



Issue Date: 05 March 2019

BALCA Case No.: 2019-TLN-00043
ETA Case Nos.: H-400-19004-309770

In the Matter of:

STONE PRO, LLC,
Employer.

Before: DANA ROSEN
Administrative Law Judge

DECISION AND ORDER REVERSING CERTIFYING OFFICER'S
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits Employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a)¹ Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the Certifying Officer denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53 During the administrative review, only the material contained within the appeal file (“AF”)² upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 CFR §655.61(e).

PROCEDURAL HISTORY

¹ The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and is effective as of April 29, 2015.

² “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

On January 4, 2019³, the Employment and Training Administration (“ETA”) received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Stone Pro, LLC (“Employer”). (AF 55-123). On January 10, 2019, the Certifying Officer issued a Notice of Deficiency. (AF 47-54). On January 21, 2019, Employer filed its Response to the Notice of Deficiency. (AF 26-46). On January 25, 2019, the Certifying Officer issued his Final Determination in response to Employer’s Response to the Notice of Deficiency. (AF 17-25). On February 7, 2019, Employer appealed the Certifying Officer’s Final Determination Denying Temporary Employment Certification and filed its request for Administrative Review. (AF 1-16).

STATEMENT OF THE CASE

On January 4, 2019, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Employer for 20 “carpenter helpers” as seasonal workers for employment from April 1, 2019 to December 20, 2019 in Apple Valley, Minnesota. (AF 55-58). The positions were classified as O*Net Code 47-3012, Helpers-Carpenters, and were to be performed in Apple Valley, Minnesota. (AF 55-58). No specific educational requirement was specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment was required in Section F.b Item 3. (AF 58). The Employer retained Aaron Bernard as its attorney. (AF 57).

On January 10, 2019, the Certifying Officer issued a Notice of Deficiency identifying the following deficiencies (AF 47-54):

Deficiency 1: Failure to establish the job as temporary in nature.

The Employer did not sufficiently demonstrate the requested standard of temporary need. The Employer is requesting 20 Carpenter Helpers from April 1, 2019 to December 20, 2019 based on a seasonal need. In order to establish a seasonal need, the Employer must show that the service or labor for which it seeks workers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.

The Employer submitted a projected itinerary indicating work dates from November 1, 2018 through December 20, 2019 for worksite 15899 Elmhurst Lane, Apple Valley, MN. The Employer did not demonstrate how its need meets the regulatory standard, as defined above. The Employer’s itinerary demonstrates work dates for a period of over 13 months covering several seasons and therefore, it is not clear how the need for the requested workers is traditionally tied to a season. The Employer also submitted supporting exhibits for its need, but exhibits D and E are missing and could not be used in determining if the Employer has a seasonal period of need.

Additional Information Requested:

1. A statement describing the Employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;

³ Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e).

2. A summary listing of all projects in the area of intended employment for the previous two years. The list should include start and end dates of each project and worksite addresses;
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 Carpenter Helpers, 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 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. (Emphasis in Original).

Deficiency 2: Failure to establish temporary need for the number of workers requested.

The Employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. In its current application, H-400-19004-309770, the Employer is requesting certification for 20 Carpenter Helpers from April 1, 2019 through December 20, 2019. The Employer did not indicate how it determined that it needs 20 Carpenter Helpers during the requested period of need. Further explanation and documentation is required in order to establish the Employer's need for 20 Carpenter Helpers.

Additional Information Requested:

The Employer must submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. The Employer's response must include, but is not limited to, the following:

1. An explanation with supporting documentation of why the Employer is requesting 20 Carpenter Helpers for Apple Valley, MN during the dates of need requested;
2. If applicable, documentation supporting the Employer's need for 20 Carpenter Helpers 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 one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation for Carpenter Helpers, 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 by 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.

On January 21, 2019, the Employer's Response to the Notice of Deficiency was received at the Chicago National Processing Center. (AF 26-46). On January 25, 2019, the Certifying Officer denied the Application for Temporary Employment Certification for 20 Carpenter Helpers stating Employer did not meet the requirements specified in 20 CFR 655, Subpart A. The Certifying Officer set forth the following reasons for the denial of the application (AF 21-25):

Deficiency 1: Failure to establish the job as temporary in nature.

In response to the NOD, Employer submitted a statement regarding its business history, activities, and schedule of operations, a summary listing of projects, summarized monthly payroll reports, an itinerary, graphs for total wages and hours, and a Profit and Loss report.

The employer's explanation and documentation of its temporary need did not overcome the deficiency. The Employer states,

Only work performed outside of the peakload season is indoor work. No outdoor work will be performed on these projects outside of the peakload season of April through December because all outdoor work is halted until the next season of need begins in April.

However, the submitted summary listing of projects for 2017 and 2018 have a majority of projects with work dates during January through March. Although the Employer attests only indoor work is performed outside of its peakload season, the summary listing of projects does not show that there is a higher amount of work during the dates of need requested compared to months it considers non-peak. The summary listing of projects does not demonstrate the Employer has increased work during the dates of need requested to create a peakload in comparison to the amount of projects performed during January through March.

Furthermore, the Employer submitted summarized monthly payroll reports for 2017 and 2018. However, the payroll reports do not demonstrate the Employer has a peakload need during the dates of need requested. The Employer states,

In 2017, Stone Pro LLC did not employ any temporary workers, however they did hire more employees to perform carpenter helper work during their season of need. Unfortunately, Stone Pro LLC experienced a very high turnover rate with employees hired during the season of need and the majority of the new hires left employment before the end of the season of need in 2017. Because of this, Stone Pro was forced to subcontract work with other providers to complete projects.

The Employer submitted a Profit and Loss report as evidence of subcontracted work. However, the Profit and Loss report shows an annual income expense for 2018, which does not establish a peakload need during the dates of need requested. The Employer could have submitted monthly statements confirming subcontracting worker hours worked; however, the Employer did not submit any subcontracting documentation that would support its requested dates of need.

The Employer further states regarding its summarized payroll reports,

Due to difficulties experienced in 2017 and the seasonal need for carpenter helpers who perform outdoor concrete activities, in 2018 Stone Pro LLC was approved for its first round of H-2B workers with an April 1, 2018 start date of need. However, by the time Stone Pro received USCIS approval for visas and complete foreign recruitment and consular processing, the workers did not arrive until mid-April and received their first paychecks in May. So while the payroll appears to show that Stone Pro LLC's Need for temporary workers did not begin until May in 2018, the numbers are misleading due to the delay in worker arrival and the first pay period.

However, the Department has no record of the employer receiving H-2B certification for the area of intended of employment of Apple Valley, Minnesota for 2018. Also, the payroll reports demonstrate that full time work was not offered for permanent workers and a peakload begins no sooner than May for both 2017 and 2018 as well. The employer is reminded that

the Department cannot partially accept an application for a later start date of need due to CFR 655. 15(b), which states a completed Application for Temporary Employment Certification, ETA Form 9142, must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.

The employer also submitted an Itinerary for 2019 Work with one project listed with work dates as April 1, 2019 to December 20, 2019. However, the employer's summary listing of 2017 and 2018 projects has demonstrated the employer has more projects in 2019 beyond the requested dates of need. The employer's itinerary does not demonstrate a peakload need during the dates of need requested.

Additionally, the employer submitted graphs for total wages paid and total hours worked. However, these graphs did not demonstrate the employer has a peakload need from April through December. The graph of the total wages paid shows an increase of wages starts in March and increases and decreases until September or October. The graph of the total hours worked shows an increase between April and May but ending by September. The employer did not give an explanation regarding the inconsistent monthly data. Furthermore, the wages graph represents total wages paid and is not exclusive the employer's requested position.

Deficiency 2: Failure to establish temporary need for the number of workers requested.

In response to the NOD, the employer submitted an explanation of why employer is requesting 20 Carpenter Helpers, summarized monthly payroll reports, and a Profit and Loss report.

The employer's explanation and documentation for the number of workers requested did not overcome the deficiency. The employer attests it used its many years of experience and best professional judgement in determining the number of workers requested. The employer further states,

In 2018 Stone Pro LLC needed to complete approximately \$10 million in work. When estimating the number of workers needed, the general industry standard is that one worker will perform \$20,000.00 of billable work per month. Including the 11 temporary workers ($\$20,000.00 \times 9 \text{ months} \times 11 \text{ workers} = \$1,980,000.00$ billable work) with its permanent workers averaged at 15 workers ($\$20,000.00 \times 9 \text{ months} \times 15 \text{ workers} = \$2,700,000.00$ billable work), Stone Pro LLC only had \$4,680,000 for billable work, which is less than half of what it needed. Thus, Stone Pro LLC was short by at least 30 workers while it was trying to complete this work, which a calculation shows would have brought the total of billable work up to \$10,080,000.00 ($\$20,000.00 \times 9 \text{ months} \times 30 \text{ workers} = \$5,400,000.00$ billable work). Accordingly the total amount of workers needed would be 55-65.

However, the employer did not submit any documentation to support project and billable work values used for its calculations. The employer further states that it will have 25 permanent workers and requested 20 temporary workers for this area of intended employment and 10 workers in a separate area of intended employment. However, the employer still has not demonstrated how or explained why it specifically needs 20 workers to work at Apple Valley, Minnesota.

The employer also submitted summarized monthly payroll reports for 2017 and 2018. The employer states it only hired permanent employees for 2017, and there was a high turnover rate with the new hires. The employer had to subcontract work and submitted a Profit and Loss report as evidence of this subcontracted work. However, it cannot be determined from the Profit and Loss report that the employer needs 20 Carpenter Helpers during the dates of

need requested.

Furthermore, the 2017 payroll report does not demonstrate enough full time work hours were offered for any month to support both permanent workers and an additional 20 temporary workers. The 2018 payroll report does not demonstrate enough full time work hours were offered during any month for 20 temporary workers as well. The employer did not give any further explanation or documentation regarding its request for 20 Carpenter Helpers from April 1, 2019 through December 20, 2019.

On February 7, 2019, the Employer filed a timely formal request for administrative review of the Certifying Officer's denial. (AF 1-16). In its "Request for Administrative Review," Employer argued its application was arbitrarily and capriciously denied although Employer submitted all documentation requested in the Notice of Deficiency. Employer argued that it requested 20 temporary carpenter helpers to perform outdoor work during peakload season and was not requesting any workers to perform "the sheltered, temperature-controlled work performed by year-round employees in the off-season." (AF 3). Employer also argued that it submitted an identical application for temporary labor certification this calendar year for a different location and it was accepted on January 23, 2019. Employer argued it is arbitrary and capricious to adjudicate two separate cases that are substantially identical submitted in the same year but have different outcomes. (AF 6).

DISCUSSION

An Employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The Employer must establish that the "number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity." 20 C.F.R. 655.11(e)(3) and (4).

Where an Employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the Certifying Officer issues a Notice of Deficiency to the Employer setting forth the deficiency in the application and permitting the Employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the Certifying Officer in its final denial determination as contained in the Appeal File and may also consider the arguments set forth in the Request for Administrative Review and legal briefs submitted to BALCA. 20 CFR §655.61(e).

Based upon the evidence in the Appeal File, the Certifying Officer's Final Determination Denying Temporary Labor Certification is reversed.

On January 21, 2019, Employer filed its Response to the Notice of Deficiency. Employer addressed the two identified deficiencies by submitting written explanations, payroll records, and charts regarding Employer's two previous business years. Employer completed each enumerated request under the two "Additional Information Requested" sections in the NOD.

In its Response to Notice of Deficiency, the Employer submitted statements describing the Employer's business history, activities, and schedule of operations throughout the years as requested by the NOD. Employer submitted a summary listing of projects during the previous

two years with start and end dates of each project as well as an explanation as to why dates were included outside of the peakload season. (AF 28). In the Certifying Officer's Final Determination issued January 25, 2019, the Certifying Officer decided the 2017 and 2018 project summaries reflected that the majority of projects did not occur during Employer's requested dates, but instead occurred January through March 2017 and 2018. (AF 17-25).

Upon review of the project summaries for 2017 and 2018 submitted by Employer in its Response to the Notice of Deficiency, Employer had eight of 10 projects during the requested time period from April through December 2017. (AF 32-33). In 2018, Employer had 16 of 19 projects during the requested time period from April through December. (AF 32-33). In 2017, six of 10 projects ended during the requested time period. In 2018, 15 of 19 projects ended during the requested time period. (AF 32-33). The project summaries reflected that a majority of Employer's projects started or finished during the requested time period from April through December.

In Employer's appeal filed on February 7, 2019, Employer argued no work would be completed by the temporary workers outside of peakload season. Employer argued it was industry wide practice to only have project start and finish dates rather than lists of dates detailing when work actually stopped and started on a project each season. Employer stated, "The contracts submitted have dates that fall outside of the peakload season but are not representative of actual work being completed in the off-season." (AF 3-4). Employer further clarified that the current application "is requesting temporary carpenter helpers to perform outdoor work; the Appellant is not requesting any workers to perform the sheltered, temperature controlled work performed by year round employees in the off-season." (AF 3).

In its Response to the Notice of Deficiency, Employer submitted monthly payroll reports for 2017 and 2018. (AF 36-37). In 2017, Employer did not hire temporary employees because it could not find any carpenter helpers willing to work a temporary job. (AF 4). Employer relied upon subcontractors (AF 4). In 2018, Employer hired temporary workers from May through December. (AF 37). Employer stated the workers were needed in April at the start of peakload season, but did not arrive until late April due to delays in processing paperwork. (AF 4).

In its Response to the Notice of Deficiency, the Employer provided the Certifying Officer with summarized monthly payroll reports for the 2017 and 2018 calendar years that separately identified the total number of workers, permanent and temporary, and the total earnings received. (AF 12). Employer also provided the Certifying Officer with a "Profit & Loss" report from January through December 2018 that included payment to "Subcontractors" in the amount of \$2,168,597.31. (AF 46).

In the Certifying Officer's Final Determination issued January 25, 2019, the Certifying Officer stated the payroll reports were not evidence of a peakload need during the dates of need requested. The Certifying Officer stated Employer "could have" submitted monthly statements confirming subcontracting hours worked. (AF 12-13).

In Employer's appeal filed on February 7, 2019, Employer argued that the Notice of Deficiency required "other evidence and documentation that similarly serves to justify the dates of need

being requested for certification” and Employer would provide monthly statements confirming subcontracting but this was not specifically requested by the Notice of Deficiency. (AF 4).

The court finds that the Employer’s summarized monthly payroll reports for 2017 and 2018 as well as the “Profit and Loss” report satisfied the requirements outlined in the Notice of Deficiency. The Notice of Deficiency requested summarized monthly payroll records and other evidence and documentation. (AF 52). The court finds that Employer’s 2018 payroll records are sufficient evidence Employer has a need for temporary workers in 2019 as temporary workers were employed during Employer’s 2018 peakload season. Although Employer’s “Profit and Loss” report showed lump sum payment to subcontractors rather than monthly payment to subcontractors, the Certifying Officer did not specifically request this document. Employer provided this information to support its request for temporary workers. Based on the evidence in the record, the court finds the payroll records provided are substantial evidence that Employer has a need for the 20 requested carpenter helpers during the dates requested.

In the Certifying Officer’s Final Determination issued on January 25, 2019, the Certifying Officer stated Employer did not receive H-2B certification for temporary employment in Apple Valley, Minnesota in 2018. (AF 13). However, Employer responded it did receive company-wide H-2B certification for 2018 for a different work site, not Apple Valley, Minnesota. (AF 5). The Certifying Officer stated, “Also, the payroll reports demonstrate that full time work was not offered for permanent workers and a peakload begins no sooner than May for both 2017 and 2018 as well.” (AF 13). It is unclear how Certifying Officer expects Employer to demonstrate full time work was not offered to permanent workers in payroll records, and this was not required in the Notice of Deficiency.

In Employer’s Response to the Notice of Deficiency, Employer submitted a calculation and explanation of how it determined the need for 20 carpenter helpers during the peakload season. (AF 15). The Certifying Officer determined this was deficient because Employer did not submit any documentation to support project and billable work values used for its calculations, and Employer did not explain why it needed 20 workers for Apple Valley, Minnesota. (AF 15). Employer argued that it was “arbitrary and capricious to deny certification based on a deficient explanation of the need to an exact number of workers after receiving the calculation used to determine that exact number of workers.” (AF 6).

Employer corrected the deficiency and established temporary need for the number of workers requested. Employer provided payroll records from 2017 and 2018 that demonstrated a need for 20 temporary carpenter helpers. Employer submitted the calculation that projected the number of workers needed based upon revenue projects generated in 2018 as well as industry standards. Employer submitted a project that Employer is already contracted to complete in 2019. (AF 39). Employer’s calculation, payroll reports, and project listing cures the second deficiency and establishes temporary need for the number of workers requested.

In Employer’s appeal filed on February 7, 2019, Employer argued it submitted an identical application before the United States Department of Labor in this calendar year with the “exact same information, evidence, and explanations in response to the NOD,” and that request was accepted by the Certifying Officer on January 23, 2019. (AF 6). Employer argued there is no

factual change between the application submitted and approved in 2018 and this application for 2019. Employer argued the Certifying Officer was inconsistently adjudicating substantially identical cases. (AF 6). While Employer's argument has merit, if true, the undersigned has no means to review Employer's previous application as well as the identical application submitted this year for a different work site.

After review of the Appeal File, this Administrative Law Judge finds that the payroll records, statements, summaries, and reports are sufficient to satisfy the deficiencies. The court approves the Employer's January 4, 2019, *Application for Temporary Employment Certification* for the requested additional twenty temporary workers as H-2B carpenter helpers for the dates of need from April 1, 2019 through December 20, 2019 pursuant to 20 CFR §655.31(c) and §655.51.

ORDER

It is hereby **ORDERED** that:

1. Certifying Officer's DENIAL of the Employer's January 4, 2019, *Application for Temporary Employment Certification* is **REVERSED**.
2. Employer corrected the deficiencies set forth by the Certifying Officer on January 10, 2019, pursuant to the Departmental regulations at 20 C.F.R. 655.11(e)(3) and (4).
3. This matter is **REMANDED** to the Certifying Officer for further processing consistent with this decision.

For the Board:

DANA ROSEN
Administrative Law Judge

DR/CN/mjw
Newport News, VA