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Issue Date: 17 January 2018

BALCA Case No.: 2018-TLN-00043
ETA Case No.: H-400-17262-807069

In the Matter of:

GM TILE LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Luis Alberto Munoz
Owner, GM Tile LLC
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and
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For the Employer

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Division of Employment and Training Legal Services
Washington, District of Columbia
For the Certifying Officer

Before: Morris D. Davis, Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arose under the temporary non-agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to

¹ On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor

hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL”), Employment and Training Administration. 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification in this case is affirmed.

STATEMENT OF THE CASE

H-2B Application

On October 31, 2017, GM Tile LLC (“Employer”) submitted an H-2B *Application for Temporary Employment Certification*, ETA Form 9142B, for occupational title “Helpers – Brickmasons, Blockmasons, Stonemasons, and Tile and Marble Setters,” with Standard Occupational Code 47-3011. (P27, P30).² The application sought approval for four temporary foreign workers to help with a peakload work requirement in the Phoenix-Mesa-Scottsdale area during the period January 20, 2018 to October 20, 2018. As justification for the temporary workers, Employer stated:

GM Tile Statement of Need 2018

GM Tile LLC was founded in 2008 and is headquartered in Phoenix, AZ. GM Tile is a best-in-class tile installer and repairer. GM Tile covers the Phoenix, AZ metropolitan area. We operate throughout the entire year, Monday to Friday from 7:00 am to 3:00 pm and our need for temporary employees is due to a peak load event

We have a short-term demand for 4 temporary workers to supplement our permanent staff at the job site, specifically a peakload need, for helpers of tile and marble setters by performing duties requiring less skill. Duties include using, supplying or holding materials or tools, and cleaning work area and equipment.

The demand for our services in 2018 will begin to shoulder mid-January and continue through mid-October. Our need for the duties to be performed by the temporary additions to staff is temporary, and will end in the near and definable future, specifically on October 20, 2018. Mid October thru the first two weeks of January marks the winter visitors’ season where many second home owners get to visit Arizona. Most of these folks want their second homes ready with their new tile installed. This is typically slow season for us. Once the New Year begins, folks tend to want to start their remodeling projects and that is usually when we get busier.

certification application after April 29, 2015 and requested a start date after October 1, 2015. The 2015 IFR applies in this matter.

² Citations are to Bates numbers shown at the bottom right corner of each page in the Appeal File.

We currently have the U.S. skilled man power and we can take care of business during the slow season; however, we exhausted all avenues to find general laborers during our peakload. We can't find the additional four (4) supplemental workers needed in the Phoenix Metropolitan area to complete our work crew for our coming peak load time of need. Consequently, we are petitioning for this temporary supplemental foreign workforce. We only need these supplemental workers to supplement our permanent workforce for a short term need that will end in a near and definable future, specifically October 20, 2018.

It is our understanding that, under DHS regulations at 8 CFR 214.2(h)(6)(ii)(b) and the DOL regulations at 20 code of (CFR) 655.6 (b), we qualify for a labor certification since our need is temporary in nature and is due to a peak load event. Our need is temporary in nature and less than a year and we qualify for the program based on 8 CFR § 214.2(h)(6)(ii)(b) "as a general rule, the period of the petitioner's need must be a year or less", our peakload need is from January 20, 2018 to October 20, 2018. The regulation applicable to H-2B visas defines temporary work as "any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary," 8 C.F.R. § 214.2(h)(6)(ii); the employer's need "must be a year or less although there may be extraordinary circumstances where the temporary services or labor might last longer than one year." 8 C.F.R. § 214.2(h)(6)(ii)(B). We regularly employ workers to perform the services and labor at the place of employment and we need to supplement our permanent staff at the place of employment due to our peakload (short- term need) as per 8 § CFR 214.2(h)(6)(ii)(b)(3). Our need for the duties to be performed by the temporary additions to staff is temporary and will end in the near and definable future, specifically will end on October 20, 2018. When our peakload ends, we are knowledgeable of the fact that all temporary guest workers must return to their country of origin at the end of their visa permitted season. These temporary workers must return to their country of origin at the end of our date of need. Once our peak load season ends, we have no problem fulfilling our services with our permanent staff. We must attest that we are not party to any collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application and that the job offer represents a bona fide job opportunity.

I will be quite thankful if you can help us get certified to hire this foreign guest workforce to supplement our current work force during our peak load need. Thank you for your time and consideration.

(P73).

Notice of Deficiency

On November 7, 2017, the Chicago National Processing Center ("NPC") issued a Notice of Deficiency ("NOD") listing two alleged deficiencies, only one of which is relevant in this

appeal. The CO afforded Employer an opportunity to respond to the NOD by not later than November 21, 2017. The relevant deficiency stated:

Deficiency 1: Failure to establish the job opportunity as temporary in nature

Applicable Regulatory Citations: 20 CFR 655.6(a) and (b)

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

The employer did not submit sufficient information in its *Application for Temporary Employment Certification* to establish its requested period of intended employment. The employer did not include adequate attestations to justify the change in dates of need from the employer's prior application, H-400-17009-516837, which requested four Tile Setter Helpers from April 1, 2017 through December 15, 2017. The current application is requesting four Tile Setter Helpers from January 28, 2018 through October 28, 2018.

In their 2017 application, the employer stated, "Even more, since most homes are empty starting April and with new orders at hand, there is more work coming our way during April which can last until mid-December. Our task is to finish new tile and bath projects for their arrival in late fall early winter."

However, in the current application the employer states "The demand for our services in 2018 will begin to shoulder mid-January and continue through mid-October. Our need for the duties to be performed by the temporary additions to staff is temporary, and will end in the near and definable future, specifically on October 20, 2018. Mid October thru the first two weeks of January marks the winter visitors' season where many second home owners get to visit Arizona. Most of these folks want their second homes ready with their new tile installed. This is typically slow season for us. Once the New Year begins, folks tend to want to start their remodeling projects and that is usually when we get busier."

The employer has provided contradictory information regarding when its temporary peakload need occurs. It is unclear why the employer's dates of need have changed from its previous application.

Additional Information Requested:

The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing the following:

- A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year;
- An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need;
- An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; and
- An explanation as to why the requested dates of need have significantly changed from the employer's prior application.

AND

The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to, the following:

1. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
2. Other evidence and documentation that similarly serves to justify the chosen dates of need, if any.

(P10-11).

Employer's Response to the Notice of Deficiency

Employer submitted a response to the NOD by email the evening of November 21, 2017. (P35-37). With respect to the relevant deficiency, Employer responded:

GM Tile LLC is a tile installation company headquartered in Phoenix, AZ. We are a small company and our services include installation of tile, marble on floors, interior and exterior walls and repair. We provide our services year-round in the Phoenix Metropolitan Area.

The nature of the construction industry and consequently our industry, the tile installation trade, has historically had a peakload. Furthermore, the nature of our need and the duties to be performed by these workers is temporary and will end in the near and definable future, specifically October 20, 2018.

The tile installation industry is one many trades in the construction industry. As stated in http://www.workforcedevelopment.com/sample_lessons/151_sample.pdf, “For the most part, construction companies tend to specialize in only one segment of the construction industry; that is, either residential or commercial. Whether a construction company is building one house, a development of 25 houses, or a large sports stadium, the company will hire a number of subcontractors who specialize in particular building trades to complete the actual work. Although each subcontractor will specialize in one building trade, all will be required to complete their work on time, within the allowed budget for the job, and with a high degree of quality and accuracy.

The economy is improving and with it the need for new construction. We need these temporary additions to staff to meet the demand for our services during our peakload for 2018. Our need for these workers is less than a year and will end in the near and definable future, specifically October 20, 2018.

Consequently, we share similar peakload dates with other trades and have not been able to find temporary workers. We are a small business and cannot meet the demand for our services during our 2018 peakload with our permanent staff; therefore we are requesting these temporary additions to staff January 20, 2018 to October 20, 2018.

We are requesting temporary workers due to a short-term demand, specifically a peakload need and I will explain how we meet the regulatory standards of a peakload need;

- The regulation applicable to H-2B visas defines temporary work as “any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary,” 8 C.F.R. § 214.2(h)(6)(ii). Our need for duties to be performed by these temporary additions to staff is temporary; less than a year and will end in the near and definable future, specifically October 20, 2018.
- The employer’s need “as a general rule, the period of the petitioner’s need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year” 8 C.F.R. § 214.2(h)(6)(ii)(B), and our need for these workers and our need for the duties these workers will perform is temporary, therefore they will not become part of our regular operation.

- We regularly employ workers (see monthly payroll reports) to perform the services and labor at the place of employment and we need to supplement our permanent staff at the place of employment due to our peakload (short-term need) as per 8 § CFR 214.2(h)(6)(ii)(B)(3).
- Furthermore, our need for the duties to be performed by the temporary additions to staff is temporary and will end in the near and definable future, specifically will end on October 20, 2018. When our peakload ends, we will no longer need temporary workers; our permanent workers will thereafter, fully assume the slower months' demand for our services.

We are knowledgeable of the fact that all temporary guest workers must return to their country of origin at the end of their visa permitted season. I attest that we are not party to any collective bargaining agreement governing the job classification that is the subject of the H-2B labor certification application. The number of worker positions being requested for is true and accurate and represents a bona-fide job opportunity.

Our peakload is based on the demand for our services. We are experiencing an increase in proposals for our services from late-January through late-October. Our business is not tied to a time of year or season, but to the nature of the construction industry, and for 2018, the need for our services to be performed is highest during the dates we have requested the H-2B Temporary Labor Certification.

“peakload needs may be unpredictable in nature” and are subject to change, as explained in “The Difference Between a Seasonal and Peakload Need” at <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/guidance-temporary-need-h-2b-petitions>.

GM Tile LLC is a small business and we started doing payroll in July 2017, (see attached). We run the risk of severe irreparable harm if we aren't able to get temporary workers to supplement our permanent short-term demand for 2018.

(P15-16) (footnotes omitted).

Employer attached payroll records for the period July to November 2017. (P48-52).

Denial of Labor Certification

By letter dated December 19, 2017, the CO denied certification. The CO said the response to the NOD was due by November 21, 2017, but it was not received at the NPC until November 23, 2017. (P2, P4). Further, the CO stated that the deficiency set out above remained unresolved and precluded certification. The CO noted that in a prior application, Employer claimed the peakload period was April 1, 2017 to December 15, 2017, while in the current

application Employer claimed the peakload period was January 28, 2018 to October 28, 2018.³ The CO asserted that Employer failed to provide a sufficient explanation for the change in the dates of the alleged peakload period and noted that the information provided in the two applications was contradictory. (P5). The CO said that Employer failed to document that the construction industry experienced a peak period in the geographic area specified in the application or that Employer received an increased number of job proposals for the January to October 2018 period. (P6). Finally, the CO stated that the NOD directed Employer to provide at least one year of summarized payroll data, but Employer only provided payroll information for July through November 2017. (*Id.*).

Employer's Appeal

On December 27, 2017, Employer submitted a request for review of the CO's denial of its application to the Board of Alien Labor Certification Appeals ("BALCA"). In it, Employer stated: "We submitted our response on time and we have the confirmation from the DOL, find attached the proof of our response and the response to the Notice of Deficiency and the final determination as well." (P1).

SCOPE OF REVIEW

BALCA's scope 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). The CO's determination denying an employer's application must be affirmed unless it was arbitrary or capricious. *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016). That means the determination must be affirmed if it was "made rationally and in good faith – not whether it was right." *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984), *cert. denied* 467 U.S. 1242 (1984), quoting *Riley v. MEBA Pension Trust*, 570 F.2d 406, 410 (2nd Cir. 1977). The CO's decision will be upheld so long as its construction of the regulations is permissible and its "path may be reasonably discerned." *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). BALCA may reverse a CO's determination for a clear error of judgment, but it may not substitute its own judgment for the CO's. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In the end, BALCA has three options: (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.

DISCUSSION

On January 4, 2018, I issued a *Notice of Assignment and Expedited Briefing Schedule*. In it, I gave the parties seven business days from receipt of the appeal file to submit briefs, if either of them chose to do so. The Solicitor notified me on January 11, 2018 that the CO was not submitting a brief. I have not received a brief or any other communications from Employer as of the date of this decision and order.

³ A copy of the prior application – which was submitted on January 9, 2017 and denied on March 24, 2017 – is included in the appeal file. (P91-104).

An employer seeking certification 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.” 20 C.F.R. § 655.6(a). A need is considered temporary if justified as “a one-time occurrence[,], a seasonal need[,], a peakload need[,], or an intermittent need.” *Id.* § 655.6(b); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6).

The burden of proof to establish eligibility for a temporary alien labor certification falls on the petitioning employer. 8 U.S.C. § 1361. At the time of filing, an employer need only submit a detailed statement of temporary need with its application. 20 C.F.R. § 655.21(a). However, if a CO requests 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*, 2012-TLN-00043, slip op. at 6 (Aug. 9, 2012) (“the CO is not required to take [Employer] at its word.”). An employer’s failure to furnish information may be grounds for denial of the application. *Id.*

The regulation – 20 C.F.R. § 655.61(a) – states that a request for review must clearly identify the particular determination for which review is sought and set forth the particular grounds for the request. Here, the only thing Employer cited in its request for review is its claim that “we submitted our response on time and we have the confirmation from the DOL.” (P1). Had the CO denied certification because Employer failed to respond to the NOD in a timely manner I would reverse the CO’s determination. Employer provided a copy of the email dated November 21, 2017 that shows it submitted its response to the email address the CO provided by the date specified. In this case, however, timeliness of the response is not an issue.⁴

The CO denied the application because Employer failed to establish that the job opportunities were temporary in nature. (P4). In addressing the deficiency, the CO discussed the matters raised in Employer’s response to the NOD, including preparing a chart depicting the payroll information Employer provided for the July to November 2017 period. (P6). This clearly shows that the CO did not reject the response as untimely, but instead considered it and set forth the reasons why it was insufficient to cure the deficiency. Accordingly, the sole ground Employer raised in its request for review must be resolved against Employer.

While timeliness was the only issue Employer raised, I find that the CO’s substantive decision was rational and reflects no absence of good faith. First, the NOD directed Employer to provide “Summarized monthly payroll reports for a minimum of one previous calendar year.” (P11). Employer only provided payroll information for July through November 2017. (P17-21). That alone is a sufficient basis to deny certification. 29 C.F.R. § 655.32(a). In its response to the NOD, Employer stated that it is a small business and “just started doing payroll in July.” (P16). That contradicts Employer’s claim in the statement of need for 2018 that it was founded in 2008, is a best in class tile installer and repairer, and operates year-round Monday through Friday. (P73). It also contradicts Employer’s January 2017 application where it provided monthly payroll information for all of calendar year 2016. (P97). Second, the NOD directed Employer to

⁴ While the CO noted in the denial letter that Employer’s response to the NOD was *received* at the NPC on November 23, 2017, whether a response to a NOD is timely is based upon the date it is *submitted*. 20 C.F.R. § 655.31.

explain why the peakload dates in the current application were different than the peakload dates for the same jobs in the January 2017 application. (P11). The regulation requires the CO to deny certification where an employer has a need that lasts longer than nine months. 29 C.F.R. § 655.6(b). Employer's prior request was for a peakload period from April 1, 2017 to December 15, 2017, and the current request is a for a peakload period from January 28, 2018 to October 28, 2018. Employer undermines the notion that it has a temporary need lasting nine months or less when it asserts that all but 45 days of a continuous 568 day span are in its peakload period. At a minimum, the dates discrepancy require explanation and I cannot say the CO acted in an arbitrary or capricious manner in finding that the explanation Employer provided was insufficient to determine the need for foreign workers was temporary.

ORDER

It is hereby **ORDERED** that the Certifying Officer's denial of the Employer's October 31, 2017 *Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

For the Board:

MORRIS D. DAVIS
Administrative Law Judge