



Issue Date: 02 June 2010

BALCA Case No.: 2010-TLN-00060

ETA Case No.: C-10085-49760

In the Matter of:

LARA BROTHERS, LTD.,
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 March 26, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Lara Brothers, Ltd., ("the

Employer”). AF 166-210.¹ In its application, the Employer requested certification for 12 “Forrest and Conservation Workers” from April 12, 2010, until February 11, 2011. AF 166. The Employer also indicated that the nature of its temporary need was seasonal. *Id.* The Employer explained that its need was temporary because the Employer “has been retained by the Potlatch Resource Management Division, for a variety of seasonal forestry work commencing in April of 2010 and continuing thru November 2010. . . . After the Idaho project, [the Employer] will commence with projects for the State of Washington with an estimated timeframe of January 2011 to April 2011.” *Id.* Attached to the application was a letter from Potlatch dated January 7, 2010. AF 202. In the letter, Potlatch confirms that the Employer will commence a variety of forestry work for Potlatch beginning in April 2010 and ending in November 2010. *Id.* Also attached to the application is a “Notice of Award” from the Washington State Department of Natural Resources dated January 8, 2010. AF 205. The award did not include the start or end date for the project.

On March 31, 2010, the CO issued a *Request for Further Information* (“RFI”). AF 160-165. In the RFI, the CO identified two deficiencies, only one of which will be addressed on appeal. Citing to 20 C.F.R. §§ 655.21(a) and 655.22(n), the CO stated that the Employer failed to “satisfy obligations of H-2B employers under the regulation.” AF 164. The CO asserted that the Employer has requested certification from April 12, 2010 until February 11, 2011, but the Employer “indicate[d] that it has obtained contracts from April through November and from January to April. Not only does its statement indicate that there is no work in the month of December, but it seems as though the employer has a year-round need for Forest and Conservation Workers.” *Id.* The CO requested that the Employer submit:

1. A description of the employer’s business history and activities and schedule of operations through the year;
2. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need;
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; and
4. A statement justifying the decrease in the number of H-2B positions being requested for certification from the previous year.

¹ References to the 210-page appeal file will be abbreviated as “AF” followed by the page number.

Id. The CO also stated that the Employer must submit supporting documentation that “justified the chosen standard of temporary need.” AF 165.

On April 7, 2010, the Employer submitted a response to the RFI. AF 95-153. In its response, the Employer wrote:

For the winter month of December, the foreign national laborers typically take a break for the holidays and return home to Mexico. . . .

Although it may at first glance appear that Lara Brothers has a year-round need for its Forest and Conservation Workers, this is not the case. Because Lara Brothers services more than one client and the clients are located in two different states—Idaho and Washington—these clients have different seasonal needs. Idaho’s reforestation season starts in April because prior to the month of April, Idaho’s forests still have snow, especially in the higher elevations, that prevent it from commencing its planting season. Even the slightest bit of frost on the ground prevents effective planting of seedlings. . . . Washington State, on the other hand, starts their planting season in mid January because by this time, the ground is already ready for seedlings. Because it does not snow as much in Washington as it does in Idaho, the Washington reforestation season starts much earlier and typically lasts until April. As such, although it may mistakenly appear that Lara Brothers has a year round need, this is not the case and is solely due to the fact that it is having to work with two different reforestation seasons for different states. . . .

Our request for temporary labor certification is for seasonal need directly tied to the limited reforestation seasons and needs of the states of Idaho and Washington, respectively. Lara Brothers’ request for twelve reforestation laborers reflects a temporary, seasonal need based solely on reforestation contracts received from Idaho and from Washington.

AF 96-98. The itinerary attached to the Employer’s response indicated that the Idaho job would end on November 11, 2010, and the second job would not begin until January 15, 2011. AF 107-109. Further, the itinerary indicated the second job would not end until March 31, 2011. *Id.* The Employer also provided records of unemployment tax paid to the states of Idaho and Washington, as well as a quarterly breakdown of wages paid to individual employees based on the employees’ names. AF 110-153.

On May 3, 2010, the CO issued a *Final Determination* denying the Employer’s application. AF 87-94. Citing 20 C.F.R. §§ 655.21(a) and 655.22(n), the CO noted that “the employer has combined two (2) separate job opportunities with two distinct seasonal needs into (1) application.” AF 92. The CO

further stated that “although the start date requested corresponds with the information in the application, the end date of need requested does not correspond to the end date of need for the employer’s client in Washington. Therefore, the employer’s application as submitted, does not represent a temporary seasonal need as defined by the regulations.” AF 92. The CO then cited to 20 C.F.R. § 655.22(h), which required the Employer to offer “bona-fide, full-time temporary position[s]” to the workers, while the Employer, in this case, “has made it clear that workers do not work in the month of December, creating a position that is not full-time as stated in the application.” AF 92. After determining that the requested start and end dates of temporary need do not reflect the start and end dates of the Employer’s contractual itinerary, the CO denied certification. The Employer’s appeal followed.

The Employer asserted in its request for review, that the CO failed to review the case in light of the TEGL 27-06 guidance letter, which provided that tree reforestation workers could file a single master application covering multiple itineraries, and as a result, “it stands to reason that any gap in between the end date of one itinerary for on state’s season and the start date of a new itinerary for another state’s season should not be construed to mean that the position is not a full-time position.” AF 3. Further, the Employer argued that according to TEGL 27-06, the start and end dates should be flexible given the climactic elements of the job.

Discussion

To obtain certification under the H-2B program, an employer must offer “a bona fide, full-time temporary position.” 20 C.F.R. § 655.22(h). The regulations further provide the application for temporary labor certification must “truly and accurately” state the “dates of temporary need.” 20 C.F.R. § 655.22(n). Where an employer has a seasonal need, the need cannot last more than 10 months. 20 C.F.R. § 655.6.

The Employer, according to its application, has a temporary seasonal need for workers based on the contracts it has in Idaho and Washington. Further, the Employer uses both of these contracts to establish its temporary need, and without them, would have no basis for seeking labor certification. However, the itineraries provided clearly show that the Washington job will not end until March 31, 2011, despite the Employer’s application, which indicates the job will end on February 11, 2011. As a

result, the Employer's application failed to accurately state its period of need because, if the Employer needs workers in order to fulfill these contracts, the Employer would need workers until at least March 31, 2010. Therefore, the application does not accurately reflect the Employer's period of need and was properly denied.

The Employer argued in its request for review that the TEGL 27-06 letter should have guided the current application. According to the TEGL, "since the work of tree planting and related reforestation occupations are dependent on climatic conditions, the precise ending dates and subsequent contracts may not be defined at the time of placing a job order." TEGL 27-06 provides that Employers may not have to establish an exact end date where the end date cannot be determined due to climate concerns. However, the end date is not a question in the present case. According to the Employer's own admission, Washington receives little snow, so seedlings may be planted in January. Moreover, based on the itinerary established by the Employer, the workers will be needed until at least March 31, 2011. Assuming, as the TEGL does, that weather might delay the planting of seedlings, the Employer would need the workers even longer than the proposed end date, thus far exceeding the 10 month limit on seasonal temporary need pursuant to 20 C.F.R. § 655.6. However, even under the most optimal weather, the Employer would need the workers approximately one and a half months longer than it indicated on its application. As a result, the Employer's application did not accurately reflect its dates of need, and the CO properly 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