



**Issue Date: 18 May 2018**

BALCA Case Nos.: 2018-TLN-00121  
ETA Case Nos.: H-400-18001-616174

*In the Matter of:*

**TABLE ROCK STONE, LLC.,**  
*Employer.*

**DECISION AND ORDER AFFIRMING THE  
DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Table Rock Stone, LLC's (Employer) request for review of the Certifying Officer's (CO) Non-Acceptance Denial in the above captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor ("Department").<sup>3</sup> A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

**FACTUAL BACKGROUND**

Employer is located in Omaha, Nebraska, and employs workers to perform manual labor associated with residential construction with stone.<sup>5</sup> On 1 Jan 18, Employer applied for H-2B temporary labor certification, seeking approval to hire 8 foreign nationals as Helpers – Production Helpers from 1 Apr 18 to 15 Dec 18, based on a peakload need.<sup>6</sup>

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<sup>1</sup> 20 C.F.R. Part 655.

<sup>2</sup> 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).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.61(a).

<sup>5</sup> Appeal File (AF) 52.

<sup>6</sup> AF 36.

On 2 Feb 18, the CO issued a Notice of Deficiency (NOD), which outlined two deficiencies in employer's application.<sup>7</sup> Specifically, the CO determined that employer failed to: (1) establish the job opportunity as temporary in nature; and (2) establish temporary need for the number of workers requested.<sup>8</sup>

Regarding the first deficiency, the CO stated that the employer had not explained what events cause the seasonal or short-term demand that leads to its peakload need.<sup>9</sup> The CO requested that Employer submit an updated temporary need statement containing the following:<sup>10</sup>

1. A detailed explanation regarding why the nature of the employer's job opportunity reflects a temporary need; and
2. 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

1. A statement describing the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. Summarized monthly production numbers for two calendar years that clearly show the number of products being produced each month by workers in the requested occupation at the employer's worksite location; AND
3. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

Regarding the second deficiency, the CO stated that the employer had not sufficiently demonstrated that the number of workers requested is true and accurate and represents

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7 AF 30-35.

8 AF 33-34.

9 AF 33.

10 AF 33-34.

bona fide job opportunities. The employer was to submit supporting evidence that must have included, but was not limited to, the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting eight Helpers--Production Workers for Omaha, Nebraska during the dates of need requested.
3. If applicable, documentation supporting the employer's need for eight Helpers-Production Workers such as contracts, letters of intent, etc. that specify the number of workers and dates of need; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

On 12 Feb 18, Employer filed an email response to the CO's NOD11 attaching only a one-page table<sup>12</sup> of 2017 and projected 2018 sales and worker hours "based upon 2018 contracts" and including a one sentence defense of its requested peakload season: "We believe [the table] correctly identifies the source and amount of anticipated work with a projection of the work-load to justify the temporary assignment of foreign workers."<sup>13</sup>

On 10 Apr 18, the CO issued a Non-Acceptance Denial.<sup>14</sup> The CO concluded that Employer had not cured either of the noted deficiencies.<sup>15</sup> Specifically, in regards to the first deficiency,<sup>16</sup>

[t]he employer's 2017 history shows that the employer's peak period does not begin in April, as the April work hours are less than its nonpeak months of January and February. The projected 2018 figures differ greatly from the employer's actual 2017 numbers; therefore, without further explanation, the 2018 projections were not used to support the employer's requested dates of need. Based on the employer's actual 2017 sales and working hours, it appears the employer may have a peakload need; however, it does not begin in April. Therefore, the employer did not overcome the deficiency.

In regards to the second deficiency, the CO stated that Employer<sup>17</sup>

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<sup>11</sup> AF 22-29.

<sup>12</sup> AF 29.

<sup>13</sup> AF 22.

<sup>14</sup> AF 9-14.

<sup>15</sup> AF 11.

<sup>16</sup> AF 12-13.

<sup>17</sup> AF 14.

presented a list of sales and corresponding worker hours needed; however, the employer did not submit an explanation as to how its list supports the employer's need for eight temporary workers. Looking at the employer's actual 2017 data, the difference between the highest number of hours worked in its nonpeak month of February (2582) and at its highest number of hours peak month of May (2677), the difference in the work hours is less than one temporary worker. Therefore, the employer did not overcome the deficiency.

On 24 Apr 18, Employer filed a "Notice of Appeal" requesting timely administrative review of the CO's Non-Acceptance Denial.<sup>18</sup> In identifying the particular grounds for which review was sought,<sup>19</sup> Employer stated "the Honorable Office of Foreign Labor Certification determined that Table Rock Stone failed to establish that it failed to properly timely recruit. See 20 C.F.R. Secs. 655.6(a) and (b)."<sup>20</sup> This one-page document contains no legal argument and "reserves the right to fully articulate with legal authority in a brief in support of the appeal until after the Honorable Office of Foreign Labor Certification has the opportunity to deliver the administrative record to the court."

On 7 May 18, I issued a Notice of Docketing and Expedited Briefing Schedule, permitting Employer and counsel for the CO ("Solicitor") to file briefs within seven business days of receiving the appeal file.<sup>21</sup> Briefs for both Employer and Solicitor were due by close of business on 15 May 18. Neither Employer nor the Solicitor filed briefs.

## **DISCUSSION AND APPLICABLE LAW**

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.<sup>22</sup> A CO's denial of certification must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in accordance with law.<sup>23</sup> After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2)

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<sup>18</sup> 20 C.F.R. § 655.61.

<sup>19</sup> 20 C.F.R. § 655.61(a)(3).

<sup>20</sup> It should be noted that timely recruiting was not a reason the CO denied Employer's request. The cited sections, 20 C.F.R. §§ 655.6(a)-(b), are the applicable regulatory citations for Deficiency 1: Failure to establish the job opportunity as temporary in nature. Therefore, I will treat Employer's request as a request for administrative review of the CO's determination on that specific deficiency.

<sup>21</sup> 20 C.F.R. § 655.61(c).

<sup>22</sup> 20 C.F.R. § 655.61.

<sup>23</sup> See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016).

reverse or modify the CO's determination; or (3) remand the case to the CO for further action.<sup>24</sup>

Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>25</sup> The CO may only grant Employer's Application to admit H-2B workers for temporary nonagricultural employment if employer has demonstrated that: (1) insufficiently qualified U.S. Workers are available to perform the temporary services or labor for which 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.<sup>26</sup>

## DISCUSSION

The sole grounds on which administrative review was requested is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, 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.<sup>27</sup> Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."<sup>28</sup> Pursuant to Section 113 of the Consolidated Appropriations Act, 2018, "for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 C.F.R. § 214.2(h)(6)(ii)."<sup>29</sup> This regulation provides:

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. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioners need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

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<sup>24</sup> 20 C.F.R. § 655.61(e).

<sup>25</sup> 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011).

<sup>26</sup> 20 C.F.R. § 655.1(a).

<sup>27</sup> 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

<sup>28</sup> 20 C.F.R. § 655.6(a).

<sup>29</sup> *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

In this case, Employer alleges it has a peakload need for 8 Production Helpers.<sup>30</sup> In order to establish such a peakload need, 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 in that the temporary additions to staff will not become a part of the petitioner’s regular operation.”<sup>31</sup>

After reviewing the record, and not receiving any legal arguments on the topic, I concur with the CO that Employer has failed to establish that it has a temporary need for H-2B workers from 1 Apr 18 through 15 Dec 18. For the reasons stated below, I find Employer has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand as it has not shown that the seasonal or short-term demand coincides with the dates for which additional labor has been requested.

Employer failed to provide much of the information the CO requested in the Notice of Deficiency, including a detailed explanation regarding why the nature of the employer's job opportunity reflects a temporary need; 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; a statement describing the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year; summarized monthly production numbers for *two* calendar years that clearly show the number of products being produced each month by workers in the requested occupation at the employer's worksite location; and other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.<sup>32</sup>

The email response to the Notice of Deficiency and the list of 2017 and projected 2018 Sales and Worker hours fails to explain Employer’s need for temporary workers, how that need is temporary, and how the numbers support a need for 8 workers.

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<sup>30</sup> AF 15.

<sup>31</sup> 20 C.F.R. § 214.2(h)(6)(ii)(B)(3).

<sup>32</sup> AF 12.

Based on the evidence of record, I find that Employer has not carried its burden to show that it needs to supplement his permanent staff on a temporary basis due to a peakload demand. Therefore, I find that the CO's decision must be upheld, since it was neither arbitrary nor capricious nor otherwise not in accordance with law, since Employer failed to establish a temporary need for H-2B workers.

### **ORDER AND DECISION**

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**PATRICK M. ROSENOW**  
Administrative Law Judge