



**Issue Date: 20 April 2018**

BALCA CASE NO.: 2018-TLN-00108

ETA CASE NO.: H-400-17336-438015

*In the Matter of:*

**R.E.M. CONSTRUCTION, INC.,**  
Employer.

### **DECISION AND ORDER**

This matter is before the Board of Alien Labor Certification Appeals on Employer R.E.M. Construction, Inc.'s application for a certification under the H-2B nonimmigrant alien worker program.<sup>1</sup> The Certifying Officer at the Department of Labor's Employment and Training Administration notified Employer of deficiencies in the application. Employer supplemented its submissions. Having considered all materials on file, the Certifying Officer denied the application on March 7, 2018. Employer timely requested BALCA review.

This Decision and Order is based on a written record, which consists of the Appeals File and Employer's request for review. 20 C.F.R. § 655.61(e). The time having run, no party filed a brief. I will affirm the Certifying Officer's denial of the labor certification.<sup>2</sup>

#### Findings of Fact

Employer is engaged in the construction business, including "residential construction and support." AF at 27.<sup>3</sup> It applied for the H-2B Temporary Employment Certification based on an asserted peak load temporary need. *Id.* It sought to hire twelve "laborers" to work in four Texas counties<sup>4</sup> in and around Houston from April 1, 2018 through December 15, 2018. *Id.* It stated that the workers would:

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<sup>1</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

<sup>2</sup> The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer's determination. But in the present case, I need not reach the issue. I would affirm the Certifying Officer's denial of the application even were I to accord her decision no deference (*i.e.*, review the matter *de novo.*)

<sup>3</sup> "AF" refers to the Appeals File.

<sup>4</sup> Harris, Montgomery, Galveston, and Brazoria.

Control traffic passing near, in, or around work zones; clean or prepare construction sites to eliminate possible hazards; signal equipment operators to facilitate alignment, movement, or adjustment of machinery, equipment, or materials; read plans, instructions, or specifications to determine work activities; load, unload, or identify building materials, machinery, or tools, distributing them to the appropriate locations, according to project plans or specifications.

Employer provided a worksite address in Houston (Harris County) and stated that it would provide transportation from the address in Houston to the particular work locations in the four named counties.

Employer describes the need as:

A temporary peak load need . . . because our busiest seasons are traditionally tied to the spring, summer and fall months from approximately April 1st to December 15th, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas winters – during which time our business slow 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 the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the winter months, of approximately December 16th to March 31st, because the cold and wet weather is not conducive to constructions; in general it slows down and the need for laborers is substantially reduced.

AF 27, 33. In support of this, Employer offered a letter from a construction company in Cleveland, Ohio that said it intended to hire Employer's services and that this customer would expect R.E.M. to perform most of the work for this customer from April 1 through December 15, 2018. AF 38. A customer from Lubbock, Texas wrote the same. AF 39.

Employer states that it needs 12 full-time temporary H-2B workers during the specified time period. AF 27. It initially offered no explanation for how it determined that particular number of workers.

As the Certifying Officer stated – and I concur – Employer's evidence is insufficient to establish that the period from December 16 through March 31 in Houston is predictably harsh and cold each year such that there is a substantial and significant decline in the construction business throughout that period. To the contrary, temperatures in March often are 70 degrees or more, and it rains perhaps once per week. Although the letter from Lubbock offers the support of one customer, the letter from the customer in Cleveland does not help Employer. Temperatures in

Cleveland are much colder and conditions much harsher than in Houston throughout the period of December 16 through March 31. If anything, the fact that construction work returns in Cleveland by April 1 each year is evidence that, even assuming some decline at some point in Houston, construction would become active there – much farther south than Cleveland – well before April 1.

Responding to the Certifying Officer, Employer shifted its explanation for needing the workers in Houston. It seems that the issue isn't really winter conditions in Houston; it's winter conditions in more northerly locations such as Cleveland, Ohio; Asheville, North Carolina; and Brentwood, Tennessee (as well as Ft. Worth, Texas, which has winter weather – such as ice storms –more often than does Houston).

As Employer explained, it has permanent and temporary workers who work at these other locations from April 1 through December 15. When winter comes to these areas, construction halts or declines. Employer brings most of the workers to Houston. With the permanent workforce (and some temporary workers) in Houston, Employer no longer needs others to work there. But when Employer sends its permanent workforce (and some temporary workers) back to the more northerly areas at the beginning of April, Employer needs additional workers in Houston to staff the jobs Employer is doing there.

I conclude from this that Employer, at most, is creating a shortage of workers in the Houston area during the 9 1/2-month period involved when it transfers its Houston workers to other locations. There is no evidence it is because of an increase in demand for Employer's services in Houston – and certainly not an increase in demand that would require 12 additional workers.

Moreover, Employer offered no explanation for how it determined that the number of workers it needed in Houston is 12. It stated that it would need 6 workers for the Tennessee project; 8 for the North Carolina project; 4 for the Ohio project; and 8 for the project in Ft. Worth. But, of course, Employer could hire construction workers – perhaps U.S. workers – in those locations; there is no requirement that it transfer its Houston workforce. Moreover, Employer offered no evidence of how many workers it has or needs for work in Houston at the relevant times.

### Discussion

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.”<sup>5</sup> An employer's need is temporary if it is: a one-time occurrence; a seasonal need; a peak load need; or an intermittent need.<sup>6</sup> 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

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<sup>5</sup> 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B).

<sup>6</sup> 20 C.F.R. § 655.6(b).

staff will not become a part of the petitioner's regular operation."<sup>7</sup> The employer must also demonstrate that the number of positions is justified.<sup>8</sup>

Here, Employer has not shown a peak load need in Houston, which would require a need to supplement its regular workforce in that location. On the contrary, Employer sends its regularly employed workforce away from Houston and is seeking to replace some of them with H-2B workers. That is not a peak load need.

Second, Employer has not established a seasonal need in Houston. Employer might be reacting to seasonal needs for more workers in other locations from April 1 through December 15, but this is not a seasonal need in Houston.

Third, Employer has not demonstrated a need to hire 12 workers in particular.

#### Order

The Certifying Officer's denial of Employer's application is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN  
Administrative Law Judge

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<sup>7</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

<sup>8</sup> 20 C.F.R. § 655.11(e)(3) and (4).