

**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: 08 April 2019**

**BALCA Case No.:** 2019-TLN-00095  
**ETA Case No.:** H-400-18353-654877

*In the Matter of:*

**M & US CONCRETE INC.,**  
*Employer.*

**Certifying Officer:** Leslie Abella  
Chicago National Processing Center

**Appearance:** Anthony Skeen, Esquire  
Whittenburg & Strange, P.C.  
Lubbock, Texas  
*For the Employer*

**Before:** Peter B. Silvain, Jr.  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from M & US Concrete Inc.’s (“Employer”) 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 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of

---

<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<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). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

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 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).

## **BACKGROUND**

On January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. (AF 792-1092).<sup>3</sup> Employer requested certification for six “Concrete Laborer[s]”<sup>4</sup> from April 1, 2019 until November 30, 2019, based on an alleged peakload need for workers during that period. (AF 792).

On February 15, 2019, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in Employer’s Application. (AF 784-791). The CO gave Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD, or request administrative review before BALCA. (AF 785). Thereafter, Employer responded to the NOD with supporting documentation and a letter of explanation. (AF 422-783).

On March 5, 2019, the CO issued a Final Determination denying Employer’s Application. (AF 410-421). In support of their denial, the CO concluded that that Employer failed to resolve all three deficiencies. (*Id.*). Specifically, the CO found that Employer failed to establish the job opportunity as temporary in nature under 20 C.F.R. § 655.6(a) and (b) as well as establish temporary need for the number of workers requested under 20 C.F.R. § 655.11(e)(3) and (4). For all of these reasons, the CO denied Employer’s Application. (*Id.*).

By letter received on March 20, 2019, Employer requested administrative review of the CO’s Final Determination (“Employer’s Appeal”). (AF 1-408). On March 26, 2019, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). Later that day, the Office of Administrative Law Judges received the Appeal File from the CO. Only Employer filed a brief.

## **DISCUSSION**

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service 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)(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”), ETA. 8

---

<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

<sup>4</sup> SOC (O\*Net/OES) occupation code 47-2051 and occupation title “Cement Masons and Concrete Finishers.” (AF 792.)

C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for Temporary Employment Certification (“Application”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“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).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he 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. § 655.33(a), (e).

The employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

After considering all 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. § 655.61(e)(1)-(3).

Applications are properly denied where the employer did not supply requested information in response to a NOD. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a NOD, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

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. *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); 20 C.F.R. § 655.11(a)(3). The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

An employer establishes a “peakload need” if it shows 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 part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *see also 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 peak load, temporary need). Furthermore, the determination of temporary need rests on the nature of the underlying need for the duties of the position” and not “the nature of the job duties.” 80 Fed. Reg. 24024, 24005.

In this case, Employer alleged it has a peakload need for six concrete laborers from April 1, 2019 until November 30, 2019, based on an alleged peakload need for workers during that period. (AF 792). In its Statement of Temporary Need, Employer explained that its primary business is providing concrete services outside during the construction and building season in Texas, which it alleged “generally coincides with the warmer months of the year.” (AF 792). Employer explained that although it is able to complete some services year-round, the cold weather during the winter months extends the time it takes the concrete to cure and also creates sub-optimal conditions for the concrete to set generally. (AF 802-803). As a result, the “vast majority” of Employer’s services are schedule during the warmer months of the year. (AF 803). Employer also provided copies of contracts, subcontracts, invoices, and monthly payroll records for 2017 and 2018. (AF 808-1078).

Ultimately, the CO issued a NOD with one of the deficiencies being that Employer failed to establish the job opportunity was temporary in nature. (AF 788-789). In the NOD, the CO requested, *inter alia*, that Employer submit evidence and documentation supporting Employer’s attestations that the weather is the determining factor for its peakload standard of need and that it is unable to perform its services consistently in the colder winter months. (*Id.*). In response, Employer provided the CO with weather data reports/graphs, concrete pouring reports, and a support letter by Employer. In its letter, Employer explained that the documentation demonstrated that “the months from December to March in Lubbock, Texas are the months in which some of the coldest weather occurs” and that, in turn, such weather negatively impacts its ability to pour concrete during this period. (AF 425).

The CO, however, disagreed, finding that Employer failed to overcome the deficiency. (AF 412-417). In reviewing the documentation submitted by Employer, the CO gleaned that concrete is affected by cold air temperatures falling below 40°F. (*Id.*). Further, the CO observed that the weather reports submitted by Employer indicate that daytime temperatures in the relevant area fall between 40°F and 50°F during the winter months. (*Id.*). The CO found that, contrary to Employer’s allegations, the documentation demonstrated that “the average temperature in its area of intended employer equals 54°F during its coolest month of January;

well above temperatures that affect the process of laying concrete according to the documentation submitted.” (*Id.*).

In its brief, Employer argues that the CO mistakenly focused on the average high temperatures during the nonpeak winter months and ignored the average low temperatures, which do support its attestation that the cold temperatures significantly hinder its ability to perform concrete labor. (*Employer’s Brief* at 8). Specifically, Employer counters the CO’s point that the average high in January is 54°F with the fact that the average low in January is 26°F, which is below the designated 40°F needed for optimal concrete pouring conditions. (*Employer’s Brief* at 8-9). The Employer also posits that since “the actual average daily temperature in January is presumably between 54°F and 27°F, which includes temperatures that are both above and below 40°F, the evidence still supports the Employer’s assertion that the weather impacts its ability to perform its ability to perform concrete services.” (*Employer’s Brief* at 9).

The Employer’s point that the CO mistakenly focused on the average high temperature is well-taken. Contrary to the CO’s finding, the data submitted by Employer does not report an average temperature of 54°F in January. Rather, it indicates that the average *high* temperature in January is 54°F while the average *low* is 27°F. (AF 624-625). Thus, by finding that the data does not support Employer’s attestations because 54°F is well above the 40°F that it is threshold for optimal concrete pouring conditions, I find the CO’s determination is unreasonable. However, this was not the CO’s only justification for finding that the weather data and reports did not support Employer’s attestations. The CO also relied on the “Mid-South Seasonal Pouring Tips” by the ConcreteNetwork.com, which indicated that the average *daytime* temperatures in the winter months fall between 40°F and 50°F, which is above the 40°F threshold. Thus, despite the average daily lows reaching 27°F in Texas’ coldest month of January, this article (submitted into evidence by Employer) indicates that the daytime temperatures are within the range of acceptable temperatures for concrete pouring. I also note that this article goes further to confirm that “[c]ool temperatures allow year-round exterior concrete placement.” (AF 638). Therefore, I find that the CO reasonably concluded that the weather data and reports do not support Employer’s attestations that its business is significantly affected by the weather conditions in the winter months.

Also in the NOD, the CO requested that Employer submit summarized monthly payroll reports for the prior two years, separately identifying its full-time permanent and temporary workers in the requested position along with the total number of workers employed, total hours worked, and total earnings received. (AF 789). Here, Employer provided payroll reports for 2017 and 2018 with monthly breakdowns of the total amount of hours worked, the total amount of overtime hours worked, and the total number of workers during each month. Employer, however, failed to summarize the reports or separate the total number of workers and hours worked by its permanent versus temporary workforce.

In reviewing the records for 2017, the CO observed that the total amount of hours worked in the nonpeak month of March amounted to 1,871 hours, which exceeded the amount of hours worked in any of the peak season months from April to November of that year. (AF 415-416). The CO also noted that in January, the nonpeak month with the least amount of hours worked, amounted to 1,320.50 hours, which was still greater than the hours worked during the peak

months of April, May, July, August, and October. (AF 416). Lastly, the CO found that the 2017 payroll records showed that Employer hired 10 workers during its nonpeak month of March, which was more than it did during any of its peak months of May, July, August, September, and October. (*Id.*).

The CO found that the 2018 payroll records likewise failed to support Employer's attestations to its peakload standard of need. (AF 416-417). Specifically, the CO pointed out that, in 2018, Employer's workforce clocked 2,381.50 hours, which again, exceeded the amount of hours worked during any of its 2018 peakload months of April to November. (AF 416). Further, in its nonpeak month of February, there was a total of 1,722 hours worked, exceeding the amount of hours worked in the peak months of April, May, June, July, September, and October. (*Id.*). Next, the CO pointed out that 13 employees were hired during the nonpeak month of March 2018, which exceeded the amount of employees hired during any of its 2018 peak season months. (AF 417). As a result, the CO determined that the 2017 and 2018 payroll records failed to support Employer's attestations regarding its peakload standard of need. (AF 415-417).

In response, Employer contends that the CO misinterpreted the payroll records and that the records do not reflect the number of employees "hired" during a given month, rather the amount of employees "employed" during a certain month. (*Employer's Brief* at 9). Thus, Employer acknowledges the CO's point to the extent that it had more workers on its payroll in March 2017 and March 2018 than its most or all of its nonpeak months during those years, but disagrees with the CO's inference that Employer hired more workers during these nonpeak months. (*Id.*). Instead, Employer asserts that this fact is indicative of the "unpredictability in hiring and/or finding permanent workforce." (*Id.*).

Here, Employer's point that it "employed," rather than "hired" more employees during its nonpeak month of March than its peak months does little to prove that it suffers a decline in business during the nonpeak winter months. Even accepting its explanation that its workforce ebbs and flows due to conditions beyond its control, Employer fails to acknowledge the fact that it not only retained a larger workforce during its nonpeak month of March in 2017 and 2018, but also that its workforce *worked* more hours in those months than many of its peak months. Similarly, Employer ignores the CO's findings relating to the greater amount of hours worked in nonpeak months of January 2017 and February 2018 versus several of their peak season month counterparts. Accordingly, I find that the CO was correct in determining that the payroll records do not support Employer's attestations relating to its peakload standard of need.

However, Employer also submitted subcontracts and invoices to support its peakload standard of need. As to the subcontracts, the CO noted that they each failed to indicate the start date, completion date, and total number of workers required to complete each subcontract. (AF 417). As such, the CO was unable to ascertain whether Employer would be performing the services during its peak season or nonpeak period. (*Id.*). Additionally, like the subcontracts, the 2017 and 2018 invoices submitted also failed to indicate the start date, completion date, and total number of workers required to complete the contract. (*Id.*). They also failed to provide the scope of work and period of intended employment. (*Id.*). While the invoices do show the due date, open balance, amount paid, and dates of submission and billing for each invoice, these details

failed to help the CO ascertain whether Employer performed the services during its peak season or nonpeak period. (*Id.*).

Employer's brief fails to address these points made by the CO entirely. However, in the letter of support accompanying Employer's prior response to the NOD, Employer explained that the subcontracts it submitted with its Application reflect the work to be performed by Employer and that once the work is completed, it would invoice the client for the work in the same month of completion. (AF 423). Acknowledging that the subcontracts themselves do not indicate the dates of performance, Employer averred that the invoices and invoice summary show when the work contracted for in the subcontracts were performed, thus supporting its stated peakload need from April 1, 2019 through November 30, 2019. (AF 423-424). In further support of this contention, Employer pointed out that in 2017, it "billed/invoiced" \$12,369.53 worth of work during its nonpeak period of January to March versus the \$165,042.65 it "billed/invoiced" during its peakload months of April to May. (AF 424). Similarly, Employer noted that from December 2017 to March 2018 it "billed/invoiced" \$118,927.80 worth of work versus the \$911,258.73 it "billed/invoiced" in its peakload months of April to November 2018. (*Id.*). Acknowledging that there were a few nonpeak months that had invoiced amounts higher than peak months, Employer urged the CO to focus on the total amount invoiced during the nonpeak periods versus the total amount invoiced during the peak periods. (*Id.*).

As stated previously, the CO was not persuaded with Employer's reasoning and found that the Employer did not overcome the deficiency. Likewise, I note that Employer failed again to supply the CO with the information she directed. At most, the invoices and invoice summary show the month in which the work for a given project was completed. The invoices do not provide any additional information including the start dates, number of workers used on each project, and duration of the projects. Here, I note that even Employer repeatedly referred to the monthly invoiced amounts as the "amounts of work billed/invoiced" as opposed to the "amount of work performed." (AF 424-425). As both the subcontracts and invoices fail to supply this requested information, I find that the CO reasonably concluded that she was unable to ascertain whether Employer performed services in the requested occupation during its peak or nonpeak period.

Again, Employer's reference to the amounts "billed/invoiced" provide no more information than as to indicate, at most, when the work was completed. Unless Employer intended the CO to assume that the monthly invoiced amounts reflected only amounts that were linked to work performed in that same month (an assumption that is both unstated and contrary to other statements made by Employer), comparing the amounts it "billed/invoiced" in any given month sheds little light on the amount of work that was performed. Additionally, a comparison of the monthly amounts "billed/invoiced" reveals, as acknowledged by Employer, that some nonpeak months have higher invoiced amounts than peak months. Further, a comparison of the "total amounts" derived from the peak periods versus nonpeak periods is hardly useful as there are twice as many months in the peak period than in the nonpeak period. Accordingly, the subcontracts and invoices also fail to support Employer's peakload standard of need.

## **CONCLUSION**

Based on the evidence of record, and for the foregoing reasons, I find that Employer has not carried its burden to show that it has a seasonal or short-term demand for temporary workers to supplement its permanent workers to work as concrete laborers. Therefore, I find that the CO properly denied Employer's Application and that the additional reasons for the CO's denial of certification need not be addressed.

## **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

Peter B. Silvain, Jr.  
Administrative Law Judge