



Issue Date: 02 April 2019

BALCA CASE NO.: 2019-TLN-00087

ETA CASE NO.: H-400-18361-894794

In the Matter of:

CORESLAB STRUCTURES (TEXAS) INC.,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification program for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.¹ The Certifying Officer in the Office of Foreign Labor Certification denied the application of Coreslab Structure (Texas) Inc. (“Coreslab”) seeking temporary labor certification for forty workers under the H-2B non-agricultural program. Coreslab appealed the decision of the Certifying Officer denying its application. The matter is now properly before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to Section 655.61(a) for review of the Certifying Officer’s denial.² Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer.

I. Procedural and Factual Background

Coreslab is a concrete company performing work in Texas. (Appeal File (“AF”), at 27, 474.) Coreslab submitted an H-2B Application for Temporary Employment Certification with the United States Department of Labor seeking certification for forty full time laborers to create concrete slabs. (AF at 465-625.)³ The application states that the laborers are needed on a temporary basis starting April 1, 2019, and ending November 30, 2019, because of peakload demands. (*Id.*) Coreslab would employ the laborers in Cedar Park, Texas. (*Id.* at 468.)

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

² The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d). Here, the Chief ALJ designated a single member of the Board to hear this appeal.

³ For purposes of clarity, the undersigned has omitted the “P” prefix on each page number of the Appeal File.

In support of its application, Coreslab contends that the temporary workers are necessary because its busiest time of year is between April 1st and November 30th, and it needs to supplement its workforce during this busy period. (*Id.* at 474.) Coreslab contends that the “harsh winter weather conditions” in Texas results in a significant slowdown in business December through March every year. (*Id.*)

Coreslab submitted summaries of its payroll records for 2016-2017 and a partial summary for 2018 in support of its application. (*Id.* at 480-81.) In 2016, Coreslab had between thirty-two to thirty-seven permanent laborers in January through November but only sixteen in December. (*Id.* at 480.) Coreslab had zero temporary workers December through February and between twenty and ninety-five in March through November. (*Id.*) Coreslab employed the most temporary laborers in April with ninety-five workers. (*Id.*) March, September, and October demonstrated the second highest numbers with fifty. (*Id.*) Coreslab’s quarterly federal tax returns, however, reflect a decrease in wages, tips, and other compensation from \$4,643,404.44 in the first quarter (January, February, and March) to \$2,810,866.22 in the second quarter (April, May, June), \$3,729,535.74 in the third quarter (July, August, September), and \$3,836,148.08 in the fourth quarter (October, November, December). (*Id.* 518-27)

Coreslab employed a similar number of permanent laborers in 2017, although the total for December increased to forty-one. (*Id.*) Coreslab employed zero temporary laborers in January, February, and December and between thirty-two and seventy one in the remaining months. (*Id.*) The records for 2018 are incomplete, but reflect similar numbers to 2017 and 2016 as to the use of temporary laborers beginning in March and running through November. (*Id.* at 480-81.) Coreslab’s quarterly federal tax returns, however, reflect a decrease in wages, tips, and other compensation from \$5,380,648.14 in the first quarter (January, February, and March) to \$3,786,202.90 in the second quarter (April, May, June), \$3,325,686.44 in the third quarter (July, August, September), and \$3,571,766.18 in the fourth quarter (October, November, December). (*Id.* at 506-15.)

The application also contained a number of proposals for work, purchase orders, and similar agreements for concrete work. (*Id.* at 485-505.) Some of this work started on January 15, 2019, and was to be completed by February 15, 2019. (*Id.* at 501.) The record reflects that Coreslab’s sales are consistent throughout the year and do not show the same drop-off reflected by the number of temporary laborers in the payroll summary. (*Id.* at 480-84.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency. (*Id.* at 458-64) The Certifying Officer noted two deficiencies. (*Id.* at 462, 464.) First, Coreslab failed to establish that the job opportunity is temporary in nature. (*Id.* at 462-3.) Specifically, the Certifying Officer found that:

The employer did not sufficiently demonstrate the requested standard of temporary need. In its temporary need statement, the employer states that its need for workers is tied to weather patterns and its inability to conduct work during winter months. However, the employer’s worksite is in Texas, which is in a historically warm weather climate.

The employer also submitted Sales and Payroll Reports for the years 2016-2018. The Sales Reports indicate that during the peak business months of June, July, August and September the sales are lower than the non-peak months. Also, the employer's Payroll Reports indicate that in the peak business months of May, June, July and August the temporary workers are not working full time hours. It is unclear based on the supporting documents provided, if the employer has a peak in business from April through November each year.

The employer did not sufficiently demonstrate the requested standard of temporary need.

(*Id.* at 462.) The Certifying Officer instructed Coreslab to submit additional documentation supporting its application and specified the specific information needed. (*Id.* at 462-3.)

Second, the Certifying Officer found that Coreslab failed to establish a temporary need for the number of workers it requested. (*Id.* at 463.) Specifically, the Certifying Officer found that:

In its current application, H-400-18361-894794, the employer is requesting certification for 40 Construction Laborers from April 1, 2019 through November 30, 2019. The employer did not indicate how it determined that it needs 40 Laborers during the requested period of need. Further explanation and documentation is required in order to establish the employer's need for the 40 Laborers.

(*Id.*) The Certifying Officer instructed Coreslab to submit specific documentation supporting its request for forty laborers. (*Id.* at 464.)

In response to the Notice of Deficiency, Coreslab submitted additional documentation in support of its application.⁴ In its Statement in Support of an Application for the Temporary Labor Certification, Coreslab contends that the laborers are needed because of the peakload construction season running Spring to November/December each year. (*Id.* at 27.) Coreslab also contends that it is unable to find local labor because of the company's current growth rate of fifteen percent and the improved national economy, which has caused a shortage of laborers in the area. (*Id.* at 28.) As Coreslab states in its letter in support of its application, "our growing business and less labor have created an increased need for H2B laborers, because there is less local labor to meet our growing need!" (*Id.*)

The primary factor impacting Coreslab's difficulty in finding local laborers appears to be the growing U.S. and Texas economy and the shift of local laborers into higher paying jobs. (*Id.*) As Coreslab states in its application:

The difficulty in finding peak-season U.S. workers has been worsened recently by an improved U.S. economy in which the unemployment rate is at historic lows . . .

⁴ The record reflects a number of duplicate documents that Coreslab submitted with both its initial application and in response to the Notice of Deficiency.

. ; higher paying disaster relief jobs in Houston and the gulf coast, and higher paying oilfield jobs returning to central and west Texas. This economy boom creates a temporary labor shortage as long as it continues. However, the economy is subject to change with historic ups and downs. At present, we have a temporary need for these peak-season laborers but cannot anticipate needing them in the future when the economy changes. As such, these workers are not part of our regular operations. . . we cannot anticipate our need for them more than from year to year. If economic conditions change, and U.S. workers become available, we will not need these peak-season H2B workers.

(*Id.* at 28.)

Vice President Robert McGee also offered a letter in support of the application stating that Coreslab is not as productive in the winter months because of the colder weather and shorter number of daylight hours. (*Id.* at 31.) In addition, Coreslab submitted additional documents including several hundred pages of invoices and copies of checks for payment for work performed. (*See e.g., id.* at 112-13.)

After receipt of the additional documentation from Coreslab, The Office of Foreign Labor Certification issued its Final Determination on March 1, 2019. (*Id.* at 2-9.) The Certifying Officer denied Coreslab's application. (*Id.*) Specifically, the Certifying Officer found that the two deficiencies previously identified in the Notice of Deficiency remained. (*Id.*) As to the first deficiency, the Certifying Officer found that Coreslab failed to offer supporting documents to substantiate the contention that its construction work is limited by the weather conditions in Cedar Park, Texas and failed to demonstrate its peakload need is temporary. (*Id.* at 6-7.) The Certifying Officer noted that the documentation demonstrated that Coreslab's sales did not significantly decrease from December to April. (*Id.* at 7.) The tax documents also demonstrated year round operations that do not support a peakload need. (*Id.*) Finally, the Certifying Officer found:

The employer also submitted over 200 pages of invoice listings. The documentation shows that the employer is continually soliciting, securing, and implementing projects. It is unclear how these documents demonstrate a peakload need as it only illustrates the employer's ability to seek out new business opportunities without showing that those opportunities are limited to a specific period.

(*Id.*)

As to the second deficiency, the Certifying Officer explained "that a labor shortage, no matter how severe, does not justify a temporary need." (*Id.* at 9.) As a result, the Certifying Officer found that Coreslab failed to establish the temporary need for the forty laborers requested. (*Id.*)

Coreslab then filed a timely Notice of Appeal of the Final Determination. (*Id.* at 1.) Neither Employer nor the Certifying Officer filed a legal brief on appeal, and the time for doing

so has expired. 20 C.F.R. § 655.61(b). Accordingly, this proceeding is now before the undersigned as a designated member of the Board of Alien Labor Certification Appeals for the issuance of this Decision within the parameters of Section 655.61.

II. Legal Standard

The Board's scope of review in the H-2B program is limited. When an employer requests review under Section 655.61(a), the Board considers "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board may not consider new evidence that was not before the Certifying Officer. *See* 20 C.F.R. § 655.61(a)(5). The Board's authority to act is similarly limited; the Board may either affirm the determination of the Certifying Officer, reverse or modify the determination, or remand the matter back to the Certifying Officer for further action. 20 C.F.R. § 655.61(e). Finally, Section 655.61(f) provides for expedited review of any request for administrative review by the Board. 20 C.F.R. § 655.61(f).

The undersigned notes that the Immigration and Nationality Act and the applicable regulations do not specify a standard of review. Some members of the Board have applied an arbitrary and capricious standard. *See e.g., Jose Uribe Concrete Constr.*, 2019-TLN-00025, at *4 (Feb. 21, 2019) (Nordby, ALJ) (collecting cases). Other members have rejected this standard and applied a less deferential standard. *Best Solutions USA, LLC*, 2018-TLN-00117, at *3 n.2 (May 22, 2018) (Barto, ALJ) (determining whether the basis provided for the applications denial was legally and factually sufficient in light of the written record); *Saigon Restaurant*, 2016-TLN-00053, at *5 (July 8, 2016) (King, ALJ) (applying a de novo standard of review). The undersigned, however, need not address this issue at this time as the result reached in this matter would be the same regardless of whether the undersigned applied an arbitrary and capricious standard or a de novo standard.

III. Discussion

The employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *Jose Uribe Concrete Constr.*, 2019-TLN-00025, at *4. The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of the foreign workers "will not adversely affect the wages and working conditions of U.S. workers similarly employed." 20 C.F.R. § 655.1(a); *see also* 8 C.F.R. § 214.2(h)(6)(i)(A).

The regulations require that an employer seeking certification must establish that its need for the laborers is temporary, irrespective of whether the position itself is permanent or temporary, and that the need for the labor will end in the "near, definable future." 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(A)-(B). A need is temporary where the employer provides justification to the Certifying Officer that the laborers are needed for either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 20 C.F.R. § 655.61(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). Temporary need is limited to periods of up to three

years for a one-time event and one year or less for seasonal need, peakload need, and intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Where an employer contends that its need for laborers is due to a peakload need, the employer must demonstrate to the Certifying Officer that: (1) the employer regularly employs permanent workers to perform the labor at its place of employment; (2) that the employer needs to supplement this permanent staff at this place of employment on a temporary basis due to a seasonal or short-term demand; and (3) that the temporary additions to the employer's staff will not become part of its regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). In addition to demonstrating that the need for laborers is temporary within the meaning of the regulations, the employer must also justify in its application the number of workers sought and the period of temporary employment. 20 C.F.R. § 655.11(e)(3).

Where the Certifying Officer issues a Notice of Deficiency, the failure of the employer to provide all required documentation will result in the denial of the employer's application. 20 C.F.R. § 655.32(a). The Board, however, has previously held that if the employer explains why it is unable to produce the documentation requested in the Notice of Deficiency and provides alternative evidence, the Certifying Officer may not deny the certification without first considering whether the alternative evidence satisfies the employer's burden. *International Plant Services, LLC*, 2013-TLN-00014, at *6 (Dec. 21, 2012) (Johnson, ALJ).

Here, the Certifying Officer correctly determined that Coreslab failed to satisfy its burden of establishing that its need for laborers was temporary as a result of the stated peakload need and failed to provide all the requested information in response to the Notice of Deficiency. As the Certifying Officer pointed out, the documents submitted by Coreslab, including the invoices and tax records, indicate that Coreslab operates year round and solicits business year around. The record does not support a finding that Coreslab needs laborers to supplement its permanent staff on a temporary basis due a seasonal or short-term demand as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). The employer's quarterly federal tax returns actually show an increase in wages, tips, and other compensation in January, February, and March compared to requested period of April through November. (*See e.g.*, AR at 506-517.) The monthly sales reports for 2016-2018 also do not reflect a seasonal or short term demand. (*Id.* at 53-55.) In fact, January was Coreslab's third best month for sales in 2018 while September (a month during Coreslab's claimed peakload period) was the lowest. (*Id.* at 55.) Coreslab's sales in 2016 were lowest in May through July. (*Id.* at 53.)

Moreover, Coreslab has failed to support its contention that its work is limited due to harsh winter weather from December 1st through the end of March. Coreslab seeks workers for Cedar Park, Texas. While Coreslab contends that Texas is known for harsh winter weather that hinders its work (*id.* at 474), Coreslab failed to submit sufficient documentation supporting this contention, such as historical average temperatures between December 1st and April 1st. Texas is not generally known as a state with harsh winter weather, and Coreslab failed to respond to the Notice of Deficiency with documentation of its claim that the winter limits its ability to perform work from December 1st through the end of March. Coreslab's conclusory statements without any supporting documentation are not sufficient to satisfy its burden. *See JCS Carolina Chipping Servs., LLC*, 2018-TLN-105, at *6 (Apr. 20, 2018) (Romero, ALJ) ("A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof.").

Much like the situation in *Jose Uribe Concrete Construction* where the employer sought seven temporary concrete finishers in Texas from February 11, 2019, through November 22, 2019, Coreslab has failed to demonstrate that its need for laborers is temporary because of a peakload need during the requested period. 2019-TLN-00025, at *2-7; *see also Resendiz Pine Straw, LLC*, 2018-TLN-00041, at *8 (Jan. 16, 2018) (Temin, ALJ) (holding that employer failed to demonstrate the need for forty-seven workers). Rather than a temporary need for labor due to a peakload need, the record reflects that Coreslab needs additional laborers on an ongoing basis due to year-over-year growth in its business. The fact that the economy will not continue growing indefinitely and Coreslab's growth will flatten out and may even decline at some unknown point in the future does not create a temporary need for foreign laborers under the applicable regulations.

Similarly, the Certifying Officer correctly determined that Coreslab failed to establish a temporary need for the number of workers requested. Coreslab offers no explanation as to why it needs forty temporary laborers, as opposed to ten or sixty. *Jose Uribe Concrete Constr.*, 2019-TLN-00025, at *7; *JCS Carolina Chipping Servs.*, 2018-TLN-015, at *7. In support of its application, Coreslab contends that the combination of its growth rate and the tight labor market resulting from a growing economy has hindered its ability to hire local laborers. (AR at 28.) Coreslab states that local laborers have taken other higher paying jobs, leaving a labor shortage in Cedar Park, Texas. (*Id.*) Other employers in the construction industry in Texas have made identical arguments in other cases. *See JCS Carolina Chipping Servs.*, 2018-TLN-105, at *3. The argument is no more convincing in this case.

The fact that the growing national economy has created a tighter labor market in which employers have to compete to attract workers cannot alone justify certification of temporary workers based on an asserted peakload need. Adopting the approach suggest by Coreslab would allow employers to utilize temporary, foreign labor to fill out their exiting labor needs during periods of economic growth and domestic wage growth rather than increase wages to attract local workers, thereby violating the basic tenet of the temporary work program of not adversely impacting the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a); 8 C.F.R. § 214.2(h)(6)(i)(A). As Judge Nordby recently explained in *Jose Uribe Concrete Construction*, “the Employer could raise its wages and other benefits to attract U.S. workers away from its local competition, or to attract workers to Texas from other parts of the country, or pay overtime to its existing permanent employees.” 2018-TLN-015, at *6. The fact that local workers have taken more attractive jobs as a result of the growing economy is not a sufficient justification for demonstrating a temporary need for forty workers.

IV. Conclusion

Upon a review of the record and the relevant legal authority, the undersigned finds that Coreslab Structure (Texas) Inc. failed to satisfy its burden of demonstrating that it is entitled to a temporary labor certification under the applicable regulations. Accordingly, the undersigned **AFFIRMS** the decision of the Certifying Officer denying the temporary labor certification.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

STEWART F. ALFORD
Administrative Law Judge