

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 16 April 2018**

**BALCA Case No.: 2018-TLN-00083**

ETA Case No.: H-400-17330-511525

*In the Matter of:*

**GORDON STONE COMPANY, LLC**

*Employer*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

Appearances: Kevin Lashus, Esquire  
The Kershaw Law Firm, P.C.  
Austin, Texas  
*For the Employer*

Before: **CLEMENT J. KENNINGTON**  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Gordon Stone Company, LLC’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

**BACKGROUND**

On January 24, 2017, the CO accepted for consideration Employer’s application requesting H-2B temporary labor certification for fourteen “Rock Splitters, Quarry” for the period of April 1, 2017 through December 1, 2017. On February 27, 2017, Employer’s application seeking temporary labor certification under the H-2B temporary nonagricultural program was certified. (AF 74-83).<sup>1</sup>

---

<sup>1</sup> In this decision, AF is an abbreviation for “Appeal File.”

On January 1, 2018, Employer applied for temporary employment certification through the H-2B program to fill fourteen positions for “Rock Splitters, Quarry” for the period of April 1, 2018 through December 1, 2018. (AF 53-73).

On January 8, 2018, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b) and 655.11(e)(3) and (4).<sup>2</sup> (AF 47-52). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer failed to 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 employer’s regular operation. Also, the CO noted Employer’s explanation that its peakload need is based on an increase in business activity during the spring, summer, and fall months was inconsistent with its previous application wherein it identified a peakload need as early as January. In addition, the CO questioned Employer’s contention that it experiences a significant decrease in business due to the harsh winters, since its work is done in Texas, which is relatively favorable to year-round outside work. Moreover, the CO noted it was not clear if Employer experiences a true peak in its business during its requested dates of need and if the employer experiences a lull in business during its nonpeak dates. (AF 50-51).

The CO also determined that Employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. In addition, the CO found Employer did not indicate how it determined that it needs 14 Rock Splitters during the requested period of need pursuant to 20 C.F.R. §§ 655.11(e)(3) and (4). (AF 52).

On January 22, 2018, Employer responded to the CO’s Notice of Deficiency and submitted a response letter along with copies of the January 8, 2018 Notice of Deficiency, letters of intent, and the Notice of Acceptance of its previous certified employment application. (AF 24-46).

On February 7, 2018, the CO made its final determination regarding Employer’s H-2B application. (AF 10-11). The CO denied Employer’s application due to its failure to establish that the job opportunity is temporary in nature pursuant to 20 C.F.R. §§ 655.6(a) and (b) and due to its failure to establish its temporary need for the number of workers requested pursuant to 20 C.F.R. §§ 655.11(e)(3) and (4). (AF 12-16).

Specifically, the CO found that Employer did not submit sufficient information in its application to establish its requested standard of need or period of intended employment. In response to the documents submitted by Employer in response to the Notice of Deficiency, the CO noted any reliance by Employer on previous certifications was misplaced, as each application is assessed on its own merits. In addition, the CO found the two letters of intent

---

<sup>2</sup> On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

submitted by Employer were signed and dated only after it was required to produce evidence of a temporary need and absent the requested payroll documentation (or sufficient explanation for its absence). As such, these documents were inadequate to establish a peakload need for temporary workers. Further, the CO found Employer did not provide adequate documentation to sufficiently support its claim of a peakload need for temporary workers for the dates requested. In particular, Employer did not provide summarized monthly payroll reports for a minimum of two previous calendar years, nor did it submit sufficient alternative evidence that would serve to justify the dates of need being requested. Thus, the CO concluded Employer did not overcome this deficiency. (AF 12-14).

In addition, the CO also found Employer failed to establish a temporary need for the number of workers requested. Rather, the CO found Employer did not submit sufficient documentation to support its request for fourteen rock splitters. Specifically, the CO noted Employer's failure to provide a summarized monthly payroll report or any sufficient alternative evidence that would adequately serve to justify the number of workers being requested for certification. Thus, the CO determined Employer failed to meet the regulatory requirements at 20 C.F.R. §§ 655.6(a) and (b) and 20 C.F.R. §§ 655.11(e)(3) and (4) and denied Employer's application. (AF 15-16).

On February 21, 2018, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals ("BALCA") appealing the CO's Final Determination in the above-captioned H-2B matter. (AF 1-9). On March 12, 2018, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b). Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of March 21, 2018. Thereafter, Employer timely submitted its brief. No brief was received by the undersigned on behalf of the Solicitor.

#### **APPLICABLE LAW**

The H-2B program permits employers to hire foreign workers 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 hire foreign workers through the H-2B program must apply for and receive a "labor certification" from the United States Department of Labor ("DOL" or the "Department"), Employment and Training Administration ("ETA"). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* ("ETA Form 9142") with ETA's Chicago National Processing Center ("CNPC"). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by a Certifying Officer ("CO"), who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA's review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), "[t]he scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application." 20 C.F.R. § 655.33(a), (e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

After considering all evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO's denial of temporary labor certification, or
2. Direct the CO to grant temporary labor certification, or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) ("The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification."); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

## DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: 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. § 655.6(b); 20 C.F.R. § 655.11(a)(3). Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). The regulations provide that employment "is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). That

period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

In its brief, Employer heavily relies on *ETA's Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need"* (Sep. 1, 2016) ("9/16 Guidance") in support of its position that the denial of its application should be reversed. The 9/16 Guidance provides:

To reduce paperwork and streamline the adjudication of temporary need, effectively [sic] immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B "Temporary Need Information," Field 9 "Statement of Temporary Need" of the Form ETA-9142B. . . . Other documentation or evidence demonstrating temporary need is not required to be filed with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.

Employer argues that if the CO followed the 9/16 Guidance, then its application would have been granted without the need for the submission of additional supporting documentation. As such, the CO's failure to follow the 9/16 Guidance warrants the reversal of the CO's denial of its application. I disagree.

Initially, I note the 9/16 Guidance is not a regulation, nor is it contained in the record. In addition, once the CO requested additional documentation, it was incumbent upon the Employer to produce such documentation. "The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification." 20 C.F.R. § 655.32(a) (emphasis in original); *Saigon Restaurant*, 2016-TLN-00053, \*5-6 (Jul. 8, 2016).

Indeed, Employer has not demonstrated that the CO was prohibited from requesting any additional information. Both 20 C.F.R. § 655.31(a) and the 9/16 Guidance require a CO to issue a notice of deficiency under certain circumstances and do not expressly prohibit a CO from requesting additional information. The circumstances under which a CO is required to request additional information is broad:

If the CO determines the Application for Temporary Employment Certification and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer . . . .

20 C.F.R. § 655.31(a).

If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued. . . . The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer's current need is temporary in nature. Likewise, inconsistencies between the employer's written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.

(The 9/16 Guidance).

In this matter, Employer's Application states it does not need peakload workers during the winter months since it experiences a significant decrease in business during this time. (AF 13). However, Employer's previous application indicates its peakload need can begin as early as January. This alone creates enough of an inconsistency to justify the CO's request for additional information. As such, the CO did not act irrationally in requesting additional information from the Employer. And, even if she had, that is not the determinative issue here. The determinative issue is whether the CO had a rational basis for her final determination.

Employer alleges it has a peakload need for fourteen rock splitters from April 1, 2018 through December 1, 2018. In order to establish a peakload need, Employer must establish 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). Generally, the regulations state that a temporary need lasts for less than a year, though certain circumstances can warrant extensions of time. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Federal regulations require that the *Application for Temporary Labor Certification* under the H-2B program be denied where the employer has a "need" lasting more than nine months, unless the need is based on a "one time occurrence." 20 CFR §655.6(b); also, 80 Fed. Reg. 24055-24056 (Apr. 29, 2015). For the "one time occurrence" exclusion, the 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 CFR §214.2(h)(6)(ii)(B)(1). "The use of this [one time occurrence] category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9 month limitation." 80 Fed Reg. 240056 (Apr. 29, 2015). In this case, Employer has demonstrated a recurring need for H-2B foreign workers for rock splitters in 2017. Accordingly, Employer's current application cannot be considered a "one time occurrence."

In response to the January 8, 2018 Notice of Deficiency, Employer submitted a response letter along with copies of the January 8, 2018 Notice of Deficiency, letters of intent, and the Notice of Acceptance of its previous certified employment application. (AF 24-46). However,

Employer did not submit a signed and attested summarized monthly payroll reports of two previous calendar years that identify, 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, as requested by the CO in the January 8, 2018 NOD. (AF 51-52).

Without the requested signed and attested summarized monthly payroll reports identifying the monthly number of rock splitters working as permanent employees and those working as temporary employees, as well as the number of hours worked by the rock splitters in each category, it is not possible to determine the base-line production of permanent employee rock splitters on a full-time basis, which is needed to establish if there are periods of demand that cannot be met by the Employer's rock splitters. Consequently, Employer's claim of a peakload period cannot be determined without the specifically requested employment data. Indeed, it is clear Employer failed to submit the specifically requested information as directed when it had the opportunity to make a timely submission. Consequently, when the credible evidence submitted to the CO prior to denial determination is considered as a whole, Employer has failed to meet its burden to establish that it has a peakload temporary need for cement masons and concrete finishers for the requested period of need.

In addition, I find Employer failed to meet its burden of establish that the requested fourteen rock splitters are needed during its requested period of need. As noted above, Employer did not submit a summarized monthly payroll report as instructed by the Notice of Deficiency, or any other alternative evidence or documentation that would adequately serve to justify the number of workers being requested for certification. (AF 52). Similar to the discussion above, it is not possible to determine the need for augmentation of the permanent rock splitters work force with H-2B rock splitters; if there is a period of increased need for the requested number of H-2B rock splitters based on past monthly production; or if permanent full-time U.S. workers are being displaced by H-2B rock splitters without the requested signed and attested summarized monthly payroll reports.

Therefore, for the reasons stated above, Employer has failed to meet its burden of showing how its employment need is temporary in nature based on peakload need or that the number of worker positions and period of need are justified. Therefore, I find the CO's determination is neither arbitrary nor capricious. Accordingly, the denial of Employer's H-2B certification must be affirmed.

**ORDER**

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

**ORDERED** this 16<sup>th</sup> day of April, 2018 at Covington, Louisiana.

**CLEMENT J. KENNINGTON**  
**Administrative Law Judge**