



Issue Date: 17 May 2019

BALCA CASE NOS.: 2019-TLN-00124
2019-TLN-00125
2019-TLN-00126
2019-TLN-00127
2019-TLN-00128
2019-TLN-00129
2019-TLN-00130
2019-TLN-00131
2019-TLN-00132

ETA CASE NOS.: H-400-19023-033866
H-400-19014-592465
H-400-19023-939992
H-400-19023-888354
H-400-19023-226572
H-400-19023-070966
H-400-19023-368959
H-400-19023-793356
H-400-19023-643448

In the Matter of:

AMERICAN SINOPAN, LLC,
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION;
ORDER CONSOLIDATING CASES

This appeal is before the Board of Alien Labor Certification Appeals on nine applications that American Sinopan, LLC filed under the H-2B nonimmigrant alien worker program.¹ As the nine appeals involve common questions of law and fact, I consolidate them for decision. *See* 29 C.F.R. § 18.43(a)(2).

After a review of the applications, a certifying officer (CO) at the Department of Labor's Employment and Training Administration notified Employer of deficiencies in each of the applications. American Sinopan filed supplemental information, but the certifying officer found the supplements insufficient and denied the applications. American Sinopan timely requested

¹ *See* Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

BALCA review. Given the similarity of the parties and issues, I consolidate the nine cases for all purposes.

BALCA review of denials of H-2B applications is limited to “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e).² American Sinopan submitted a brief; the Administrator did not. I will affirm the certifying officer’s denial of the labor certification applications.

Findings of Fact

American Sinopan was incorporated in the Commonwealth of the Northern Mariana Islands (CNMI) in October 2016. AF 124 at 11, 80.³ It is a subsidiary company of First Sinopan International, LTD, which is registered in Hong Kong. AF 124 at 91. American Sinopan’s “sole business” is to develop and operate a hotel resort called Saipan Garden Resort. AF 124 at 11, 80. The Saipan Garden Resort will consist of:

Ten (10) 6-story Hotel buildings with a total of 1,184 rooms, two (2) 6-story Service Apartment buildings with a total of 180 rooms, two (2) 6-story Staff Housing buildings with a total of 170 rooms, two (2) single story Restaurants, two (2) single story Hotel Dining Rooms, one (1) single story Banquet Hall, one (1) single story Cafeteria, three (3) Swimming Pools, one (1) single story Administration Building, a Generator Room, and landscaping features, as well as the improvement of surrounding infrastructure.

AF 124 at 80.

As to development of the hotel property, American Sinopan states it will contract with Jiangsu Province Construction Engineering Group to “plan and coordinate” the construction. AF 124 at 85. Jiangsu is one the largest construction companies in China, employing over 10,000 management level personnel for engineering and economic projects. *Id.* Jiangsu’s past projects include the construction of a hotel in Guam. *Id.* American Sinopan states that Jiangsu “is actively engaged in several options to secure” 600 construction workers. *Id.*

As to operation of the hotels once built, American Sinopan states that it expects “[t]wo world-renowned and distinguished Hotel brands [Hilton Double Tree and Hilton Gardens] . . . to manage and operate the Hotel facilities” AF 124 at 84, 93.

² The request for review may contain only legal arguments and evidence that was submitted to the certifying officer prior to issuance of the final determination; no new evidence is permitted. *See* 20 C.F.R. § 655.61(a)(5).

³ “AF 124” refers to the Appeal File for BALCA No. 2019-TLN-00124. “AF 125” refers to the Appeal File for BALCA No. 2019-TLN-00125. “AF 126” refers to the Appeal File for BALCA No. 2019-TLN-00126. “AF 127” refers to the Appeal File for BALCA No. 2019-TLN-00127. “AF 128” refers to the Appeal File for BALCA No. 2019-TLN-00128. “AF 129” refers to the Appeal File for BALCA No. 2019-TLN-00129. “AF 130” refers to the Appeal File for BALCA No. 2019-TLN-00130. “AF 131” refers to the Appeal File for BALCA No. 2019-TLN-00131. “AF 132” refers to the Appeal File for BALCA No. 2019-TLN-00132.

Each Appeal File is nearly identical to the others. I note any differences among them in the findings of fact below.

The H-2B applications are based on an asserted temporary one-time occurrence.⁴ The workers fall into nine categories: 110 carpenters, 90 masons, 80 painters, 30 construction supervisors, 30 construction equipment operators, 60 plumbers, 100 electricians, 65 structural iron and steel workers, and 55 reinforcing iron and rebar workers. The workers would be employed from April 15, 2019 to April 14, 2020.⁵ They would all work on the hotel project in Saipan.⁶

To demonstrate a one-time occurrence American Sinopan states:

The Employer does not currently, and has not in the past, employed construction workers of the type for which H2B visas are being sought The Employer is not a construction contractor and does not solicit construction contracts of any form as part of its business. Once the Project is complete and certified for occupation, there will be no further need for H2-B workers.

AF 124 at 81. It states that “CNMI suffers from a chronic labor shortage” that “is especially acute in the construction industry.” AF 124 at 82. It further states that with changes to the CW-1 visa program, “there is no source of labor available to complete the Project *other* than H-2B workers.” AF 124 at 12, 81-82.

Notices of Deficiency. The certifying officer issued a Notice of Deficiency in each case on March 7 or 8, 2019.⁷ Each Notice identified three to six deficiencies. In each case, it is undisputed that American Sinopan cured all of these deficiencies except one. That one was a failure to establish that the need is temporary (Deficiency No. 1). AF 124 at 56. As to this deficiency, the certifying officer stated in the Notice of Deficiency that:

The employer’s statement of temporary need indicates that it does not and has not in the past, employed H2B workers before, however the employer has previously applied for H2B workers for this same type of work. The employer also stated that it has employed these type of workers in the past under a different visa classification. Additionally, the employer indicates that its need is due to a chronic labor shortage, which does not justify a temporary need.

Id. The certifying officer required American Sinopan to submit certain additional information going to temporary need.⁸ *Id.* at 56-57.

⁴ AF 124 at 81; AF 125 at 81; AF 126 at 76; AF 127 at 78; AF 128 at 75; AF 129 at 89; AF 130 at 89; AF 131 at 88; AF 132 at 89.

⁵ AF 124 at 18, 70; AF 125 at 18, 70; AF 126 at 18, 65; AF 127 at 18, 67; AF 128 at 18, 64; AF 129 at 18, 73; AF 130 at 18, 73; AF 131 at 18, 72; AF 132 at 18, 73.

⁶ AF 124 at 73; AF 125 at 73; AF 126 at 68; AF 127 at 70; AF 128 at 67; AF 129 at 76; AF 130 at 76; AF 131 at 75; AF 132 at 76.

⁷ AF 124 at 52; AF 125 at 50; AF 126 at 47; AF 127 at 48; AF 128 at 47; AF 129 at 51; AF 130 at 51; AF 131 at 52; AF 132 at 51.

⁸ The certifying officer required in particular:

1. A statement describing the employer's business history and activities (i.e. primary products or services);

Employer's responses to the Notices of Deficiency. American Sinopan responded to the Notices of Deficiency with a cover letter, a letter from its CEO, a "Construction Labor Estimation," an amended job order, and a "foreign recruitment agreement and disclosure." AF 124 at 25. The first three items are relevant to the issue of temporary need.

In the cover letter, American Sinopan stated:

The Employer has applied in the past for labor certification for employees in the job category of carpenter (for the same construction project), but certification was denied, and no such employees were ever hired by the Employer. Furthermore, the Employer has not ever employed any individuals under any visa category for the job category
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American Sinopan's CEO Ken Tze-Sen Lin confirmed the statement quoted above. He denied that his company had employed workers in the past under a different visa classification, stating: "The Employer has never employed any person or persons as a construction equipment operator, let alone any person or persons under a different visa category than H2B." AF 124 at 28. In his view, the certifying officer's misunderstanding resulted "from incorrect information provided by the Employer's former counsel on the previous application for H2B workers mentioned above." AF 124 at 28. He stated that he was attaching documentation for "all employees of the Employer," stating that "none of these persons is employed under the job classification of this application." *Id.* But no such documentation was attached. Finally, he added:

That while work on the project . . . has commenced, it has not (to date) utilized any employees of the Employer under the specific job classification of this application. The only work done so far is general clearing of the work site and preparation for foundational and structural construction. No foundation or structural construction has

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2. Schedule of operations throughout the year and how its one-time need is an exception to those operations;
 3. A summary listing of all projects in the area of intended employment for its previous calendar year. The list must include start and end dates of each project and worksite addresses;
 4. Contracts for all the identified projects in the employer's summary that indicate the worksite/project. The contracts must also include a description of the work to be performed by include signatures of all appropriate parties;
 5. Explanation as to how a single contract (or contracts) represents a one-time need when the employer is in the business of securing contracts for services on an ongoing basis; and
 6. 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.

⁹ AF 124 at 25; AF 125 at 25; AF 126 at 23; AF 127 at 23; AF 128 at 23; AF 129 at 23; AF 130 at 23; AF 131 at 23; AF 132 at 23.

taken place. Progress on the Project has come to a near-complete halt due to the lack of qualified construction workers.

AF 124 at 28-29.

In the Construction Labor Estimation, a consulting engineer stated that American Sinopan “was not able to employ the construction workers in the position being sought in this H2B application.” AF 124 at 30. I give little weight to this statement because the engineer offered no explanation for it. He projected employing at least 800 field workers for two years to complete the construction of the project. AF 124 at 31.¹⁰

Denial of applications. The certifying officer denied the applications. AF 124 at 15, 18. She concluded that American Sinopan had not shown that the jobs were temporary. AF 124 at 21. She found that American Sinopan appears to be “in the business of soliciting, securing, and executing contracts in the construction industry Based on this business model, it is unclear how the project . . . is unique to its operations and how the employer can attest that it will not require temporary” workers in the future. *Id.* The certifying officer provided a detailed explanation of her findings and conclusions.¹¹

Discussion

Standard of review. The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer’s determination. When the certifying officer’s determination turns on the Employment and Training Administration’s long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. *Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (describing deference courts give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer’s determination unless it is arbitrary, capricious, or inconsistent with the ETA’s established policy interpretation. Absent ETA’s long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer’s denial *de novo*. On the present record, I need not determine the deference owed the certifying officer, for I would affirm her denial of the applications on the less deferential, *de novo* review.

H-2B program requirements. An employer seeking certification under the H-2B program must “establish that its need for non-agricultural services or labor is temporary, regardless of whether

¹⁰ The engineer enclosed a “Construction Schedule Graph,” “Construction Labor Planner,” and “Construction Manpower Calculations.” *See* AF 124 at 31-38. The Construction Schedule Graph outlines three phases of construction from April 2019 to April 2021. AF 124 at 34. It indicates that site work, such as excavation and foundation, began on July 2018. *Id.* The Construction Labor Planner estimates the number of workers – divided by category – from February 5, 2019 to May 22, 2021, with the highest number of workers needed in April-June 2020. AF 124 at 36. The Construction Manpower Calculations indicates the number of working days required for each category of worker. AF 124 at 38. It shows that the Saipan Garden Resort project requires the following H2-B workers: 110 carpenters, 87 masons, 79 painters, 30 construction supervisors, 30 equipment operators, 57 plumbers, 109 electricians, 65 structural iron steel workers, and 55 reinforce iron/rebar workers. *Id.* The project also requires local workers: 180 construction helpers. *Id.*

¹¹ The certifying officer expressly rejected American Sinopan’s reliance on a local labor shortage. She stated that a “labor shortage no matter how severe does not constitute a temporary need.” AF 124 at 21.

the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer’s need is temporary if it is: “a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.” 20 C.F.R. § 655.6(b). The employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity. *Id.* § 655.11(e)(3)-(4). American Sinopan asserts that its need is a one-time occurrence.

To establish a one-time occurrence, an employer must show that

[1] 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 [2] 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)(1). “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.” *Id.* § 214.2(h)(6)(ii)(B).¹²

I accept that American Sinopan has not directly employed workers in the past to perform the services it describes in its applications. But American Sinopan has failed to produce persuasive evidence that affiliated companies managed together with it have not done so, and it especially has not demonstrated that it will not need workers in the future to do the same services for which it is requesting workers.

The central difficulty is that American Sinopan has not described itself adequately to make sense of its “business model,” to use the certifying officer’s language. Very few corporations are formed for a short-term, temporary purpose; most people forming corporations intend that the corporation will be financially successful and continue its operations over the long-term. American Sinopan is a relatively new corporation, formed in 2016. It states that it has not hired employees to build hotels before, and I accept that.

It also asserts that it will not build any more hotels after these two. It states that it plans to operate the hotels, but it admits elsewhere in its submissions that Hilton will manage and operate the hotels. If American Sinopan’s current business is to build and operate the two hotels, but it will not in the foreseeable future build any other similar projects and will not actually manage or operate either of the hotels it is building, what exactly is American Sinopan’s business model?

American Sinopan is a subsidiary of Hong Kong-based First Sinopan International Ltd. The record provides few details regarding this parent company. If one of the parent corporation’s activities is to incorporate businesses in various locales for the purpose of building and operating hotels domestically, these subsidiaries might be lawfully formed, distinct entities. But the overall business is engaged in an ongoing, permanent construction business. I reject that the intent of the H-2B program is to allow the employment of nonimmigrant aliens on a basis of a

¹² “Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional recruitment requirements with respect to the continuing validity of the labor market test or offered wage obligation.” 20 C.F.R. § 655.15(g).

temporary need that arises only because a parent company incorporates a different subsidiary to build each new building. That is not a genuine temporary need.

If American Sinopan had explained its business model such that I could appreciate what its future plans and needs likely will be, I would not be concerned that its status as a subsidiary—for purposes of an H-2B application—is a sham to convert an ongoing, permanent need for workers into a temporary need. But American Sinopan seems to be suggesting that, since Hilton will operate the hotels, American Sinopan plans to end all operations once the hotels are built; the corporation plans no future activity after that. Without some explanation for the formation of such a corporation, I must infer that American Sinopan, more likely than not, is part of some larger operation of the parent corporation.¹³

Second, American Sinopan has not sufficiently shown that it will actually employ the requested workers. American Sinopan states that Jiangsu will “plan and coordinate” the construction. It does not define what “coordinate” means. Jiangsu is a very large business. It has experience building at least a hotel in Guam. Does “coordinate” include hiring and managing the construction workers? Or does American Sinopan intend to hire and manage the workers directly? American Sinopan admits Jiangsu “is actively engaged in several options to secure” 600 construction workers for this project. AF 124 at 85. It is possible that this means American Sinopan has engaged Jiangsu to search for workers from whom American Sinopan will select people to hire, pay, and manage; it could also mean that Jiangsu will be the employer and will manage the construction workers. American Sinopan again has not established a sufficient record to support the application; too much is left unaddressed.¹⁴

The certifying officer inferred from American Sinopan’s applications that the company was in the business of soliciting, securing, and executing contracts in the construction industry. In my view, that goes too far. Rather, I simply cannot understand what business American Sinopan is in unless it is something along the lines that I suggested as a possibility above—one of a number of subsidiaries, each formed to do a limited construction project as a domestic corporation in locations outside China. Without being able to understand what business American Sinopan is

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¹³ I do not mean to suggest that there is anything unlawful about incorporating a new subsidiary for every construction project. My point is that an applicant for H-2B workers cannot establish that its need is one-time when its real overall business entails numerous ongoing and newly arising constructions projects.

¹⁴ Documentation of American Sinopan’s current employees might have helped clarify what business American Sinopan is in and what its employees do. But, despite its CEO’s statement that he was providing this kind of documentation for all American Sinopan employees, he did not provide it.

in, I cannot find that it would have only a one-time need for the H-2B workers it is seeking.

Accordingly, American Saipan has not met its burden to show that it is entitled to a temporary labor certification based on a one-time occurrence.¹⁵

Order

The certifying officer's denial of Employer's nine applications is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge

¹⁵ American Sinopan argues that it was not afforded fair notice to respond to certain of the deficiencies the certifying officer found. I need not reach this issue, because I affirm the certifying officer's denial for a deficiency about which the certifying officer did provide notice.