

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 28 November 2012

OALJ Case No.: 2013-TLN-00008
ETA Case No.: C-12272-59859

In the Matter of:

PROGRESSIO, LLC, D/B/A LA MICHOACANA MEAT

Employer.

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

The above-captioned matter arises under the temporary nonagricultural labor or services 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, employers must file an *Application for Temporary Employment Certification* with the U.S. Department of Labor’s Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. The applications are reviewed by a Certifying Officer (“CO”) within ETA, who makes a determination to either grant or deny the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may request review before an Administrative Law Judge on the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a).

BACKGROUND

The Employer, Progreso, LLC, d/b/a La Michoacana Meat Market (“Employer”), operates Hispanic supermarkets in cities throughout Texas. AF 2.¹ On September 28, 2012, the Employer filed an *Application for Temporary Employment Certification* (“Application”) with ETA’s Chicago National Processing Center, requesting H-2B certification for four Master Bakers from October 15, 2012 to May 31, 2013. AF 123-168. The Employer maintained that it had a temporary seasonal need for these positions based on the Mexican holiday season. AF 125. In the Application’s “Statement of Temporary Need,” the Employer explained:

During the course of the year, certain Mexican Holidays figure prominently into an increase in sales for Mexican specialty breads and pastries. The most important season is the Winter Holiday Season beginning with Dia de Los Muertos (Day of the Dead), which reoccurs on November 1st and ends on November 2nd each year. This is followed in the next month with The Feast of our Lady Guadalupe on December 12th and with Las Posadas from December 16th until December 24th and Christmas on December 25th. The season continues in January with the Epiphany which incorporates the celebration Dia de Los Santo Reyes, also known as the Three Kings Day on January 6th each year. In February, Dia de La Candelaria is celebrated on February 2nd and Carnaval is celebrated before the beginning of Lent. In March, Dia de San Jose, or St. Joseph’s day, is celebrated on March 19th and, in April, the Holy week of Semana Santa, including Good Friday and Easter Sunday, is celebrated. The season closes out in May with Cinco de Mayo commemorating Mexico’s victory at the Battle of Puebla and Mother’s Day on May 10th. The holidays within the season occur systematically and predictably each year.

Id. In an attached statement, the Employer further attested:

As a tradition, Mexican families buy artisan breads and pastries during the holiday season and especially on the various Holidays. The pastries consist of specific ingredients and are decorated in a specific manner. For example, Rosca de Reyes, the cake served during the Dia de los Santos Reyes in January, contains one or more baby figurines. If one gets a piece of cake with this figurine, tradition says they should throw a party for the following Dia de la Candelaria celebration in February.

Per the enclosed sales analysis, La Michoacana’s sales are elevated predictably and seasonally from late October until late May of the following year. This is also reflected in the sales of breads and pastries.

AF 134.

¹ Citations to the Appeal File will be abbreviated “AF” followed by the page number.

The CO issued a *Request for Further Information* (RFI) on October 4, 2012, notifying the Employer that its Application failed to satisfy all of the requirements of the H-2B program. AF 116-122. In particular, the CO noted it was “unclear how the [E]mployer ties the increase in sales to the Mexican Holiday season.” AF 120. According to the CO, the holidays listed in the Application “are not continuous from October 15th through May 31st and as such are not tied to a season of the year but are described as many seasons that come and go throughout the year.” *Id.* As a result, the CO found that the Application failed to establish that the Employer had a temporary need for Master Bakers. AF 119 (citing 20 C.F.R. §§ 655.6, 655.21(a), 655.22(n)). To remedy this deficiency, the CO instructed the Employer to review the four standards of temporary need, select the standard that best fit its need, and if applicable, submit an updated temporary need statement. AF 123. The CO further directed the Employer to submit evidence to justify its chosen standard of temporary need, including, but not limited to, the following documentation: (1) Signed work contracts and/or monthly invoices from previous calendar years clearly showing work will be performed for each month during the requested period of need; (2) annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of services and clearly showing work will be performed for each month during the requested period of need; and (3) summarized monthly payroll reports for a minimum of three previous calendar years that identity, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. AF 121.

The Employer responded to the RFI on October 10, 2012, submitting, *inter alia*, an amended Application and select payroll records. AF 72-115. The Employer amended its Application to select a peak load standard of temporary need (rather than the seasonal standard selected in its initial application) and provided a revised statement of temporary need. AF 87, 94-98. Specifically, the Employer stated that it was experiencing a “peak load period as defined by the increased demand and resultant increased sales of its Bakery Products which occurs in the peak load period from 10/15/2012 through 5/31/2012 [*sic*].” AF 75. The Employer elaborated:

1. The need is tied to peak load demand in that it includes a period encompassing a cooler temperate season as well as several important Mexican observed celebrations. During this period demand for specific baked goods and pastries associated with specific celebrations rises. The demand decreases in late May.
2. The company operates year round employment 2 permanent bakers in the denoted location
3. The need is above and beyond the existing permanent workforce. [The Employer] employs 2 Bakers and needs to supplement that workforce with additional Bakers for a temporary period from October 15, 2012 through May 21, 2013. The above described need is reflected in the Sales Analysis charts which show that it is above and beyond the existing permanent workforce of the existing Bakers who will not be able to meet the demand for traditional Mexican pastries during the requested period.

Id. According to the Employer, the enclosed sales analysis demonstrated that the Employer’s sales are “elevated predictably . . . from late October until late May of the following year.” AF 95.

After reviewing the Employer's response, the CO determined that the Employer did not provide adequate documentation to establish a peak load temporary need. AF 66-69. In particular the CO noted:

The documentation provided by the employer is broken down by fiscal periods and does not indicate specific dates of need. The documentation submitted, without specific dates does not support a peak load temporary need from October 15, 2012 to May 31, 2013. Additionally the evidence provided does not clearly support any temporary need and suggest the employer has a consistent permanent increase in demand.

AF 69. Accordingly, on October 26, 2012, the CO issued a *Final Determination* denying certification. AF 63-71.²

The Employer requested review of the CO's Final Determination by letter dated November 2, 2012 and received by BALCA on November 5, 2012. The Board issued a Notice of Docketing on November 6, 2012, setting forth an expedited briefing schedule. The CO filed a brief on November 19, 2012; the Employer did not file an additional brief or statement of position.

DISCUSSION

Scope of Review

The Board's scope of 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 application. 20 C.F.R. § 655.33(a), (e). Accordingly, I am unable to consider the additional evidence included in the Employer's request for review. 20 C.F.R. § 655.33(a)(5).

Temporary Need

In order to qualify for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor is temporary. Pursuant to regulations promulgated by the Department of Homeland Security ("DHS"), "temporary services 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. The employer must establish that the need for the employee will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer's need for nonagricultural services or labor is deemed temporary if it meets one of the following standards of temporary need, as defined by DHS: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 20 C.F.R. § 655.6; 8 C.F.R. 214.2(h)(6)(ii)(B). The burden of proof to establish eligibility falls squarely on the petitioning employer. 8 U.S.C. § 1361.

² Although the CO identified an additional deficiency in the *Final Determination*—the Employer's failure to satisfy the obligations of H-2B employers (655.22(h))—it is not necessary to address this additional ground for denial because, as discussed below, I affirm the CO's finding that the Employer failed to establish temporary need.

In the instant case, the Employer asserts that it has a peak load need for the requested Master Bakers. AF 87. To establish a peak load need, the Employer must demonstrate “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). The Employer argues that it needs to supplement its permanent staff from mid-October through the end of May, due to a seasonal increase in demand for baked goods caused by a combination of Mexican holidays and cooler temperatures. AF 95.

The record before the CO does not justify the Employer’s purported peak load temporary need. The Employer’s payroll records do not demonstrate a consistent need for increased labor during the entire period of requested need. *See* AF 101-104. In fact, these records are of little probative value, since they do not differentiate between temporary and permanent employees, or type of position. *Id.* While the Employer’s sales analysis does demonstrate an increase in revenue during discrete periods of the Employer’s purported period of need (which spans from mid-October through the end of May), it does not demonstrate a consistent increase throughout the entire requested period. *See* AF 137-138. The Employer never adequately explained how such limited increases in revenue could support its alleged increase in need throughout the entire period spanning between mid-October through the end of May. Accordingly, it was impossible for the CO to verify whether the Employer actually needed to supplement its permanent staff on a temporary basis throughout the *entire* period requested in the Employer’s Application.

It is the Employer’s burden to establish why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. The Employer failed to present evidence sufficient to convince the CO of that need. Accordingly, I find that the CO properly denied certification.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Certifying Officer’s denial of certification in this matter is **AFFIRMED**.

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge