



Issue Date: 30 October 2017

**BALCA Case No.:** 2018-TLN-00004  
**ETA Case Nos.:** H-400-17198-298547

*In the Matter of:*

**WILCO GUTTERING CO., INC.**

*Employer.*

Appearances: Sheila A. Grey  
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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 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.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C.

§1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a)<sup>1</sup> Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR §655.50 If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53 During the administrative review only the material contained within the appeal file (“AF”)<sup>2</sup> 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 CFR §655.61(e). Accordingly, the documents attached to Employer’s filings after the September 14, 2017, denial determination are not considered.

### STATEMENT OF THE CASE

On July 19, 2017<sup>3</sup> the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Wilco Guttering Co., Inc. (“Employer”) for four “Guttering Fabricators” as peakload workers for employment from October 2, 2017 through March 1, 2018 (AF68, 71-78, 123-157). The position is classified as O\*Net Code 47-2211, Sheet Metal Workers, and is to be performed in Tulsa, Oklahoma (AF 124-126). No specific educational requirement is specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment is required in Section F.b Item 3; but, indicated 3 months of experience in guttering fabrication is required in Section F.b Items 4 and 5 (AF 126). The Employer retained Sheila A. Gray of Labor Made Easy as its agent (AF 125).

On July 27, 2017 the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 113-122):

**“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 four Sheet Metal Workers from October 2, 2017 through March 1, 2017 (sic), 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 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 petitioner’s regular operation.

... The employer received a previous certification for CNPC case number H-400-16243-600106, for six Sheet Metal Workers from April 1, 2017 to December 31, 2017. The current application is requesting four Sheet Metal Workers from October 2, 2017 through March 1, 2018. The employer is requesting Sheet Metal Workers for a total period of 11 months (April 1, 2017 through March 1,

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<sup>1</sup> The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and are effective as of April 29, 2015.

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

<sup>3</sup> Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

2018) at the same worksite location. The employer appears to have a full-time, almost year-round need for Sheet Metal Workers rather than a temporary one, as the total period of need spans more than 10 months.

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

... The employer must submit supporting evidence and documentation that justifies the standard of temporary need. The employer's response must include, but is not limited to, the following [specific listed information]"

**“Deficiency 2: Failure to justify the dates of need requested.**

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an 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 is 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.

The employer did not submit sufficient information to support the dates of need requested.

The employer's statement of temporary need ... states: ‘Beginning October 1<sup>st</sup> we need 4 additional full-time, temporary workers for fabricating gutter and downspouts. By March 31<sup>st</sup> these additional workers will not be needed.’ However, the employer has requested a start date of need of October 2, 2017 and an end date of need of March 1, 2018. These dates are not consistent with employer's statements regarding when the season begins and ends.

The employer has requested a peakload need for H-2B workers from October 2, 2017 to March 1, 2018, but has not provided any information or supporting documentation as how I determined the start and end dates of need. The employer has not justified that it has a need for temporary workers for the dates requested.

... The employer must include a revised, detailed statement of temporary need containing the following [specific listed information, supporting evidence and documentation].”

**“Deficiency 3: Failure to submit an acceptable job order.**

... The employer did not submit a copy of a job order with its application to the CNPC.

... In order to be in compliance with the regulation, the employer must submit a job order that includes [specific listed information].”

**“Deficiency 4: Disclosure of foreign worker recruitment.**

... The employer's application did not include any agreements between itself or its attorney/agent and an agent or recruiter engaging in the recruitment of H-213 workers.

... The employer and its attorney/agent must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-213 workers ... or [t]he employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H=213 workers under this Application for Temporary Employment Certification.”

**“Deficiency 5: Failure to submit a complete and accurate ETA Form 9142.**

... The employer submitted an ETA Form 9142; however, the employer did not accurately complete [Section F.c.4.]

... The employer must amend Section F.c.4. to reflect the true and accurate county of the primary worksite location.”

On August 15, 2017 the Employer filed its response to the NOD by e-mail transmitted at 5:04 PM, Monday, August 14, 2017 to TLC, Chicago – ETA SVC (AF 68, 79-112).

On September 14, 2017, the CO denied the *Application for Temporary Employment Certification* for the four guttering fabricators (sheet metal workers) requested by Employer. The CO set forth the following reason for the denial of the application without addressing the employer’s response to noted deficiencies 2 through 5 (AF 65-70):

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

The CO set forth the information originally set forth in Deficiency 1 of the July 27, 2017, Notice of Deficiency and then noted the following:

“In response to the NOD, the employer submitted 7 Labor and Material Contracts, 6 Proposals, and 2015-2016 Payroll summaries. ... The employer requested to change the end date of need from March 1, 2017 to March 31, 2017. However, in conjunction with the previously certified case H-400-16243-600106, which has been certified from April 1, 2017 to December 31, 2017, this requested change increases the duration of temporary need from 11 months to a year round need.

Therefore, the employer did not submit sufficient information in its NOD response to establish that the requested period is temporary in nature and did not overcome the deficiency.

... Under DHS regulations, the employer must establish that the need for the employee will end in the near, definable future. Except in cases of one time occurrence, the Department of Labor has consistently viewed temporary need, as defined in 8 CFR 214.2(h)(6)(ii)(B), as lasting no more than ten months, which has been reflected in all rules promulgated since 2008. The Department continues to view this as an appropriate threshold for assessing the temporary nature of the employer’s need, which is consistent with the definition of temporary need in DHS regulations, which provides that ‘generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.’ ... Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time off due to a slow-down in work activity.

... Based on the foregoing reason, the employer’s application is denied.”

The Employer filed a timely formal request for administrative review of the denial determination with additional documentation (AF 1-42).<sup>4</sup> In its “Request for Administrative Review,” the Employer’s non-attorney agent addressed the issue of temporary need by referring to the materials filed in response to the July 27, 2017 NOD and arguing that the “Employer responded fully, providing all documentation requested by CNPC and additionally providing the

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<sup>4</sup> By Notice issued October 20, 2017 this presiding Judge found that the Employer’s filing of its written appeal with the Office of Administrative Law Judges was timely made and that any delay incurred was due to the delays occasioned by the U.S. Postal Service misrouting the Employer’s priority mailing. The Employer’s request for review, with attached original exhibits, was received and is accurately reflected in the appeal file.

only contract and invoice completed and paid during the year previous to the requested dates of need; showing this as an atypical occurrence.”

In response to the “Notice of Assignment and Briefing Schedule” issued on October 13, 2017, counsel for the CO filed notice on October 24, 2017, that no written brief would be submitted. The Employer responded that it “regularly employs permanent workers to perform services and labor ... it needs to supplement its permanent staff on a temporary basis due to a peak load short-term demand with temporary employees who will not become part of the regular operations.” The Employer argued that a PERM application can be issued for a maximum of one year; acknowledged that the 2017 application was for a period of nine months; and requested the current application end of need date be amended back to March 1, 2018. The Employer argues that because it has secured contracts for gutters and downspouts for apartment complexes in 2017-2018 off-season, it is “clearly not a typical time this year” since the 2016-2017 off-season only had one contracted job. The Employer projects “Once fabrication is complete, [it will] only need installers, therefore Employer’s application for 2018 will be for installers only, rather than fabricators and installers as was the application for 2017.” Employer requests the application be remanded to the CO for further processing.

## **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). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and legal briefs submitted to

BALCA. 20 CFR §655.61(e). Accordingly, the documents attached to the request for review and Employer's request to again amend the end date for the date of need cannot be considered.

The CO submits, based on the original information submitted by the Employer in the AF, that the Employer's need for the four sheet metal workers requested in the current application exceeded the nine month maximum for H-2B applicants because the application as submitted was for the period October 2, 2017 through March 31, 2018, as amended by the Employer; and this abutted the prior H-2B application for 6 similar sheet metal workers for the period April 1, 2017 through December 31, 2017.<sup>5</sup> Thus the request reflected a period of continuous need for the sheet metal workers from April 1, 2017 through March 31, 2018, a period of 12 months. Such a period of need must be denied pursuant to 20 CFR §655.6(b).

In its "Revised Statement of Temporary Need" submitted as part of the response to the NOD (AF 84), the Employer states that "during a usual year our core staff of permanent additional workers are able to handle the reduced workload from January 1<sup>st</sup> through March 31<sup>st</sup> and additional temporary workers are only needed during our peakload period of April 1<sup>st</sup> and December 31<sup>st</sup>. However, Employer has contracted to provide guttering and downspouts for 6 apartment complexes. This causes an unusual peakload need for fabricators from October 2<sup>nd</sup> to March 31<sup>st</sup> as all but one of our permanent, full time workers will be needed to work on site to install guttering and downspouts. Additionally, our permanent full time workers will not be able to fabricate guttering, gutter guards, downspouts, etc. in preparation for Oklahoma's spring storm season. Beginning October 2<sup>nd</sup> we need 4 additional full time, temporary workers for fabricating gutters and downspouts. By March 31<sup>st</sup> these additional workers will not be needed ... These temporary workers are not and will not become a part of our permanent staff because we do not usually have sufficient work for full time fabricators from October 1 through March 31<sup>st</sup>." The Employer submits that "a job opportunity is considered temporary under the H-2B classification if the employer's need for the duties performed is temporary, whether or not the underlying nature of the job is permanent. It is the nature of the employer's need, not the nature of the job that is the determining factor." In support of the application Employer submitted work contracts entered into in February 2016 through and July 2017 which Employer submits were amended to reflect "anticipated work completion dates between October 2, 2017 and March 31, 2018 ... as the apartment complexes are currently under construction. The anticipated work completion dates are the estimated dates construction will be ready for guttering installation." The Employer argues that the summarized payroll records for CY 2015 and CY 2016 and the sole guttering contract for the Cottages at Tallgrass Point that was invoiced on February 3, 2017 and paid March 15, 2017 (AF 106-110) demonstrate a temporary the need for 4 additional H-2B gutter fabricators for the new apartments with anticipate completion dates of October 2, 2017 to March 2018.

The payroll records submitted in response to the NOD reveal that the Employer had no H-2B workers during 2015 and did employ 3 H-2B workers from May to December 2016, while the number of permanent workers was reduced by one employee during the time the foreign workers were employed in 2016. The Employer did not include a payroll summary for 2017; however the Employer was certified to employ 6 H-2B sheet metal workers as gutter fabricators from April 1, 2017 to December 31, 2017. That certified application indicated in Section B.7 that all 6

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<sup>5</sup> ETA application number H-400-16243-600106 (AF 158-168)

foreign workers would be “new employment.” (AF 161). Whereas the current application indicates in Section B.7 that 1 requested foreign worker would be “new employment” and 3 foreign workers would be for a “change in previously approved employment.” (AF 123).

Here the actual work history and employment needs of the Employer over time document a growing business involving new building construction coupled with an ongoing seasonal repair of gutter and downspout damage in Oklahoma demonstrating a peakload need for additional temporary employees from May 2016 through December 2016 and again in April 1, 2017 through December 31, 2017. The work history also indicates that a permanent U.S. worker may have been displaced by the foreign workers hired in 2016. No staffing summary for 2017 was submitted for comparison or to demonstrate the permanent employee position was refilled in 2017. Additionally, the submitted new apartment construction contracts lack sufficient clarity to confirm whether the fabrication of gutters and downspouts is a new construction project going into March 2018 or were projects considered in the temporary need of the 6 foreign workers in the certified application for H-2B gutter fabricators that experienced construction delays into the October 2, 2017 through March 31, 2018 timeframe. The Employer has failed to demonstrate why the 6 H-2B gutter fabricators certified for 2017 cannot complete gutter fabrication for those contracts to be performed from October 2, 2017 through December 31, 2017 since the Employer states that only permanently employees are needed at the apartment construction sites to complete gutter and downspout installations.

The speculative uncertainty of gutter fabrication needs after December 31, 2017 undermine a business need for 4 H-2B temporary sheet metal workers from October 2, 2017 through March 31, 2018. Additionally, where an employer has been granted certification for a specific classification of H-2B workers and subsequently submits an additional application for the same classification of H-2B workers at the same location of intended employment with the same work duties and requirements, consideration of the work periods involved in the prior certified application(s) is appropriate on the issue of “temporary need” for the H-2B workers because of the overlapping nature of dates of need and similarities in job requirements and duties. see *William Ashby Maltsberger d/b/d Maltsberger Ranch*, 2016-TLN-00078 (Sept. 28, 2016)

Here the Employer argues it has a temporary need for gutter and downspout fabricators (sheet metal workers) from April 1, 2017 through March 31, 2018; a period of 1 year. Federal regulations require that the *Application for Temporary Labor Certification* under the H-2B program be denied where the employer has a “need” lasting more than nine months, unless the need is based on a “one time occurrence.” 20 CFR §655.6(b); also, 80 Fed. Reg. 24055-24056 (Apr. 29, 2015). For the “one time occurrence” exclusion, the Employer “must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation, that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” 8 CFR §214.2(h)(6)(ii)(B)(1). “The use of this [one time occurrence] category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9 month limitation.” 80 Fed Reg. 240056 (Apr. 29, 2015). In this case the Employer has demonstrated a recurring need for H-2B foreign workers for gutter and downspout fabrication (sheet metal work) for “off-peak season” in 2016 and 2017. Accordingly, the current application cannot be considered a “one time occurrence” and the Employer is limited to a nine

month period for foreign workers as H-2B guttering fabricators (sheet metal workers). The nine month period began in April 1, 2017 under the certified 2017 application and expired on December 31, 2017, also under the prior 2017 application.

After deliberation on the AF and argument of the Parties, this Administrative Law Judge finds that the CO properly denied the Employer's July 19, 2017, *Application for Temporary Employment Certification* for the requested additional four foreign workers as H-2B guttering fabricators (sheet metal workers) for the modified dates of need from October 2, 2017 through March 31, 2018, in Tulsa, Oklahoma, pursuant to 20 CFR §655.6(b).

### **ORDER**

**It is hereby ORDERED that the Certifying Officer's DENIAL of the Employer's July 19, 2017, *Application for Temporary Employment Certification* is AFFIRMED.**

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia