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BALCA Case Nos.: 2019-TLN-00056/57/58/59/60/89
ETA Case Nos.: H-400-18352-100505/18353-971649/18352-239006/
18352-343651/18352-068414/19007-330596

In the Matter of:

Cobra Stone, Inc.
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Kevin R. Lashus
Fisher Broyles, LLP
Austin, Texas
For the Employer

Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Judge Francine L. Applewhite**

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

These cases are before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Cobra Stone, Inc.'s (Employer) request for review of the Certifying Officer's (CO) Final Determinations regarding the Employer's H-2B temporary labor certifications.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (DOL).³ Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA).

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (2015 IFR) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the 2008 Rule, found at 73 Fed. Reg. 78020 (Dec. 19 2008). See 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. See 20 C.F.R. 655.4(e) (explaining transition procedures).

² See 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 U.S.C. §214.2(h)(6); 20 C.F.R. §655.6(b).

³ 8 C.F.R. §214.2(h)(6)(iii).

H-2B Applications

The Employer is a natural stone producer, manufacturer, repairer, and installer in Central Texas.⁴ In January 2019, the Employer filed the six ETA 9142B, *Application for Temporary Employment Certification* (Application), with the CO. The Employer requested certification of 60 “laborers”, 30 “laborers”, 50 “laborers”, 30 “laborers”, 50 “laborers”, 30 “laborers” respectively, from April 1, 2019 to November 1, 2019 based on peak load need. According to the Employer, the temporary peak load need is because their busiest seasons are traditionally tied to the spring, summer and fall months, from approximately February 1st to November 1st, during which time they need to substantially supplement the number of workers.

Notices of Deficiency (NOD)

H-400-18352-100505

On February 7, 2019, the CO issued a NOD. The CO listed three deficiency grounds: 1) application requirements (20 CFR §655.15(f)) - the Employer submitted two applications for the same position during the same period of need in the same area of intended employment; 2) failure to establish the job opportunity as temporary in nature (20 CFR §655.6(a) and (b)); and 3) failure to establish temporary need for the number of workers requested (20 CFR §655.11(e)(3) and (4)).

As to the first deficiency ground, the CO explained that the Employer submitted two applications for the same position during the same period of need in the same area of intended employment, specifically, case numbers H-400-19007-330096 and H-400-18352-100505. The NOD requested that the Employer either withdraw one of the applications or demonstrate that the job opportunities presented in each application are not the same, as the regulations state only one application may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. The NOD further requested that if the Employer chose to amend the number of workers in its remaining application, then the employer’s response must include an explanation and documentation to support the total number of workers resulting from the amendment. The Employer must submit:

1. An explanation with supporting documentation of why the Employer is requesting 90 Laborersfor Florence, Texas during the dates of need requested. The explanation must include supporting documentation concerning why the Employer is requesting an additional 30 workers for the same worksite;
2. If applicable, documentation supporting the Employer’s need for 90 Laborers..... Such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify for each month and separately for full-time permanent and temporary employment in the requested occupation Laborers....., the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation

⁴ Employer Appeal Brief 1

- must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the total number of workers requested, if any.

As to the second deficiency ground, the CO explained that the Employer's Application did not sufficiently demonstrate the requested standard of temporary need. Specifically, the CO noted that in order to establish a peak load need the Employer must establish that it regularly employ's permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation. The NOD requested the Employer to provide additional information including:

1. A statement describing the Employer's (a) business history, (b) activities, and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the Employer's permanent workers in this same occupation during the stated non-peak period;
3. Documentation supporting the Employer's statement that it cannot conduct its business during cold weather period between November 1st and April 1st, such as historical temperature readings and precipitation levels for its worksite in Florence, Texas;
4. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite address;
5. Summarized monthly payroll reports for 2017 and 2018 calendar years that identify each month and separately for full-time permanent and temporary employment in the requested occupation Laborers....., the total number of workers or staff employed, total hours worked, and total earnings received.....; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.⁵

As to the third deficiency ground, the CO explained that the Employer's Application did not sufficiently demonstrate that the number of workers requested is true and accurate and represents bona fide job opportunity. Specifically, the CO noted that in the current application, H-400-18352-100505, the Employer is requesting certification for 60 Laborers..... but the Employer did not indicate how it determined that it needed the 60 Laborers. The NOD requested that the Employer provide additional information including:

1. An explanation with supporting documentation of why the Employer is requesting 60 Laborers..... for Florence Texas during the dates of need requested;
2. If applicable, documentation supporting the Employer's need for 90 Laborers..... Such as contracts, letters of intent, etc. that specify the number of workers and dates of need;

⁵ AF 37-38

3. Summarized monthly payroll reports for a minimum of one previous calendar year 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. 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; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

Employer's Response to NOD

On February 14, 2019, the Employer submitted its response to the NOD. As to the first deficiency, the Employer did not withdraw one of the applications. The Employer stated that it needed 60 temporary laborers during the busy construction season, which runs from spring to November/December. In support, the Employer submitted Form 941 quarterly tax liability reports.

As to the second and third deficiency, the Employer submitted a statement of business history and activities, a statement as to the nature of the quarry laborer opportunity, letters of intent, gross invoice listings, Form 941 quarterly tax information, and 2016 and 2017 Income Tax Returns. In addition, the Employer noted that it had met its burden in previous years on the identical issue, and as such it was requesting favorable discretion without the need to fully respond regarding the peak load nature of the quarry business.

CO's Final Determination

On February 20, 2019, the CO issued a final determination denying the temporary labor certification. The CO found the response to the NOD unacceptable. Although the Employer provided some additional information and documentation with its response, the CO found that the Employer did not provide the specific information or documentation requested. For example, the CO requested an explanation and supporting documentation as to why the Employer requested 90 laborers, this was not provided. In addition, while the Employer submitted quarterly tax information, the information represents the Employer entire operations and is not exclusive to the requested occupation of Laborer... The CO also noted that the letters of intent stated that the peak months that services are performed by the Employer are from April 1, 2019 to November 1, which correlate to the Employer's request for temporary workers but offer no support for the Employer's need for temporary workers. Therefore, the CO issued a denial of the application because the Employer did not provide sufficient documentation to overcome the deficiency.

H-400-18353-971649; H-400-18352-239006; H-400-18352-343651; H-400-18352-068414; and H-400-19007-330596

The CO issued a NOD in each individual case. The CO listed two deficiency grounds: 1) failure to establish the job opportunity as temporary in nature (20 CFR §655.6(a) and (b); and 2)

failure to establish temporary need for the number of workers requested (20 CFR §655.11(e)(3) and (4).

As to the first deficiency ground, the CO explained that the Employer's Application did not sufficiently demonstrate the requested standard of temporary need. Specifically, the CO noted that in order to establish a peak load need the Employer must establish that it regularly employ's permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation. The NODs' requested the Employer to provide additional information including:

1. A statement describing the Employer's (a) business history, (b) activities, and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the Employer's permanent workers in this same occupation during the stated non-peak period;
3. Documentation supporting the Employer's statement that it cannot conduct its business during cold weather period between November 1st and April 1st, such as historical temperature readings and precipitation levels for its worksite, and how this weather impacts the occupation requested;
4. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite address;
5. Summarized monthly payroll reports for 2017 and 2018 calendar years that identify each month and separately for full-time permanent and temporary employment in the requested occupation Laborers., the total number of workers or staff employed, total hours worked, and total earnings received.; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. [*The CO noted that in the event that the Employer did not have the specific information and documents itemized, the Employer was not exempt from providing evidence in response to the NOD. The Employer may submit any other evidence of its current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.*]

As to the second deficiency ground, the CO explained that the Employer's Application did not sufficiently demonstrate that the number of workers requested is true and accurate and represents bona fide job opportunities. Specifically, the CO noted that the Employer did not indicate how it determined that it needed the requested number of Laborers during the requested period of need. The NODs' requested that the Employer provide additional information including:

1. An explanation with supporting documentation of why the Employer is requesting (*the specific number of*) Laborers for (*the individual county in Texas*) during the dates of need requested;
2. If applicable, documentation supporting the Employer's need for the Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;

3. Summarized monthly payroll reports for a minimum 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. 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; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

Employer's Response to NOD

The Employer submitted its response to each individual NOD. As to the first deficiency, the Employer stated that many of its major customers are retail sellers, landscaping companies, and residential home builders who are peak load, March through November, businesses. As a result, the Employer's peak load months follow closely the peak load needs of such businesses. In support, the Employer submitted letters of intent, gross invoice listings, Form 941 quarterly tax information, and 2016 and 2017 Income Tax Returns.

As to the second deficiency, the Employer submitted a statement of business history and activities, a statement as to the nature of the quarry laborer opportunity, letters of intent, gross invoice listings, Form 941 quarterly tax information, and 2016 and 2017 Income Tax Returns. In addition, the Employer noted that it had met its burden in previous years on the identical issue, and as such it was requesting favorable discretion without the need to fully respond regarding the peak load nature of their business.

CO's Final Determination

The CO issued a final determination, in each case, denying the temporary labor certification. The CO found the response to the NOD unacceptable. Although the Employer provided some additional information and documentation with its response, the CO found that the Employer did not provide the specific information or documentation requested. For example, the Employer submitted quarterly tax information, the information represents the Employer entire operations and is not exclusive to the requested position. The CO also noted that the letters of intent stated that the peak months that services are performed by the Employer are from April 1, 2019 to November 1, which correlate to the Employer's request for temporary workers but offer no support for a need for the Employer's services during a certain and limited timeframe need for temporary workers. Therefore, the CO issued a denial of the application because the Employer did not provide sufficient documentation to overcome the deficiency.

Procedural History

On February 27, 2019, the Employer filed a Notice of Appeal appealing the CO's final determinations in case numbers H-400-18352-100505; H-400-18353-971649; H-400-18352-239006; H-400-18352-343651; and H-400-18352-068414. The Appeal Files were received on or about March 7, 2019. On March 11, 2019, I issued Notices of Docketing and Orders Establishing Briefing Schedule.

On March 20, 2019, the Employer filed a Notice of Appeal appealing the CO's final determination of case number H-400-19007-330596. In addition, the Employer filed a Motion to Consolidate Case Numbers H-400-18352-100505; H-400-18353-971649; H-400-18352-239006; H-400-18352-343651; H-400-18352-068414; and H-400-19007-330596. On March 21, 2019, I granted the Employer's motion, and extended the briefing schedule. The CO has not filed a brief. The Employer filed an Appeal Brief on April 9, 2019.

In its brief, the Employer argued that the CO failed to follow recent departmental guidance regarding the processing of renewal applications like its own. The Employer further argued that the CO applied the wrong standard in her analysis of the Employer's temporary need: rather than applying the standard for a "peakload" need, the CO applied "seasonal" need analysis.⁶

The Employer stated that "[t]he clearest basis for reversing the denial of Cobra Stone's application is that the decision is at variance with the Department of Labor's 2016 guidance regarding subsequent determinations of an employer's previously certified temporary need and the evidence necessary to support such a subsequent determination." Employer's Brief at 3. The Employer discusses the developments that led to the Department of Labor issuance of the 2016 guidance, including the 2012 Interim Rule (the "2012 Rule") as well as a 2015 Interim Rule (the "2015 Rule") on the evidence necessary to substantiate an employer's temporary need.⁷

The Employer equates certain language in these rules as a "reduced burden to prove (and correspondingly lessen [the] degree of regulatory scrutiny of) temporary need for employers that have previously demonstrated such need's existence in their businesses:"⁸ Under the 2012 Rule, for the first time, employers would file a multi-year registration of temporary need; if approved, "the registration would be valid for a period of up to 3 years, absent a significant change in conditions." 77 Fed. Reg. at 10,058. In particular, like the 2012 Rule, the 2015 Interim Rule "adopts an employer registration process that requires employers to demonstrate their temporary need for labor or services before they apply for a temporary labor certification," which, upon approval, "remain[s] valid for up to three years, thereby shortening the employer's certification process in future years." 80 Fed. Reg. 24,042 (Apr. 29, 2015).

Applicable Law

BALCA's standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering

⁶ Employer's Brief at 1

⁷ The "2012 Rule" refers to *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 77 Fed. Reg. 10,038 (Feb. 21, 2012), an interim final rule that was ultimately struck down. The "2015 Rule" was an interim final rule that was jointly published by the Department of Labor and the Department of Homeland Security on April 29, 2015. *See supra*, at fn. 2.

⁸ Employer's Brief at 5-6.

the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(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).

The Employer is required to establish that its need for the workers requested is "temporary." Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

- (A) Definition. Temporary services or labor under the H-2B classifications refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
- (B) Nature of petitioner's need. 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 petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. An employer establishes a "peakload need" if it shows it "regularly employs permanent workers to perform the services 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).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other

than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Discussion

An employer's failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.⁹

In each NOD, the CO clearly identified information and evidence that would provide a reasonable basis upon which to analyze the application. According to the CO, the Employer did not provide information and documentation sufficient to overcome its noted deficiencies. Specifically, the Employer did not provide summarized monthly payroll reports for 2017 and 2018; did not include a summary listing of all projects in the area of intended employment for the previous two calendar years. Although, the Employer provided its 2016 and 2017 Income Tax Returns, the returns represented the annual operations of the Employer, and is not exclusive to the requested position. Additionally, the letters of intent stated that the peak months that services are performed by the Employer are from April 1, 2019 to November 1, which correlate to the Employer's request for temporary workers, but offer no support for a need for the Employer's services during a certain and limited timeframe need for temporary workers.

The Employer has not met its burden of showing that it is entitled to temporary labor certifications for the requested laborers. The Employer was provided with a NOD and in response, the Employer submitted additional evidence. However, the CO determined that the responsive evidence did not cure the deficiencies. After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer did not provide sufficient information and documentation to overcome its deficiencies. Accordingly, for the foregoing reasons, I find that the Denials issued by the CO were proper. Therefore, the denials are **AFFIRMED**.

ORDER

Wherefore, the Denials of Temporary Labor Certification issued by the Certifying Officer in this consolidated matter are **AFFIRMED**.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge

⁹ 20 C.F.R. §655.32(a).