

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: 12 April 2018

BALCA Case No.: 2018-TLN-00106
ETA Case No.: H-400-17362-094054

In the Matter of:

PADILLIA CONSTRUCTION COMPANY, d/b/a GARRIS PLASTERING
Employer.

Appearance: Kevin R. Lashus, Esq.
FisherBroyles, LLP
Austin, TX
For the Employer

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

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 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).¹ Employers who seek to hire foreign workers

¹ 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

under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”) using an ETA Form 9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)² upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 C.F.R. § 655.61(e). Accordingly, documentation submitted after the March 9, 2018, denial determination is not considered.

STATEMENT OF THE CASE

On January 1, 2018, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Padilla Construction Company for 20 “Plaster Helper” as a peakload need for employment from May 31, 2018 to December 31, 2018, with attachments in support of the application (AF 257-266). The position was listed by the Employer as O*Net Code 47-3014, “Helpers – Painters, Paperhangers, Plasterers, and Stucco Masons” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 267) and is to be performed in Orange County, California. (AF 260). No minimum educational, training, experience, or special requirements were specified in Section F.b of the application. (AF 260). The Employer retained Kevin R. Lashus as legal counsel in this matter. (AF 257-258, 264).

On January 31, 2018, the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 250-256):

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

... The employer did not sufficiently demonstrate the requested standard of temporary need.

The employer is requesting 20 Plasterers/Helpers from April 1, 2018 to December 31, 2018, based on a peakload need. In order to establish a peakload need, the petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of petitioner’s regular operation.

Section B., Item 9 of the ETA Form 9142 indicates the following:

Most of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for the H-2B workers we are asking for in 2018, but cannot anticipate, at this time, that we will need H-2B workers in 2019 due to fluctuations in the economy.

“submitted on or after April 29, 2015, and that have 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.

² “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

The employer did not sufficiently demonstrate how its need meets the regulatory standard. The employer has not explained what events cause the seasonal or short-term demand that leads to its peakload need.

... The employer must submit an updated temporary need statement containing [specific listed information].

“Deficiency 2: Failure to establish temporary need for the number of workers requested.

... The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.

The employer is requesting 20 Plaster Helper from April 1, 2018 to December 31, 2018. The employer did not indicate how it determined that it needs 20 Plaster Helper during the requested period of need. Further explanation and documentation is required in order to establish the employer’s need for the 20 Plasterers/Helpers.

... The employer must submit supporting evidence and documentation to establish that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. The employer’s response must include, but is not limited to, 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 20 Plaster Helper for Orange, California during the dates of need requested;
3. If applicable, documentation supporting the employer’s need for 20 Plasterers/Helpers 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.

“Deficiency 3: Failure to submit a complete and accurate ETA Form 9142

... The employer submitted an ETA Form 9142; however, the employer did not accurately complete the following fields/items:

The employer completed Section F.c., Item 4., to indicate the worksite location as being in Orane county. The job opportunity appears to be in Orange county.

Modification Required:

If applicable, the employer must amend Section F.c., Item 4., to list the true and accurate worksite county.

We require your written permission to make the amendments to the application on your behalf.”

On February 14, 2018, the Employer filed a response to the NOD. (AF 21-249).

On March 9, 2018, the CO issued a “Non-Acceptance Denial” determination denying the Employer’s *Application for Temporary Employment Certification* for the 20 Plasterer Helpers requested by the Employer in accordance with Departmental regulations at 20 CFR § 656.6(a) and (b) because the Employer’s submissions did not support the specific dates of service; and regulations at 20 CFR § 655.11(e)(3) and (4) because the Employer failed to submit and explanation with supporting documentation, as well as summarized monthly payroll to support a temporary need for 20 Plasterer Helpers. (AF 10-13).

On March 23, 2018, the Employer filed a “Notice of Appeal” to BALCA with the Office of Foreign Labor Certification. On March 29, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA and granting leave to the Employer and Solicitor to file briefs on the issues involved in this case by mail or facsimile transmission to the office of this BALCA Judge, or e-mail to the National Office, no later than 4:00 PM, Thursday, April 9, 2018. The CO forwarded the AF to BALCA on April 4, 2018. No responsive briefs were filed through April 11, 2018.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job “must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment,” 20 CFR §655.20(e). Additionally, the 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 [the Department of Homeland Security] regulations.

These regulations provide that in order for an employer to establish 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 [employer’s] regular operation.” 8 CFR §214.2(h)(6)(ii)(B)(3)

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b).

In the Employer’s February 14, 2018 response to the NOD, the Employer submitted extensive copies of work contracts for 2015 through 2017. Some contracts reflected effective

billing rates into February 2018 and some contracts contained an annual automatic renewal provision. The Employer did not submit an updated statement of need to explain what events cause the seasonal or short-term demand that leads to its peakload need, as required by the CO in in “Deficiency #1” of the NOD. The Employer also failed to submit any summarized monthly payroll reports, signed by the employer attesting that the information being presented for a minimum of two previous calendar years, 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, or any other evidence and documentation that similarly serves to justify the number of workers requested, as required by the CO in in “Deficiency #2” of the NOD.

The Employer has failed to meet its burden to establish its need for 30 H-2B Plasterers/Helpers and failed to establish a peakload temporary need during the period of May 31, 2018 through December 31, 2018.

In support of its January 1, 2018 application, the Employer included a copy of a previously approved application for plasters/helpers, ETA Case Number H-400-16077-486771, which received “full certification” for the validity period May 31, 2016 to December 31, 2016. (AF 267-274).

In the current application the Employer indicated in ETA Form 9142B, Section B.9 (AF 257, 263):

“... 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 1, 2018 to December 31, 2018. Our company currently requires the services of laborers to perform manual labor associated with residential construction such as cleaning work areas and equipment’ performing support duties to assist plasterers; applying protective coverings, such as masking tape, to articles or areas that could be damaged or stained by work processes; erecting scaffolding; filling cracks or breaks in surfaces of plaster articles or areas with putty or epoxy compounds. 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. ... it is possible for us to predict that [the California winter] 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 ... of approximately December 31st to April 1st. This is an application for recertification – H-400-16077-486771; same number of workers and six-week later start and end date. ... the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for H-2B workers we are asking for in 2018, but cannot anticipate, at this time, that we will need H-2B workers in 2019 due to fluctuations in the economy. ...”

As noted above, the Employer did not submit signed and attested employment documentation compiled from the Employer’s actual accounting records or system which separately set forth for the period January 1, 2016 through December 2017, the respective monthly number of full-time permanent and temporary employees working as Plaster Helpers; their respective total hours worked each month; and their total earnings received each month, as requested by the CO in the initial NOD.

Without the requested attested employment documentation detailing the monthly number of Plasterer Helpers working as permanent employees and those working as temporary employees, as well as the number of hours worked by the Plasterer Helpers in each category, for the period from January 1, 2016 through December 31, 2017, it is not possible to determine the number of hours of Plaster Helper work performed per month and the base-line production of permanent employee Plasterer Helpers on a full-time basis, both of which are needed to establish if there are periods of demand that cannot be met by the Employer's permanent Plasterer Helpers that would establish a period of temporary peakload need. The requested information was also required to justify the number of Plaster Helpers needed for augmentation of the permanent workforce based on past monthly production and to determine if permanent full-time U.S. workers are being displaced by H-2B Plaster Helpers. Without the specifically requested employment data the Employer's claim of a specific peakload period of temporary need is bare speculation and the requested number of H-2B Plasterer Helpers is unsubstantiated. Here the Employer failed to submit the specifically requested information as directed when it had the opportunity to make a timely submission.

When the credible evidence submitted to the CO prior to the March 9, 2018 denial determination is considered as a whole, Padilla Construction Company has failed to meet its burden to establish that it has a peakload based temporary need for Plaster Helpers for the period May 31, 2018 to December 31, 2018 and failed to meet its burden to establish that it has a need for 20 Plaster Helpers during the May 31, 2018 to December 31, 2018 period.

After deliberation on the AF and the position of the Parties reflected in the record, this Administrative Law Judge finds that the CO properly denied the Employer's January 1, 2018, *Application for Temporary Employment Certification* for 20 Plaster Helpers for the period of need from May 31, 2018 to December 31, 2018, in Orange County, California, pursuant to 20 C.F.R. §655.6 and 20 C.F.R. § 655.11(e).

ORDER

It is hereby ORDERED that the Certifying Officer's **DENIAL** of the Employer's January 1, 2018, *Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

For the Board:

ALAN L. BERGSTROM
Administrative Law Judge