

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 26 March 2019**

BALCA Case Nos.: 2019-TLN-69  
ETA Case Nos.: H-400-18363-917032

*In the Matter of:*

**GERARDO CONCRETE, LLC.**  
*Employer*

Appearances: Kevin Lashus, Esq.  
*For Employer*

Mikole Allekotte, Esq.  
*For the Solicitor*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

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

This case arises from Gerardo Concrete, LLC'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.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (Department).<sup>3</sup> A CO in the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before the Board of Alien Labor Certification (BALCA).<sup>4</sup>

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<sup>1</sup> 20 C.F.R. Part 655.

<sup>2</sup> 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). 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>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.61(a).

## FACTUAL BACKGROUND

Employer is located in San Antonio, Texas, where it employs workers as construction laborers at multiple worksites to clean and prepare the site, mix and pour concrete, reinforce, grade, dig, and load and unload materials.<sup>5</sup> On 7 Jan 19, Employer applied for H-2B temporary labor certification, seeking approval to hire 40 foreign nationals as construction laborers from 1 Apr 19 to 31 Dec 19, based on a Peakload need.<sup>6</sup> It explained that its need is due to the annual concrete season and included 2018 letters of intent with T&D Moravits, Tealstone Commercial Inc., and DK Concrete Construction to support its need. Employer also provided monthly payroll reports from 2015-2016 and sales reports<sup>7</sup> from 2016-2017.

On 12 Feb 19, the CO issued a Notice of Deficiency (NOD), identifying three areas of deficiency.<sup>8</sup> Specifically, the CO determined that Employer failed to establish that it met the regulatory definition of employer, failed to establish the job opportunity as temporary in nature, and failed to establish temporary need for the number of workers requested.<sup>9</sup> The CO requested<sup>10</sup>

[For deficiency 1:] 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 Gerardo Concrete LLC. Examples of evidence may include documentation issued by the State of Texas which indicates the business name and address as active.

...

[For deficiency 2:]

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. An explanation and supporting documents that substantiate that its type of work cannot be performed under certain weather conditions in San Antonio, TX.
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 *Laborer*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be

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<sup>5</sup> AF 51-58.

<sup>6</sup> AF 27.

<sup>7</sup> The graph from AF 43 (sales reports from 2017) is not accurate – it is simply a copy of the graph from AF 42 (sales reports from 2016). The monthly income listed on AF 43 may be accurate, as it is not identical to the monthly income listed on AF 42, but the graph included does not reflect those monthly incomes.

<sup>8</sup> AF 20-26.

<sup>9</sup> AF 23-25.

<sup>10</sup> *Id.*

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.

Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

...

[For deficiency 3:] supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. The employer's response must include, but is not limited to, the following:

1. An explanation with supporting documentation of why the employer is requesting 40 Laborers for San Antonio, TX during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 40 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 two previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Laborer, 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.

On 19 Feb 19 Employer responded to the CO's NOD,<sup>11</sup> including its Certificate of Formation, Certificate of Filing, and letters of intent from contractors for 2019 and 2020 projects.

On 27 Feb 19, a Final Determination was issued, denying Employer's application. In regard to the first deficiency, Employer's

explanation and documentation of its business verification did not overcome the deficiency. The Certificate of Formation indicates that the employer's business address is 440 Benmar, Suite 3100, Houston, Texas 77060, which is not consistent with the address listed in Section C. of the employer's ETA Form 9142, which indicates 1129 CR 257, Liberty Hill, Texas 78642. The employer did not provide any explanation for the

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<sup>11</sup> AF 192-256.

discrepancy. It is unclear if this documentation is related to the employer listed on this application.

In regard to the second deficiency, Employer

failed to submit the requested documentation that includes a statement of its need, an explanation and supporting evidence for why its work is limited during winter months in Texas, a summary of all projects in the area of intended employment, or summarized monthly payroll for the previous two calendar years.

The employer's explanation and documentation of its temporary need did not overcome the deficiency. The employer did not provide an explanation of the events that cause its peakload need and how weather conditions in the area of intended employment of San Antonio, TX limit its workload to the requested dates of need. Therefore, it remains unclear whether the employer experiences a true peakload need for workers during the requested period of need.

Further, the letters of intent from contractors indicate the employer may perform services as early as January 15, 2019, which is outside of the period of need. The employer did not submit any contracts to substantiate its statements that work is primarily performed during the indicated peak periods. Therefore, the employer did not demonstrate its peakload need and it did not overcome the deficiency.

Finally, in regard to the third deficiency, Employer

did not submit the requested documentation that includes a statement of its need, an explanation and supporting evidence for why its work is limited during winter months in Texas, a summary of all projects in the area of intended employment, or summarized monthly payroll for the previous two calendar years.

The employer's explanation and documentation of its temporary need did not overcome the deficiency. The employer did not provide any statement or explanation for why it needs 40 Laborers from April 1 to December 31, 2019. It therefore is not clear why the employer is requesting 40 Laborers during the requested period of need at the area of intended employment of San Antonio, Texas.

Although the employer submitted letters of intent from contractors, these letters do not offer support to how the employer determined that it has a need for 40 temporary workers. The letters of intent only indicate that it has prospective contracts and projects for the year, but they do not demonstrate how the employer determined it has a need for 40 temporary workers. Therefore, the employer did not overcome the deficiency.

On 5 Mar 19, Employer appealed the final determination, stating that:<sup>12</sup>

the Honorable Office of Foreign Labor Certification erroneously determined that Gerardo Concrete failed to establish that its peakload job opportunity is and will be temporary in nature. See 20 C.F.R. Sec. 655.6(a) and (b).

[Employer] reserves the right to fully articulate with legal authority in a brief in support of the appeal until after the Honorable Office of Foreign Labor Certification has the opportunity to deliver the administrative record to the court.

On 11 Mar 19, I issued a Notice of Docketing and Expedited Briefing Schedule, permitting both Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the appeal file,<sup>13</sup> in order to reach me by the end of the seventh business day after receiving the Administrative File. I received the Administrative File on 12 Mar 19, making briefs due by close of business on 21 Mar 19. Neither Employer nor Solicitor filed a brief.

### **DISCUSSION AND APPLICABLE LAW**

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer’s request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.<sup>14</sup> A CO’s denial of certification must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in accordance with law.<sup>15</sup> After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action.<sup>16</sup>

Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>17</sup> The CO correctly identified multiple deficiencies, none of which Employer fully responded to. Employer has still failed to carry its burden to show it qualifies as an employer under the regulations, specifically that the address used on its application is the same as any entity registered with the State of Texas. It also failed to add any helpful description of the events that cause its peakload need and how weather conditions in the area of intended employment of San Antonio, Texas limit its workload to the requested dates of need. Additionally, it failed to explain why the letters of intent show dates of requested services that fall outside the requested period of temporary labor. Finally, Employer has not submitted any documentation that provides a reasonable explanation why it is requesting 40 additional laborers when, from the documentation provided, Employer employs 2 permanent workers year round and a maximum of 22 temporary employees, which only happened in September and October of 2015 and 2016.<sup>18</sup>

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<sup>12</sup> AF 1-2.

<sup>13</sup> 20 C.F.R. § 655.61(c).

<sup>14</sup> 20 C.F.R. § 655.61.

<sup>15</sup> See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (10 May 16).

<sup>16</sup> 20 C.F.R. § 655.61(e).

<sup>17</sup> 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (10 Jan 11).

<sup>18</sup> AF 47.

Also, of the limited information submitted, some is obviously inaccurate.<sup>19</sup> Denial was sufficient under the circumstances.

**ORDER AND DECISION**

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**PATRICK M. ROSENOW**  
Administrative Law Judge

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<sup>19</sup> See note 7.