

**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: 14 February 2014**

**BALCA Case No.:** 2014-TLN-00011  
**ETA Case Nos.:** H-400-13338-591283

*In the Matter of:*

**HEARTLAND CATFISH, INC.**

*Employer.*

Appearances: Dale Schwindaman, Esq.  
Schwindaman Law Firm, PLLC  
Byram, MS  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Jonathan Hammer, Attorney  
Office of the Solicitor of Labor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: WILLIAM S. COLWELL  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**

This case arises from the Employer's request for review of the Certifying Officer ("CO")'s denial of an application for temporary alien labor certification under the H-2B program. 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. *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). Following the CO's denial of an application under 20 C.F.R. § 655.32, an 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**

On December 10, 2013, the Employment and Training Administration ("ETA") received an *Application for Temporary Employment Certification* (ETA Form 9142B) from Heartland

Catfish (“Employer”) for 50 Catfish Processors to be employed from January 15, 2014 through October 31, 2014. AF 49-72.<sup>1</sup> The Employer’s application indicated that the Employer had a seasonal need for these workers.

On December 27, 2013, the CO issued a Request for Further Information (“RFI”). AF 42-48. In the RFI, the CO notified the Employer that the documentation it submitted with its application “was not sufficient to establish that the number of worker positions being requested for certification on the application is true and accurate and represents bona fide job opportunities,” as required by 20 C.F.R. §§ 655.23(b), 655.22(n). AF 47. To remedy this deficiency, the CO directed the Employer to submit “supporting evidence and documentation to establish that the number of worker positions being requested for certification is true and accurate and represents bona fide job opportunities.” AF 48. The CO specified that this documentation must include the following:

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 on the ETA Form 9142, Section B., Items 5 and 6;
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 on the ETA Form 9142, Section B., Items 5 and 6; or
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, 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.

*Id.* The CO also requested an explanation of how this documentation supported the number of workers requested. *Id.* The Employer responded on January 2, 2013, submitting a written response to the deficiency identified in the RFI, as well as the following documentation: a comparison of its sales versus industry sales for catfish; payroll reports from 2011-2013; and sales analysis from 2011-2012. AF 18-41.

On January 15, 2014, the CO issued a Final Determination denying the Employer’s application. AF 12-17. After evaluating the Employer’s documentation, the CO concluded that it did not overcome the deficiency identified in the RFI, *i.e.*, it did not “establish that the number of worker positions being requested for certification on the application is true and accurate and represents bona fide job opportunities.” AF 14.

The Employer requested expedited review of the denial by letter dated January 22, 2014. AF 1-11. BALCA received the appeal file on February 4, 2014.

---

<sup>1</sup> Citations to the 72 page Administrative File will be abbreviated “AF” followed by the page number.

## **DISCUSSION**

The CO's stated basis for denial was that the Employer's documentation "was not sufficient to establish that the number of worker positions being requested for certification on the application is true and accurate and represents bona fide job opportunities." The analysis in the Final Determination, however, was not focused on the number of positions requested, but rather, whether the Employer had established a temporary need for the positions. Similarly, in his brief before BALCA, the CO urges affirmance by arguing that the Employer's documentation was insufficient to establish a temporary need. But the CO never explicitly identified this deficiency in the RFI. The Employer was thus deprived of notice and an opportunity to respond to the CO's actual concerns about its application—an outcome that is inconsistent with regulations, which require the CO to "[s]pecify the reason(s) why the application is not sufficient to grant temporary labor certification, citing the relevant regulatory standard(s) and/or special procedure(s)." 20 C.F.R. § 655.23(c)(2)(i). Accordingly, I hereby **REMAND** this matter to the CO with instructions to provide the Employer an opportunity to demonstrate that it has a seasonal need for 50 Catfish Processors from January 15, 2014 through October 31, 2014.

**SO ORDERED.**

For the Board:

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