bell  
Administrative Law Judge