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**Issue Date: 12 November 2014**

**OALJ Case No.: 2015-TLN-00001**

**ETA Case No.: H-400-14245-129677**

*In the Matter of*

**Cumar, Inc.,**

*Employer*

Certifying Officer: Chicago Processing Center

Before: **CHRISTINE L. KIRBY**  
Administrative Law Judge

**DECISION AND ORDER**

This case arises out of Cumar, Inc.’s request to the Board of Alien Labor Certification APPEALS (“BALCA”) for an administrative review under 20 C.F.R. § 655.33<sup>1</sup> of a United States Department of Labor Certifying Officer’s (“CO”) denial of its 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, non-agricultural work within the United States on a one-time, seasonal, peak load, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b)l 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

**Statement of the Case**

***H-2B Application***

On September 17, 2014, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Cumar, Inc. (“Cumar”, “the company”, or “Employer”) seeking temporary labor certification for two workers to serve as Specialty Stone Installation and Restoration Specialists in phases of up to three months during the period of September 30, 2014, to September 30, 2017. (AF<sup>2</sup> 178).

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<sup>1</sup> The applicable regulations may be found at 73 Fed. Reg. 78020 (Dec. 19, 2008).

<sup>2</sup> Citations to the Appeal File in this case will be abbreviated “AF” followed by the page number(s).

The application listed the following job duties and specifications: “Provide specialty stone restoration and installation for a unique project, extensive restoration of 1930’s mansion. The home is approximately 35,000 square feet. High level expertise in stone restoration, extreme attention to detail and careful handling of stone; ensure care and quality at worksite to reflect original 1930’s detail related to floors, walls, facades, countertops, tubs, structural columns and other special[t]y applications.” (AF 180, Item F.a.5). Employer specified that the position would be “[f]ull-time up to 3 months at a time, from 9/30/2014 to 9/30/2017, done in phases, intermittently.” *Id.* Employer did not list any education or training requirements, but did list 180 months (15 years) of work experience as a requirement. (AF 181, Item F.b). Employer also listed as special requirements “[m]ust have experience with use of specialty products used in restoration of 1930s stone applications, as well as knowledge of and experience with CAD drawings/plans.” *Id.* The work site address was listed as 3400 Belcaro Drive, Denver, CO, 80209. (AF 181, Item F.c).

### ***Request for Further Information***

On September 24, 2014, the ETA Certifying Officer (“CO”) issued a *Request for Further Information* (“RFI”) notifying Cumar, Inc. that the ETA was unable to render a final determination on the company’s H-2B application because Cumar did not comply with all the requirements for the application. In order to obtain information to ensure compliance, the CO identified four areas of deficiency. (AF 171-77).

First, the company failed to provide adequate attestations to establish a temporary need for foreign labor. Specifically, the application did not provide documentation sufficient to demonstrate how the company determined that the construction project would take approximately three years to complete or why work would be offered only up to three months at a time. To remedy this deficiency, the CO indicated that Cumar, Inc. must submit an updated temporary need statement containing documentation establishing a temporary need for foreign labor. (AF 173-74). It also stated that the company must submit information sufficient to justify its chosen standard of one-time occurrence temporary need. (AF 173-74).

Second, the company failed to comply with its obligations under 20 C.F.R. § 655.22(h) because it did not advertise a job offer that included qualifications that are normal and accepted by non-H-2B employers in the same or comparable occupations. While Cumar, Inc. indicated that it would require the employees to have 180 months (15 years) of experience in stone installation, the typical Stonemason has between one and four years of experience. Thus, the CO stated that Cumar, Inc. must provide documentation demonstrating that the employer’s requirements for its job opportunity are consistent with standard qualifications required by non-H-2B employers, including a letter explaining why 180 months of experience is necessary to perform the job listed on its ETA Form 9142. (AF 174-75).

Third, Cumar, Inc.’s job order and newspaper advertisements also failed to comply with the requirements in 20 C.F.R. § 655.17. The CO stated that, although the company listed a description of the stonemason job, it did not indicate that 180 months of stone installation experience was required for the position. Therefore, Cumar, Inc. must submit copies of the job

order and any advertisements it ran in the newspaper to verify its compliance with the pre-filing recruitment requirements. (AF 175-76).

Fourth, the company failed to submit a complete and accurate ETA Form 9142. The CO indicated that because Cumar submitted an expired version of the form, it must submit an amended Appendix B in order to comply with the requirements of 20 C.F.R. § 655.20(a). (AF 176-77).

### ***Employer's Response***

On September 30, 2014, in response to the CO's RFI, Cumar, Inc. provided multiple documents, including an affidavit from the company's president describing how his current employees are trained; a magazine article describing the company's facility and projects; copies of the general contractor's pricing and project schedules; a copy of the National Park Service's website showing that the construction work site is on the National Register of Historic Places; a copy of the Design Guidelines for Landmark Structures and Districts within the city and county of Denver, CO; an updated ETA Form 9142 with an amended Section B, Item 9; a copy of the company's payroll records for the year prior; a copy of the company's projects list for the year prior; a letter from an editor at *Stone World* magazine stating that the construction project will require highly skilled employees with at least fifteen years of experience; and several articles discussing labor shortages in the United States and the difficulty involved in obtaining labor for the project at issue. (AF 40-170).

In a statement, Cumar, Inc. explained that large construction projects do not operate with all trades working consistently for the entire construction period; rather, a construction schedule must allow for work to be performed at separate times by plumbers, electricians, and other professionals (AF 34-36). The company also stated that the unique and historical nature of the property under construction necessitates that the foreign employees have fifteen years of stonemasonry experience. (AF 37-38).

### ***Final Determination***

On October 17, 2014, the CO issued a final determination denying Cumar, Inc.'s H-2B application for alien labor certification on the basis that the company failed to establish that: a) there were not sufficient qualified U.S. workers available for the job opportunity for which temporary labor certification was sought; and b) the employment of foreign workers would not adversely affect the wages and working conditions of U.S. workers in similar employment. (AF 14-15).

The CO noted that Cumar was able to cure three of the four deficiencies described in the RFI. However, the CO denied the company's application because it did not include attestations to establish a one-time occurrence temporary need. Employer's response to the RFI was not sufficient to show that workers would be offered full-time employment for three years because it stated that the stonemasons would only work for up to three months at a time. Therefore, the company could not guarantee full-time employment for the entire period of need requested. The

CO noted that, in order to secure employment in smaller increments, Cumar should file separate applications for each three-month period of employment. (AF 16-19).

### ***Appeal***

Cumar, Inc. submitted its request for expedited administrative review on October 27, 2014. In support of its appeal, the company argued that it had submitted the required attestations in response to the RFI in order to establish a temporary, one-time need for foreign labor. Cumar stated that it could not utilize any of its current employees for the project because they are located in Massachusetts, far from the project site in Colorado, and because the employees lack the specialized skills in “old-world” stonemasonry techniques required for the project. This, the company argued, necessitates hiring two foreign workers with special skills in stone installation and restoration.

Cumar also asserted that the CO was incorrect in stating that the requested employment should not be considered “full-time.” The company argued that while the regulations define full-time employment as 35 or more hours of work each week, they do not require proof of full-time employment for the entire period of need. The company asserted that its need for work performed in intervals of up to three months is akin to a one-time need for temporary labor and should not be expected to test the labor market for each separate interval. Cumar maintained that the CO’s requirement that the company show full-time employment for the entire three-year period is not consistent with the language and intent of the H-2B governing regulations and fails to take into account the company’s true employment needs. (AF 2-11).

### ***BALCA Adjudication***<sup>3</sup>

On October 28, 2014, BALCA received Cumar, Inc.’s appeal of the CO’s rejection of its application. On October 30, 2014, the Associate Chief Administrative Law Judge assigned the case to me for adjudication on behalf of BALCA. On October 31, 2014, BALCA received the appeal file from the CO. On November 3, 2014, I provided the parties an opportunity to file briefs in support of their positions by fax or email no later than the fifth day after their respective receipt of the appeal.

On November 6, 2014, the Acting Associate Solicitor for Employment and Training Legal Services submitted a brief in support of the CO’s final determination. Counsel asserted that Employer’s application was insufficient because it failed to show that the job opportunity was a full-time position for the entire three-year period of need. A full-time position, counsel argued, must continue for the entire period of need without interruption. In addition, Cumar, Inc. failed to comply with the documentation requirements of the RFI because the material it

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<sup>3</sup> Under 20 C.F.R. §§ 655.33, within 10 calendar days of the adverse determination, an employer may request an administrative review of the CO’s denial by BALCA. Within five business days of receipt of the employer’s appeal, the CO will assemble and submit to BALCA an administrative appeal file. Within five business days of receipt of the appeal file, counsel for the CO may submit a brief in support of the CO’s decision. The Chief Administrative Law Judge may designate a single member or the three-member panel of BALCA to consider the case. BALCA must notify the employer, the CO, and counsel for the CO of its decision within five business days of submission of the CO’s counsel’s brief, or 10 days after receipt of the appeal file, whichever is earlier.

submitted was not specific enough to support its temporary need for full-time workers. (Supporting Brief, 5-6).

Cumar, Inc. did not file a brief in support of its position.

### Issue

The issue in this case is:

- 1) Whether Cumar, Inc. demonstrated that the nature of its need for foreign labor is temporary and full-time during the period of need requested.

### Discussion

Under the provisions of 20 C.F.R. § 655.33(e), upon completion of my administrative review of the appeal file, the Employer's request for administrative review, and consideration of the parties' positions, I may: a) affirm the CO's denial of the temporary labor certification, b) direct the CO to grant the certification, or c) remand the appeal file to the CO for further action.

The CO may only grant an employer's application to admit non-immigrant workers on H-2B visas for temporary non-agricultural employment in the United States if there are not sufficient domestic workers available who are capable of performing the temporary labor at the time the employer files its application for temporary employment certification. 20 C.F.R. § 655.(b)(1). Consequently, the CO must determine whether the employer has demonstrated that its need for workers is a temporary rather than a permanent one. 20 C.F.R. § 655.6(a). The employer's need is considered temporary if justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 8 C.F.R. 214.2(h)(6)(ii)(B), 20 C.F.R. 655.6. To demonstrate a one-time occurrence need, an employer "must establish that 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 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).

Under the H-2B regulations, an employer must make its showing of temporary need "regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)." 20 C.F.R. § 655.6(a). The Preamble to the regulations notes that "[t]he controlling factor [in an H-2B determination] continues to be the employer's temporary need and not the nature of the job duties." 73 F.R. 78025. The regulations provide that employment is considered temporary when the employer demonstrates that it needs a worker for a limited period of time for a job that will end in the "near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). An employee's H-2B application must "truly and accurately" state the dates of temporary need. 20 C.F.R. 655.22(n).

In addition to being temporary, the job opportunity must be a bona fide, full-time position, the qualifications for which are consistent with the normal and accepted qualifications required by non-H-2B employers in the same or comparable occupations. 20 C.F.R. § 655.22(h).

Under the H-2B regulations, full-time work is defined as 35 or more hours of work per week. 20 C.F.R. § 655.5, 29 C.F.R. 503.4. However, the Preamble to the regulations states that the ETA may make determinations of whether work is full-time for purposes of foreign labor certification “based on the facts, program experience, customary practice in the industry, and any investigation of the attestation.” 73 Fed. Reg. 78020 (December 19, 2008).

Cumar, Inc, has shown that its employment needs are highly unique in that the stone installation for which it seeks foreign workers is very different from the type of work performed by the vast majority of domestic stonemasons. The company argues that the use of foreign labor for the construction project will not adversely affect the wages of U.S. workers given that there are no domestic workers who can fill the company’s very specific employment needs. Further, the CO has not provided a rationale for why granting the company’s H-2B application would adversely affect the wages or working conditions of domestic employees. However, Cumar, Inc. has acknowledged that it will only employ the foreign workers for intervals of up to three months at a time. The company has therefore failed to demonstrate that it can provide full-time employment for the entire period of need, and its H-2B application is insufficient to meet the requirements of the regulations.

The Office of Foreign Labor Certification (OFLC) Administrator has the authority to establish special procedures in the form of variances for the processing of certain H-2B applications. 20 C.F.R. § 655.3(b). In order to be granted a variance, an employer must demonstrate through written application to the OFLC Administrator that special procedures are necessary in light of its employment needs. *Id.* Given the unique nature of the construction project at issue, and noting that it may be impossible for Cumar, Inc. to provide exact dates of employment for the foreign workers, it seems inappropriate in this case to require the company to submit a separate H-2B application for each discrete period of employment, as the CO has recommended. Instead, a variance from the rigid H-2B regulations will allow the company to file only one H-2B application. Accordingly, absent justification as to why employing the foreign workers will adversely affect the wages or working conditions of domestic stoneworkers, I find that remand to the CO to establish special procedures is appropriate in this case.

### **ORDER**

Cumar, Inc.’s application for temporary labor certification is **REMANDED** to the Certifying Officer to provide the company time to file a variance requesting the establishment of special procedures for the processing of its application.

CHRISTINE L. KIRBY  
Administrative Law Judge