

**U.S. Department of Labor**

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

BALCA Case No.: 2018-TLN-00140  
ETA Case No.: H-400-17262-066822

*In the Matter of:*

WHITTON CONCRETE, INC.  
*Employer*

Appearances: Justin Greenberg, Esquire  
Lefelco Visas  
Las Vegas, NV  
*For the Employer*

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

**ORDER GRANTING REQUEST TO WITHDRAW APPEAL**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the request of Whitton Concrete, Inc. (“Employer”) for administrative review of the Non-Acceptance Denial issued by the Certifying Officer (“CO”) in the above captioned H-2B temporary labor certification matter.<sup>1</sup>

The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).<sup>3</sup> A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

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<sup>1</sup> 20 C.F.R. Part 655.

<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

<sup>3</sup> 8 C.F.R. 655.214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. 655.61(a).

Employer is located in Mesa, Arizona and employs workers throughout the year to provide concrete slabs for new homes, and removes, replaces, and repairs concrete.<sup>5</sup> On or around March 26, 2018, Employer applied for H-2B temporary labor certification, seeking approval to hire 10 foreign nationals as construction laborers from June 9, 2018 to December 15, 2018, based on a temporary peakload need.<sup>6</sup> Employer stated that the peakload period was a result of increased demand for its concrete services for the period April 1 to December 15, 2018, “however, due to the 90 to 75-day regulation, we are requesting these workers for the remainder of our [period of] peakload” need.<sup>7</sup>

On April 3, 2018, the CO issued a Notice of Deficiency (“NOD”), stating that Employer “fail[ed] to establish that the job opportunity was temporary in nature,” and “fail[ed] to establish temporary need for the number of [the] workers requested.”<sup>8</sup>

On April 17, 2018, Employer filed a response to the CO’s NOD.

On May 29, 2018, the CO issued its “Non Acceptance Denial.”<sup>9</sup>

The Employer requested BALCA review on May 29, 2018.<sup>10</sup> Subsequently, on June 6, 2018, the case was transferred to and docketed at the Office of Administrative Law Judges (“OALJ” or “the Office”).

On June 4, 2018, the Office issued a Notice of Assignment and Expedited Briefing Schedule. The Notice required the parties to submit briefs “in time to reach the undersigned **no later than the close of business (4:30pm EST) within seven business days of receiving the appeal file.**” (Emphasis in the original, citing § 655.61(c)).

On June 7, 2018, the Office received the Administrative File.

Subsequently, on June 18, 2018, this Office received via email notice of Employer’s June 9, 2018 email to the CO indicating its desire to withdraw its petition for temporary labor certification.

The Office construes the June 18, 2018 as a motion to withdraw Employer’s appeal based on CO’s denial of certification. *See* 20 C.F.R. § 655.62 (allowing an employer to withdraw its application for temporary employment certification, by writing, “after it has been accepted and before it is adjudicated”). Because this Office has yet to adjudicate Employer’s appeal, Employer’s request to withdraw its appeal of the CO’s denial is, hereby, GRANTED.

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<sup>5</sup> Appeal File (“AF”) at 61, 80.

<sup>6</sup> AF at 61–62.

<sup>7</sup> AF at 61.

<sup>8</sup> AF at 44–49.

<sup>9</sup> AF at 2–8.

<sup>10</sup> AF at 1.

SO ORDERED.

For the BALCA

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey