



Issue Date: 16 March 2018

**BALCA Case Nos.: 2018-TLN-00060
2018-TLN-00063**

ETA Case Nos.: H-400-17262-318846
H-400-17262-447997

In the Matter of:

UNLIMITED DRYWALL AND PAINTING LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIALS OF CERTIFICATION

These matters arise from Unlimited Drywall and Painting LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its applications for temporary alien labor certification under the H-2B non-immigrant program. 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 United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. *See Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).*

² 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

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

For the reasons set forth below, the CO’s denial of temporary labor certification in these matters is affirmed.

STATEMENT OF THE CASE

In January of 2018, ETA received two applications for H-2B temporary labor certification from Employer for employment of twenty “Drywall Installers” and twenty “Drywall Tapers” from April 1, 2018 to December 15, 2018. (AF1 at 45, 47); (AF2 at 63, 65).³ Employer’s applications indicated the jobs would be performed at multiple worksites in or near Peoria, Arizona and stated its need was “peakload.”⁴ (AF1 at 45, 48, 60); (AF2 at 63, 66, 74).

On January 3, 2018, the CO issued Notices of Deficiency (“NOD”). (AF1 at 38-43); (AF2 at 55-60). The Employer was notified that its applications did not meet the criteria for acceptance because of its failure to establish the job opportunities were temporary in nature.⁵ *Id.* In the NODs, the CO requested Employer provide particular supporting documentation and information, including summarized monthly payroll reports, a summary of monthly projects, and signed contracts for each of its projects. (AF1 at 42-43); (AF2 at 59-60). On January 18, 2018, Employer responded to the deficiencies outlined by the CO, and provided charts showing monthly invoiced production and the number of workers needed in both occupations each month

“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.

³ Citations to the Appeal Files are abbreviated as “AF1” for case number 2018-TLN-00060, and “AF2” for case number 2018-TLN-00063, followed by the page number.

⁴ In its applications, Employer stated it had a short-term demand and peakload need for twenty drywall installers and twenty drywall tapers to help the permanent staff in performing work duties. (AF1 at 60); (AF2 at 74).

⁵ Because I affirm denial of both applications on this ground, I need not address the other reasons for denial cited by the CO.

in 2017 and projected for 2018, and 2017 summarized monthly payroll reports. (AF1 at 22, 33-37); (AF2 at 26, 38-40, 42-43).

On February 12 and 16, 2018, the CO issued Final Determinations denying Employer's applications pursuant to 20 C.F.R. § 655.6(a) & (b) for failing to establish that the job opportunities were temporary in nature. (AF1 at 8-13); (AF2 at 10-15). The CO noted Employer's response to the NODs was insufficient to establish a peakload need for temporary workers for the dates requested. (AF1 at 10-13); (AF2 at 12-15).

Thereafter, Employer requested administrative review of the denial of both applications before BALCA. (AF1 at 1); (AF 2 at 1). Upon being assigned to these matters, I issued on March 2, 2018, a Notice of Docketing, Order of Consolidation and Briefing Schedule allowing the parties to file briefs within seven business days. Neither Employer nor the CO filed appellate briefs.

DISCUSSION

The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.61(a), (e). The issue before me is whether the CO properly denied certification on the basis that Employer did not establish a peakload need for twenty drywall installers and twenty drywall tapers between its requested dates of April 1, 2018 and December 15, 2018.

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload, or intermittent. *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). Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify for peakload need, an 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.

Id.; see, e.g., *Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014).

Employer's purported period of need is April 1, 2018 through December 15, 2018. (AF1 at 45); (AF2 at 63). In response to the CO's NODs, Employer stated: "[W]e work in a fast pace[d] environment and homes must be built on a schedule. Most builders impose[] [on] themselves yearly goals, based on some myriad economic variables and we need to fulfill the demand sold and additional spec homes demanded by builders for year-end closing and public reporting." (AF1 at 33); (AF2 at 38). Employer also averred: "The nature of the construction industry, and consequently, our industry has historically had a peakload . . . The economy is improving and with it the need for new homes." *Id.*

In the Final Determinations denying certification, the CO found Employer's explanation unclear "as to what causes its temporary need" in the alleged peakload period, and noted "some of [Employer's] statement[s] point to a year round need due an improved economy and demand for services." (AF1 at 7); (AF2 at 6). I agree. I find it problematic that Employer is unable to point to any specific event or cause for the alleged short-term demand between April and December. See *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload need). I will nevertheless consider whether Employer met its burden establishing that the job opportunities are temporary in nature in accordance with 8 C.F.R. § 214.2(h)(6)(ii)(B).

I. Invoiced Production Charts/Job Itineraries 2017 & 2018

To support its alleged period of peakload need, Employer provided the CO with charts demonstrating monthly invoiced production in 2017 and its projected invoiced production for 2018, along with a graph showing monthly invoiced work for both years. (AF1 at 34, 36); (AF2 at 39, 42). Since Employer failed to support its invoiced production in 2017 and estimated invoiced production in 2018 with work contracts or other documentation, the information contained in these charts provide little to no value in establishing the need for temporary workers. See (AF1 at 7); (AF2 at 7). Without any documentary support, Employer's assertions do not prove it experiences a short-term demand between April and December. *Cf. Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the

employer failed to produce any documentation proving weather conditions and contract patterns contribute to a temporary seasonal need).

Even if Employer provided the CO with work contracts to support its 2017 invoiced production, the information in the charts does not support the purported period of need of April 1, 2018 through December 15, 2018.⁶ Invoiced production for April and May of 2017, totaled \$234,315.93 and \$235,694.99, respectively, while the purported off-peak month in January that same year similarly totaled \$229,548.02 in production. (AF1 at 34, 36); (AF2 at 39, 42).

I find that Employer had a total of 42 drywall installers and 35 drywall tapers in April 2017, and 43 drywall installers and 36 drywall tapers in May 2017. *Id.* Employer also had almost the exact number of workers in January 2017, with 41 drywall installers and 35 drywall tapers. *Id.* In January, Employer had a total of 76 drywall workers, while in April and May, it employed a total of 77 and 79 drywall workers. *Id.* Based on these numbers, it appears Employer does not need to supplement its permanent staff beginning in the month of April. It was not until August that Employer's invoiced production and number of workers in each occupation significantly increased.⁷ (AF1 at 34, 36); (AF2 at 39, 42). This information suggests Employer's period of need does not begin in April, and starts much later on in the year, if at all.

I find the lowest number of drywall tapers in 2017 were employed in two alleged on-peak months: July (31 tapers) and December (30 tapers). However in two purported off-peak months, January and March of 2017, Employer used more drywall tapers than it did in July or December.⁸ (AF1 at 34, 36); (AF2 at 39, 42). These numbers do not bolster a consistent need for the requested additional twenty drywall tapers between April and December. At best, the information provided for 2017 shows Employer's work demand and need for additional drywall workers fluctuates throughout the year.

⁶ Although Employer's 2018 projected invoiced production and number of workers in each occupation per month seemingly support a short-term demand in some months in the purported peakload need, the information is not supported by documentation of Employer's clients, work contracts, work sites, and dates of work for each project. *See* (AF1 at 34, 36); (AF2 at 39, 42).

⁷ In August 2017, Employer allegedly invoiced a total of \$314,321.90 in completed work and had 56 drywall installers and 40 drywall tapers, or a total of 96 drywall workers on its payroll. (AF1 at 34, 36); (AF2 at 39, 42). In all the months prior to August 2017, the number of drywall workers did not exceed 82. *Id.*

⁸ In January, there were 35 drywall tapers and in March, there were 33 drywall tapers. (AF1 at 34, 36); (AF2 at 39, 42). In February of 2017, there were 30 drywall tapers—almost the same number of drywall tapers in July (31 tapers) and December (30 tapers) of 2017. *Id.*

II. Payroll Reports for 2017

Employer's 2017 payroll reports do adequately document a short-term demand in the purported period of need. Initially, I note the payroll reports for both drywall installers and drywall tapers do not identify the total number of hours worked and total earnings received *separately* for the permanent staff and temporary workers. *See* (AF1 at 37); (AF2 at 43). Instead, Employer provided combined totals of hours worked and wages earned by both the permanent staff and the temporary workers for each month. *See id.* Therefore, it is impossible to discern whether temporary workers were in fact used to supplement the permanent staff's hours of work.

However, the data presented in the payroll reports indicate that Employer does not "supplement its permanent staff" on a temporary basis in the alleged period of need.⁹ *See* § 214.2(h)(6)(ii)(B). Employer did not use any temporary drywall installers in the alleged on-peak months of April and May. (AF1 at 37). Then, in June 2017, Employer reduced its permanent staff from 43 workers to 26 workers, and hired 18 temporary workers, although the total number of hours worked did not significantly increase that month.¹⁰ *Id.* And, as I previously noted, Employer's invoiced production in 2017 did not significantly increase until August. *See supra* p. 5. The number of permanent drywall installers decreased once Employer began using temporary workers in June, implying Employer did not supplement its permanent staff, but instead replaced those employees with temporary workers.¹¹ *See* (AF1 at 37). Therefore, the payroll report for drywall installers does not establish a constant peakload need between April and December.

Employer's purported need for twenty drywall tapers between April 1, 2018 and December 15, 2018 is also unsupported by the 2017 payroll report. No more than 11 temporary drywall tapers were used in any month in Employer's alleged peakload period. (AF2 at 43). Employer did not even use any temporary drywall tapers until June of 2017. *Id.* Even though

⁹ As pointed out by the CO, the payroll records for drywall tapers and installers did not include an attestation that the information presented was compiled from Employer's accounting records or system. (AF1 at 7); (AF 2 at 7).

¹⁰ The total number of hours drywall installers worked in May 2017, including both permanent and temporary staff, was 6,880 hours. (AF1 at 37). In June 2017, the total number of hours permanent and temporary drywall installers worked increased only to 7,040 hours. *Id.*

¹¹ In January 2017, Employer started out with 41 permanent drywall installers, and by June it had reduced its permanent staff to 26 workers. (AF1 at 37). In July 2017, Employer also only had 31 permanent installers, but had 20 temporary installers. *Id.* August of 2017 also showed a decrease from January 2017 in the number of permanent drywall installers, with 37 permanent workers, and 19 temporary employees. *Id.*

the total number of hours worked by all drywall taper employees did not significantly increase in June, Employer hired 10 temporary workers.¹² *Id.* In fact, Employer reduced its permanent staff that month from 36 to 27 employees, and employed 10 temporary workers. *Id.* Based on those numbers, it seems Employer replaced some of its permanent staff with temporary workers. *See id.*

In July 2017, the total hours worked by all drywall tapers was less than the hours worked in the alleged off-peak months of January and March.¹³ *Id.* Work hours in July also reduced significantly from those worked in April, May and June.¹⁴ (AF2 at 43). This data strongly suggests Employer does not need to supplement its permanent taper staff with twenty temporary employees in the purported peakload period because the total number of hours worked during that time shows no consistent increase between April through December, and the hours worked actually decrease in some purported on-peak months. *See Roadrunner Drywall Corp.*, 2017-TLN-00035, et al. (May 4, 2017) (affirming denial where monthly hours worked do not support peakload need in the purported period); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of peakload need); *Cf. Los Altos Mexican Rest.*, 2016-TLN-00073 (Oct. 28, 2016) (payroll records do support the alleged seasonal period of need).

Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. Here, Employer did not submit documentation to support the information detailed in its invoiced production charts for the years 2017 and 2018. Even if Employer did include documentation to bolster the invoiced production charts and payroll reports for 2017, that information is not indicative of a peakload need between the months of April and December. Therefore, I find Employer has not met its burden of establishing that its need is truly temporary in the purported peakload period.

¹² In June 2017, all drywall tapers—temporary and permanent—worked a total of 5,920 hours. (AF2 at 43). In May 2017, Employer did not use any temporary drywall tapers, but the permanent staff worked a total of 5,760 hours. *Id.*

¹³ In July 2017, all drywall tapers worked a total of 4,960 hours, while they worked a total of 5,600 hours in January 2017 and 5,280 hours in March 2017. (AF2 at 43).

¹⁴ All drywall tapers worked a total of 5,600 hours in April 2017, 5,760 hours in May 2017, and 5,920 hours in June 2017. (AF2 at 43). The total number of hours worked in these alleged on-peak months are not substantially higher than those worked in the off-peak months from January to March. *Id.* In fact, the total number of hours worked in April 2017 is the same exact number of hours worked in January 2017 (5,600 hours). *Id.*

ORDER

IT IS ORDERED that the denial of labor certification in these matters is hereby **AFFIRMED**.

For the Board:

TIMOTHY J. McGRATH
Administrative Law Judge