



Issue Date: 20 December 2019

BALCA Case Nos.: 2020-TLN-00015; 2020-TLN-00016; 2020-TLN-00017
ETA Case Nos.: H-400-19297-106821; H-400-19297-106935; H-400-19295-100900

In the Matters of:

COBRA STONE INC.,
Employer.

Before: Jonathan C. Calianos
Administrative Law Judge

Appearances: Kevin Lashus, Esq.
Fisher Broyles, L.L.P.
Austin, Texas
*For the Employer*¹

DECISION AND ORDER AFFIRMING DENIALS OF CERTIFICATION

These matters arise under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification. 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 United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);² 20 C.F.R. § 655.6(b).³

¹ There was no appearance from the Office of the Solicitor, U.S. Department of Labor, on behalf of the Certifying Officer.

² The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018). The continuing resolutions signed into law on September 27, 2019 and November 21, 2019 did not modify this requirement. *See* Continuing Appropriations Act, 2020, Pub. L. No. 116-59, Division A (2019); Further Continuing Appropriations Act, 2020, Public Law No: 116-69, Division A (2019). The current continuing resolution expires on December 20, 2019.

³ 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

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor (“DOL”) using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

For the reasons set forth below, the CO’s denials of temporary labor certification in these matters are affirmed.

STATEMENT OF THE CASE

On October 24, 2019, the Employer filed three Applications, seeking to hire 50 Laborers in San Saba, Texas, 50 Laborers in Lueders, Texas, and 60 Laborers in Florence, Texas, for the period of January 15, 2020 to October 15, 2020, based on a temporary peakload need.⁴ (AF 328, 331).⁵ In its Applications, the Employer provided the following Statement of Temporary Need:

Our company is engaged in the stone quarry business in [Texas]. . . Our company has a temporary peakload . . . because our busiest seasons are traditionally tied to the spring, summer and fall months . . . As is well known, Texas winters (during which time our business slows significantly each year due to the winter weather conditions and slow construction period) are normally predictable Due to the nature of our work we are unable to engage in much business during the winter months, of approximately October 15th to January 15th because the cold and wet weather is not conducive to separating blocks of rough dimension stone at a quarry. Also, construction and landscaping in general slows down, and since our stone is used for construction and landscaping projects, our peak load need is

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.

⁴ While the Employer’s Application in Claim No. 2020-TLN-00016 referenced a “seasonal need” (AF 328), its Statement of Need attached with the Application referenced a peakload need, and all other documentation in the matter supports an allegation of a peakload, not seasonal, need.

⁵ The Applications and associated Appeal Files in these matters are nearly identical, with the same facts, issues, and arguments presented, and therefore for purposes of this decision, I will cite to a representative Appeal File, 2020-TLN-00016. The Appeal File will be referenced by the abbreviation “AF,” followed by the page number.

directly tied to those industries and therefore the need for laborers is substantially reduced.

(AF 333). The Employer stated because its dates of need and number of workers have not changed substantially from its previous applications, it was not submitting additional supporting documentation in accordance with the September 1, 2016 DOL announcement that additional information may not be required in such cases. (AF 333). However, the Employer did provide executed contracts, which it asserted showed that general contractors have indicated they expect their product on January 15, 2020. (AF 333, 339-49).

On November 1, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF 321-27). The CO found, in part, that the Employer did not “sufficiently demonstrate the requested standard of temporary need” as required by 20 C.F.R. § 655.6(a) & (b). (AF 324). The CO questioned the Employer’s assertion that weather is a determining factor for its peakload need, stating that “the weather in . . . Texas is favorable to year-round outdoor work.” (AF 324). The CO further stated that the contracts for upcoming projects provided by the Employer did not indicate “how it calculates the necessary number of workers per ton or the specific length of each project,” and did not establish how the work for the specific timeframe identified in the contracts compared with work performed the remainder of the year for the same services. (AF 324-35). The CO requested additional documentation to cure the deficiency, including, but not limited to, documentation supporting its position that weather affects its peakload need, documentation of a schedule or season for providing rock quarry products and services in the area of intended employment, a summary listing of all projects for 2018 and 2019, and monthly payroll reports for 2018 and 2019.⁶ (AF 325-26).

On November 13, 2019, the Employer filed a Response to the NOD, attaching additional documentation, including a letter of explanation, 2019 payroll data, 2018-2019 sales reports, 2015-2020 gross total sales with projections, letters of intent, 2018-2019 weather reports, 2018-2019 941 Tax Forms, and a 2018 Form 1120S Return Summary. (AF 48-319). The Employer stated the following in its letter of explanation:

[U]nprecedented growth and improved economy have actually caused a shortage of labor in Texas These two factors, our growing business and less labor

⁶ The CO agreed that the September 1, 2016 DOL Guidance states that if the job offer has not changed since prior applications, no additional documentation is required. (AF 325). However, the CO stated under the Guidance, if the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD may be issued requesting additional explanation or documentation. (AF 325).

have created an increased need for H2B laborers, because there is less local labor to meet our growing need. . . .

As a large stone supplier, Cobra Stone does not only supply stone to Texas builders and suppliers. We presently supply stone for operations in 15 states and we will ship stone to more states in 2020 [O]ur clients in the Northern states who have very cold and severe winters . . . only order during the spring/summer months because of their harsh winters [P]ayroll charts have always confirmed that we are peak load. We begin producing more rock in January to meet the Spring, Summer and Fall peak demand. We normally produce all of the rock needed for the year during our dates of need, January 15th-October 15th, so when our customers businesses slow down during the winter. . . so does our business. . . .

Even in Texas, our operations are still peak load because of our clients in the northern states that have harsh winters. This is because our major customers are landscaping companies and builders, who are themselves peak-load businesses. Even in Texas, most landscaping is done February through November. Landscapers do not usually conduct very much business in the winter months because of the weather. Building companies also follow the same peak-load cycle due to cyclical financing and beginning of the year bidding being contracted in February and March. As a result, our peak-load months follow closely the peak-load needs of these businesses

(AF 57-58).

On November 22, 2019, the CO issued a Final Determination denying certification, based on a finding that the Employer did not establish a peakload need pursuant to 20 C.F.R. § 655.6(a) & (b).⁷ (AF 37-47). The CO addressed the Employer's documentation provided in response to the NOD and found that the documentation did not support a finding of peakload need. First, the CO found that the weather data did not include any data for Texas as requested,⁸ was general in nature, and did not show the effects of climate on the Employer's operations. (AF 43-44). The CO next stated that the Employer failed to provide payroll data from 2018 as required by the NOD and the 2019 payroll data did not support a peakload need because the alleged non-peakload months of November and December had not yet occurred. (AF 43). The CO further found that the monthly summarized sales figures for 2018 and 2019 did not support a peakload

⁷ The CO also denied certification for failure to establish the need for the number of workers requested. Because I affirm the CO's denials based on the Employer's failure to establish a peakload need, I need not address this additional denial reason.

⁸ The CO acknowledged that the Employer did provide general weather data for several states where its clients are located, but stated that it did not clarify what portion of the Employer's production output is derived from these states. (AF 43).

need because the 2019 data did not include the non-peak months of November and December and the 2018 data demonstrated that the Employer had more sales in its non-peak month of November than in the alleged peak months of January and February. (AF 44).

The CO also reviewed the letters of intent provided by Employer and found that they did not justify the Employer's peakload need because they were not from independent sources as required in the NOD and did not address how the specified timeframe referenced in the letters compared with work performed throughout an entire year. (AF 44). The CO also discounted the gross total sales for 2015-2020 because they were not broken down by month, and the 2018 Income Tax Return because it only represented the annual operations of the Employer. (AF 44). Lastly, the CO found that the quarterly tax information did not establish peakload need because it covered the Employer's entire operations and not just those operations associated with Laborers, and stated that even if it was considered, it showed a higher tax liability in the non-peakload months of November and December than in the peak months of January, February, April, May, July, September, and October. (AF 44).

On November 29, 2019, the Employer timely requested administrative review of the denials of the Applications before the Board. (AF at 1). On December 11, 2019, I issued a Notice of Docketing and Expedited Briefing Schedule, allowing the parties to file briefs within seven business days. On December 19, 2019, the Employer filed an appellate brief. The CO did not file a brief in this matter.

Employer's appellate brief is entitled to minimal weight as it refers to a different application not before me, evidenced by Employer's references to a request for "30" workers for the position of "material movers," as well as references to statements of the CO and evidence not contained in the record. (*See, e.g.*, Er. Br. 2, 3, 6, 7, 9-10, 13, 14, 15). With that said, giving significant leeway to the Employer, there are two main arguments in the Employer's brief that can be applied to the claims before me, namely, that the CO failed to follow recent DOL Guidance regarding previous applications, and that the CO erroneously applied the "seasonal need" standard as opposed to a "peak load" standard when assessing the evidence.

DISCUSSION

At issue on appeal is whether the Employer has adequately documented a temporary, peakload need for either 50 or 60 Laborers from January 15, 2020 to October 15, 2020, in San

Saba, Lueders, and Florence, Texas. The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal arguments and such evidence that was actually submitted to the CO in support of the Application. 20 C.F.R. § 655.61(a), (e).

1. Prior Certifications

As an initial matter, the Employer asserts because the CO has certified its applications involving the same issues in previous years, it was not required to submit additional documentation in support of its present Applications, and the CO should have approved certification on the face of the Applications, in accordance with the ETA’s Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers (“Guidance”), effective September 1, 2016.⁹ (Er. Br. at 3-8). To the Employer’s point, the Guidance clearly encourages COs to strongly consider past certifications in making their determinations and to limit requests for additional documentation, but also states: “If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued.” Further, in the wake of the Guidance, BALCA has emphasized its non-regulatory status and has held that while “applications should reasonably be reviewed within the context of the previous certifications,” the Guidance “does not allow a non-meritorious application to survive simply based on previous years’ approvals.” *BMC West LLC*, 2018-TLN-00093, PDF at 8-9 (July 12, 2018); *see also Cooper Roofing and Solar*, 2018-TLN-00080 (Mar. 27, 2018); *H & H Tile and Plaster of Austin, Ltd.*, 2018-TLN-00049, PDF at 11 (Feb. 16, 2018); *Jose Uribe Concrete Constr.*, 2018-TLN-00044 (Feb. 2, 2018).

The Appeal Files in these matters do not contain any documentation of the prior certifications referenced by the Employer,¹⁰ and I therefore cannot make any determinations of whether the CO properly applied the DOL Guidance based on these prior applications. Either way, Board precedent indicates that non-meritorious applications should not survive based solely on past approvals, and I find in these matters, the Employer has failed to establish its applications are meritorious, for the reasons discussed below.

⁹ The Guidance is available at https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf.

¹⁰ While the Employer asserts in its brief that it did submit evidence of its prior certifications, the Employer was referring to an incorrect application. Er. Br. 3. No such evidence is in the record before me.

2. *Determination on the Merits*

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload, or intermittent. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). To qualify for peakload need, an employer:

must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

Id.; *see, e.g., Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Prods.*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014). An employer must also demonstrate the number of workers and period of need requested are justified, and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3), (4). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In its initial statement of temporary need, the Employer stated: "As is well known, Texas winters (during which time our business slows significantly each year due to the winter weather conditions and slow construction period) are normally predictable" and "[d]ue to the nature of our work we are unable to engage in much business during the winter months . . . because the cold and wet weather is not conducive to separating blocks of rough dimension stone at a quarry." (AF 333). The Employer, however, appeared to abandon this rationale for a peakload need in its response to the NOD and outright denies this basis for peakload need its brief, despite its original statements in the Applications. (Er. Br. 2, 7-8). Therefore, I find that weather conditions in Texas limiting production activities is no longer a basis for Employer's alleged peakload need.

The Employer additionally asserted because its customers are construction and landscaping companies, and construction and landscaping generally slows down during the winter months, its peakload need is directly tied to the peakload need of its customers, many of whom are located in Northern states with harsh winters. While on its face, a peakload need based on a construction or landscaping schedule is plausible, the documentation provided by the Employer in these matters does not support such a peakload need.

Payroll data is often crucial in cases involving a peakload need, and in this matter the Employer failed to provide any relevant payroll data. The Employer failed to explain why it did not provide 2018 payroll data as required by the NOD. While the Employer did provide payroll data for 2019, it cannot establish a peakload need because it does not include the non-peakload months of November and December for comparison with the alleged peakload period of January to October.

The Employer did provide bar charts of sales by month for 2018 and 2019. (AF 61-62). As with the payroll data, the 2019 sales chart cannot establish peakload need because it does not include the non-peakload months of November and December for comparison. As for the 2018 sales chart, I find that it is of minimal value, as it does not provide the specific dollar amounts of sales for each month, and at most I can only make an eyeball judgment on which months appear to have higher sales than others based on the slightly varying bar heights. (AF 61). Based on this limited visual review, I see no discernable pattern of a peakload need as it does not show a recurring or consistent increase in sales during the alleged peak season, necessitating the need for temporary workers. For example, the non-peakload month of December appears to have similar total sales as the months of January and February, and the non-peakload month of November appears to have higher sales than January and February, and similar, if not higher, sales compared with the months of March through June. Given the chart's lack of accuracy, and the fact that on its face, I can discern no true peakload period from January 15 through October 15, this evidence does not establish a peakload need.

To the extent the Employer asserts that the CO improperly required payroll and sales data for previous years under the peakload standard, and that such evidence is only relevant under the seasonal need standard, I do not find this argument persuasive. (Er. Br. at 11-14). The definition of peakload need states that an employer must establish a temporary need to supplement its permanent staff "due to a *seasonal* or short term demand." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3)(emphasis added). Here, the Employer does not allege a short-term demand, but rather asserts a "peak busy season" based on the weather conditions in the Northern states where its customers are located and the fact that its customers, who are landscapers and builders, do not conduct much business in the winter months. (AF 57-58). Because the Employer alleges a peakload need based on a seasonal demand, I find that previous years' payroll data and sales data are probative of peakload need. Here, the sales and payroll data do not show an increased need during the alleged "peak busy season" from January 15th to October 15th.

The Employer also filed Quarterly Federal Tax Return 941 Forms, which break down total tax liability by month. I agree with the CO that because this document pertains to the Employer's operations as a whole and is not limited to Laborer positions, it is entitled minimal weight. I also agree with the CO that even considering this evidence, it does not support a peakload need, as the non-peakload months of November and December in 2018 had a higher tax liability than all other months with the exceptions of March, June and August.

The Employer submitted seventeen letters of intent from customers, all stating "the peak months that services are performed for our company by Cobra Stone Inc. are 1/15/20 – 11/15/20."¹¹ (AF 211-218). These letters do indicate the reason for the peak months, and the identical, conclusory language in each letter diminishes their persuasive value. *San Felipe Stone*, 2019-TLN-00039, PDF at 9 (Mar. 7, 2019); *Titus Works, LLC*, 2019-TLN-00023 (Feb. 8, 2019). More significantly, the letters are contrary to the Employer's alleged peakload period, as all the letters indicate the need extends into the month of November. These generic letters without any details as to the need for the peak season, and which indicate a longer period of need than asserted by the Employer, do not support the Employer's alleged peakload period of need.

The contracts for upcoming projects provided by the Employer similarly list projects dates from January 15th to November 15th, contrary to Employer's alleged peakload period ending on October 15th. (AF 339-49). Further, these contracts cannot establish a peakload need because there is no basis for comparison with services performed for the remainder of the year, to determine whether there is an increase in the need for workers during the peak period. Lastly, I find that the CO correctly determined that the annual total gross sales for 2015 through 2020 and the Form 1120S Return Summary for 2018 cannot establish a peakload need as this documentation is not broken down by month for comparison of peakload versus non peakload periods. (Er. Br. 10, 13-15).

Based on the Employer's response to the NOD, it appears that the Employer's primary need for H-2B workers is due a combination of a labor shortage and the company's "unprecedented growth." (AF 57). Neither of these reasons are a legitimate basis for certification based on a peakload need, and in fact, a significant growth in the Employer's business supports more of a permanent, rather than a temporary need. *See BMC West LLC*, 2018-TLN-00100, PDF at 10 (July 17, 2018).

¹¹ As an exception, two clients listed a more general peakload period of "January through November." (AF 66, 79).

After reviewing all of the documentation provided in this matter and for the reasons discussed above, I find that the Employer has not met its burden of establishing it has a peakload period of need for either 50 or 60 Laborers from January 15, 2020 to October 15, 2020.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's denials of certification in the above-captioned matters are **AFFIRMED**.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts