



Issue Date: 27 August 2012

BALCA Case No.: 2012-TLN-00045

ETA Case No.: C-12166-59293

In the Matter of:

AVON SEAFOOD,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION

This matter arises under the temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), and the implementing regulations at 8 C.F.R. Part 214 and 20 C.F.R. Part 655, Subpart A. These provisions, referred to as the “H-2B program,” permit employers to bring foreign nationals to the United States to fill temporary nonagricultural jobs when there are not sufficient domestic workers who are able, willing, qualified, and available to perform such services or labor. *See* 8 C.F.R. § 214(2)(h)(1)(ii)(D). Prior to applying for a visa under the H-2B program, an employer must file an *Application for Temporary Employment Certification* with the Department of Labor’s Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. A Certifying Officer (“CO”) within ETA’s Office of Foreign Labor Certification reviews these applications and makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies the requested certification, in whole or in part, the affected employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

The Employer in this case, Avon Seafood (“Avon”), filed an *Application for Temporary Employment Certification* (“Application”) with ETA on June 14, 2012. AF 158.¹ In this application, Avon requested H-2B certification for seven (7) “whole fish processors/net builders” from July 2, 2012 to March 31, 2013. *Id.* Under “Statement of Temporary Need,” Avon explained:

We are a peakload operation and have operated as such since our establishment in 1998. Our company is requesting H-2B certification after continuing to experience significant and increasing shortages of workers. My company is engaged in processing whole fish for sale for human consumption. We ship the fish to different wholesale markets who in turn sell the fish for human consumption. The type of fish, mainly menhadens, are subject to the climatic conditions of the water. When cold weather approaches and the water temperatures drop, these fish migrate to deeper and warmer waters making it impossible to catch these fish. Our business operates as weather allows. There are very few domestic workers willing to work doing this type of heavy work and we have met our processing needs through the H-2B program as a consequence. Our ability to hire sufficient, temporary US workers locally to meet our labor need is virtually zero. We are located in Avon which is the central village of Hatteras Island. It is located about 30 miles south of Oregon Inlet and about 20 miles north of Hatteras Inlet. Avon used to be a maritime forest but the trees were cut for shipbuilding and never grew back. Today, Avon has a harbor where local residents earn their living from commercial fishing. The problem is that local US workers have increasingly chosen other jobs rather than working in the seafood industry. Consequently many of them have left the island to seek work on the mainland. Local recruitment of workers via “word of mouth” and newspaper help wanted ads produce about 1-2 applicants per year. The applicants who applied this year did not wish to relocate to the island for work.

AF 158.

On June 19, 2012, the CO issued a *Request for Further Information* (“RFI”), notifying Avon that its Application failed to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.21(a) . AF 154-157. In particular, the CO informed Avon that it “failed to explain the nature of the temporary need based on [its] business operations.” AF 156. To cure On June 19, 2012, the CO issued a *Request for Further Information* (“RFI”), notifying Avon that its Application failed to establish that the nature of its need is temporary, as required by 20

¹ Citations to the appeal file will be abbreviated “AF” followed by the page number.

C.F.R. § 655.21(a) . AF 154-157. In particular, the CO informed Avon that it “failed to explain the nature of the temporary need based on [its] business operations.” AF 156. To cure this deficiency, the CO directed Avon to provide a detailed statement of temporary need containing the following:

1. A description of [Avon’s] business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of [Avon’s] job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

AF 157. The CO also instructed Avon to submit documentation justifying its chosen standard of temporary need, including, but not limited to, signed work contracts and/or monthly invoices, and monthly payroll records to support its claimed need. AF 157.

Avon responded to the RFI on June 28, 2012, submitting an amended statement of temporary need and supporting documentation. AF 100-152. Avon’s amended statement of temporary need provides, in pertinent part:

Our company employs two (2) US workers on a permanent basis. We supplement our staff with several seasonal part time domestic workers. The workers reflected on our payroll summary as seasonal only work on average 15 hours a week with our company. They all have full time jobs elsewhere (mainly the ferry boat or construction on the mainland) and we utilize them as much as possible to supplement our full time staff. Unfortunately, our ability to meet our labor needs in this matter has proved difficult for several years now

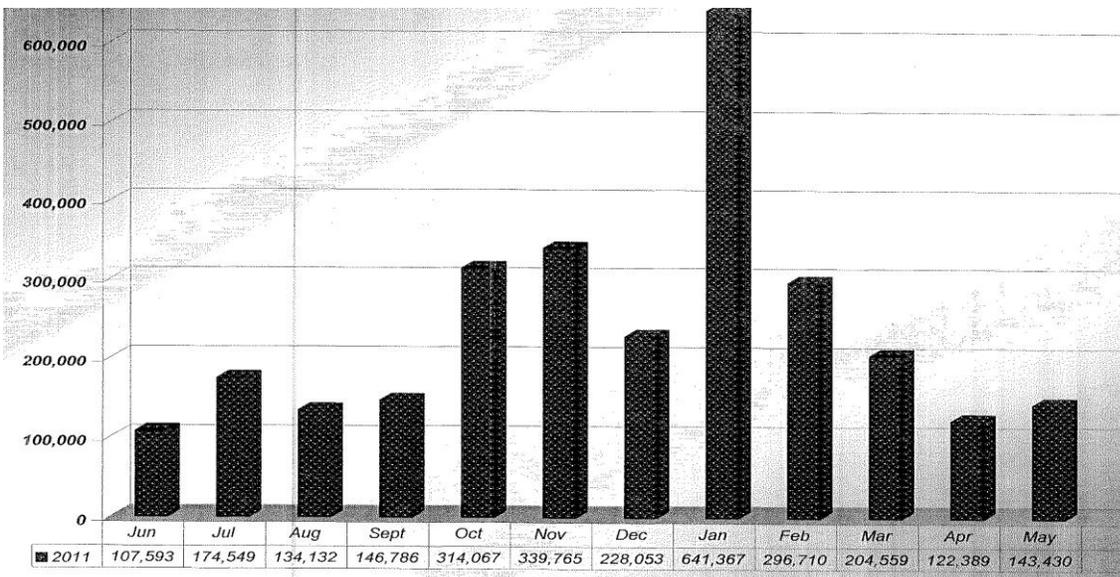
Our busiest season runs between July and March when we need more workers to assist with fish packing and nylon mesh netting fabrication. Again, since our business works on a peak load need we are able to utilize workers year round. We simply cannot meet the processing demands for the busiest part of the year (July – March). We have provided a chart reflecting our sales by month which shows an increase in sales during late summer into early spring when we need the additional seasonal workers.

AF 112. Avon provided a payroll summary report for calendar year 2011, identifying two full-time permanent employees, both of whom worked 80 hours a week, and between four and six temporary non-H-2B workers. AF 111. Avon explained that it supplements its staff with several seasonal part time domestic workers, who work an average of 15 hours a week, and all of whom have full time jobs elsewhere. Avon maintained that it uses these workers as much as possible to

supplement its full time staff, but that the company’s “ability to meet [its] labor needs in this manner has proved difficult for several years now,” since “local US workers have increasingly chosen other jobs rather than working in the seafood industry.” This report provided the following data for the temporary workers Avon employed in 2011:

Month	Part-Time Temporary Workers	Total Hours Worked Per Month
January	5	415.5
February	5	248
March	4	188.5
April	5	287
May	4	319
June	6	331.5
July	4	191.5
August	4	215.5
September	5	105
October	6	217.5
November	6	179
December	5	371

AF 111. Avon also submitted invoices from calendar year 2011; sales data reports from July 2011 to May 2012; and the following sales summary report:



AF 139.

On July 25, 2012, the CO issued a *Final Determination* denying certification, citing Avon's failure to establish that the nature of its need is temporary. AF 94-99. In particular, the CO remarked: "The Department remains unclear as to how [Avon] determined a need for seven temporary workers at 40 hours per week or 280 hours per month for each worker." AF 99. According to the CO, Avon's 2011 payroll summary report indicates that its domestic temporary employees worked the least hours in September and July, even though both months fall within Avon's requested dates of peakload need. AF 98. In addition, the CO noted that during Avon's alleged period of peakload need, the total number of domestic temporary workers Avon employed varied between four and six. *Id.* As a result, the CO found that the 2011 payroll report failed to establish Avon's alleged peakload need, and failed to demonstrate Avon's need for seven temporary full-time workers. AF 99. The CO further found that Avon's invoices and sales data failed to support Avon's alleged temporary need. AF 99. After reviewing the 2011 sales report, the CO noted that while Avon's highest sales were in November and March, its lowest sales were in August and September. The CO also found that the 2011 sales invoices did not correlate to the number of workers or dates of need that Avon had requested in its Application. As a result, the CO determined that Avon's supporting documentation failed to identify a clear increase in need during the alleged peakload period, and accordingly, denied Avon's Application on this basis.

On August 6, 2012, the Board of Alien Labor Certification Appeals ("BALCA" or "the Board") received a letter from Avon's Owner/Operator, Tilman Gray, requesting administrative review of the CO's *Final Determination*. Mr. Gray disputed the CO's finding that Avon's lowest sales were in August & September, explaining:

While the sales dip in August, it increases for the next 2 months. While it dips again in December, it never goes below August sales until April, which is when we do not need seasonal workers. Even though sales are low in August, which is during the time we need additional workers, it is not lower than sales in April which is when we do not need additional workers.

AF 1 (emphasis included). Mr. Gray also argued that Avon's highest sales were not in November and March, as the CO had found, but rather in November and January. Mr. Gray further asserted: "While the sales were highest in those months, they were also higher in the months of July, September, October, November, December, January and February than they were in the months of April, May or June. The sales data correlates to the months that we are requesting H-2B workers, regardless of the dip in August." *Id.*

Mr. Gray maintained that the invoices Avon submitted in response to the RFI were only a “small sampling” of what Avon “sees for the month,” and asserted that “there is some gap between when the work is performed, sales are made and payment is received from customers.” AF 2. He explained:

July, August, and September start off slow because that is the beginning of our season. During our slow season is when the workers are needed to work on nets and the boats getting them ready for fishing. Pound net stakes have to be stuck, and the nets put in the water. These workers also have a net building skill that has been lost by American workers over the years, it now is what we call “an art,” this must also be considered.

Id. Mr. Gray also stated that Avon occasionally uses local independent fisherman to perform work on a contract labor basis, but that their information was not provided on the payroll summary report because they were not on payroll. *Id.*

The Board issued a *Notice of Docketing* on August 9, 2012, providing the parties an opportunity to file briefs in this matter. Counsel for the CO filed a brief on August 20, 2012, arguing that the CO’s denial of certification should be affirmed because Avon failed to demonstrate a peakload temporary need. Counsel for Avon also filed a brief on August 20, 2012, informing its Board that Avon “wishes to have its initial letter stand as evidence supporting its appeal.”

DISCUSSION

Scope of Review

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 employer’s request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the employer’s application. 20 C.F.R. §§ 655.33(a), (e) (2008).² In the instant case, Mr. Gray discussed information in his request for review that was not included in Avon’s original

² In adjudicating this case, I will apply the H-2B regulations promulgated in 2008. While the Department’s revised H-2B regulations were to become effective on April 23, 2012, *see* 77 Fed. Reg. 10038 (February 21, 2012), the U.S. District Court for the Northern District of Florida enjoined the Department from enforcing these provisions shortly thereafter, *see Bayou Law & Landscape Services et al. v. Solis*, Case 3:12-cv-00183-MCR-CJK (April 26, 2012). Accordingly, on May 16, 2012, the Department announced the continuing effectiveness of the 2008 H-2B Rule until further judicial or other action suspends or otherwise nullifies this district court order. *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Guidance, 77 Fed. Reg. 28764, 28765 (May 16, 2012).

application or RFI response materials, such as Avon's occasional use of local independent fisherman. Accordingly, this evidence may not be considered on BALCA review.

Temporary Need

The Department of Labor's H-2B regulations require Applications for Temporary Employment Certification to "include attestations regarding temporary need in the appropriate sections." 20 C.F.R. § 655.21(a). Section 655.21(a) specifically instructs employers to include a detailed statement of temporary need containing: (1) a description of the employer's business history and activities (*i.e.*, primary products or services) and schedule of operations throughout the year; (2) an explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need; and (3) an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need, as defined by the Department of Homeland Security. *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 demonstrate the existence of a "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." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3)

In the instant case, the attestations and documentation that Avon submitted before the CO do not establish that it has a "peakload need" for seven whole fish processors/net builders. In its amended statement of temporary need, Avon maintains that its "busiest season runs between July and March when [it] need[s] more workers to assist with fish packing and nylon mesh netting fabrication." AF 112. However, Avon's payroll summary does not corroborate this statement: its number of temporary employees did not increase during the alleged months of peakload need, and the number of hours its temporary employees worked during each of the alleged off-peak months was greater than the number of hours worked during seven of the nine alleged peakload months. It is also difficult to draw any definite conclusions from Avon's sales invoices and monthly sales figures. The significance of these documents is unclear, and Avon did not provide any additional context to explain their relevance. For instance, even though this documentation demonstrates that two of the three lowest sales months are in the alleged off-peak period, three

other months in the alleged peakload period had similarly low sales figures.³ Moreover, as the CO points out in his brief, Avon failed to establish a definite link between increases in sales by dollar amount and increases in need for labor; because the pricing for different types of fish varies significantly, it is not clear whether higher sales figures actually equate with an increase in the number of fish sold (and presumably, a greater need for labor) or just the sale of more expensive fish. CO's Brief at 2, citing AF 113-36.

The employer bears the burden of demonstrating that it has met all of the requirements of the H-2B program. 8 U.S.C. § 1361. Here, Avon's payroll summary indicates that it has a year-round, permanent, and consistent need for labor. Avon failed to adequately explain how its sales documentation supports the alleged peakload need. Accordingly, I find that the CO did not err in finding that Avon failed to establish that the nature of its need is temporary, and thus affirm the CO's denial of Avon's Application on this basis.

ORDER

In light of the foregoing, the Certifying Officer's *Final Determination* denying certification is AFFIRMED.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

³ Compare sales in April, May, and June with those in July, August, and September.