



Issue Date: 04 March 2019

BALCA Case No.: 2019-TLN-00040
ETA Case No.: H-400-18340-584848

In the Matter of:

LONE STAR LINING COMPANY,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Meagan Kirchner
MAS Labor H2B, LLC
Lovingstone, VA
For the Employer

Micole Allekotte, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On February 11, 2019, the Board of Alien Labor Certification Appeals (“BALCA”) received a request for administrative review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter.¹

The H-2B program permits employers to hire foreign workers to perform temporary,

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.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 (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

On January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Lone Star Lining Company (“Employer”). AF 75 – 111.³ Employer requested certification for 10 “construction laborers” from April 1, 2019 until December 21, 2019. AF 75. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

Our primary services are the installation of liners and piping. We have installed over 75 million square feet of geosynthetics. It is crucial for the long-term well-being of the worksite and surrounding community that the geosynthetic and/or piping system job be completed correctly. We work with sensitive materials which exposure during the winter months could be damaged and ultimately will not enable our company to deliver a superior product. For this reason, the majority of our work occurs between early spring through the onset of winter. We have been in business since 2003 and this is the regularly recurring annual business cycle customary to our industry in our locale.

...

We thoroughly reviewed our past need for temporary workers in relation to our forecasted workload for the 2019 season. We evaluated our current staff capacity in relation to our planned 2019 workload. This process assisted in determining our requested number of H-2B workers. This number also reflects our historical experience in recruiting local, local workers.

...

We require labor on a temporary seasonal basis during the fairest weather months of the year when the ground is no longer frozen and the temperature is above freezing. With the onset of warm weather our business increases dramatically. Our need for temporary geosynthetic installation helpers ceases once the weather

² See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B)); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

³ References to the 111-page appeal file will be abbreviated with an “AF” followed by the page number.

becomes inclement (too cold or wet) to reliably work outdoors. This seasonal need is both predictable and recurring in nature.

On January 22, 2019, the CO issued a Notice of Deficiency (“NOD”) notifying Employer that its application did not comply with the requirements of the H-2B program. AF 67 – 74.

First, the CO identified a “failure to establish the job opportunity as temporary in nature.” The CO noted that Employer based its temporary need on climate data in the Dallas County, Texas area, but that “climate data from the employer’s area of intended employment shows average low temperatures in its nonpeak period are all above freezing.” The CO said that average temperatures of in January and February 2018 of 45.8 degrees and 51.1 degrees, respectively, “does not seem to represent a harsh winter climate.”

The CO requested that the Employer provide:

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;
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. Supporting documents that substantiate that the type of work described in the application cannot be performed in the weather experienced in Dallas County, Texas during the dates of need requested;
4. A summary listing 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 addresses;
5. 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 *Construction Laborer*, 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
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.

AF 72 – 73.

Second, the CO identified a “failure to establish temporary need for the number of workers requested” in that Employer did not sufficiently demonstrate “that the number of workers requested in the application is true and accurate and represents bona fide job opportunities.” The CO requested the following:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. If applicable, documentation supporting the employer’s need for 10 construction 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 *Construction Laborer* and at the requested area of intended employment of *Dallas County, Texas*, 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.

AF 73 – 74.

On January 23, 2019, Employer responded to the NOD by providing a description of its business history, activities and work schedule; Guidelines for installation of HDPE and LLDPE Geomembrane Installation Specifications; summarized monthly payroll reports from 2017 and 2018; and Subcontractor invoices (AP Invoice List) from 2017 and 2018. AF 23 – 66.

On January 31, 2018, after reviewing the documentation that Employer submitted in response to the NOD, the CO issued a Final Determination denying Employer’s application (“Denial”). AF 14 – 22. The CO explained that the additional information did not address the deficiencies noted in the NOD.

In its Denial, the CO indicated a “failure to establish the job opportunity as temporary in nature.” AF 16. The CO noted that Employer provided a description of its business history, activities and work schedule, subcontractor invoices (AP Invoice List), LSLC Work Schedule, summarized monthly payroll reports, and Guidelines for installation of HDPE and LLDPE Geomembrane Installation Specifications, but that “Employer did not overcome the deficiency.” The CO offered particular responses to the items submitted by Employer:

The employer is requesting workers from April 1 through December 21. Based on the employer’s reason of the climate in its area of intended employment limits its work, it is not clear why work is being done in December as December experiences the 2nd lowest temperatures of the year. According to the weather chart that was provided by the employer, the month of December has a similar daily range of temperatures as January. The maximum and minimum

temperatures are only 3 and 4 degrees higher in December than in January making it a colder month than February.

...

The NOD requested a detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period. The employer explains that during periods of slow field activities, Lone Star Lining Company's permanent employees schedule time off or work in their shop in Cedar Hill repairing and maintaining the field equipment and preparing for the upcoming construction season. This statement indicates that the employer's permanent workers are not performing the same duties outlined in the employer's application. Therefore, the employer is not meeting the definition of a peakload need as the employer did not establish that it regularly employs permanent workers to perform the services or labor at the place of employment.

The NOD also directed the employer to submit a schedule of operations throughout the entire year, summary of monthly projects for 2017 and 2018, including signed contracts for those projects. Signed contracts were not submitted in the NOD response. The employer submitted a document entitled, "LSLC Work Schedule". This document is a summary listing all projects in the area of intended employment for the previous two calendar years. This document does not show a peak in scheduled work but rather up and downs in the number of days that projects were performed. The employer also submitted a summarized 2017 and 2018 payroll report. The report does not show a peak but rather ups and downs in its monthly hours worked.

...

In addition...the employer stated that it utilizes subcontractor labor. The employer submitted supplementary information, AP Invoice List, showing its use of subcontractor labor stating its need to use its labor in order to complete its contractual obligations. The employer submitted an invoice List for "Subcontractors 1" and "Subcontractor 2". The documents were not summarized to indicate the number of hours worked per month by the subcontracted workers, making it impossible to assess the true number of monthly hours worked by Construction Laborers. The Invoice List showed the employer contracted labor in all months of the year including labor invoiced in its stated nonpeak month of January 2018 that totaled \$35,092.90

The employer was directed in the NOD to submit documentation that substantiates the employer's statements indicating that it experiences an increased demand for labor during the warmer weather months in the employer's area of intended employment in Dallas, Texas. However, the employer did not provide documentation that satisfies this requirement.

Therefore, the employer did not overcome this deficiency.

AF 16 – 20.

The CO also noted a “failure to establish a temporary need for the number of workers requested.” AF 21. In response to the NOD, the employer provided a statement indicating the total number of workers the employer is requesting for this occupation and worksite; subcontractor invoices (AP Invoice list), LSLC Work Schedule, and summarized monthly payroll reports. The CO’s responses were as follows:

The employer provided a statement indicating the total number of workers the employer is requesting for this occupation and worksite. In addition to the statement, the NOD directed the employer to provide signed contracts or letters of intent to support the number of workers requested. These were not provided.

...

The employer is requesting 10 Construction Laborers from April 1 through December 21. In addition to the payroll shown above, the employer stated that it utilizes subcontract labor. The payroll report does not show a peak use of workers but rather ups and downs in its monthly hours worked. Further, the employer submitted supplementary information, AP Invoice Lists, showing its use of subcontract labor. The employer submitted an Invoice List for “Subcontractor 1” and “Subcontractor 2”. The documents were not summarized to indicate the number of hours worked per month by the subcontracted workers, making it impossible to assess the true number of monthly hours worked by Construction Laborers. The Invoice Lists showed the employer contracted labor in all months of the year including labor invoiced in its stated nonpeak month of January 2018 that totaled \$35,092.90 pointing to a permanent need for Construction Laborers.

Therefore, it is unclear if the employer has a peakload need for 10 Construction Laborers from April 1, 2019 through December 21, 2019.

The employer also submitted a document entitled, “LSLC Work Schedule”. The report does not show a peak in work performed but rather ups and downs in its monthly days worked.

The employer noted that due to weather uncertainty, its “business model does not schedule installations during the off-peak months.” The submitted work schedule contradicts this statement and provides no support for 10 workers.

The employer was directed in the NOD to submit supporting evidence and documentation to establish its temporary need for 10 Construction Laborers. However, the employer did not provide documentation that satisfies this requirement.

The employer did not cure this deficiency.

DISCUSSION AND 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 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 CO denied Employer's application because Employer failed to demonstrate that the job position was temporary in nature; and failed to establish a temporary need for the number of workers requested. AF 13 – 22. The CO said that without the requested information, Employer does not overcome the deficiencies in the NOD.

Temporary Nature of Job Opportunity

Pursuant to the regulation at 20 C.F.R. § 655.6(a) and (b), 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 the underlying job is permanent or temporary." Under the regulation, "the employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations..." In the NOD, the CO said that in order to demonstrate peakload need, Employer "must establish that it regularly employs 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 a seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation.." AF 72.

In this case, Employer submitted gross income statements for the years 2016 and 2017. These statements show an increase in gross income toward the middle of the year, with the

highest months being April through August for both years. AF 37 – 38. Employer also submitted tax documentation for 2015 through 2017. AF 42 – 81. Finally, Employer provided letters of intent from 3 different entities that said they intended to contract with employer for services during the “peak months “of April 1 to December 31, 2018. AF 39 – 41.

Upon review of the record, I find that Employer has not met the requirement of establishing that the job position is temporary in nature. 20 C.F.R. § 655.6(b) requires employers to justify to the CO that the temporary job position is one of several categories, including “peakload need.” I concur that the weather reports do not establish a temporary need for Employer, as the report demonstrates that temperature in December are lower on average than those in February. I concur that the LSLC work schedule does not include signed contracts as required by the CO. I concur that the summarized 2017 and 2018 payroll reports do not show a peak “but rather ups and downs in its monthly hours worked.” I concur that Employer’s statement that its “permanent employees schedule time off or work in their shop in Cedar Hill repairing and maintaining the field equipment and preparing for the upcoming construction season” demonstrates that Employer’s permanent workers are not performing the same duties outlined in the employer’s application. Finally, I concur that invoices for “Subcontractor 1” and “Subcontractor 2” were not summarized to indicate the number of hours worked per month by the subcontracted workers, and that it is therefore not possible to assess the true number of monthly hours worked by Construction Laborers.

I concur with the CO that Employer has not presented sufficient information to establish that the position is temporary in nature.

Temporary Need for Number of Workers Requested

The CO also denied Employer’s application under the requirement to establish a temporary need for the number of workers requested. According to the regulation at 20 C.F.R. § 655.11(e)(3) and (4), “The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on the following factors...(3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.”

In this case the CO found that the payroll report does not show a peak use of workers but rather ups and downs in its monthly hours worked. The CO found that the Invoice List for “Subcontractor 1” and “Subcontractor 2” were not summarized to indicate the number of hours worked per month by the subcontracted workers, making it impossible to assess the true number of monthly hours worked by Construction Laborers. The CO found that the Invoice Lists showed the employer contracted labor in all months of the year including labor invoiced in it stated nonpeak month of January 2018, making it unclear if the Employer has a peakload need for 10 Construction Laborers from April 1, 2019 through December 21, 2019. The CO found that the “LSLC Work Schedule” does not show a peak in work performed but rather ups and downs in its monthly days worked. Finally, the CO found that Employer’s statement that its “business model does not schedule installations during the off-peak months” is contradicted by the work schedule submitted by Employer, and provides no support for 10 workers.

I concur with the CO's findings in this regard. I therefore find that Employer has not presented sufficient information to establish its temporary need for the number of workers requested.

CONCLUSION

For the reasons above, I find that the evidence presented by the Employer fails to support its temporary need for an additional 10 workers from April 1 to December 21, 2019. I therefore find that it was not an abuse of discretion for the CO to issue a denial of Employer's application.

In light of the foregoing, the record establishes that Employer failed to establish that the temporary nature of the job opportunity, and the temporary need for the number of workers requested. Accordingly, the CO's denial of Employers application is hereby **AFFIRMED**.

SO ORDERED.

For the Board:

CARRIE BLAND
Administrative Law Judge

Washington, D.C.