

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 November 2012

BALCA Case No.: 2013-TLN-00002

ETA Case No.: C-12221-59563

In the Matter of:

**BUCRON, INC,
D/B/A FARMERS MART WHOLESALE PRODUCE**
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

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, employers must file an *Application for Temporary Employment Certification* (ETA Form 9142) with the U.S. Department of Labor (“DOL” or “the Department”), Employment and Training Administration (“ETA”). 20 C.F.R. § 655.20. Employers’ applications are reviewed by a Certifying Officer (“CO”), who makes a determination to either grant or deny the requested labor certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, an employer may appeal that decision and request administrative 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). 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 Employer’s application. 20 C.F.R. § 655.33(a), (e).

BACKGROUND

This appeal arises from an *Application for Temporary Employment Certification* (“Application”) that the Employer, Bucron, Inc., d/b/a Farmers Mart Wholesale Produce, (“the Employer”), filed with ETA on August 8, 2012. AF 64.¹ In this Application, the Employer requested temporary labor certification under the H-2B program for one “Stock Packer” position. AF 64-153.² The Employer attested that its need for the Stock Packer was a temporary one-time occurrence lasting from September 25, 2012 to February 25, 2014. AF 65, 75. Specifically, the Employer’s statement of temporary need provided:

Bucron, Inc DBA Farmers Mart Wholesale Produce specializes in the wholesale and distribution of fresh fruits and vegetables in different cities of Florida. In our intention to grow as a company and further expand our business from distributing our products in the wholesale market we would like to 'also begin to distribute our products in the retail industry. To be able to know if such mechanism (retail packaging of the products offered) will further expand our business we are in the need of a specialized stock packer to facilitate the work and perform the labor of packing our products in retail size (10 pounds or less.) Since this is not the mechanism we have experience in doing we want to hire a person who has had more than 6 months of experience in such field for him/her to be able to organize and develop our retail size packing department and figure out if such mechanism will be worth implementing to our daily fresh fruits and vegetables packing. We have not employed workers to perform the services or labor in the past and we will not be needing any workers to perform the services in the future for this one-time occurrence will only permit us to see if the retail industry is the right path to help our business grow. Please see enclosed statement of temporary need...

AF 65. In the enclosed statement, the Employer’s CEO, Wayne Buchanan, elaborated:

We strive to grow and further expand our business not only as a wholesale produce distributor but also as a retail distributor. That is why we need temporarily an individual who may use specific packing techniques to develop and implement the retail size packing, labeling and distribution system. In order to pursue this new system of packing in small quantities, we are in the need of a Stock Packer who will organize and facilitate the work while teaching our team the system of packing, labeling, etc. small packages for the retail distribution. This is a project that will be considered for the expansion of Farmers Mart Wholesale Produce to the retail distribution; implementing a new system of packing and labeling of items 10 pounds or less in our company will certainly help us grow, therefore this one-time occurrence will give us a better understanding and help us decide whether to implement such system in our daily routine. Once the decision is made to implement the system we will start hiring

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

² Citations to the Appeal File will be abbreviated “AF” followed by the page number.

permanent workers; is in this essence that once the Stock Packer is done with his job we are not going to need him anymore.

AF 76. According to Mr. Buchanan, the Employer based the proposed dates of temporary need on the Stock Packer completing the following duties:

Examine and inspect fruits, vegetables, products & materials used to ensure that packing specifications are met; organize the packing department with the help of other workers that will take care of classifying the products by type, origin & place of distribution. Place the products into containers or units & fill containers from spouts or chutes. Remove completed and defective products, placing them on moving equipment such as conveyors or in specified areas such as loading docks. Determine proper storage methods, identification, and stock location based on turnover, environmental factors & capabilities of facilities. Measure, weight and count products and materials. Examine and inspect stock items for wear and defects, reporting any damage directly to the manager. Receive and count stock items, and record data manually or using computer. Mark and label containers, container tags, or products using marking tools.

AF 76.

After reviewing the Employer's Application, the CO issued a *Request for Further Information* ("RFI") notifying the Employer that its Application failed to satisfy the requirements of the H-2B program. AF 56-63. Among other things, the CO found that the Employer had not adequately explained why the Stock Packer position reflected a one-time occurrence, as opposed to a more permanent need. AF 60-62.³ The CO also questioned whether the dates of need listed in the Employer's Application reflected the Employer's true need for a Stock Packer, since the Employer had not provided any evidence or documentation connecting its business operations to these dates. AF 60. To remedy these deficiencies, the CO directed the Employer to submit an updated statement of temporary need containing the following:

1. A description of the employer'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 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, peak load, or intermittent need.

AF 61. The CO additionally instructed the Employer to submit supporting evidence and documentation to justify the chosen standard of temporary need, including but not limited to:

³ The RFI identified three additional deficiencies in the Application; because none of these deficiencies are listed as a basis for denial in the CO's Final Determination, they will not be addressed in this appeal.

1. Signed work contracts and/or monthly invoices from previous calendar year(s) 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 service and clearly showing work will be performed for each month during the requested period of need; or
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identifies, 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. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system.

AF 62.

The Employer responded to the RFI on August 23, 2012, submitting, *inter alia*, an amended statement of temporary need and an additional letter from Mr. Buchanan. AF 24-54. In this letter, Mr. Buchanan reiterated that the Employer wished to expand its business to include retail distribution. AF 28. To implement this expansion, Mr. Buchanan explained, the Employer sought to temporarily hire “an individual who may use specific packing techniques to develop and implement the retail size packing, labeling and distribution system”—specifically, a “Stock Packer who will organize and facilitate the work while teaching our team the system of packing, labeling, etc. small packages for the retail distribution.” AF 28. He elaborated:

Since this is not the mechanism we have experience in doing we want to hire a person who has had more than 6 months of experience in such field for him/her to be able to teach our team the retail size packing. This is a business project that will be considered for the expansion of Farmers Mart Wholesale Produce to the retail distribution depending on its outcome; implementing a new system of packing and labeling of items 10 pounds or less in our company will certainly help us grow, therefore this one-time occurrence will give us a better understanding and help us decide whether it is the right path to implement such system in our daily routine. Bucron has not employed workers to perform the services or labor offered in the past and due to this business projection the employer has an employment situation that is otherwise permanent, but this temporary project or business projection of short duration has created the need for a temporary worker. Once a decision is made with regard to implementing the system of packing in retail sizes we will start hiring permanent workers; in this essence that once the Stock Packer (1) is done with his job we are not going to need him anymore for such trial period is just a way to know if such system will take us to the place (economically) our company strives to go. The proposed dates are from September 25, 2012 to February 25, 2014 because in such time frame we will be able to know exactly if our business projections with regard to growing

not only as a wholesale distributor but also as a retail distributor reach our expectations.

AF 28-29.

On September 28, 2012, the CO issued a *Final Determination* denying certification based on the Employer's failure to establish that its need for the Stock Packer position was temporary. AF 18-23 (citing 20 C.F.R. §§ 655.6, 655.21(a)). After reviewing the Employer's submissions, the CO found that the Employer's need for a Stock Packer "appears to be permanent and ongoing," and thus does not meet the regulatory standard for a one-time occurrence. The CO was not persuaded by the Employer's explanation that it would no longer require the services of a Stock Packer once the person who fills this position "is done with his job"—*i.e.*, successfully implements the Employer's new retail packing system—since the Employer did not provide any evidence demonstrating: (1) that successful implementation of the new packing system would last for the entire duration of the requested period of need, and no longer; or (2) that it would no longer require the services of a Stock Packer once the new packing system has been successfully implemented. *Id.* In the CO's view, the Employer's statement of temporary need "described a business goal, rather than a temporary event." *Id.* Based on these findings, the CO concluded that "the documentation provided in the [E]mployer's RFI response failed to adequately explain how the nature of the job opportunity and number of foreign workers being requested for certification reflect a one-time temporary need." *Id.*

The Employer's BALCA appeal followed. The Board issued a Notice of Docketing on October 15, 2012, setting out an expedited briefing schedule. BALCA received the Appeal File on October 24, 2013. The CO submitted a Statement of Position on November 2, 2012; the Employer did not file an additional brief or statement of position.⁴

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). Here, the Employer cites evidence in its request for review that was not included in any of its filings before the CO.⁵ Due to BALCA's limited scope of review, this evidence will not be considered in the adjudication of the instant appeal.

⁴The initial briefing schedule was extended due to office closures caused by Hurricane Sandy.

⁵ Such evidence includes, for instance, the portion of the Employer's request for review that begins: "In the previous RFI we might have emphasized our goals and not fully on the events we will develop for our company to reach such goals. . . . To be able to reach such goals we are currently developing several events with the account we have with the Greater Fort Lauderdale Broward County Convention Center . . ." AF 2.

Temporary Need

To obtain certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor is temporary, *i.e.*, that its need for the duties to be performed by the requested worker(s) “will end in the near, definable future.” 8 C.F.R. 214.2(h)(6)(ii)(A). “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.” *Id.* This need must also meet one of the following regulatory standards: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. *Id.* The burden of proof to establish eligibility falls squarely on the petitioning employer. 8 U.S.C. § 1361.

The Employer has attested that its need for a Stock Packer is a temporary one-time occurrence. To qualify under this standard, an employer must demonstrate “that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1). The Employer’s submissions before the CO do not satisfy this burden.

In his letters before the CO, the Employer’s CEO, Wayne Buchanan, asserts that the Employer temporarily requires the services of a Stock Packer to assist with its expansion into retail distribution. As Mr. Buchanan explains, the Employer intends for the Stock Packer to assist it in developing a system to pack produce in smaller quantities. Mr. Buchanan states that this Stock Packer “will organize and facilitate the work while teaching our team the system of packing, labeling, etc. small packages for the retail distribution.” AF 28. But despite Mr. Buchanan’s portrayal of this position as temporary and advisory, many of the job duties listed in the Employer’s application appear ongoing and permanent. Such duties include, for instance: examine and inspect fruits, vegetables, products, and materials to ensure that packing specifications are met; place products into containers or units & fill containers from spouts or chutes; remove completed and defective products, placing them on moving equipment such as conveyors or in specified areas such as loading docks; measure, weigh and count products and materials; examine and inspect stock items for wear and defects, reporting any damage directly to the manager; receive and count stock items, and record data manually or using computer; and mark and label containers, container tags, or products using marking tools. AF 67. The Employer never provided an adequate explanation as to how its need for a worker to perform these duties would end. Indeed, assuming the Employer succeeds in its expansion into the retail distribution business, it is hard to imagine a circumstance in which it would not require a Stock Worker to perform these duties.

“Temporary services or labor,” for purposes of the H-2B program, “refers to any job in which the petitioners 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). Since the Employer provided no rational basis to explain why it will no longer require the services of a Stock Packer to perform the duties listed in its Application after February 25, 2014, the CO reasonably concluded that the position was not temporary in nature. Accordingly, I affirm the CO’s denial of certification on that basis.

ORDER

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

For the Board:

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge