

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: 22 April 2019

BALCA Case No.: 2019-TLN-00062
ETA Case No.: H-400-18320-947096

In the Matter of:
BLUE STONE MOUNTAIN, INC (NM),
Employer.

Before: **THEODORE W. ANNOS**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary nonagricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated implementing regulations promulgated by the Department of Labor (“DOL”) at 20 C.F.R. Part 655, Subpart A. Commonly referred to as the H-2B Nonimmigrant Visa Program, the H-2B visa classification applies to an individual coming to the United States as a temporary worker in a non-agricultural job with no plans to stay permanently. An employer who wants an H-2B visa must first obtain a "temporary labor certification" from the DOL.

Blue Stone Mountain, Inc (NM) (“Employer”) submitted an *Application for Temporary Employment Certification* (“Application”). The Certifying Officer (“CO”) of the DOL’s Employment and Training Administration denied the Application, and Employer subsequently submitted a timely request for administrative review to the Board of Alien Labor Certification Appeals (“BALCA”). For the reasons that follow, I affirm the CO’s denial of Employer’s Application.

BACKGROUND

Employer owns and operates rock quarries. It produces flagstone slabs that are used in commercial and residential landscapes, patios, planters, and other hardscape designs.¹ On January 7, 2019, Employer submitted the Application to hire 20 nonimmigrant workers as Rock Splitters for the period April 1, 2019 to December 15, 2019.² Specifically, Employer made the following assertion:

The [Employer's] need for 20 non-immigrant temporary workers is based on an insufficient number of U.S. employees that are qualified, and available to work. The local labor force is unable to sustain existing contractual obligations that the businesses agreed to for the upcoming season and the labor afforded by the non-immigrant temporary workers will allow the [Employer] to expand the business that could lead to additional U.S. management personnel and realize potential future commitments. The employment of non-immigrant, temporary workers will not adversely affect the wages and working conditions of similarly employee US workers.

[Employer] has a need for nonimmigrant temporary labor during the months of April through November. [Employer's] need for nonimmigrant temporary labor will decline during the months of December through March. Due to weather patterns of New Mexico, [Employer] is limited to the months of April through November to complete the type of work that is scheduled as it would be impractical to perform the duties in months of inclement weather or the growing season is dormant.³

In support of the Application, Employer included payroll summaries and reports,⁴ income statements,⁵ an employee report,⁶ a contract report,⁷ and customer invoices.⁸

¹ Appeal File ("AF") at 42.

² AF at 29-104.

³ AF at 29, 35.

⁴ AF at 43-45.

⁵ AF at 46-48.

⁶ AF at 49-50.

⁷ AF at 51-53.

The Application also contained letters from four customers. Each customer indicated that they would be using Employer as a material supplier in 2019.⁹

On February 13, 2019, the CO issued a Notice of Deficiency (“NOD”) to Employer, identifying deficiencies in the Application. One of those deficiencies was Employer’s failure to establish temporary need for the number of workers requested under 20 C.F.R. § 655.11(e)(3)-(4)¹⁰ The CO directed Employer to provide the following information:

1. An explanation with supporting documentation of why the employer is requesting 20 Rock Splitters, Quarry for Garita, New Mexico, during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 20 Rock Splitters, Quarry such as contracts, letters of intent, etc. that specify the number of workers and dates of need; and
3. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.¹¹

Employer filed a response on February 16, 2019.¹² The only additional documentation submitted were two pictures of a rock quarry. Employer also submitted a statement in an attempt to justify its need for 20 Rock Splitters:

[Employer] owns and operates rock quarries, one located in Colorado, and a new quarry located in Garita, New Mexico. Payroll reports submitted for this application are for the Colorado operation. Because the New Mexico quarry is new, no payroll reports are available for this operation.

[Employer] requires 20 Rock Splitters to meet projected orders for 2019.

Owner determines, based on years of experience bidding and working in the quarry that at least 20 Rock Splitters will be needed to support full-time

⁸ AF at 54-81.

⁹ AF at 82-85.

¹⁰ AF at 23-28. In light of my disposition of this matter, it is unnecessary to discuss other deficiencies noted by the CO or any remedial measures undertaken by Employer.

¹¹ AF at 27.

¹² AF at 17-21.

employees to fill letters of intent for stone, based on past years tonnage in their Colorado quarry and projected tonnage requirements in 2019 for the Garita, New Mexico quarry.¹³

On February 20, 2019, the CO determined that Employer had not overcome the identified deficiency.¹⁴ Specifically, the CO stated that Employer did not provide further documentation for the projected 2019 orders, and did not provide further explanation how it came to that number of workers necessary for its projected orders.¹⁵

On March 4, 2019, Employer appealed the CO's decision to BALCA.¹⁶ In its appeal, Employer states, in relevant part:

[W]e are banking that these 20 Rock Splitters/Quarry employees will produce enough raw stone material to keep up with our high demand[.]

The contract report that was submitted with the original application shows beginning and end dates for stone requests from 2017, 2018. ... The contract report submitted for this application is for the Colorado operation, because the New Mexico quarry is new, no contract report is available for this operation.

Letters of intent from several stone buyers that project stone purchases in 2019 do not reflect start/end dates, however based on the Colorado quarry operations, the contracts report is able to show start/end dates of quarry activity per buyer, the New Mexico operation will complete similar contracts.

Payroll reports submitted for this application are for the Colorado operation. Because the New Mexico quarry is new, no payroll reports are available for this operation.

[Employer] requires 20 Rock Splitters/Quarry to meet projected orders for 2019. Our largest vendor, Tribble Stone has placed large amount of stone orders – each order is about 20 tons of material or one semi-truckload of

¹³ AF at 20.

¹⁴ AF at 10-16.

¹⁵ AF at 16.

¹⁶ AF at 1-2.

stone. ... Tribble Stone will be purchasing about 300 tons of material each month. ... In order for us to process this raw material we must be able to have 20 H-2B visas to fill this request. Each Rock Splitter/Quarry must be able to produce about 15 tons a month to reach this Quota.¹⁷

On March 5, 2019, I notified the parties that the case had been docketed, and instructed the CO to transmit the appeal to BALCA, Employer, and the Associate Solicitor for Employment and Training Legal Services (“Solicitor”).¹⁸ I also permitted Employer and Solicitor to submit briefs within seven business days of receipt of the appeal file.¹⁹ On March 13, 2019, the Appeal File was submitted to BALCA. As of the date of this decision, no additional briefs have been filed.

DISCUSSION

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, any legal briefs submitted by the parties, and Employer’s request for administrative review (which, itself, may only contain legal arguments and evidence actually submitted before the CO).²⁰ The standard of review is de novo. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.²¹

An employer bears the burden of demonstrating “that its need for nonagricultural services or labor is temporary[.]”²² To meet that burden, an employer, *inter alia*, “must establish” that the requested number of worker positions is justified.²³ Here, Employer has failed to establish a justified need for the number of worker positions requested.

¹⁷ *Id.*

¹⁸ See 20 C.F.R. § 655.61(b).

¹⁹ See 20 C.F.R. § 655.61(c).

²⁰ 20 C.F.R. § 655.61(a) and (e).

²¹ The proper standard of review is not identified in statute or regulation. I find persuasive the rationale articulated in *Best Solutions USA, LLC*, 2018-TLN-00117, slip op. at 3 (May 22, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate for administrative review under Part 655. See also *ATP Restaurants Inc. d/b/a Cobblestones of Lowell*, 2019-TLN-00018, slip op. at 5 (Dec. 20, 2018) (applying the de novo standard).

²² 20 C.F.R. § 655.6(a). See also *D and R Supply*, 2013-TLN-00029, slip op. at 6 (Feb. 22, 2013) (citing 8 U.S.C. § 1361).

²³ *Roadrunner Drywall Corp.*, 2017-TLN-00035, slip op. at 8 (May 4, 2017). See also *North Country Wreaths*, 2012-TLN-00043, slip op. at 6 (Aug. 9, 2012).

As previously stated, Employer argues that it requires 20 Rock Splitters at the New Mexico quarry to meet 2019 projected orders and fill letters of intent. However, there is nothing in the record indicating that 2019 will be any different from 2018 in terms of orders. That is, although the New Mexico quarry is new, there is no documentation in the record indicating that there will be an increase in 2019 orders that would justify an additional 20 workers. Indeed, there are no 2019 projections in the record, and the letters of intent are silent as to the anticipated quantity of materials the customers will require in 2019. On appeal, Employer attempts to rectify this deficiency by asserting that its largest vendor will be purchasing approximately 300 tons of material per month, which would require each of the 20 Rock Splitters to produce about 15 tons per month. However, there is no documentation to support Employer's assertion and, even if there was, I would not be able to consider it on appeal since it was not presented to the CO.²⁴ Therefore, I find that the number of temporary worker positions Employer requested is not justified.

CONCLUSION

For the reasons stated above, the CO's denial of Employer's Application was legally and factually sufficient in light of the written record provided.

ORDER

It is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**.

SO ORDERED.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge

²⁴ 20 C.F.R. § 655.61(a) and (e)