



Issue Date: 29 December 2020

BALCA Case No.: 2021-TLN-00008
ETA Case No.: H-400-20305-893919

In the Matter of:

COBRA STONE, INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

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

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER AFFIRMING FINAL DETERMINATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request filed by Cobra Stone, Inc. (“Employer”), for review of the Final Determination issued by the Certifying Officer (“CO”) in the above-captioned H-2B temporary labor certification case.² The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.³ 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 CO 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).

¹ The Office of the Solicitor, U.S. Department of Labor, did not make an appearance on behalf of the Certifying Officer in this case.

² On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

³ 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). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation.

STATEMENT OF THE CASE

The Employer is a stone quarry business located in San Saba County, Texas. On October 31, 2020, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF⁴ 48-62.) The Employer requested certification for forty-five laborers⁵ from January 15, 2021, until October 15, 2021, based on an alleged peakload need for workers during that period. (AF 48.)

On November 10, 2020, the CO issued a Notice of Deficiency (“NOD”), which outlined two deficiencies in the Employer’s Application. (AF 41-47.) The CO gave the Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD or request administrative review before BALCA. (AF 42-43.) On November 18, 2020, the Employer responded to the NOD. (AF 22-40.) On November 25, 2020, the CO issued a Final Determination outlining one outstanding deficiency. (AF 12-21.) The CO concluded that the Employer failed to establish that the laborer job opportunity was temporary in nature under 20 C.F.R. § 655.6(a) and (b). (AF 12-21.) Therefore, the CO denied the Employer’s Application.

On December 8, 2020, the Employer requested administrative review of the CO’s Final Determination. (AF 1-11.) BALCA assigned this case to me on December 15, 2020. The same day, I received the Appeal File and issued a Notice of Assignment and Order Setting Briefing Schedule permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). Neither the Employer nor the Solicitor filed a brief.⁶

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. The review is not de novo. 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 of the CO’s 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*

⁴ “AF” refers to the Appeal File.

⁵ SOC (O*Net/OES) occupation code 53-7062.00 and occupation title “Laborers and Freight, Stock, and Material Movers, Hand.” (AF 48.)

⁶ On December 28, 2020, counsel for the Employer filed a Motion to Consolidate (“Motion”) H-400-20304-893184 with H-400-20304-893233. However, the Employer filed it after the deadline for filing briefs in this case had passed. Moreover, although counsel for the Employer referenced an ETA case number in his Motion, he did not identify another pending BALCA case number. Thus, it is not clear whether BALCA has even docketed the other ETA case. Therefore, I hereby deny the Employer’s Motion.

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).

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of these four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). For the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B), which provides the following:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

In order to establish a peakload need, the 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." 8 C.F.R. 214.2(h)(6)(ii)(B)(3).

After reviewing the record, I find no error in the CO's determination that the Employer failed to establish that it has a temporary need for H-2B workers from January 15, 2021, until October 15, 2021. In support of its dates of alleged peakload need, the Employer explained that it needs fewer workers during the "winter months," as "[r]ain days, daylight hours[,] and temperatures" slow down its business significantly. (AF 53, 23-24.) Given that January, February, and March are "winter months," and they are months included in the Employer's period of alleged peakload need, the Employer's argument makes little sense on its face. More significantly, the Employer did not submit evidence showing that its business increases during its period of alleged peakload need and decreases during the other months of the year. The Employer argued that market indicators show increased demand for services from early spring to winter, and it submitted to the CO articles regarding the booming construction in its region. However, the Employer did not submit historical earnings records, payroll records, and/or a list of prior projects, contracts, or letters of intent showing that demand for its business, and, consequently, its need for additional laborers, increases around January 15 and decreases around October 15. Moreover, the Employer did not provide any data evidencing how many fulltime and temporary laborers it hires each month. Therefore, the Employer has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand for its services.

In her Final Determination, the CO explained that when she previously granted the Employer certification to employ H-2B workers, the Employer had demonstrated a temporary need from April 1, 2020, until October 15, 2020, under certification number H-400-20003-230116. (AF 17-21.) As discussed above, the Employer is now alleging a temporary need for workers from January 15, 2021, until October 15, 2021.⁷ The evidence submitted in support of the Employer's prior Application is not of record in this case. Even if it were, and even if it showed that the Employer has a peakload need for workers from April to October, the CO's Final Determination cannot be modified and the CO ordered to partially certify the Employer's Application from April until October. Under the applicable regulation at 20 C.F.R. § 655.15(b), the Employer must file a completed Application "no more than 90 calendar days and no less than 75 calendar days before" its "date of need" for workers. Because the Employer filed its Application on October 31, 2020, it does not meet the regulatory timelines even if it were to allege a start date of need of April 1, 2021. I note, however, that the Employer is not precluded from filing another Application with the CO, with supporting documentation, within the regulatory timeframe prescribed in 20 C.F.R. § 655.15(b).

Based on the evidence of record, I find that the Employer has not carried its burden of showing that it regularly employs permanent workers to work as laborers and that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand. Therefore, I find that the CO properly concluded that the Employer failed to establish a temporary need for H-2B workers.

ORDER

It is hereby **ORDERED** that the Certifying Officer's decision denying the Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

JOHN P. SELLERS, III
Administrative Law Judge

⁷ Although the Employer referenced *another* prior Application in which it requested H-2B workers from January 15, 2020, through October 15, 2020, the CO denied that Application. (AF 20, 54.) Therefore, it does not aid the Employer in demonstrating a temporary for workers from January until October.