



Issue Date: 26 April 2019

BALCA Case No.: 2019-TLN-00073

ETA Case Nos.: H-400-18351-438706

*In the Matter of:*

FOCUS FRAMING DOOR AND TRIM, LLC,  
*Employer*

**ORDER VACATING DENIAL OF CERTIFICATION  
AND REMANDING TO CERTIFYING OFFICER  
TO DETERMINE WHETHER A PARTIAL CERTIFICATION SHOULD BE  
GRANTED FOR A REDUCED PERIOD OF NEED**

This case arises from a request for review of the Certifying Officer's ("CO") decision to deny an application 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 Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> 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).

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<sup>1</sup> The definition of "peakload" temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015).

<sup>2</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). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

## Background

On January 7, 2019, Focus Framing (“Employer”) applied for temporary employment certification through the H-2B program to fill 25 positions for Helpers-Carpenters for the period of April 1, 2019 to December 15, 2019. (AF 26).<sup>3</sup>

On February 14, 2019, the CO issued a Notice of Deficiency identifying two deficiencies. (AF 19-25).<sup>4</sup> Employer responded on February 28, 2016. (AF 13-18). On March 4, 2019, the CO issued a Final Determination on March 4, 2019 maintaining both deficiencies as separate bases to deny certification of Employer’s application. (AF 123).

In the Final Determination letter, the CO noted that Employer was requesting twenty-five (25) Helpers of Carpenters<sup>5</sup> based on a peakload need for the period April 1, 2019 to December 15, 2019. As evidence to support the requested dates of need, employer submitted monthly job itineraries for the period January 2017 through December 2018 and projected job itineraries for January through December 2019. The CO concluded that the documentation did not support the period of need requested, in part, because employer completed more jobs in the nonpeak month of March 2017 than it did during the alleged peak months of April, May, July and September 2017. Additionally, the employer completed more jobs in the nonpeak month of January than peak months of April and July 2017. In 2018, employer completed more total jobs in March than peak load months of April, June and November and completed more jobs in February than peak load months of June and December 2018. In other words, employer’s documentation indicated it completed more jobs in some non-peak load months than peak load months, thereby contradicting its argument that temporary workers were need to support a peak load need for the period of April through mid-December. Additionally, the CO concluded the evidence submitted by Employer did not adequately explain why 25 temporary workers were required for the period of need. (AF 8-11).

On March 6, 2019, Employer submitted a request to BALCA for administrative review. (AF 1). On March 7, 2019, BALCA docketed the appeal and on March 26, 2018, I issued a *Notice of Docketing and Order Establishing Briefing Schedule*. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services on March 28, 2019, in accordance with 20 C.F.R. § 655.33(b). Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of April 9, 2019. However, neither party has submitted a brief and I decide this matter on the existing record.

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<sup>3</sup> In this decision, AF is an abbreviation for “Appeal File.”

<sup>4</sup> Deficiency 1 was a failure to establish the job opportunity as temporary in nature, under 20 C.F.R. 655.6(a) and (b). Deficiency 2 was a failure to establish temporary need for the number of workers requested, under 20 C.F.R. 655.11(e)(3) and (4).

<sup>5</sup> According to Employer, “Helper of Carpenter will help Carpenter by performing duties requiring less skill like manual and physical duties, use, supply or hold materials and tools, and clean work areas, machines, or equipment, to maintain a clean and safe job site in residential construction.” (AF 37).

### Applicable Law

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor, Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(5). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* with ETA’s Chicago National Processing Center. 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a CO, who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a). The scope of the Board’s review is limited to the appeal file prepared by the CO, any 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).

After considering all the evidence, BALCA may take one of the following actions:

1. Affirm the CO’s denial of temporary labor certification,
2. Direct the CO to grant temporary labor certification, or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

### DISCUSSION

To qualify as a peak load 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 petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

A review of the record in this case compels a conclusion that the Employer did not establish a temporary need for the entire period requested in the application, April 1, 2019 to December 15, 2019, but may have established a temporary need for part of the period, and thus it is appropriate to remand this matter to the CO to decide whether to grant partial certification by reducing the requested period of need as authorized by 20 C.F.R. § 655.54 and whether she should exercise her discretion to waive applicable time requirements as authorized by 20 C.F.R. § 655.17(a). *Erickson Framing Az*, 2016-TLN-00016 (Jan. 15, 2016) (remands to permit the CO to determine if a partial certification should be granted for a reduced period of peak load need); *accord Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (June 4, 2015) (remanded to permit certification for a shorter period of need).

Accordingly, I find it appropriate to remand this matter to the CO for further processing of the application to determine whether to exercise her discretion to approve a reduced period of need.<sup>6</sup>

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that: (1) the Certifying Officer's denial of labor certification is **VACATED**; and (2) this matter is **REMANDED** to the Certifying Officer for further processing of the application so she can determine whether to exercise her discretion to approve a reduced period of need.

**SO ORDERED.**

For the Board:

**STEPHEN R. HENLEY**  
Chief Administrative Law Judge

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<sup>6</sup> Given the disposition of this case, I need not address the CO's second deficiency and determination that the evidence submitted by Employer did not support a temporary need for 25 workers. However, I do note that the 2017 and 2018 monthly payroll reports submitted by Employer do reflect they did hire 25 temporary carpenter helpers for the period September through December of each year.