



**Issue Date: 26 March 2019**

BALCA Case No.: 2019-TLN-00068  
ETA Case No.: H-400-18363-138572

*In the Matter of:*

**GLD Concrete**  
*Employer*

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

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act (“INA,” or “the Act”), 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “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 (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the Certifying Officer’s (“CO”) denial of temporary labor certification is affirmed.

### **STATEMENT OF THE CASE**

#### **H-2B Application and Notice of Deficiency**

On January 7, 2019, GLD Concrete, LLC, (“Employer”) filed an H-2B Application for Temporary Employment Certification (“ETA Form 9142B”) for the job titled “Construction Laborers,” Standard Occupational Classification (“SOC”) code/occupation title 47-2061. (AF 24.)<sup>2</sup> Employer requested forty Construction Laborers from April 1, 2019 through December 23, 2019. (*Id.*) Employer listed the nature of temporary need as “peakload.” (*Id.*) Employer’s application stated:

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<sup>1</sup> On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 FED. REG. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

<sup>2</sup> For purposes of this opinion, “AF” stands for “Appeal File.”

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 much business during the winter months, of approximately December 23rd 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.

(Id. at 35.)

On February 8, 2019, the CO issued a Notice of Deficiency (NOD) to Employer. (AF 18.) Employer's application contained two deficiencies. First, Employer failed to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. § 655.6(a) and (b). (AF 21.)

To remedy this deficiency, the CO directed Employer to submit the following items:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period;
3. Supporting documents that substantiate that its type of work cannot be performed under certain weather conditions.
4. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
5. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Construction Laborers, 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
6. 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 21-22.)

Second, Employer failed to establish temporary need for the number of workers requested pursuant to C.F.R. § 655.11(e)(3) and (4). (Id. at 22.) The CO found that Employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. (Id.)

To remedy this deficiency, the CO directed Employer to submit the following items:

1. An explanation with supporting documentation of why the employer is requesting 40 Construction Laborers for Combine, Texas during the dates of need requested.
2. If applicable, documentation supporting the employer's need for 40 Construction Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of one previous calendar year 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
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

#### Employer's Response to Notice of Deficiency

On February 22, 2019, Employer responded to the CO's request, providing documentation in support of its application. Included in Employer's response was a cover letter, payroll for 2017 and 2018, a letter confirming work under contract for 2019, and one letter of intent. (AF 11-16.)

In its cover letter, Employer explained that its schedule of operation is year-round. (Id. at 12.) Employer stated that its peakload season occurs from April to December because of rain, daylight hours, and temperatures. (Id.) Employer is unable to pour concrete on rainy days, concrete takes too long to dry in low temperatures, and daylight hours limit the time that they can work. (Id.) Employer's payroll charts from 2017 and 2018 are bar graphs that are presumably showing wages paid to all of its workers during each month. (Id. at 13-14.) These charts do not distinguish between permanent and temporary employees and they also do not indicate how many employees that Employer had during each month.

Employer submitted a letter from G2 Concrete, LLC confirming work under contract for 2019. (Id. at 15.) The letter listed various projects in Texas that G2 intends to use Employer's services for and declared April to December as peak work time. (Id.) The letter further stated, "To meet our contractual requirement will require a substantial number of workers. It is very difficult to find U.S. workers ready, willing and able to perform this work." (Id.)

Employer also submitted a letter of intent from Tealstone Commercial, Inc. (Id. at 16.) This letter confirmed that GLD Concrete has contracted with Tealstone for various projects in the Dallas Ft. Worth area in 2019. (Id.) The letter explained that Employer conducts its business for Tealstone from April 1, 2019 through December 31, 2019. The letter also stated, “To perform the required services will require a substantial number of workers, and it is difficult, if not impossible, to find U.S. workers ready willing and able to perform this work.” (Id.)

### Final Determination and Appeal

On February 26, 2019, the CO denied Employer’s H-2B Application for Temporary Employment Certification for forty Construction Laborers because the aforementioned deficiencies remained. (AF 3-10.) Regarding Employer’s failure to establish that the job opportunity is temporary in nature, the CO explained that the requested job opportunity is in an area where weather conditions do not prevent construction work during winter months. (Id. at 7.) Employer did not provide documentation or any other evidence substantiating its statements concerning the weather conditions in areas of intended employment affecting its work. (Id. at 8.) Employer’s payroll charts for 2017 and 2018 also failed to separately summarize full-time permanent and temporary employment. (Id. at 9.) Therefore, the CO concluded that Employer has not demonstrated how it experiences a peakload need for Construction Laborers from April 1, 2019 to December 23, 2019. (Id. at 9.)

Regarding Employer’s second deficiency, the CO found that Employer’s documentation failed to demonstrate how it experiences a peakload need for forty Construction Laborers. (Id. at 10.) Employer’s documentation did not support its request for forty Construction Laborers because the payroll charts failed to separately summarize full-time permanent and temporary employment. (Id.) Thus, Employer failed to demonstrate how it experiences a peakload need for forty Construction Laborers. On March 4, 2019, Employer submitted its Notice of Appeal. (Id. at 1.)

### **SCOPE OF REVIEW**

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). After considering the evidence, BALCA must take one of the following actions in deciding the case:

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

20 C.F.R. § 655.33(e)(1)-(3).

## DISCUSSION

### I. HAS EMPLOYER ESTABLISHED THAT THE JOB OPPORTUNITY IS TEMPORARY?

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security (“DHS”). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655.6(b). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); see also Tampa Ship, 2009-TLN-44, slip op. at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. AB Controls & Technology, Inc., 2013-TLN-00022 (Jan. 17, 2013). In evaluating whether a job opportunity is temporary, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need,” rather, “[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position.” Matter of Artee Corp., 18 I. & N. Dec. 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982).

The regulations provide that “employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 20 C.F.R. § 655.6(b)(ii)(B). Here, Employer requests temporary workers for “peakload” need. In order to establish peakload need:

Employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, that it 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 part of the employer’s regular operation.

8 C.F.R. § 214.2(h)(6)(ii)(B)(3). See Deober Brothers Landscaping, Inc., 2009-TLN-00018 (Apr. 3, 2009) (suggesting peak load need can recur if it lasts no longer than ten months each year); Workplace Solutions LLC, 2009-TLN-00049, slip op. at 5 (Apr. 22, 2009) (finding that the employer’s payroll documentation supported a claim for peak load need because, notwithstanding a calculation error, it was evident that the employer had a permanent staff that is supplemented by temporary workers); Los Altos Mexican Restaurant, 2016-TLN-00073 (Oct. 28, 2016) (payroll records do support alleged period of need).

Employer has established all the elements of peakload need. First, Employer has permanent workers that perform the same activities year round. (AF 12.) Second, Employer’s payroll records, letter confirming work under contract, and letter of intent support a period of increased demand from April through December. (AF 13-16.) Since this period is less than ten months, Employer has established that it needs to supplement its permanent staff due to a seasonal or short-term demand. Lastly, Employer’s application states that the temporary workers do not

become part of its permanent labor force. (AF 35.) Employer has proven all the elements of a peakload need and therefore established that the job opportunity is temporary.

II. HAS EMPLOYER ESTABLISHED TEMPORARY NEED FOR FORTY CONSTRUCTION LABORERS?

According to the applicable regulation:

The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on the following factors:

- (1) The job classification and duties qualify as non-agricultural;
- (2) The employer's need for the services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;
- (3) The number of worker positions and period of need are justified; and
- (4) The request represents a bona fide job opportunity.

20 C.F.R. § 655.11(e).

Employer's documentation fails to establish why it has a temporary need for forty Construction Laborers. The payroll charts submitted by Employer fail to distinguish between temporary and permanent workers. (AF 13-14.) Furthermore, Employer's documentation states "construction worker shortage is extremely high" and "to meet our contractual requirements will require a substantial number of workers." (*Id.* at 14-15.) These documents lack the specificity and detailed explanation about why Employer needs **forty** temporary Construction Laborers to supplement its permanent staff, as opposed to ten, or one hundred. The Employer's documents do not show exactly how many workers have been needed in the past to meet peak loads, or what the actual needs for workers will be as a result of the future contracts. Because Employer has failed to establish why it experiences a peakload need for forty Construction Laborers, the CO properly denied Employer's application under the third prong of 20 C.F.R. § 655.11(e).

**ORDER**

In light of the foregoing, it is hereby ORDERED that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification is AFFIRMED.

**SO ORDERED.**

**THERESA C. TIMLIN**  
Administrative Law Judges

Cherry Hill, New Jersey