

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 16 May 2018**

**BALCA Case No.: 2018-TLN-00122**  
**ETA Case No.: H-400-17355-943172**

*In the Matter of:*

**GERARDO CONCRETE, LLC,**  
*Employer.*

Certifying Officer: Chicago National Processing Center

Appearances: Robert Kershaw  
The Kershaw Law Firm, PC  
Austin, TX  
*For the Employer*

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

Before: **CARRIE BLAND**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

On April 24, 2018, the Board of Alien Labor Certification Appeals (“BALCA”) received a request for administrative review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup>

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<sup>1</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.

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) 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”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer (“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. 20 C.F.R. § 655.61(a).

## STATEMENT OF THE CASE

On January 11, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Gerardo Concrete, LLC (“Employer”). AF 89 – 115.<sup>3</sup> Employer requested certification for 40 “construction laborers” from April 1, 2018 until December 31, 2018. AF 90. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is April 1st, 2018 to December 31st, 2018

Our company currently requires the services of laborers to perform manual labor associated with concrete construction such as cleaning and preparing sites, form setting, mixing and pouring cement, reinforcing, grading, digging and loading and unloading materials. No education required. Transportation is provided to and from area work sites at employer's expense from centralized Bexar County pick up location and employer will provide overnight accommodation when necessary. Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 31st, 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 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 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

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<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B)); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

<sup>3</sup> References to the 115-page appeal file will be abbreviated with an “AF” followed by the page number.

much business during the winter months, of approximately December 31st to April 1st, because the cold and wet weather is not conducive to cleaning and preparing sites, form setting, mixing and pouring cement, reinforcing, grading, and digging. Also, construction in general slows down and the need for laborers is substantially reduced.

AF 90.

On February 1, 2018, the CO issued a Notice of Deficiency (“NOD”) notifying Employer that its application did not comply with the requirements of the H-2B program. AF 82 – 88.

First, the CO was “unable to verify the existence of the business associated with this filing” after searching through several relevant databases, and requested additional information to verify the existence of Employer as a business entity. Specifically, the CO requested that:

Employer must provide evidence that it satisfied the regulatory obligations of H-2B employers. The employer's response must include evidence which shows the employer's business name, and that the address provided on the ETA Form 9142 is associated in the State of Texas with Gerardo Concrete, LLC. Examples of evidence may include documentation issued by the State of Texas which indicates the business name and address as active.

AF 84 – 85.

Second, the CO identified a “failure to establish the job opportunity as temporary in nature.” The CO noted that while Employer described “harsh” winter conditions in its work environment, “the employer's work is done in Texas, which is relatively favorable to year-round outside work.” AF 86. The CO found that Employer did not explain “what events cause the peakload and the specific period of time in which the employer will not need the services or labor,” and requested further explanation and documentation to establish the temporary nature of the job position. The CO requested that the Employer provide:

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;
4. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Construction Laborer, 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

5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 86 – 87.

Third, the CO identified a “failure to establish temporary need for the number of workers requested” in that Employer did not sufficiently demonstrate “that the number of workers requested in the application is true and accurate and represents bona fide job opportunities.” The CO requested the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting 40 Laborers in its area of intended employment during the dates of need requested;
3. If applicable, documentation supporting the employer's need for 40 Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
4. Summarized monthly payroll reports for a minimum of two previous calendar years 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
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 87 – 88.

On February 15, 2018, Employer responded to the NOD, including in its response a State of Texas consent to use similar name certificate; a copy of 2016 – 2017 summarized sales and income reports; letters of intent; and 2015 – 2017 federal income tax documents. AF 28 – 81.

On April 10, 2018, after reviewing the documentation that Employer submitted in response to the NOD, the CO issued a Non Acceptance Denial (“Denial”). AF 12 – 27. The CO explained that the additional information did not address the deficiencies noted in the NOD.

In its Denial, the CO indicated a “failure to establish the job opportunity as temporary in nature.” The CO noted that Employer submitted letters of intent from contractors, summarized gross income reports for 2016 and 2017, and tax documentation for 2015 through 2017, but that “employer did not submit the requested documentation that includes a statement of its need, an explanation and supporting evidence for why its work is limited during winter months in Texas, a summary of all projects in the area of intended employment, or summarized monthly payroll for the previous two calendar years.” The CO offered particular responses to the items submitted by Employer:

The employer did not provide an adequate explanation for how it experiences a peakload need from April 1 to December 31, 2018 and in what way weather conditions in the area of intended employment in San Antonio, Texas limit its primary workload to the requested dates of need.... It therefore remains unclear whether the employer experiences a true peakload need for workers during the requests period of need.

...

[T]he letters of intent merely show that the employer has services to perform from April to December and do not indicate whether its services are limited to such months.... It is therefore not clear whether the requested dates of need for services are due to the employer acquiring temporary labor, which would thereby increase the employer’s availability for such services.

...

The gross income tax statements provided by the employer “only indicate that it has increases sales revenue in these months. The gross income tax summaries do not provide an indication of the extent and duration of its need for workers as well as when and how many projects it undertakes throughout the year. The gross income summaries, therefore, do not support how the employer experiences a need for workers from April through December.

The employer also submitted tax documentation for 2015 through 2017. The employer’s income tax document represents the employer’s entire organization for a period of one year and is not specific to the requested occupation. Therefore, the income tax documentation was not used to assess a peakload need for workers in the specified occupation.

AF 16 – 17.

The CO also noted a “failure to establish a temporary need for the number of workers requested.” AF 17. The CO noted that the information submitted by the Employer did not overcome the deficiency because “the employer did not submit the requested documentation that includes a statement indicating and explaining the total number of workers requested in the area of intended employment for the requested dates of need, or summarized monthly payroll for the previous two calendar years.” The CO’s responses were as follows:

The employer did not provide any statement of explanation for why it needs 40 workers from April 1 to December 31, 2018. It therefore is not clear why the employer is requesting 40 workers during the requested period of need at the area of intended employment in San Antonio, Texas.

...

The employer’s letters of intent only indicate that it has prospective contracts and projects for the year, but they do not demonstrate how employer quantitatively determined that it has a need for 40 temporary workers. The employer’s gross income reports for 2016 and 2017 only show how much revenue it received for each month. It is not clear from the income reports how the employer quantitatively determined that it had a need for 40 temporary workers to supplement its permanent workers.

...

The employer’s income tax documents represent the employer’s entire organization for a period of one year and is not specific to the requested occupation. Therefore, the income tax documentation was not used to assess the employer’s need for additional workers. The employer did not submit sufficient documentation to justify a temporary need for 40 Construction Laborers. Therefore employer did not overcome the deficiency.

AF 18 – 19.

The CO also noted a deficiency in “Definition of Employer.” AF 19. The CO stated that:

The employer’s submitted tax documents were completed by the employer or an agent and are not documents issued by the State of Texas or some other official document. It is noted that these forms indicate that the employer’s business address of 440 Benmar, Suite 3100, Houston, Texas 77060, which is not consistent with the address listed in Section C. of the employer’s ETA Form 9142, which is 1129 CR 257, Liberty Hill, Texas 78642. The letter from the State of Texas has a name that matches the employer but does not include any address and so does not support and verify the existence of the employer’s business and its stated address... Therefore, the employer did not overcome the deficiency.

AF 19 – 20.

On April 24, 2018, Employer filed a Request for Administrative Review. AF 1 – 11.

## **DISCUSSION AND APPLICABLE LAW**

BALCA's standard of review in H-2B cases is limited. BALCA reviews [H-2B] decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). 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 the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. 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. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 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). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the 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. 20 C.F.R. § 655.1(a).

The CO denied Employer's application because Employer failed to indicate whether provide requested documentation indicating that it was a registered business entity under Texas state law that qualifies for participation in the H-2B program; that the job position was temporary in nature; and the reason that 40 laborers were necessary for the position. AF 4 – 10. The CO said that without the requested information, Employer did not overcome the deficiencies in the NOD.

### ***Temporary Nature of Job Opportunity***

Pursuant to the regulation at 20 C.F.R. § 655.6(a) and (b), 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." Under the regulation, "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..." In the NOD, the CO explained that in order to demonstrate 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 employer's regular operation." AF 33.

In this case, Employer submitted gross income statements for the years 2016 and 2017. These statements show an increase in gross income toward the middle of the year, with the highest months being April through August for both years. AF 37 – 38. Employer also submitted tax documentation for 2015 through 2017. AF 42 – 81. Finally, Employer provided letters of intent from 3 different entities that said they intended to contract with employer for services during the “peak months “of April 1 to December 31, 2018. AF 39 – 41.

Upon review of the record, I find that Employer has not met the requirement of establishing that the job position is temporary in nature. 20 C.F.R. § 655.6(b) requires employers to justify to the CO that the temporary job position is one of several categories, including “peakload” need. I concur with the CO that these figures only demonstrate increased sales revenue for these months, and do not substantiate a need for workers or the number of projects undertaken during these months. While the tax information represents Employer’s entire organization, it does not represent information for the occupation that the employer is requesting in its application. Finally, I find that the CO was correct in finding that these letters of intent are not substantiated by actual contracts, nor do they indicate whether employer’s services are limited to these months.

I concur with the CO that Employer has not presented sufficient information to establish that the position is temporary in nature.

#### ***Temporary Need for Number of Workers Requested***

The CO also denied Employer’s application under the requirement to establish a temporary need for the number of workers requested. According to the regulation at 20 C.F.R. § 655.11(e)(3) and (4), “The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on the following factors... (3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.”

In the present case, the CO determined that Employer failed submit supporting documentation justifying the number of workers requested and that their positions represent bona fide job opportunities. The CO found that the letters of intent only indicate prospective contracts for the year, and not how Employer quantitatively determined its need for 40 workers. Employer’s gross income reports for 2016 and 2017 only show how much revenue is received for these years, and not how the Employer determined it needed 40 workers. The CO also found that Employer’s income tax documents for 2015 through 2017 were not specific for the requested occupation, as they represent Employer’s entire organization.

I concur with the CO’s findings in this regard. I therefore find that Employer has not presented sufficient information to establish its temporary need for the number of workers requested.

### *Definition of Employer*

The CO also denied Employer's application under the requirement of "Definition of Employer." According to the regulation at 20 C.F.R. § 655.5 an employer is defined as:

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).

According to the regulation at 20 C.F.R. § 655.15(a), *the Application for Temporary Employment Certification* must be filed by an employer.

In the present case, the CO determined that Employer did not submit information substantiating its existence as a business. The CO said that the income tax documents "are not documents issued by the State of Texas or some other official document," and noted that the address on these forms is inconsistent with the address listed in Section C of Employer's application. Furthermore, the letter from the State of Texas "has a name that matches the employer but does not include any address and so does not support and verify the existence of the employer's business at its stated address."

I concur with the CO's finding that the information provided does not establish the existence of Employer as a business in the state of Texas. I find that Employer has not presented sufficient information to overcome this deficiency.

### **CONCLUSION**

For the reasons above, I find that the evidence presented by the Employer fails to support its temporary need for an additional 40 workers from April 1 to December 31, 2018, and that Employer has failed to substantiate its existence as a business. I therefore find that it was not an abuse of discretion or arbitrary and capricious standard for the CO to issue a denial of Employer's application. Accordingly, the CO's denial of certification is hereby **AFFIRMED**.

**SO ORDERED.**

For the Board:

**CARRIE BLAND**  
Administrative Law Judge

Washington, D.C.