



Issue Date: 09 April 2013

BALCA Case No.: 2013-TLN-00044
ETA Case No.: H-400-13043-604101

In the Matter of:

LIVINGSTON CONSTRUCTION, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING PARTIAL CERTIFICATION

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the H-2B temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B non-immigrant program,” allow employers to bring foreign nationals to the United States on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to use this program must first obtain certification from the Secretary of Labor that (1) there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work; and (2) the employment of H-2B aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(6)(iii). The Secretary of Labor has delegated this responsibility to the Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”).

STATEMENT OF THE CASE

On February 12, 2013, Livingston Construction (“the Employer”) filed an application for H-2B temporary labor certification with ETA’s Chicago National Processing Center (“CNPC”) for 15 Carpenter positions from April 1, 2013 to January 31, 2014. AF 61-73.¹ After the

¹ Citations to the Appeal File will be abbreviated “AF” followed by the page number. The application included in the Appeal File indicates that the Employer requested only three Carpenter positions. I assume this is not a copy of

Employer's application was accepted for processing, it was reviewed by an OFLC Certifying Officer ("CO").

On February 19, 2013, the CO issued a *Request for Information* ("RFI") informing the Employer that its attestations failed to establish a temporary need for H-2B workers. AF 54-60. In particular, the CO stated:

Section B., Item 9., did not adequately explain how the employer's request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need as defined by 8 CFR 214.2(h)(6)(ii)(B). The employer states in its statement of need "Our need for temporary carpenters is in response to a peak load event which begins in April and it sustains until late January of each year. February and March are the rainiest months, while we have year-round mild conditions and October is the driest. Given these dates of employment we would like to employ them the complete possible period." However, the employer provided no documentation or other supporting documents to justify its requested peakload need.

AF 57. To remedy this deficiency, the CO directed the Employer to submit an updated temporary need statement containing the following information: 1) a description of the Employer's business history and activities (*i.e.* primary products or services) 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; and 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. AF 58. The CO further directed the Employer to submit evidence to justify its attestations. AF 59.

The Employer responded to the RFI on February 25, 2013. AF 26-53. With respect to its temporary need for Carpenters, the Employer stated:

Our need for temporary carpenters is in response to a peak load event which begins in April and it sustains until late January of each year. February and March are the rainiest month, while we have year-round mild conditions and October is the driest. The nature of the job opportunity is temporary due to the best weather conditions throughout the year, except for February and March, commonly. For this reason our need is temporary in nature and is due to a peak load event, given the weather conditions.

The work is slow on the months of February and March so there is no need for any additional workers. We want to employ the temporary worker the complete possible period, also we understand that the date of need is temporary and it's due

the Employer's original application, as the CO later granted *partial* certification for three positions. I therefore rely on the Employer's account to find that the Employer initially sought certification for 15 positions.

to a peak load occurrence and the temporary employees must return to their residence country. There will not become a part of our regular nor permanent staff.

We need to supplement our current workforce for a short term demand; we understand that, under DHS regulations at 8 CFR 214.2(h) (6) (ii) (B) and the DOL regulations at 20 CFR 655.6 (b), we qualify for a labor certification since our need is temporary in nature and is due to a peak load event, as it was stated before.

Therefore in our application for alien employee certification, we plead your certification to hire thirteen (13) foreign temporary employees to supplement our current workforce. We were petitioning for fifteen (15) temporary workers and after the Recruitment period we hired two (2) U.S. workers that met the requirements for the job. This is our effort to supplement our permanent staff hiring our local people along with temporary foreign workers.

Regarding to support evidence and documentation to justify the chosen standard of temporary need, find attached to this letter a Summarized monthly payroll report for Carpenters for the calendar year of 2012. You will see that there are few permanent employees in this company, any way the work is slow during the months of February and March. Peak load starts on early April and will see that are more work hours during our company's period of need from April 1 to January 31 of each year and our 2012 earnings are increasing as well form that period. Also find a Job Chart worked in 2012 with different clients.

Additionally find two bank statements from two different banks, Bank of Tuscaloosa and Regions Bank. The principal activity is registered during the months of the date of need. You will see deposits and paychecks on this period.

Bank of Tuscaloosa is mostly used for payroll, see the difference of the amount of payrolls from the slowly months of February and March, the rest of the months the payroll increased. Payroll and expenses for February were \$21,479.40 with no deposits and for March \$62,287.96 and a small deposit comparable throughout of the year. Those were the lowest for 2012. From the Regions Bank, the month of February has a small deposit and March has no deposits. Check the transactions thru the period of need.

AF 27-28. After reviewing the Employer's response, the CO determined that the Employer failed to demonstrate a temporary need for all fifteen positions for which it sought certification. Specifically, the CO explained:

The employer failed to justify a bona fide need for the 13 workers requested from April 1, 2013 through January 31, 2014. In response to the RFI, the employer submitted a copy of its 2012 payroll report. The 2012 payroll report shows that although employer was certified for 11 Carpenters from June 2012 through January 2013, the highest number of temporary workers employed by the employer during the 2012 period of need was five. The employer also submitted a

letter in response to the RFI, however the discrepancy in the number of workers certified for and the actual number of temporary workers employed in 2012 was not addressed in the letter or in the employer's statement of need.

The employer did not provide any documentation or explanation to indicate that its 2012 payroll report is not a proper indicator of its peakload need, therefore, the Department finds five workers to be a more accurate need for the dates of employment requested. However, certification has been further reduced because the employer's recruitment report indicates that it successfully recruited and hired 2 U.S. workers for the position.

AF 23. Accordingly, the CO issued a *Final Determination* on March 7, 2013, granting partial certification for three Carpenter positions from April 1, 2013 to January 31, 2014. AF 21-25.

The Employer requested administrative review before BALCA on March 18, 2013. AF 1-20. The appeal letter stated, in pertinent part:

Please accept our case for Administrative review as the final [sic] Determination has been partially certified for only 3 Carpenters. Originally, the petition was submitted for 15 Carpenter and after the recruitment period I hired 2 carpenters. Therefore, I understand that I have 13 positions to be certified.

The Department of Labor has reduced the number of temporary nonagricultural workers certified based on the previous Application I filed. The Department of Labor is making a determination based on previous work and not warning about the coming work.

AF 1. The undersigned issued a Notice of Docketing on March 19, 2013, providing the parties an opportunity to submit briefs on an expedited basis. Both parties timely filed briefs in this matter.

DISCUSSION

Prior to certifying an application for H-2B temporary labor certification, the CO must confirm that the petitioning employer has established that the number of positions being requested for certification is justified and represent bona fide job opportunities." See 20 C.F.R. § 655.23(b) ("The CO will review complete applications for an absence of errors that would prevent certification and for compliance with the criteria for certification. . . . Criteria for certification, as used in this subpart, are whether the employer has . . . established that the number of worker positions being requested for certification is justified and represent bona fide job opportunities. . . .").

After examining the Employer's RFI response in the instant case, the CO determined that the Employer's documentation only established a need for five temporary workers from April 1, 2013 to January 31, 2014. I agree. The Employer contends that the Department made "a determination based on previous work and not warning about the coming work." AF 1. But the Employer failed to provide any evidence or explanation to demonstrate why it had a greater need

for temporary Carpenters this year than it did in 2012. The CO was thus unable to determine whether the additional positions for which the Employer requested certification represented bona fide job opportunities. Accordingly, I find that the CO did not err in partially certifying the Employer's *Application for Temporary Labor Certification*.

ORDER

In light of the foregoing, the Certifying Officer's *Final Determination for Partial Certification* is AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge