



Issue Date: 16 February 2021

BALCA Case No.: 2021-TLN-00016
ETA Case No.: H-400-20305-893933

In the Matter of:

C EAGLE STONE SUPPLY LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER AFFIRMING
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 “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). 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 (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR § 655.53.

STATEMENT OF THE CASE

On October 31, 2020, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B or “Application”) from C Eagle Stone Supply LLC (“Employer”) for 30 Laborers to be employed as “Helpers—Production Workers” from January

15, 2021 to October 15, 2021, to meet a peakload need. (AF¹ 107.) The job duties were listed as: “lift stone to put on pallets or buckets, wrap pallets of stone with wire, lift up to 50 lbs.” (AF 109). The statement of temporary need described the Employer as a stone quarry business in the Hood County, Texas area, whose services include “production and movement of rock.” (AF 112). The statement asserted: “The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is Jan. 15th to Oct. 15th.” Employer stated: “Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately Jan 15th to Oct 15th,” and “due to the nature of our work we are unable to engage in much business during the winter months, of approximately Oct 15th – Jan 15th.” Employer asserted that “construction in general slows down and the need for laborers is substantially reduced” during the winter months, and that clients in northern states with severe winters “only order during the Spring/Summer months.” Accordingly, “we begin producing more rock in April 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, April 1st—November 1st so when our customers’ businesses slow down during the winter (Oct 15—Jan 15), so does our business.” (AF 112). Based on these assertions, Employer claimed a peak load need from January 15 through October 15, 2021.

Employer also stated that while it had requested 10 workers in the past, it was requesting 30 workers this year, so it was “submitting additional documentation” in support of its application. (AF 112).

On November 10, 2020, the CO issued a *Notice of Deficiency* (NOD). (AF 100-106). The CO found three deficiencies with Employer’s Application: failure to establish the job opportunity as temporary in nature (including failure to establish the requested dates of need and failure to justify the change in the dates of needs from the dates requested in prior applications); failure to establish a temporary need for the number of workers requested (due to the increased request for 30 workers, after prior requests for 10 workers); and deficiencies in the job order assurances and contents (due to inconsistencies between the Application and the job order).

The Employer filed a response to the NOD on November 23, 2020. (AF 44-98). The Employer cited three prior Applications that were certified for 10 workers based on a peak load need. The Employer stated:

[Y]ear over year our customers have indicated that there is a precipitous decrease in residential home purchases in the Fall because of the holiday season and a measurable increase in demand near the end of the school year beginning in March each year because families with children are hoping to resettle prior to the beginning of the school year. It’s enough of a “trend” to be classified as a predictable pattern.

(AF 44). Employer asserted that workflow will have “a peak running from early spring to winter,” and attached news articles which it contended “verify construction around Central Texas is booming even during the pandemic and it does not appear to be slowing down.” (AF 45).

¹ The Appeal File will be cited as “AF” followed by the relevant page number.

Employer cited a quarry worker shortage, and stated its peak load period of January to October was also attributable to weather, because “rain days, daylight hours, and temperatures” contribute to its peak load period. (AF 45).

Regarding the second deficiency, Employer stated it expects to grow about 18% in 2021 due to the improved economy and growth in Central Texas. Employer stated it increased the number of H-2B workers requested because it needs another 10% due to growth, and 10% due to lost U.S. workers, for “20% total.” (AF 46). Regarding the third deficiency, Employer gave permission to modify its Application to correct the inconsistencies. (AF 47). Finally, Employer stated that other quarries in the area had been approved in the past for start dates in January, “to meet the growing needs of construction in our area.” Employer asked the CO to approve “our 35 requested H2B workers in 2020.” (AF 47).

The CO issued a *Final Determination* denying the Application on December 22, 2020. (AF 23-43.) The CO stated: “While the employer provided summarized payroll reports from 2018, 2019, and 2020, the employer did not provide an explanation of the data of the payroll reports submitted to the Chicago NPC,” as the NOD had directed. (AF 29). Additionally, the CO found that the “employer’s explanation and documentation of its temporary need did not overcome the deficiency,” because its previously certified application stated a period of need from April 1 through November 1, and “[t]he employer does not have a history with the Department filing for a January start date within the area of intended employment.” The CO found that the requested start date of January 15 “does not reflect the true start date associated with the employer’s peakload need.” (AF 31). Because it remained unclear why the Employer’s dates of need had changed from the previous year, the CO found the Employer had not established a peak load need from January 15 to October 15, 2021. (AF 31).

Further, the CO noted that the Employer cited an increase in demand from March to the fall season, and cited an increased workflow in stucco from “early spring to winter.” The Employer’s filing history showed a usual start date of need of April 1. The payroll reports showed an increase in the total hours worked by Employer’s employees beginning in “the month of April in 2018, the month of June in 2019, and the month of June in 2020.” (AF 33-34). While the Employer contended it does not require H-2B workers during the “winter months,” the CO noted that January, February, and March—all included within the Employer’s current request—are winter months. The CO also found “[t]he employer’s payroll data indicates a clear decrease in total hours worked by permanent and temporary workers during the stated peak months of January through March.” (AF 34). The CO stated that “the employer may have a peakload need for workers starting in April, after the winter months,” but if so, the current Application was filed too early for an April 1 start date of need, so the CO could not issue a partial certification with an April 1 start date. (AF 35).

The CO also noted that the Employer employs laborers and freight, stock, and material movers all 12 months of the year, and had temporary H-2B workers for 11 months of the year in 2020. The CO stated: “it appears the employer may have a year-round need for temporary workers.” (AF 34). The CO noted that “a labor shortage, no matter how severe does not justify a temporary need for workers.” (AF 35).

Regarding the second deficiency, the CO found that the Employer's response to the NOD did not sufficiently explain why it needs 30 H-2B workers. The Employer stated it needed a "20%" increase in workers, but as the CO observed, a 20% increase over the historical request for 10 workers would be 12 workers. The CO also noted that the conclusion of the Employer's response requested approval for 35 workers. The CO found the Employer's need remained unclear, and the Employer had not established a bona fide need for 30 temporary workers.

Regarding the third deficiency, the CO found that the amendments authorized by the Employer's response to the NOD were not sufficient to correct all of the inconsistencies identified in the NOD, and therefore failed to overcome the deficiency.

For all of these reasons, the CO denied the Employer's Application for temporary labor certification for 30 H-2B workers.

By letter filed on January 14, 2021, Employer requested administrative review of the Final Determination.² (AF 1-22.) Employer stated that the CO "erroneously determined that C-Eagle Stone, LLC failed to establish the job opportunity as temporary [in] nature," failed to establish the number of workers needed, and erred in the job order assurances and contents. (AF 1). Employer stated that it "reserve[d] the right to fully articulate with legal authority in a brief" the reasons for its appeal of the denial. (AF 1).

I issued a *Notice of Assignment and Expedited Briefing Schedule* on February 4, 2021. The Notice stated that the regulations require an employer to submit its argument in its request for review, and provide only for a responsive brief from the CO. Thus, I permitted the CO to file a brief within seven business days of receipt of the Appeal File, and stated I would consider Employer's arguments in its request for review. The CO waived her right to file a brief, and relies on the reasoning stated in the Final Determination.

LEGAL STANDARD

The standard of review in H-2B cases is limited. A reviewing judge may consider only "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.

DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly,

² The Employer sent its request for review via FedEx Overnight Delivery on January 4, 2021. (AF 22). Tracking results from FedEx show it was delivered on January 5, 2021. Therefore, notwithstanding the date stamp of January 14, 2021, I find the request for review was timely made.

an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. Temporary service or labor “refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.” 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer needs a worker for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer must establish that its need for temporary services or labor “will end in the near, definable future.” *Id.*

The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009).

To qualify as a peak load 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); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a temporary peak load need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer’s documentation revealed that the employer’s alleged “peakload” need spanned at least a 19-month period); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer’s payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need).

The employer must demonstrate a bona fide need for the number of workers requested. *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application).

Here, Employer requested certification for 30 Laborers to lift stones onto pallets in its stone quarry, for an asserted peak load period from January 15 through October 15, 2021. I find that Employer has not established entitlement to certification, because its submissions do not demonstrate a peak load period beginning January 15. As the CO found, the Employer’s payroll reports show that January is its slowest month, in terms of total number of hours worked, and February and March are also historically among the slowest months. Employer’s previous applications stated a start date of need of April 1, and its payroll reports show that its peak period typically begins sometime between April and July. Employer’s assertions about increases in work in the “spring” are consistent with its filing history and payroll reports in showing that its

peak season begins months later than the requested period of need in this case. The Board has consistently affirmed denials of certification for applications where an employer's own records belie its claimed peak load periods of need. *See, e.g., DDM Haulers LLC*, 2018-TLN-00037 (Jan. 12, 2018); *Cody Builders Supply*, 2018-TLN-00053 (Feb. 8, 2018); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Erickson Construction*, 2016-TLN-0050 (Jun. 20, 2016); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011). The record does not show that the CO's denial of certification for failure to show a temporary peak load need from January 15 to October 15 was improper here.

Additionally, the CO noted that the Employer did not submit "[a]n explanation of the data in submitted payroll documentation," as directed in the NOD. Applications for temporary labor certification are properly denied when the employer does not supply requested information. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017); *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017).

Finally, the CO correctly found that the Employer did not adequately explain or substantiate its need for 30 H-2B workers, when it has historically requested 10. The Employer's explanation that it expects a 20% overall increase in need due to growth (10%) and loss of U.S. workers (10%) would not result in the 30 workers requested (or the 35 workers mentioned in its response to the NOD), and the Employer provided no other explanation of how it arrived at the request for 30 laborers.

For these reasons, the CO properly denied the Employer's *H-2B Application for Temporary Employment Certification*.

ORDER

It is hereby ORDERED that the Certifying Officer's denial of the Employer's Application for Temporary Employment Certification is AFFIRMED.

For the Board:

MONICA MARKLEY
Administrative Law Judge