



Issue Date: 10 January 2011 BALCA Case No.: 2011-TLN-00004

ETA Case No.: C-10316-51675

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, as defined by the Department of Homeland Security. *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).

STATEMENT OF THE CASE

On November 12, 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 1183-1189.¹ The Employer requested certification for 200 construction laborers from December 13, 2010 to August 30, 2010 for completion of the Chalmette Loop Levee project before June

¹ Citations to the 1,244 page appeal file will be abbreviated "AF" followed by the page number.

1, 2011, the beginning of the hurricane season. AF 1183. Additionally, the Employer submitted a statement of temporary and peakload need with its application, stating:

The United States Army Corps of Engineers (USACE) has asked Cajun Constructors, Inc. to work around the clock in order to meet the accelerated new completion date of the Chalmette “Barrier” (part of the levy system that protects New Orleans and southern Louisiana from hurricanes and flooding). At the urging of the USACE, Cajun has agreed to do everything necessary to make sure this levy/barrier is in place, ready for the start of the 2011 hurricane season (the official annual start date of hurricane season is June 1).

This means that Cajun has to complete its work a full 5 months ahead of the schedule previously agreed-upon.

Cajun must again turn to your office to assist us in completing this project as ordered by President Obama. This new deadline has placed us in a very precarious position where we must secure additional workers via H-2B program as swiftly as possible and without fail.

The President’s directive has placed an immense amount of pressure on our company to once again request 200 H-2B “construction laborers” in order to fill our peakload need due to the shortage of unskilled workers in the region containing Chalmette Barrier. Our request to hire temporary foreign workers will enable us to provide the unskilled construction labor we must have in order to meet the new deadline. It is imperative that we have the labor required to finish this project on-time and we cannot do this without your commitment to help protect the citizens of Louisiana by approving this petition.

[...]

We regularly employ permanent construction laborers. Unfortunately for this Peakload need, these workers are not enough. In reviewing the four temporary needs under which we can apply for H-2B workers, we believe our need is “Peakload” because as I wrote above, **these workers are needed to supplement our year round permanent workforce due to the short-term demand created by deadlines given to us by the President and USACE.**

This temporary addition to our staff **will not** become a part of Cajun’s regular operation.

We have searched long and hard to recruit a sufficient number of US workers for this position, all to no avail. **We are now in a position where we have no choice but to file this petition in order for Cajun to comply with the [sic] President Obama’s directive.**

AF 1191-1193. (emphasis in original). Additionally, the Employer indicated that one of the requirements of the position was that applicants must pass a “behavioral assessment.” AF 1186.

On November 18, 2010, the CO issued a *Request for Further Information* (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer did not comply with all requirements of the H-2B program. AF 35-39.² The CO found that the Employer had not established that the requirement of the behavioral assessment test was a normal and accepted qualification required by non-H-2B employers in the same or comparable occupations, in violation of 20 C.F.R. § 655.22(a) and (h). Therefore, the CO required the Employer to submit a signed, written business necessity document explaining why the behavior assessment test (called the “TESCOR Survey”) is a requirement and why the Employer believes that it is: normal to similarly employed U.S. workers in the area of intended employment, not a term of employment that is less favorable than that offered to the H-2B workers, and why the requirement is not less than the minimum terms and conditions required by the regulation. AF 37. Additionally, the CO required the Employer to submit: 1) a complete copy of the TESCOR Survey that it administered; 2) the objective standards used for determining whether an applicant has passed or failed the TESCOR Survey; 3) the actual copy of the test which the applicants took; and 4) a list of the answers for each applicant that “failed.” AF 38.

Secondly, the CO found that the Employer failed to establish that the nature of its need is temporary in violation of 20 C.F.R. § 655.21(a). AF 38. The CO determined that the Employer’s end date of need, August 30, 2011, conflicted with the Employer’s documentation of its temporary need, which consisted of newspaper articles and President Obama’s directive mandating that all work on the construction project is to be completed by June 1, 2011. AF 38. Further, the CO found that while the Employer suggests that June 1, 2011 is a “new deadline,” one of the Employer’s newspaper articles, dated January 27, 2010, also included June 1, 2011 as the date that work on the construction project must be completed. AF 38. Therefore, the CO required the Employer to submit the following documentation regarding its temporary need:

- 1) a description of the Employer’s business history and activities and schedule of operations through the year;
- 2) explanation regarding why the nature of the Employer’s job opportunity reflects a temporary need of the length of requested;
- 3) a complete copy of the government construction contract to which the Employer attributes its temporary need;
- 4) documents evidencing the stated communications between the Employer and the U.S. Army Corps of Engineers regarding completion deadlines and accelerated work schedules;

² The Appeal File index indicates that the RFI can be found at pages 1176-1181, however, the RFI is not included. A copy of the RFI was included in the Employer’s response to the RFI at pages 35-39.

- 5) a copy of any Presidential directives or press releases regarding the Chalmette Loop Levee Project;
- 6) signed work contracts and/or monthly invoices from previous calendar years clearly showing work will be performed for each month during the requested period of need;
- 7) annualized and/or multi-year contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need; **or**
- 8) summarized monthly payroll reports for a minimum of one previous calendar year that identifies, 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.

AF 39. On November 26, 2010, the Employer responded to the RFI. AF 19-1175. The Employer included the following documentation in its response to the RFI: a copy of the application, a copy of the RFI, an amended Statement of Temporary Need, a business necessity letter, a copy of the TESCOR Survey, a copy of a Validation Research Report performed by American Tescor, Inc., a copy of the TESCOR exam that applicants were given, a statement from Tescor regarding answers to the survey, a copy of two pages of a contract between Cajun Constructors, Inc. and the United States Army Corps of Engineers, a copy of a press release from The White House, Office of the Press Secretary, dated August 29, 2010 regarding remarks by the President on the fifth anniversary of Hurricane Katrina, copies of monthly billing invoices showing work that has been performed for each month of the contracted period, copies of summarized payroll reports, and a copy of a Cornell University study regarding the use of pre-employment behavioral assessments. AF 19-1175.

Regarding the use of the TESCOR exam, the Employer stated that the exam falls within OPM and OSHA guidelines and is used by many industries, including the construction industry, to identify applicants that are faking, lying, or have the propensity to commit workplace violence and theft. AF 23. Additionally, the Employer explained that it was received notice from Tammy Mayhew, the Relationship Manager for Merchants Information at Tescor, who stated that she could not provide the Employer with the answers of the applicants that failed the TESCOR exam. AF 24. In regard to the second deficiency, the Employer explained that while all construction on the barrier must be completed by June 1, 2011, finish grading and general cleanup duties must be completed by August 29, 2011. AF 24. The government contract award with the United States Army Corps of Engineers shows that the

Employer made the bid on December 11, 2009 and was awarded the contract on February 23, 2010. AF 1212.

On December 7, 2010, the CO denied the Employer's application. AF 11-18. The CO found that none of the materials contained in the Employer's RFI response constituted evidence that use of the TESCOR exam was consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations, and therefore determined that the Employer failed to comply with 20 C.F.R. § 655.22(a) and (h). AF 13. Additionally, because the Employer did not submit the results from the TESCOR Survey from the applicants that failed the exam, the CO determined that it was unable to verify that applicants were rejected for lawful, job-related reasons as required by 20 C.F.R. § 655.15(j)(2)(iii). AF 15.

Secondly, the CO denied the Employer's application because the Employer did not establish a temporary need as required by 20 C.F.R. § 655.21(a). AF 15. The CO found that the Employer did not submit evidence that it required workers between June 1, 2011 and August 30, 2011. AF 17. In addition, the CO found that while it had requested the Employer to submit a complete copy of its government contract, the Employer only submitted two pages of 319 pages. AF 17. The CO found that there was no information about an accelerated work schedule or modified deadline of the project, and determined that the Employer may have had notice of the June 1, 2011 completion deadline as early as March 2009. AF 17. Based on the foregoing, the CO determined that the Employer did not provide sufficient evidence to demonstrate that a new and unexpected June 1, 2011 deadline created the temporary need for foreign workers. AF 17. Finally, the CO found that the Employer's payroll reports do not justify the period of need past June 1, 2011, because it shows work occurring during June, July, and August 2010.³

On December 17, 2010, the Employer appealed the denial, arguing that the Employer presented sufficient evidence to demonstrate that the TESCOR behavioral assessment test was normal and accepted within the construction industry and that the nature of employment was temporary in nature.

³ Additionally, the CO found that the payroll records do not demonstrate a need for the services of low-skill construction workers, because the payroll records show employees designated as laborers working less than 40 hours per week, while Journeymen (highly-skilled laborers) work 40 hours per week. AF 18.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer 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 basis, as defined by the Department of Homeland Security. *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). In order to establish a peakload need, the 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).

Although the portion of the government contract submitted with the Employer’s RFI response does not show the date that construction must be completed, the Employer has submitted extensive evidence demonstrating that construction of the Chalmette Loop Levee is to be completed by June 1, 2011. Nevertheless, I accept the Employer’s explanation that although construction is to be completed on June 1, 2011, it needs workers until August 29, 2011 to finish grading and general cleanup to be a sufficient explanation for its August 30, 2011 end date.

However, I find that the Employer has not provided sufficient evidence of a peakload need. In this case, the Employer was awarded a government contract with the United States Army Corps of Engineers (“USACE”) on February 23, 2010 for the construction of the Chalmette Loop Levee, with an estimated construction cost between \$250-\$500 million. AF 1211-1212. Although the Employer did indeed secure a very large government contract in order to complete the Chalmette Loop Levee by June 1, 2011, the Employer’s request for 200 workers rests on its assertion that it has a peakload need created by the accelerated schedule and new deadline set by USACE. (AF 1191-1193). Curiously, the Employer does not state the date that USACE informed it of the accelerated schedule, nor does it provide any documentation from USACE regarding a new deadline for completion. Further undermining the Employer’s assertion that USACE just recently gave it a new deadline for completion is a newspaper article submitted by the Employer, showing that June 1, 2011 was the projected date of completion as of January 27, 2010 – almost a month *before* the Employer secured the contract. AF 1221-1223.

The Employer's argument that USACE set up a new deadline for completion of the project, requiring the Employer to work around the clock, is also undermined by information contained in the Employer's recruitment efforts. The Employer began its recruitment effort for 200 workers in October 2010.⁴ Interestingly, the Employer's recruitment efforts did not state that the Employer is currently seeking construction workers; rather, the Employer stated that it was seeking workers to begin almost two months later, in the middle of December.⁵ AF 1214. This begs the question: if the Employer found out that USACE accelerated its construction schedule in October, creating an immediate short-term demand for additional construction workers on the site, why would the Employer want these workers to wait two months before starting?⁶

It is the Employer's burden to establish eligibility for certification. The Employer has not presented evidence that it has a need for more workers due to a short-term demand, as required by the DHS and H-2B regulations. The Employer has presented no evidence showing that USACE accelerated the construction deadline, causing the Employer to need 200 temporary foreign workers. For that reason alone, certification is improper. Additionally, however, the Employer has not established that it has a peakload need because it has not explained or offered supporting documentation to establish that this project requires so many more workers than it usually has available. The Employer has not demonstrated that the workload cannot be handled by the Employer's construction workers that have already been working on the project for several months, along with the 29 U.S. workers that the Employer recently hired, and for this reason as well, I find that the Employer has not demonstrated its peakload need for 200 construction workers.⁷ *See generally Carlos Uy III*, 1997-INA-304 (Mar. 3,

⁴ The Employer placed a job order with the Louisiana State Workforce Agency ("SWA") from October 13, 2010 to October 23, 2010, placed an advertisement in The Times-Picayune from October 16, 2010 to October 17, 2010, and filed a Notice with the Louisiana AFL-CIO on October 14, 2010. AF 1187, 1214.

⁵ Although the Employer did not submit copies of its newspaper advertisements, a copy of its Notice of Filing, sent to the Louisiana AFL-CIO on October 14, 2010, states "We are applying for H-2B alien employment certification through the Department of Labor. As required by the State of Louisiana, we are filing notice of the advertisement. The following is the classified ad currently running to find workers. Please advise us of any candidates." AF 1214. The advertisement indicated that the Employer had 200 openings for construction laborers from December 13, 2010 through August 30, 2011. AF 1214.

⁶ While the issue is not squarely before me, I also question whether the Employer recruited U.S. workers in good faith. The record shows that the Employer advertised different terms and conditions of employment to U.S. workers than foreign workers. While the Employer's application indicates that its H-2B employees will work 40 hour weeks, and that any hours beyond 40 will be paid at the overtime rate, the Employer advertised this construction worker position as one requiring 50 hour weeks, and that overtime would be paid for hours worked beyond 50. AF 1214.

⁷ The Employer's payroll records show that it has had laborers working on the Chalmette Loop Levee site for months. For example, during the week of September 5, 2010, the Employer had 59 workers working on the

1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

Accordingly, I find that the CO properly denied certification for 200 H-2B construction laborers because the Employer did not demonstrate a peakload need.⁸

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

construction site, 22 of whom are laborers. AF 835-851. As part of its pre-filing recruitment, the Employer was able to hire 29 U.S. workers as construction workers to assist the 59 workers it already has on the construction site. AF 1137.

⁸ As I affirm the denial on this ground, I do not reach the issue related to Employer's requirement of a behavioral assessment test.