



Issue Date: 17 October 2016

**BALCA Case No.: 2016-TLN-00070**

ETA Case No.: H-400-16188-559089

*In the Matter of:*

**L & R TRUCKING LLC,**  
*Employer.*

Appearances: Pablo E. Bustos, Esq.  
For the Employer

Micole Allekotte, Esq.  
U.S. Department of Labor  
Office of the Solicitor  
For the Certifying Officer

Before: PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This proceeding is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to L & R Trucking's request for administrative review of the Certifying Officer's (CO) denial of temporary labor certification under the H-2B non-immigrant program.<sup>1</sup> 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. 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).

Employers who seek to hire foreign workers under this program must apply for and receive a labor certification from the Department of Labor. § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (OFLC) of the Employment and Training Administration (ETA). If the CO denies certification, in whole or in part, the employer may seek administrative review. BALCA must affirm, reverse,

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<sup>1</sup> On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). The Interim Final Rule applies to this case.

modify, or remand the CO's determination within 7 business days of submission of the CO's brief or 10 business days after receipt of the Appeal file, whichever is later. § 655.61.

## **BACKGROUND**

The Employer, L & R Trucking, is located in Arizona near the border with Mexico that delivers produce, primarily grown in Mexico, to locations throughout the United States. AF 119.<sup>2</sup> On July 6, 2016, the Employer filed an H-2B application with the ETA seeking 15 full-time Truck Drivers to be employed as seasonal workers for the period from October 3, 2016 through July 3, 2017. *Id.* The Employer's Statement of Temporary Need describes the transported produce as seasonal, in that the produce grows during specific periods. The need for an increase in truck drivers corresponds with the increase in marketable produce. Every year there is an increase in need near at the beginning of October lasting through the beginning of July. *Id.*

On July 14, 2016, the CO issued a *Notice of Deficiency* (NOD) notifying the Employer that its application did not comply with all the requirements of the H-2B program. AF 107. In particular, the CO cited the following deficiencies: failure to establish the job opportunity as temporary in nature pursuant to §655.6(a) and (b); inclusion of multiple areas of intended employment in violation of §655.15(f) and §655.5; and failure to submit a complete and accurate ETA Form 9142 per §655.15(a). AF 110-113. The CO requested additional documentation justifying the Employer's chosen standard of temporary need, a revised ETA Form 9142, and a completed ETA Form 9142B, Appendix B. *Id.*

The Employer responded to the NOD on July 29, 2016. AF 89. The Employer submitted a "Certified Payroll and Income Expense Report," a new state workforce agency (SWA) advertisement, affidavits of areas of intended employment and temporary need, and ETA Form 9142B Appendix. AF 89-105.

The CO issued a *Final Determination* denying certification on September 8, 2016. AF 75. The CO determined the additional documentation did not sufficiently demonstrate that Employer's need is seasonal. A review of the Employer's application history shows the dates of need in the same area of intended employment overlap and include the entire year. The CO denied the application because Employer's need appears to be year-round not seasonal. AF 79.

The Employer filed a request for administrative review with BALCA on September 23, 2016. AF 1-18. BALCA issued a Notice of Docketing, notifying the parties that the appeal had been docketed and providing the parties an opportunity to submit briefs on an expedited basis. Both parties submitted briefs: the Employer on October 7, 2016, and the CO on October 12, 2016.

## **DISCUSSION**

The Employer bears the burden of establishing that its temporary need is justified as seasonal as defined by the Department of Homeland Security.

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<sup>2</sup> Citations to the Appeal File are abbreviated as "AF" followed by the page number.

Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

8 C.F.R. §214.2(h)(6)(ii)(B)(2)

The Employer did not specify a period of time when it does not need labor as required by §214.2(h)(6)(ii)(B)(2). Further, a review of the record shows the Employer has applied for certification of H-2B truck drivers in excess of one year. The regulations state that certification of a seasonal need will be denied “where the employer has a need lasting more than 9 months.” §655.6(b). Employer does not address these deficiencies, but rather contends that its “seasonal need was always extremely clear. The ‘seasonal need’ was based on the weather.” AF 19.

The Employer confuses a seasonal need as defined in the regulations with seasons as determined by the earth’s orbit around the sun. *Id.* The Employer identifies three growing seasons and correlating harvest times with an increase in need for truck drivers. The Employer requests that “[i]f only one season is allowed,” it has clearly requested temporary workers for early October through early July. AF 20. Although that time period would be permissible were it Employer’s sole request for labor, the Employer was previously certified (H-400-15328-884244) for 15 truck drivers in the same area of intended employment from February 8, 2016 through November 8, 2016. AF 79. The prior approval combined with the present request encompasses 17 months. The Employer cannot provide a specific period of time it does not need labor, rather the Employer has demonstrated it has a year-round need for truck drivers.

Further, the Employer also previously submitted an application (H-400-16101-025714) for approval of 15 truck drivers in the same area of intended employment for July 1, 2016 through March 31, 2017. This application reinforces that the Employer’s need is year-long and not seasonal. The Employer’s applications for a seasonal need in the same area of intended employment encompass the following dates:

ETA Case # H-400-15328-884244													
Certified – 15 Truck Drivers													
02/08/16 – 11/08/16													
2016													
Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov				
					Jul	Aug	Sep	Oct	Nov	Dec	2017		
ETA Case # H-400-16101-025714									Jan			Feb	Mar
Denied – 15 Truck Drivers													
07/01/16 – 03/31/17													

	Oct	Nov	Dec							
ETA Case # 16188-559089				Jan	Feb	Mar	Apr	May	Jun	Jul
The present case										
October 3,2016 – July 3,2017										

The Employer has not established a period in which it does not require at least 15 truck drivers. The overlapping dates show a need every month for seventeen consecutive months. Thus, Employer’s need is not seasonal as defined by the regulations.

Even if the other applications are not considered, the Employer’s contention that its seasonal need coincides with its busiest season, October through early July, is not supported by the record. AF 104. The Employer submitted a report of its income with its Affidavit of Temporary Need claiming July, August and September are “the slowest months of the year.” *Id.* The report shows an average monthly income in 2015 of \$130,294.00, “but for the months of July, August and September it was \$117,141.67, or \$13,152.42 less than average, or 10.09% lower than average.” *Id.* It appears the Employer only included September with July and August in order to satisfy the nine-month limitation for a temporary, seasonal need pursuant to §655.6(b). The combined average of July, August, and September obfuscates the fact that alone the September income was \$146,530.96, exceeding the monthly average by \$16,236.87, and outperforming every month except for December and February. Further, the 2015 income in January, April, May, and November, claimed peak season months, is less than the monthly average. *Id.*

Based on all of the foregoing, the Employer has not demonstrated that its need for labor is a temporary, seasonal need as required by §655.6 (a) and (b).

**ORDER**

Accordingly, the Certifying Officer’s *Final Determination* denying certification is hereby **AFFIRMED**.

For the Board:

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

PCJ,JR/JDP/jcb  
Newport News, Virginia