



Issue Date: 02 April 2019

BALCA Case No.: 2019-TLN-00088

ETA Case No.: H-400-18339-285161

In the Matter of:

H&H TILE AND PLASTER OF AUSTIN, LTD.,
Employer.

Certifying Officer: Chicago National Processing Center

Before: Paul C. Johnson, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from H&H Tile and Plaster of Austin, Ltd.’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)¹; 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of 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. § 655.3, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a). For the reasons set forth below, the CO’s denial of temporary certification is affirmed.

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 Appropriation 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. 24,024 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.

Statement of the Case

On December 5, 2018, Employer filed an H-2B Application for Temporary Employment Certification with U.S. Department of Labor, requesting certification for 18 Plaster Finishers from February 18, 2019 through November 22, 2019. (AF 163-226). On December 12, 2018, the CO issued a Notice of Deficiency, identifying two deficiencies in the application. (AF 156-62).

First, the CO stated Employer “did not sufficiently demonstrate the requested standard of need.” (AF 160). The CO explained that “to establish a peakload need, the petitioner must show it regularly employs permanent workers to perform the services or labor at the place of employment, needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand and the temporary additions to staff will not become part of the employer’s regular operation.” *Id.* The CO furthermore stated that “[i]n the employer’s temporary statement, it states their peak load period ends in mid-November due to a reduction in daylight hours and the onset of fall weather. However, the employer has not submitted any supporting documentation of the weather conditions in Dripping Springs, Texas and how it has impacted its business.” *Id.* Accordingly, the CO requested the following additional information:

1. A statement describing the employer’s business history and activities (i.e., primary products or services) and schedule of operations through the year;
2. An explanation and supporting documents that substantiate the employer’s statement that concrete construction slows significantly each year due to the low temperature conditions in the employer’s area of intended employment, Dripping Springs, Texas;
3. A summary listing of all projects in the area of intended employment for its previous calendar year. The list should include start and end dates of each project and worksite addresses;
4. 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 Plaster Finishers, 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;
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.... 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 161) (emphasis in the original).

Second, the CO stated Employer did not “sufficiently demonstrate[] that the number of workers requested on the application is true and accurate and represents bona fide job opportunities” and that Employer “did not indicate how it determined that it needs 18 Plaster

Finishers during the requested period of need.” *Id.* Accordingly, the CO requested the following additional information:

1. An explanation with supporting documentation of why the employers is requesting 18 Plaster Finishers for Dripping Springs, Texas during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 18 Plaster Finishers 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.

(AF 162).

On December 26, 2018, Employer filed a request for an extension until January 2, 2019 to respond to the Notice of Deficiency; there is no response from the CO indicating the request was granted. (AF 152-55). On December 28, 2018, Employer filed a response to the Notice of Deficiency and included the following additional documents: explanation of weather effects, Notices of Certification for H-400-17313-786465, H-400-16334-709964, and H-400-15339-151917, 2019 projected staffing chart, 2019 staffing levels graph, 2019 projections for pool plastering jobs, lead proposals, quarterly wage graphs, IRS Form 941 for 2017-18, summarized payroll for 2017, and sales by customer summary report for 2016. (AF 63-152).

On February 28, 2019, the CO issued a Final Determination denying certification, concluding that Employer’s response failed to correct the two identified deficiencies. (AF 50-59). With respect to the first deficiency, the CO wrote:

In its original application, the employer explained that its temporary need was due to the effects of climate on its duties and reduced daylight hours. The employer’s NOD instructed the employer to submit documentation to support its statements; however, the employer did not submit any documentation pointing to climate or daylight hours effecting [*sic*] its operations.

The employer was also to submit a summary listing of all projects in the area of intended employment for its previous calendar year. The list was to include start and end dates of each project and worksite addresses. However, the employer did not include this documentation. Such documentation would have been helpful in determining the customer and market demand that the employer states takes place between February to November.

Finally, the NOD instructed the employer to submit 2017 and 2018 payroll summaries; however, the employer simply submitted its 2017 payroll....

The employer is requesting 18 Plaster Finishers from February 18, 2019 to November 22, 2019, a period of over nine months. The employer did not provide any supporting information of a pool construction schedule in the Dripping Springs area in Texas. The employer did provide seven letters of intent.... The letters point to the employer having business during its requested dates of need. However, it is not clear if the letters are also being submitted to support a pool construction schedule. It must be noted that the contractors that submitted letters benefit from the employer's use of temporary workers and are not independent sources establishing a pool construction season in the employer's area of intended employment.

The employer also submitted projections for 2019 including payroll and a project schedule that includes work in the employer's nonpeak months of January and December. The documents also point to work being performed during the employer's requested dates; however, it is not clear if the employer schedules its work around the availability of a temporary workforce.

The employer submitted 2017 and 2018 quarterly tax documents. The employer's quarterly taxes represents its entire organization and offers limited information in determining if an employer has a peakload need for a certain occupation. The employer did submit its 2017 payroll summary.... As noted above, the employer's NOD directed the employer to submit its 2018 payroll summary; however, that information was not included in its response.

The 2017 payroll shows a consistent use of at least two temporary workers every month of the year. Further, the employer's permanent workers and their hours worked went down in June, and further down in August, all during its stated peakload period. This represents the employer's need for additional permanent workers.

It remains unclear if the employer experiences an increase in demand for its services from February 18, 2019 to November 22, 2019 or if the employer's operations and scheduling revolves around the employer's availability of a temporary workforce. The employer's payroll shows the use of temporary workers year-round, which points to permanent need for workers. The employer also did not submit any documentation establishing a pool construction season in the Dripping Springs area in Texas.

(AF 55-57). With respect to the second deficiency, the CO wrote:

The employer's statements point to a challenge in recruitment and retention of workers in general. The employer notes that it runs behind schedule. If that is the case, it is not clear why the employer's projects do not extend throughout the year. The employer did not provide any documentation to support a peakload in pool construction and therefore a need for temporary workers.

In addition, the employer's payroll ... displays a consistent use of at least two temporary workers every month of the year. Further, the employer's permanent workers and their

hours worked went down in June, and further down in August, all during its stated peakload period. This represents the employer's need for additional permanent workers.

(AF 59).

On March 7, 2019, Employer filed a request for reconsideration of the Final Determination; the appeal file contains no response from the CO. (AF 16-49). On March 14, 2019, Employer filed a request for administrative review before the BALCA. (AF 1-15). On March 29, 2019, Employer filed a motion to disqualify the undersigned.

Employer's Motion to Disqualify the Administrative Law Judge

Before turning to the merits of this appeal, I must address the motion filed by Employer that I disqualify myself from presiding over this matter. Employer filed the motion by email at 10:39 p.m. Eastern time on March 29, 2019. Employer argues (1) that I have, over the past several years, demonstrated a "clear pattern of bias" against employers, as demonstrated by affirming the CO's denials of certification in "at least 12" cases since 2012; (2) that I have deprived employers of due process by curtailing them of their right to submit a legal brief after appealing to BALCA; and (3) as a result, I have relieved the CO of any burden to file briefs because they are aware of my history of affirming denials of labor certification.

Employer's motion is factually incorrect, and fails to make out a legal basis for my disqualification. First, I recently directed certification in *Miller's Quality Processors of Arkansas*, 2019-TLN-00001 (BALCA Oct. 24, 2018). Second, the regulations permit a CO to file a brief after transmittal of the appeal file, but they limit consideration of Employer's case to the material that the CO actually considered. Although this interpretation of the regulation is admittedly the minority view in BALCA, it is not unique. And it does not preclude my permitting Employer to file a brief in an appropriate case, of course, but in this case, as noted in the briefing order, Employer has availed itself four times of the opportunity to present evidence and legal arguments. Allowing a fifth would be overkill. Finally, BALCA has docketed 108 H-2B appeals in Fiscal Year 2019. Of the 71 cases that have been decided, I reviewed docket entries for 55; in only three cases, involving virtually all BALCA judges, did the CO file a brief. It is incorrect to say that the CO has determined that they don't need to file a brief in cases assigned to me; the CO has determined that they don't need to file briefs in many cases at all.

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provides:

A party may file a motion to disqualify the judge. The motion must allege grounds for disqualification, and include any appropriate supporting affidavits, declarations or other documents. The presiding judge must rule on the motion in a written order that states the grounds for the ruling.

29 C.F.R. § 18.16(b). Similarly, the Administrative Procedures Act requires recusal by an administrative law judge upon a substantial showing of personal bias or prejudice set forth in a legally sufficient affidavit. *See* 5 U.S.C. § 556. This statute provides in pertinent part:

The function of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial

manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as part of the record and decision in the case.

5 U.S.C. § 556(b)(3). The requirements of 5 U.S.C. § 556(b) and 29 C.F.R. § 18.16 reveal that a timely and legally sufficient affidavit is mandated and must accompany a motion to recuse. *See Gibson v. Federal Trade Commission*, 682 F.2d 554 (5th Cir. 1982). As the Fifth Circuit aptly stated:

The requirement of affidavits [for recusal motions] is not an empty formality to be cast aside unilaterally by a party [to an administrative proceeding]. There are many reasons for such a requirement. An affidavit provides an exact, sworn, recitation of the facts, collected in one place . . . The affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. [The] failure to submit affidavits is thus an independently sufficient basis to deny the petitions in this respect.

Id. at 565; *See also White Eagle Coop. Ass'n. v. Conner*, 553 F.3d 467, 475-476 (7th Cir. 2009); *Reyes v. Ascroft*, 358 F.3d 592, 598 (9th Cir. 2004). Hence, when an administrative law judge is faced with an allegation of bias or prejudice that is not accompanied by a legally sufficient affidavit, the administrative law judge is not obligated to recuse himself from the case. *Id.* Furthermore, 28 U.S.C. § 144 likewise requires that assertions of personal bias or prejudice or other grounds for disqualification of a judge be supported by the filing “of a timely and sufficient affidavit.” Here, Employer has not submitted a legally sufficient affidavit in support of its motion to Disqualify, and the motion could be dismissed for legal insufficiency alone. I will excuse the deficiency, however, and will address the merits of the motion below.

Under 28 U.S.C.S. § 144, a judge is presumed to be impartial and unbiased, and a substantial burden is imposed on the requesting party to prove otherwise. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Verduzco v. Apfel*, 188 F.3d 1087, 1089 (9th Cir. 1999). Furthermore, bias generally cannot be shown without proof of an extra-judicial source of bias. *See, e.g., Matter of Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-002, slip op. at 15-16 (ARB Apr. 29, 1995). Here, Employer has not shown that the undersigned has any personal bias against it based on any extra-judicial source. Employer has not advanced any specific allegation of personal bias or prejudice. It is clear that neither prior adverse rulings of a judge nor his participation in a related or prior proceeding involving the same parties or issues is sufficient for recusal. *See U.S. v. Merkt*, 794 F.2d 950, 960-61 (5th Cir. 1986); *see generally Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). Unfavorable rulings and possible legal errors in an ALJ’s orders generally are insufficient to prove bias. *Powers v. Paper, Allied-Industrial, Chemical and Energy Workers International Union*, ARB No. 04-111, ALJ No. 2004-AIR-019 (ARB Aug. 31, 2007). Under 28 U.S.C. § 455(a), opinions held by judges as a result of what they learned in earlier proceedings are not bias or prejudice requiring recusal. *Liteky, supra*, at 1157-1158; *Billings, supra*, at 3-4. Employer has not shown nor demonstrated any facts which would tend to show bias or prejudice, personal or otherwise, against her or in favor of an adverse party; it has offered only a statistically insignificant and incomplete argument that my previous decisions reflect bias against employers. Without comparing the results of my 13 decisions (12 denials,

according to Employer, and one reversal) against overall BALCA statistics, the numbers are meaningless. Furthermore, it is well established that a motion to recuse must not be filed for strategic purposes. Yet, “[i]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns.” *In re Cargill*, 66 F.3d 1256, 1262-63 (1st Cir. 1995). *See also Standing Committee on Discipline of U.S. District Courts v. Yagman*, 55 F.3d 1430, 1443 (9th Cir. 1995) (“Judge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined.”) Here, it appears that Employer has problems only with my interpretation of a regulation, and with a statistically deficient view of my rate of affirmances versus reversals. And Employer explicitly requests reassignment of its case, which smacks of improper judge-shopping.

In view of the foregoing, I find and conclude that Employer has failed to establish a basis for disqualification; accordingly, its motion to disqualify the undersigned will be denied.

Discussion

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination. 20 C.F.R. § 655.61(a). A CO may only grant an employer’s H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification and the employment of H-2B workers will not adversely affect wages and working conditions of American workers. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655.1(a). The employer has the burden of proving entitlement to temporary labor certification. 8 U.S.C. § 1361; *see also M.A.G. Irrigation, Inc.*, 2017-TLN-00033, slip op. at 4 (Apr. 25, 2017).

To meet its burden, the employer “must establish that its need for non-agricultural services or labor is temporary.” 20 C.F.R. § 655.6(a). The employer’s need is temporary if the application demonstrates a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 20 C.F.R. § 655.6(b). Under the Department of Homeland Security’s regulations, to prove a “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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The employer must also prove the “number of worker positions ... [is] justified.” 20 C.F.R. § 655.11(e)(3).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, 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.”); *Cooper Roofing & Solar*, 2018-TLN-00080, slip op. at 5 (Mar. 27, 2018); *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).

Employer’s request for reconsideration and request for administrative review offer four general arguments. First, Employer takes issue with the CO’s statement in the Final Determination that the response to the Notice of Deficiency was due on December 22, 2018. (AF

3; 17-18). Second, Employer argues the fact that the CO issued its Final Determination 62 days after the Employer filed its response to the Notice of Deficiency was “de facto arbitrary and capricious.” (AF 4, 18). Third, Employer argues, citing *H&H Tile and Plaster of Austin, Ltd.*, 2018-TLN-00049 (Feb. 16, 2018), “it seems cavalier and erratic for the Certifying Officer to ignore the fact that a BALCA Administrative Law Judge reviewed H&H Tile’s application in 2018 and made a determination in support of H&H Tile, based on statutes and regulations that have not changed, and based on records and evidence submitted in 2018, just like those submitted in 2019, and ignore the clear legal reasoning and ruling of BALCA.” (AF 4, 19). Fourth, Employer argues it “has provided extensive records for multiple years that shows that H&H Tile regularly employs permanent to perform the labor at the place of employment, and that it needs to supplement its permanent staff at the place of employment on a temporary (February 18, 2019 to November 22, 2019) basis due to a short-term customer and market demand, and that the temporary additions to staff will not become a part of the Employer’s regular operations, as their payroll records show.” (AF 5).

Employer Argument 1: Timeliness of Response to Notice of Deficiency

In the Final Determination, the CO wrote:

On December 12, 2018, the Chicago NPC issued a Notice of Deficiency (NOD) to the employer to afford the employer the opportunity to remedy the deficiency or deficiencies. The response to the NOD was due on December 22, 2018. The employer’s response to the NOD was received at the Chicago NPC on December 28, 2018.

(AF 53). The regulations make clear that an employer has 10 business days to respond to a Notice of Deficiency. 20 C.F.R. § 655.31(b). Business days are every official working day of the week (i.e., Monday through Friday) and do not include legal holidays. *See also* 29 C.F.R. § 18.32(a)(4) (“‘Legal holiday’ means the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and any day on which the district office in which the document is to be filed is closed or otherwise inaccessible.”). Given that the Notice of Deficiency was issued on December 12, 2018, Employer is correct that its response was due on December 27, 2018, however nothing in the Final Determination suggests that the denial of certification was due to an untimely filed response.

Employer Argument 2: Timeliness of CO’s Final Determination

Employer complains that a 62 day gap between Employer’s submitted response to the Notice of Deficiency and the CO’s Final Determination is “de facto arbitrary and capricious.” I agree that such a delay in processing is entirely too long, especially since it cut into Employer’s requested period of need. However, it does not logically follow that the application should be automatically certified because of a delay in processing.

Employer Argument 3: Prior BALCA Decision

Employer argues that Administrative Law Judge Larry Merck’s Decision and Order Directing Grant of Certification in *H&H Tile and Plaster of Austin, Ltd.*, 2018-TLN-00049 (Feb.

16, 2018), which posed a similar set of facts and evidence, demonstrates that Employer has met its burden in the past.

I agree with Employer that this case is remarkably similar to last year's case. In last year's case, the CO denied Employer's application for failure to demonstrate a peakload need and for failure to establish temporary need for the number of workers requested. *H&H Tile and Plaster of Austin, Ltd., supra*, slip op. at 5. Employer also submitted similar evidence. *Id.* at 4. Judge Merck found that a "totality of the evidence" demonstrated Employer had met its burden of proof. *Id.* at 11-12 ("Based on Employer's history of prior certifications, the last two years of payroll and wage documentation, and the sales summary reports [which show increasing sales], Employer has established its need for eighteen Plaster Finishers.").

As Judge Merck stated, "Certification is not guaranteed based on previous years' approvals, and each application must stand on its own merits. However, the current application should be reasonably reviewed, within the context of the previous certifications, and the understanding that the certifying officer had concluded that the basic requirements for certification had been met in the previous years." *Id.* at 11. I agree with the first sentence. And applying the second, Employer was on notice that last year the CO no longer concluded that the basic requirements for certification had been met, and chose not to avoid the problem this year by providing the information the CO wanted. As discussed in more detail below, Employer failed to provide the information requested by the CO and did not provide an explanation for why such information could not be produced. Accordingly, I conclude that Employer's reliance on last year's decision is misplaced and reject this argument.

Employer Argument 4: Employer has met its burden of proof

Employer argues it "has provided extensive records for multiple years that shows that H&H Tile regularly employs permanent to perform the labor at the place of employment, and that it needs to supplement its permanent staff at the place of employment on a temporary (February 18, 2019 to November 22, 2019) basis due to a short-term customer and market demand, and that the temporary additions to staff will not become a part of the Employer's regular operations, as their payroll records show." This argument is conclusory and therefore it is summarily rejected.

Deficiency 1: Failure to establish peakload need

The CO determined Employer had failed to establish a peakload need because it failed submit numerous requested documents, including (1) documents to support that its temporary need was due to the effects of climate on its duties an reduced daylight hours; (2) a summary listing of all projects in the area of intended employment for its previous calendar year; and (3) payroll summaries for 2018. For the reasons set forth below, I affirm the CO's conclusion that Employer failed to provide the requested documents.

1. Climate Documents

In its Statement of Temporary Need, Employer wrote:

Our company provides swimming pool plastering services for homeowners, swimming pool construction companies, property management companies & homebuilders in the greater Austin area. Our services include plastering newly constructed swimming pools & repairing older pools. A detailed explanation of our services is listed on our application. **We experience a temporary peak period during the year, based on various factors, including customer & market demand for our services, weather conditions such as warmer temperatures & increased daylight, which result in an increase in our workload.** As a result, we need to supplement our permanent work force, by hiring additional temporary workers during our peak load period of need from February to November. **When our peak load period ends in mid-November, due to a reduction in daylight hours & onset of fall weather, we no longer need the temporary workers, since we have permanent workers to complete the work.** Although we have tried to hire temporary workers through advertisements in various publications, online and through the State Workforce Agency, we have been unable to locate ready, willing and available workers to work for our company during our temporary peak load period. We are providing relevant documentation in support of our temporary peak load.

(AF 163,169) (emphasis added). In the Notice of Deficiency, the CO instructed Employer to provide: “An explanation and supporting documents that substantiate the employer’s statement that concrete construction slows significantly each year due to the low temperature conditions in the employer’s area of intended employment, Dripping Springs, Texas.” (AF 161). In its response to the Notice of Deficiency, Employer provided the following letter:

In the NOD, DOL requests an explanation to substantiate our statement that “concrete construction slows significantly each year due to the low temperature conditions in the employer’s area of intended employment, Dripping Springs, Texas.” – **Please note that our company is a swimming pool plastering company, not a concrete construction company.** Therefore, we believe this to be a misstatement; however, in an abundance of caution, we note that pool plastering is affected by adverse weather conditions.

Although we perform swimming pool plastering services, which includes tile and coping services, and involves some concrete pouring, H&H Tile and Plaster of Austin installs plaster, tile, coping & decking. *However, we are unable to install plaster if it is raining, too windy or too cold. Plaster will not apply correctly or set up properly in these conditions.* Our company is not able to install tile & coping in rainy weather or if the temperature is close to freezing because, again, the binding agent for the tile & the grout for both tile and coping will not set up properly. We are unable to install any type of decking in rainy conditions because you cannot pour concrete in the rain, nor if the areas are too wet and which do not dry quickly in colder temperatures. Concrete and plaster do not set up or cure properly in rainy, saturated or close to freezing conditions. If any of these conditions occur, then our jobs get delayed until weather permits. Once conditions are clear for installation of plaster, tile, coping & decking, then we are rushed to get everything back on schedule. This could take days or weeks, depending on how many workers we have to complete the jobs. Therefore, during our peak load season, we have an increased workload, when we need to supplement our permanent plaster finishers with temporary workers to attend to our increased workload. When we don’t have any additional temporary workers to help us meet the increased workload needs during our

short term peak load, then our company gets behind schedule, which upsets our dedicated clients and can cause loss of business and affects our permanent staff negatively as well.

(AF 76) (emphasis in the original). In the Final Determination, the CO wrote “the employer did not submit any documentation pointing to climate or daylight hours [affecting] its operation.” (AF 55). As demonstrated by the letter above, the CO is not correct. There is evidence that rainy, windy, cold conditions affect the operation of Employer’s business. However, there is no evidence in the appeal file respecting the climate of Dripping Springs, Texas, especially the climate during the peakload months versus the non-peakload months. To that extent, I affirm the CO’s conclusion.

2. Summary Listing Projects

In the Notice of Deficiency, the CO requested Employer provide “[a] summary listing of all projects in the area of intended employment for its previous calendar year. The list should include start and end dates of each project and worksite addresses.” (AF 161). In its response, Employer submitted sample contracts, sample invoices, and sample proposals for 2018, which “document the nature of the Pool Plastering services performed by H&H Tile & Plaster.” (AF 71, 122-52). Employer simply failed to provide the specific information the CO requested. Accordingly, I affirm the CO’s conclusion.

3. 2018 Payroll Summaries

In the Notice of Deficiency, the CO requested Employer provide “[s]ummarized 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 Plaster Finishers, the total number of workers or staff employed, total hours worked, and total earnings received.” (AF 161) (emphasis in the original). Employer provided its 2017 payroll summaries with all of the information the CO requested. (AF 108). Employer inexplicably failed to do so for 2018, but instead submitted its quarterly federal tax returns. (AF 93-95). Employer’s reliance upon these documents is misplaced. The quarterly tax returns do not distinguish between permanent and temporary workers. They do not distinguish between Plaster Finishers and other employees within Employer’s business. They do not document the total hours those employees worked. Accordingly, I affirm the CO’s conclusion.

Deficiency 2: Failure to establish the number of workers requested

In the Final Determination, the CO reasoned that because Employer failed to demonstrate a peakload need, Employer also failed to that the number of temporary workers it requested was justified. (AF 59). Because I agree that Employer failed to establish a peakload need, I also affirm the CO’s conclusion that Employer failed to establish the number of temporary workers it requested was justified.

ORDER

Based on the foregoing, IT IS ORDERED that Employer’s motion to disqualify the undersigned is DENIED; and the denial of labor certification in this matter is AFFIRMED.

SO ORDERED.

PCJ, Jr./PML/jcb
Newport News, Virginia

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge