

**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: 10 April 2018**

**Case No.:** 2018-TLN-00089  
**ETA Case No.** H-400-17357-351351

**In the Matter of:**

**MAURY PAINTING**

*Employer.*

**Certifying Officer:** Leslie Abella Dahan  
Chicago National Processing Center

**Appearances:** Kevin Lashus  
Robert Kershaw  
The Kershaw Law Firm, P.C.  
Austin, Texas  
*For the Employer*

Nora Carroll  
Office of the Solicitor  
Division of Employment and Training Legal Services  
United States Department of Labor  
Washington, DC  
*For the Certifying Officer*

**Before:** **TRACY A. DALY**  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

**1. Nature of Appeal.** This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)<sup>1</sup> and 20 C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for 10 temporary

---

<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

nonagricultural workers and an administrative review of the application's denial.<sup>2</sup>

## **2. Procedural History and Findings of Fact.**

a. On January 1, 2018, Maury Painting (Employer) filed ETA Form 9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for 10 temporary "Painter Helpers" to perform work from April 1, 2018 through December 15, 2018 based on Employer's claimed peakload need for temporary workers. Employer requested these positions for "new employment" on its application. Employer stated it is a construction business located in Bexar County, Texas and provides painting and drywall services. Employer explained "Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when coldest and slowest part of the season will be."(AF 40-49)<sup>3</sup>

b. On February 5, 2018, the CO issued a Notice of Deficiency (NOD) on three grounds. The CO explained the application contained the following deficiencies based on Employer's failure to: 1) establish the job opportunity as temporary in nature, as required by 20 C.F.R. § 655.6(a)-(b); 2) establish temporary need for the number of workers requested, as required by 20 C.F.R. § 655.11(e)(3)-(4); and 3) verify the existence of the business associated with the filing, as required by 20 C.F.R. §§ 655.5, 655.15(a). The CO directed Employer to submit various documentation and information to cure the cited deficiencies. (AF 33-39)

c. The CO received Employer's timely response to the NOD on February 13, 2018. Employer attached a "summary of projected man-hour requirements based upon 2018 contracts." Employer stated it secured multiple contracts scheduled to begin on April 1, 2018 and did not have enough employees to complete work on the contracts. Employer stated it currently employed four full-time and three temporary employees, but declared it needed an additional 10 temporary employees to timely complete its contracts. Specifically, Employer argued it needed: 1) five workers to complete the "Endeavor Wall Homes" project; 2) four workers to complete the "Hearthside Homes" project; 3) four workers to complete the "Rausch Coleman Homes" project; and 4) four workers to complete the "Monticello Custom Homes" project. Although Employer provided additional documentation in its initial application, it did not submit any further documentation in response to the CO's NOD. (AF 12, 24-32, 50-52)

d. On February 26, 2018, the CO issued a non-acceptance letter and denied certification. First, the CO explained the CNPC was unable to verify the existence of the business associated with the filing. The CO stated that Employer, in response to the CO's NOD, "did not submit any evidence or include a statement or explanation to verify the existence of the business associated with the filing." Second, the CO denied certification based on Employer's failure to establish the

---

<sup>2</sup> 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 established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

<sup>3</sup> References to the Appeal File are by the abbreviation AF and page numbers.

job opportunity as temporary in nature. Specifically, the CO explained that Employer's response to the NOD did not include the CO's requested documentation, including monthly summarized payroll reports and documentation concerning the weather in the area of intended employment. The CO further explained that, although Employer provided the number of workers needed for its contracts, Employer did not indicate or submit documentation establishing the dates needed for workers on each contract, a copy of signed contracts that included the worksite location, and the commencement and end dates of each project. In addition, the CO found that Employer did not adequately demonstrate its claimed peakload need from April through December is due to harsh weather in the area of intended employment. Finally, the CO concluded that Employer did not establish a temporary need for the number of workers requested. The CO found Employer did not explain how it determined it has a need for 10 temporary workers during the requested period of need. The CO stated Employer's project summary, which only included the name of a project and number of workers needed to complete each specific project, was insufficient to justify the number of workers requested. (AF 10-23)

e. On March 14, 2018, Employer requested administrative review of the CO's denial of certification pursuant to 20 C.F.R. § 655.61. (AF 1-9)

f. On March 14, 2018 the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. The CO transmitted the Appeal File to BALCA on March 19, 2018. On March 21, 2018, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines.

g. Consistent with 20 C.F.R. § 655.61(c), on March 29, 2018, Employer submitted a brief urging BALCA to reverse the CO's decision denying Employer's ETA Form 9142B application.<sup>4</sup> The CO did not file an appeal brief.

### **3. Applicable Law and Analysis.**

a. *H-2B Program.* The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 20 C.F.R. § 655.20.

b. *Standard of Review.* BALCA's standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that 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 that was actually submitted to the CO in support of the employer's application. After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3). BALCA may overturn a CO's decision if it finds the decision is arbitrary or

---

<sup>4</sup> Employer's appeal brief is marked EB-1.

capricious. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Definition of Employer.* A registered employer seeking H-2B workers must file a completed Application for Temporary Employment Certification (ETA Form 9142B). 20 C.F.R. § 655.15(a). An employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and (3) possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN). 20 C.F.R. § 655.5.

The CO's NOD issued on February 5, 2018 specifically required Employer to submit documentation to verify its existence as an employer defined under the regulations. (AF 38-39) Employer failed to submit this required documentation to the CO. Pursuant to 20 C.F.R. § 655.32(a), "[t]he employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification." BALCA panels consistently affirm the CO's denial of certification where the employer does not properly supply requested information or documentation to the CO. *See Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017). In addition, Employer's appeal brief makes no mention or attempted explanation for this deficiency. Therefore, CO properly denied certification on this basis alone.

e. *Temporary Peakload Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). 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 Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer's need is temporary if the need is limited and will "end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B).

To qualify as a peakload need, the 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 burden is on the

applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers. *Chippewa Retreat Spa*, 2016-TLN-00063 (Sept. 12, 2016).

In this case, Employer's claimed period of temporary peakload need ranges from April 1, 2018 through December 15, 2018. In support of its assertion, Employer stated that it has four specific contracts scheduled to commence on April 1, 2018 and it does not have a sufficient number of workers to complete its contracted work. Employer further stated it needs four or five workers to complete the work on each contract. However, Employer did not indicate or submit documentation establishing the dates needed for workers on each contract. Specifically, Employer failed to provide a copy of signed contracts that included the worksite location, and the commencement and end dates of each project as requested by the CO. Employer's appeal brief provides no explanation for Employer's failure to comply with the CO's requests. Not only did Employer fail to comply with the CO's NOD by producing the requested documentation, the CO reasonably found Employer did not establish the job opportunity was temporary in nature. Therefore, Employer failed to comply with the CO's NOD, and the CO's basis for denial was proper. See *Erickson Construction d/b/a Erickson Framing CA LLC*, 2016-TLN-00036, slip op. at 5 (May 6, 2016) (affirming the CO's denial of certification where the employer failed to provide any contracts specifying the start and end dates for the project, amongst other documentation); *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009) (affirming the CO's denial of certification where the employer's submission of agreement letters, which were not legally binding, did not provide adequate evidence of the employer's need to supplement its permanent workforce with temporary workers during the stated time period).

The only substantive argument raised in Employer's appeal brief is that the CO improperly denied certification because this "application for recertification . . . which has a documented history of temporary peakload needs justifying the issuance of H-2B visas . . . should have been granted on its face, without call for supplying additional supporting documentation." In support of this argument, Employer cites recent guidance issued by the Employment & Training Administration. See Employment & Training Admin, U.S. Dep't of Labor, *Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documents Demonstrating "Temporary Need"* (Sept. 1, 2016). (EB-1, pp. 3-5)

Employer's argument is unpersuasive and inconsistent with its application. Employer's brief implies this application is presented for recertification; however, the record contains no documentation that Employer has obtained prior certifications from the CO. Conversely, Employer's application specifically states "this is a new application" and as a result "no previous supporting documentation exists to refer to from prior applications . . ." (AF 46) Nevertheless, the ETA guidance specifically cautions applicants that the "issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer's current need is temporary in nature." Even if Employer had obtained prior approvals, they would not govern the outcome of this case; the CO's prior decisions to grant certification does not constitute a waiver of the regulatory requirement that the employer demonstrate that its need is temporary. *DialogueDirect, Inc.*, 2011-TLN-00038, 00039 (Sept. 26, 2011). The fact that the CO

may have approved similar applications in the past is not grounds for reversal of the denial. *Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017).

f. *Temporary Need for Number of Workers Requested.* The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based the following: the number of worker positions and period of need are justified and the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4). “[I]t is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the employer at its word.” *N. Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012).

As the CO noted, Employer did not - either in its application or response to the NOD - explain how it determined that it needs 10 temporary workers during the requested period of need. Employer merely stated that it currently has four full-time employees and three temporary employees, but “still need[s] 10 more temporary workers to complete [its] contracts in a timely manner.” Employer only submitted general information about four contracts it will begin in 2018 and the number of workers required to complete each contract. Employer did not address this issue or provide any explanation for this failure in its appeal brief. Therefore, due to Employer’s failure to comply with the CO’s requirement to provide a statement explaining why it needs 10 workers during the requested period of need, the CO reasonably concluded Employer’s response was insufficient to demonstrate a temporary need for 10 additional workers. Thus, Employer did not carry its burden to provide adequate documentation to the CO to support its request for 10 temporary workers. *N. Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own declaration, that it had a greater need for workers this year than it did in the prior year).

**4. Ruling.** Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

**SO ORDERED.**

**TRACY A. DALY**  
**Administrative Law Judge**