



Issue Date: 05 October 2010

BALCA Case No.: 2010-TLN-00079

ETA Case No.: C-10218-50777

In the Matter of:

CAJUN CONSTRUCTORS, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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 ("the 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

Statement of the Case

On August 6, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Cajun Constructors, Inc. ("the

Employer”). AF 188-210.¹ The Employer requested certification for 200 “Construction Laborers” from October 1, 2010, until August 1, 2011. AF 188. The Employer also indicated that the nature of its temporary need was a one-time occurrence. *Id.* The Employer explained that its need was temporary because:

1. [The Employer has] extraordinary circumstances due to the type of work;
2. [The Employer’s] need cannot be defined within a 10 month window, but does have a definable end that does not exceed three years in duration;
3. [The Employer’s] need for the this project is temporary even though the underlying need is year round; Our overall company need is permanent but the uniqueness and location of this project truly qualifies us for a one-time occurrence under current USDOL regulations.
4. Prior to project assignment, [the Employer] did not have workers at this location;
5. After contract completion the workers will be laid off and will once again return to their homes;
6. Our nationwide employment situation is permanent (due to multiple locations) however, a new temporary need (contract award) has created an extraordinary demand for workers.

AF 197-198. The Employer also stated that:

once the contract is completed, these workers will no longer be needed. [The Employer] operates in 24 states and in multiple locations all the time. We stay at one job site until the project is completed. . . .Regularly being awarded projects in different geographical locations lends to the temporary nature of our need, but require us to work year round in multiple locations as well as multiple states.

Our need is always defined by contract, but the location of our projects change regularly. Our request is based solely on contract demands.

Id.

On August 13, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 178-187. In the RFI, the CO identified multiple deficiencies, only one of which will be addressed on appeal. Citing to 20 C.F.R. § 655.6, the CO stated that the Employer failed to “establish that the nature of the employer’s need is temporary.” AF 186. Specifically, the CO stated that the Employer failed to:

1. Explain the nature of the temporary need based on the employer’s business operations;
2. Explain why the nature of the employer’s job opportunity and number of foreign workers requested reflect a temporary need; and

¹ References to the 302-page appeal file will be abbreviated with an “AF” followed by the page number.

3. Explain how the request for temporary labor certification meets the regulatory standard of a one-time occurrence.

AF 186. Further, the CO noted that the one-time occurrence need required that the Employer had never used H-2B workers in the past, but the Employer's "statements confirm that the employer has employed workers to perform the services in the past and will perform the services in the future." *Id.* Moreover, the CO noted that the Employer admitted that its need was based on a one-time contract, however "an individual contract, on its own, does not constitute a one-time occurrence. . . .The employer has failed to sufficiently explain what causes its individual business and, more specifically, its construction project to be considered a one-time occurrence when it is the nature of the business for the employer to secure work contracts for this type of job opportunity." AF 187. The CO required the Employer to submit an explanation regarding why the nature of the Employer's business reflect a temporary need based on a one-time occurrence.

On August 24, 2010, the Employer submitted a response to the RFI. AF 18-172. In its addendum to its statement of temporary need, the Employer asserted that "the survival of a construction company depends on the acquisition of and renewal of multi-year contracts in different locations." AF 41. The Employer also wrote that it was confused as to why the CNPC "thinks the construction industry dependence on multi-year contracts in different locations does not meet the definition of one time occurrence." *Id.* The Employer also stated that "construction is a mobile industry. . . . [The Employer] readily admits [that it survived] on contracts in different locations." *Id.*

On August 31, 2010, the CO issued a *Final Determination* denying the Employer's application on multiple grounds, only one of which will be addressed on appeal. AF 10-17. Citing 20 C.F.R. § 655.6, the CO noted that "the employer has failed to prove that it has not employed construction workers laborers in the past and that it will not need Construction Laborers in the future." AF 14. The CO then cited to multiple certifications approved for the Employer for construction laborers. *Id.* Further, the CO noted that the Employer based its one-time occurrence need on the changing worksites, but the CO found that "it [was] the nature of this employer and other non H-2B employers in the commercial construction industry to establish contracts in different worksite locations. . . . therefore, [the CNPC] cannot support the employer's claim that a need for laborers in this specific worksite is justified as a one-time occurrence based solely on its change of worksite location from one contract to another." AF

15. The CO also found that the Employer failed to establish the second prong of the one-time occurrence standard because the Employer established that it had a “constant need for construction laborers of a short duration” rather than a need to temporarily supplement permanent workers due to a one-time event of short duration. *Id.* Having found the Employer failed to establish a temporary need, the CO denied the Employer’s application. The Employer’s appeal followed.

Discussion

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b). While an applicant need only submit a detailed statement of temporary need at the time of the application’s filing, failure to provide substantiating evidence or documentation in response to the CO’s RFI “may be grounds for the denial of the application.” § 655.21(b).

In the present case, the Employer attempted to establish a one-time occurrence need. To establish a one-time occurrence, “the petitioner must establish that (1) it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or (2) that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

The Employer readily admitted in its request for review and in its RFI that it had used H-2B workers in the past. Whether the Employer has used H-2B workers at this particular jobsite is irrelevant. The regulations do not specify that a need is a one-time occurrence based on the geographical area of the Employer’s work sites but rather based on the Employer’s need, and according to the CO and the Employer, the Employer has received multiple certifications in the past. Therefore, the Employer cannot claim that it satisfies the first prong under the one-time occurrence standard, which requires that the Employer has not utilized workers in the past.

The Employer repeatedly argued in its brief that it was the nature of the construction business to survive on contracts. At one point, the Employer questioned whether or not it would be treated similarly if it was a fixed site employer. Assuming that the Employer was a fixed site employer, as it suggested at one point in its arguments, the Employer would most certainly not meet the one-time occurrence standard under the first prong because it has used H-2B workers in the past. Moreover, simply because the Employer thrives on contracts and changes its locations do not alleviate it from meeting its burden to show that the Employer has not used H-2B workers in the past. The job sites are irrelevant to the analysis.

The Employer also cannot establish a one-time occurrence under the second prong, which requires the Employer to show that it normally employs permanent workers but a temporary event of short duration has created the need for temporary workers. While the Employer may regularly hire permanent workers, it readily admitted in its request for review that its business model required it to take on contracts all over the country. Under the Employer's theory that each site should be treated separately, the Employer is attempting to claim that every contract it takes on is a temporary event of short duration that has created a temporary need. Every project cannot possibly be a temporary event; at some point, the combinations of "temporary" projects create a permanent need for the Employer. The Employer argued in its request for review that the CO mischaracterized this contract as unique and that all contracts are essentially treated the same. Therefore, this contract was just one in a string of many contracts, and as such, is not a temporary event of short duration but rather one in a series of permanent events with an indefinite duration. Because the Employer failed to establish a temporary need, the CO correctly denied certification.

Order

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge