



Issue Date: 04 April 2019

**BALCA Case No.: 2019-TLN-00084**  
**ETA Case No.: H-400-18348-788780**

*In the Matter of:*

**A. FRAILE GOMEZ CONSTRUCTION, INC.,**  
*Employer.*

Before: Jerry R. DeMaio  
Administrative Law Judge

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

This case arises from a request for review by A. Fraile Gomez Construction, Inc. (“Employer” or “Gomez”) before the Board of Alien Labor Certification Appeals (“Board”) of the denial of its application for an H-2B temporary labor certification by a Certifying Officer (“CO”) for the Employment and Training Administration (“ETA”). 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655.6(b).<sup>1</sup> For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

**STATEMENT OF THE CASE**

On January 17, 2019, Gomez filed an application for H-2B temporary labor certification with the ETA. (AF 394-416).<sup>2</sup> The application sought to certify the employment of eight construction laborers for employment in the United States from April 1, 2019 to December 31, 2019. (AF 409-416). On February 5, 2019, the CO issued a Notice of Deficiency (“NOD”) outlining the reasons why the Employer’s application could not be accepted for consideration. (AF 386-393).

The CO listed two deficiencies in the NOD. The first deficiency was identified as a failure to establish the job opportunity as temporary in nature under 20 C.F.R. §§ 655.6(a) and (b). (AF 391). Specifically, the CO noted the Employer had not sufficiently demonstrated the requested standard of peakload need. (AF 391-392). The second deficiency was identified as a failure to establish a temporary need for the number of workers requested under 20 C.F.R. §§

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<sup>1</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) amending the standards and procedures for the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

<sup>2</sup> Citations to the appeal file are abbreviated “AF” followed by the page number.

655.11(e)(3) and (4). (AF 392). Specifically, the CO explained the Employer did not sufficiently demonstrate how it had determined its need for eight construction laborers during the requested period of peakload need. (AF 391-392).

The CO requested supplemental documentation to conform to the relevant regulations. In response, on February 14, 2019, the Employer filed a letter and attachments addressing the identified deficiencies. (AF 22-385). Among its attachments, the Employer submitted a subcontract agreement, a list of building permits in San Antonio, Texas, a monthly local market report, and its 2016-18 federal tax documentation. *Id.*

On February 28, 2019, the CO issued a Final Determination denying the application. (AF 12-21). In the Final Determination, the CO retained the two original grounds for denial and pointed out several shortcomings in the evidence provided by the Employer. *Id.* On March 7, 2019, the Employer requested an administrative review of the denial by the Board. (AF 1-11). On March 25, 2019, a Notice of Docketing was issued allowing the parties to file briefs within seven business days. Neither party has filed a brief.

### **DISCUSSION**

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. § 655.61(a), (e).

The first issue in this case is whether the CO properly denied certification on the basis that the Employer did not establish a temporary need for eight general laborers during its alleged peakload period. To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one-time occurrence, seasonal, peakload, or intermittent. *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). Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify for peakload need, an 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.

*Id.*; *see, e.g., Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Prods.*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014). Here, the Employer's purported period of peakload need was from April 1, 2019 to December 31, 2019. (AF 409).

In each area of concern the CO raised, however, the Employer failed to substantiate this need. First, the CO noted the NOD response justifies the current peakload need based on a prior certified application. (AF 7, 23). Gomez argues in its NOD response that it will not submit

additional supporting documentation for this application, based on a September 1, 2016 Department of Labor announcement. (AF 7, 23). The Employer, however, misinterpreted the announcement. As the CO explained in its denial, prior-approved certifications do not justify a peakload need in a *current* application and the announcement that the Employer references states that a NOD will be issued when more information is needed. (AF 7). This was the case here.

Second, the CO noted that two reports submitted in response to the NOD and intended to substantiate the Employer's peakload need—specifically, the City of San Antonio Building Services Department Building Permits Granted reports and Realtors Local Market Report—do not clearly relate to the Employer's operation. (AF 7, 42-351). As the CO explained, the first report “does not support its indicated need for eight temporary general labors.” (AF 7). As for the second report, it shows “general market trends... [and] does not support the scope of the employer's contractual work during the indicated peak period.” (AF 7). Upon reviewing these reports, I agree with the CO.

The CO also discussed the Employer's submission of its 2016, 2017, and 2018 federal tax filings. (AF 7, 356-85). The CO stated these filings do not outline which employees are permanent and which are temporary, so the “overall business operations and labor requirements are unclear.” (AF 7). I reviewed the tax filings and agree with the CO, as there is no clear delineation of which employees are permanent and which are temporary.

Finally, the Employer pointed to a labor shortage in its area as a justification for its peakload need. (AF 24). Nevertheless, the CO noted, and the Board has consistently held, that a labor shortage, of any kind, does not justify a temporary need. (AF 7).

In short, the Appeal File does not support the Employer's temporary need. The Employer, as such, cannot substantiate its purported short-term peakload need between April and December. *See 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 peakload need). Based on the foregoing, the Employer failed to meet its burden of establishing a need for temporary workers on a peakload need basis and the CO's denial of the Employer's application will be upheld. Because denial of certification is upheld based on the Employer's failure to justify a need for temporary works on a peakload need basis for its dates requested, it is not necessary to reach the issue regarding the Employer's failure to establish a need for the number of workers requested under 20 C.F.R. § 655.11(e)(3) & (4).

**SO ORDERED.**

**JERRY R. DeMAIO**  
Administrative Law Judge

Boston, Massachusetts