

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 March 2018**

**BALCA Case No.:** 2018-TLN-00078  
**ETA Case No.:** H-400-17330-959393

*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 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

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<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.

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) Letters of Intent; (3) signed Appendix B; (4) DHS Form G-28; (5) job order; (6) *Prevailing Wage Determination* P-400-17182-520477.<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) establish temporary need for the number of workers requested; (3) offer a sufficient wage; and (4) submit an acceptable job order.<sup>8</sup> Deficiency (1) is the sole issue on appeal.<sup>9</sup> Regarding this deficiency, 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 need. The list should include the anticipated start and end dates of each project and worksite addresses<sup>10</sup>

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<sup>3</sup> AF 75. In this Decision and Order, "AF" refers to the Appeal File.

<sup>4</sup> *Id.* at 74-99.

<sup>5</sup> SOC (O\*Net/OES) occupation title "Construction Laborers" and occupation code 47-2061. AF 74.

<sup>6</sup> AF 74.

<sup>7</sup> *Id.* at 64-73.

<sup>8</sup> *Id.* at 67-73.

<sup>9</sup> *Id.* at 10-16.

<sup>10</sup> AF 70.

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>

Thereafter, on January 22, 2018, Employer filed a response to the CO’s NOD.<sup>13</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, as well as the approved application from the previous year.<sup>14</sup>

On February 7, 2018, the CO issued a Non-Acceptance Denial.<sup>15</sup> Although Employer cured three of the four deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing that the job opportunity was temporary in nature.<sup>16</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>17</sup>

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>18</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>19</sup>

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<sup>11</sup> *Id.* at 67-68.

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

<sup>13</sup> AF 25.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 10-16.

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

<sup>17</sup> AF 1-9. 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 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>18</sup> 20 C.F.R. § 655.61.

<sup>19</sup> 20 C.F.R. § 655.61(e).

Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>20</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>21</sup>

#### Failure to Establish a Peakload Need for Workers

The sole issue on appeal is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.<sup>22</sup> Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."<sup>23</sup> Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, "for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B)." Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015). Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

In this case, Employer alleges it has a peakload need for forty construction laborers. In order to establish such a peakload need, 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). The CO found that:

It remains unclear whether and in what way the weather conditions in in [*Sic*] the area of intended employment prevents concrete construction work during the attested non-peakload months of

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<sup>20</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>21</sup> 20 C.F.R. § 655.1(a).

<sup>22</sup> 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3).

<sup>23</sup> 20 C.F.R. § 655.6(a).

January through March. The employer therefore has not sufficiently attested to how it experiences a peakload need for temporary workers from April through December 2018.<sup>24</sup>

The CO noted that the submitted contracts do not specify any time during the year by which the work must be completed, despite the statements from contractors that their peak services were performed during that time.<sup>25</sup> In addition, the CO found that the submitted payroll reports did not support a finding of a peakload need specifically from April through December as they showed that permanent and temporary employees performed full time work from January through October or November, with no work performed in December during either of the last two years reported.<sup>26</sup> While the CO acknowledged that there was some peakload from July through October or November, she concluded that there was inadequate evidence to show a peakload need from April 1 through December 23.<sup>27</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>28</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>29</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 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

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<sup>24</sup> AF 14.

<sup>25</sup> AF 14-15.

<sup>26</sup> *Id.* at 14-15.

<sup>27</sup> *Id.* at 15-16.

<sup>28</sup> *Emp. Bf.* at 5-7.

<sup>29</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).

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>30</sup>

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

Employer has argued that the administrative record was sufficient to show that there was a peakload need during non-winter months and that the CO ignored the evidence of non-weather related needs.<sup>31</sup> However, Employer has failed to present any evidence to demonstrate that the peakload actually occurred during all of the months requested which included two months during which Employer had zero hours worked in 2016, and the winter month of December which had zero hours worked in either 2015 or 2016.

Employer submitted payroll charts which documented the hours worked by permanent and temporary employees during the years 2014 through 2016 which I have charted below.<sup>32</sup>

**2014 Hours Worked**

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	0	0
February	0	0
March	0	0
April	320	20,172
May	320	29,411
June	320	16,043
July	320	23,049
August	320	16,093
September	320	9,939
October	320	8,907

<sup>30</sup> Submission of Documentation Demonstrating “Temporary Need” at 1-2. (*Emphasis added*).

<sup>31</sup> *Emp. Bf.* at 8-9.

<sup>32</sup> AF 45-46.

November	320	6,535
December	320	6,163

**2015 Hours Worked**

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	320	4,202
February	320	6,400
March	320	3,599
April	320	7,760
May	320	8,790
June	320	6,671
July	320	11,063
August	320	8,587
September	320	10,687
October	320	20,610
November	320	18,954
December	0	0

**2016 Hours Worked**

Month	Hourly Hours worked by Permanent Employees	Hours Worked by Temporary Employees
January	320	21,132
February	320	30,440
March	320	27,192
April	320	41,370
May	320	39,785
June	320	35,173
July	480	54,948
August	480	40,734
September	480	51,024
October	480	40,299
November	0	0
December	0	0

After reviewing the record and the parties' legal arguments, I concur with the CO that the Employer has failed to establish that it has a temporary need for H-2B workers from April 1, 2018 to December 23, 2018. Although the Employer has demonstrated that it has an increased demand during a portion of the time requested, I find it has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand during the span of the months requested. I concur with the CO that that contracts Employer has submitted do not specify a time frame requiring the work be completed during the requested months, and that the contractors' letters stating that in general the peak months that services are performed are from April 1 through December 23, do not adequately address the complete lack of work performed during two of the requested months during 2016.

Based on the evidence of record, I find that Employer has not carried its burden to show that it needs to supplement its permanent staff on a temporary basis due to a peakload demand. Therefore, I find that the CO properly concluded that Employer failed to establish a temporary need for H-2B workers.

**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