

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 May 2019

BALCA Case No.: 2019-TLN-00118
ETA Case No.: H-400-18355-519308

In the Matter of:

RAPID FRAMING CORP.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Kevin Lashus
3355 Bee Caves Rd
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Austin, Texas 78746
For the Employer

Sarah Tunney
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For the Certifying Officer

Before: William S. Colwell
Associate Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF
CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of 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);¹ 20 C.F.R. § 655.6(b).² Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or the "Board"). 20 C.F.R. § 655.33(a). 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. § 655.33(a), (e).

STATEMENT OF THE CASE

Rapid Framing Corp. ("Employer") is a construction business in Bexar County, Texas that specializes in "[c]onstruct[ing], erect[ing], install[ing], or repair[ing] structures and fixtures made of wood, such as building frameworks, including partitions, joists, studding, and rafters; and wood stairways, window and door frames." AF at 35.³ Employer submitted an H-2B application because its "busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to November 30th, during which time [it] need[s] to substantially supplement the number of workers" AF at 42.

On January 7, 2019, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification for 20 carpenters from Employer. AF at 33. On February 27, 2019, the CO issued a Notice of Deficiency ("CO Notice"), finding three deficiencies. AF at 29–32. On March 13, 2019, Employer filed its Response to the CO Notice ("Employer Response"). AF at 21. On March 19, 2019, the CO issued a Final Determination denying employers application for not having overcome any of the three deficiencies. AF at 12–20. On April 11,

¹ 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).

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 (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.

³ Citations to the Appeal File are abbreviated as "AF." For purposes of clarity, the "P" prefix on each page number of the Appeal File has been omitted (e.g., "P60" becomes "60").

2019, BALCA received Employer request for review of the CO's Final Determination. AF at 1. Each deficiency is expanded below.

Deficiency 1: Definition of Employer

In its application, Employer submitted two federal corporation income tax returns from years 2016 and 2017. AF at 76–92. The 2017 return reflected the same corporate address as in the Form ETA-9142B, which is 4191 Naco Perrin Blvd, San Antonio, Texas 78217. AF at 34, 76. The 2016 and 2017 return and the Form ETA-9142B also provide the same Federal Employer Identification Number of 465117560. AF at 34, 76, 88.

The CO Notice explains that the CO was “unable to verify the existence of the business associated with” the application and required “additional information to verify the existence of Rapid Framing Corp.” AF at 29. The CO explained that to overcome the deficiency, Employer’s response must “include evidence which shows the employer’s business name, and that the address provided on the ETA Form 9142 is associated in the State of Texas with Rapid Framing Corp. . . . including documentation issued by the State of Texas which indicates the business name and address as active.” AF at 29.

The Employer’s Response did not address the issue of establishing the existence of Rapid Framing Corp. AF at 21–23. The CO concluded in the Final Determination that “lack of documentation verifying the existence of the business associated with this filing did not overcome the deficiency.” AF at 15.

Deficiency 2: Failure to establish the job opportunity as temporary in nature

In its application, Employer explains its peakload need:

Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peakload workers during these winter months (we do however continue to employ some year round workers). Our temporary peakload 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 November

30th to April 1st, because the cold and wet weather is not conducive to framing work. Also, construction in general slows down and the need for laborers is substantially reduced.

AF at 42. The Employer also provides three subcontract agreements from 2018. AF at 44–70.

The CO Notice indicates the Employer's explanation did not meet the regulatory standard. AF at 30. The CO Notice further explains that the climate data for Employer's area does not demonstrate a harsh winter that would justify a temporary labor need. AF at 30. The CO Notice stated that the subcontract agreements "do not sufficiently support the employer's temporary needs. Specifically, the subcontract agreements do not provide information that will support the employer's current requested dates of need." AF at 30. The CO Notice instructed Employer to submit

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. Supporting documents that substantiate that the type of work described in the application cannot be performed in the weather experienced in Bexar County, Texas during the dates of need requested;
3. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period;
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 Carpenters, 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 at 30-31 (emphases omitted).

The Employer's Response provided a statement of its employment plan, type of work to be completed by the H-2B laborers, recruitment efforts, business activity, and schedule of operations. AF at 21-23. Employer explains that "most residential construction is performed March through December. Building also follows the same peak-load cycle due to cyclical financing and beginning of-the-year bidding for March and April contracting. As a result, our peak-load months follow closely the peak-load needs of these businesses"; "[w]hen our customers businesses slow down, so do we." AF at 22. -

The Final Determination did not find these explanations sufficient because they were not the level of specificity required and Employer did not submit any of the supporting documentation requested in the CO Notice. AF at 17-18. The Final Determination concluded that Employer's explanation of temporary need did not overcome deficiency. AF at 17.

Deficiency 3: Failure to establish temporary need for the number of workers requested

The Employer's application generally requests 20 carpenters. AF at 33. Employer also provides three subcontract agreements from 2018. AF at 44-70.

In the CO Notice, the CO found that "[t]he employer did not indicate how it determined that it needs 20 Carpenters during the requested period of need. Specifically, the employer provided subcontract agreements from 2017 to 2018. However, the subcontract agreements do not provide information that will support the employer's requested number of workers." AF at 31. The CO Notice required Employer to submit

1. An explanation with supporting documentation of why the employer is requesting 20 Carpenters for San Antonio, Texas during the dates of need requested;

2. If applicable, documentation supporting the employer's need for 20 Carpenters 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 two previous calendar year[s] that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Carpenter, 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.

AF at 32.

The Employer's Response stated the "peak-season schedule . . . will require us to add at least 20 construction laborers to our workforce immediately beginning April 1st, which is not possible through the local workforce." AF at 21.

The Final Determination concluded that the "The employer did not provide further information or documentation to substantiate the basis of its request for 20 temporary workers. The employer's explanation did not overcome the deficiency." AF at 20.

PROCEDURAL HISTORY

On April 29, 2019, I issued a Notice of Assignment and Briefing Schedule. The Employment and Training Administration opted to not submit a brief, and the Employer was to submit its brief by May 1, 2019 by fax and email. To date, I have not received a brief from Employer, despite several efforts made by my clerk to contact Employer to obtain its brief. Because no brief was timely filed, I will infer that Employer no longer intends to submit a brief and make my decision based solely on the facts and arguments made in the administrative file.

STANDARD 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

In order for the Employer to prevail, all three deficiencies must be overcome. Should any one deficiency remain, the CO denial must be affirmed.

Deficiency 1: Definition of Employer

Applicants for H-2B laborers must establish with evidence they are a qualifying employer for their application to be approved. The regulatory definition of "employer" provides the elements:

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

- (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;
- (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and
- (3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

20 C.F.R. § 655.5.

While the documents that the CO requested in the CO Notice could satisfy the regulatory requirements, they are not the exclusive means. The Employer's submission of the federal corporation tax returns and subcontract agreements establish itself as an employer under § 655.5. The physical location of the corporation and FEIN are included on the federal corporation tax returns, and the subcontract agreements evidences Employer's required

"employer relationship." Employer satisfied all three elements of the regulatory definition "employer."

Thus, Employer overcame Deficiency 1.

Deficiency 2: Failure to establish the job opportunity as temporary in nature

In regards to demonstrating temporary need, the regulation provide

(a) An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.

(b) 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 DHS regulations. Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an H-2B Registration or an Application for Temporary Employment Certification where the employer has a need lasting more than 9 months.

20 CFR § 655.6.

Employer bases its peakload need on the winter time providing less business and Texas winters being cold and wet. While either of these bases could justify a temporary need, mere assertion of those conditions is insufficient for approval by the CO. The Employer's descriptions of predictable fluctuation in labor needs must be supported by some documentation or a very detailed description that itself proves the temporary need. Employer did not provide any documents tracking its purported fluctuating business activity throughout the year; three subcontract agreements are insufficient to supply a reliable representation of Employer's annual business fluctuations. Nor did Employer provide weather data or a detailed explanation of how the weather impacts the ability to perform its line of work. Had Employer submitted the documents that the CO Notice requested, Employer likely would have overcome the deficiency; however, Employer did not submit satisfactory descriptions or documentation to justify its temporary need.

Thus, Deficiency 2 was not overcome.

Deficiency 3: Failure to establish temporary need for the number of workers requested

The regulations require that the “number of worker positions . . . are justified.” 20 CFR § 655.11(e)(3). Similar to justifying temporary need, justifying the number of workers requested requires more than a mere assertion. Employer describes an increased need for workers but does not provide any documents or descriptions that explain why 20 is the amount needed. The subcontract agreements do not indicate how many workers were used in the past or purport to be a comprehensive representation of work completed during Employer’s busiest months. Had Employer submitted the documents that the CO Notice requested, Employer likely would have overcome the deficiency; however, Employer did not submit satisfactory descriptions or documentation to justify its need for 20 workers.

Thus, Deficiency 3 was not overcome.

CONCLUSION

After reviewing the administrative file, I find that Employer overcame Deficiency 1. But, I find that Employer did not overcome Deficiencies 2 and 3. Because Employer did not overcome all of its deficiencies, I must affirm the CO’s denial.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer’s **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

For the Board:

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.
WSC/aje