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BALCA Case No.: 2015-TLN-00048
ETA Case No.: H-400-15047-457183

In the Matter of:

MARIMBA COCINA MEXICANA I, INC.,
Employer

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Appearances: Eric Enrique, Esq.
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For the Employer

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For the Certifying Officer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER
REVERSING AND REMANDING IN PART
AND AFFIRMING IN PART

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B guest worker program permits employers to hire foreign workers to perform temporary non-agricultural 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 administrative review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). 20 C.F.R. § 655.33(a).

STATEMENT OF THE CASE

On February 16, 2015, Marimba Cocina Mexicana I, Inc., (“Employer”), submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). (AF 85-101).¹ Employer requested certification for two (2) “Mexican Food Cooks” to be employed from February 16, 2015 to November 2, 2015 on a peakload basis. (AF 85). Employer’s application included monthly sales data for the years 2012 to 2014. (AF 97-101).

On February 23, 2015, the CO issued a Request for Further Information (“RFI”) notifying Employer that it was unable to render a final determination for Employer’s application because Employer did not comply with all requirements of the H-2B program. (AF 79-84). The CO addressed two deficiencies, one of which was Employer’s failure to establish that the nature of the employer’s need is temporary. *See* 20 C.F.R. §§ 655.6, 655.21(a). The CO found that Section B.9. of the application was not sufficient because the Statement of Temporary Need did not adequately establish a peakload need. Specifically, Employer appeared to base its temporary need on an increase in business activity, but the Statement did not contain sufficient detail regarding Employer’s business operations to demonstrate a temporary need during the dates requested. (AF 82). Employer’s payroll and sales charts for 2013 showed a peakload from September to December, and the chart for 2014 showed a large decrease in business from September to December. Also, the charts showed a higher level of sales for January and February. Thus, the CO requested additional information, including:

- 1) a description of the employer’s business history and activities and schedule of operations through the year;
- 2) an explanation as to why the need for services or labor described in the employer’s application are not needed on a recurring basis during the months of December, January, and the first half of February;
- 3) summarized monthly payroll reports for the three previous calendar years;
- 4) IRS Form 941, Employer’s Quarterly Tax Return, covering the three previous calendar years; and
- 5) an explanation detailing how the submitted documentation supports the dates of need requested and how the employer determined its peakload period of need.

(AF 83). The CO also requested an amended ETA Form 9142B with Section B.2 and B.3 corrected to address a second deficiency.

¹ In this decision, AF is an abbreviation for Appeal File.

On March 2, 2015, Employer submitted two responses to the RFI. (AF 30-78). Employer submitted the requested items, including an amended ETA Form 9142B, in which it submitted a “corrected page one for [ETA Form] 9142;” sales and staffing figures from 2011-2014; and a statement from the Employer’s Chief Financial Officer (“CFO”) describing the business history and why the sales figures for 2013 and 2014 were different. Amendments were made to page one of ETA Form 9142B in Sections B.2, B.3 (SOC code and occupation title) and B.9 (Statement of Temporary Need) to address the deficiencies listed by the CO.

According to Employer, the company’s name was La Bamba Mexican Restaurant, Inc. from its inception in 2006 until 2013. (AF 31). Employer’s peakload period has always been **“January to October with the slowest period in the months of September to December.”** (AF 30-31, 74) (emphasis added). In September 2013, Employer moved to a new location and facility. Employer’s CFO explained that the “excitement to the public of a new location” created a surge in demand during the typical slow season. However, in 2014, the typical trend continued with a peakload period “from January to November, with a **slow down [sic] from September to December.”** (AF 31, 74) (emphasis added). Having two temporary cooks during the peakload period, the CFO continued, “will allow the restaurant to meet the demand of this year’s high sales during the peakload period while also **allowing the permanent staff to take vacation in the months of September and October as business slows down.”** (AF 31, 74) (emphasis added).

In the Final Determination of April 27, 2015, the CO informed Employer that its application was denied. (AF 21-28). The CO found that Employer’s attestations were not sufficient to establish a peakload need for February 16, 2015 to November 2, 2015. First, the Statement of Temporary Need states that during the requested peakload period, Employer is experiencing an increase in demand due to the fact that the restaurant has expanded, and it needs the temporary worker to help deal with the temporary surge/demand in services. The CO opined that Employer “appears to be basing its temporary need on an increase in business activity due to an expansion in business,” but “the Statement of Temporary Need did not contain sufficient detail regarding the employer’s business operations to demonstrate a temporary need during the dates requested.” (AF 18). Additionally, the sales chart for 2013 shows a peakload from September to December, while the 2014 chart shows a large decrease in business from September to December. (AF 18). The CO also analyzed staffing levels and sales during the “non-peak” month of January in 2011, 2012, and 2014 when compared to the “peak months” and noted the inconsistencies from year to year. Thus, Employer “appears to have a year-round need for workers,” and its application was denied for failure to establish that the nature of its need is temporary under 20 C.F.R. §§ 655.6, 655.21(a). (AF 18-20).

On May 5, 2015, Employer submitted a brief requesting administrative review of the denial of certification for several reasons. First, the CO failed to address the statement from Employer’s CO and the amended ETA Form 9142B, which adequately explains Employer’s business operations and supports Employer’s temporary need from January to October. Second, Employer reiterated that it did not include January as a peakload month in its application because it was unable to file a labor certification application until February 2015. Therefore, the CO’s assertion, based on 2011, 2012 and 2014 sales data that January is a non-peak month is misguided. Third, the CO’s reliance on the 2013 sales chart to show a peakload period from

September to December is also misguided, and Employer explained the anomaly in 2013 due to its move to a new location and facility, and that its sales figures were back to normal for that period in 2014. Also, the sales data for 2011, 2012 and 2014 show an increase in sales from January through October.

On May 26, 2015, the Board received a position statement on behalf of the CO. The CO argues that the employer has failed to carry its burden proving that it is entitled to labor certification and cites *Tarilas Corp.*, 2015-TLN-16 (Mar. 5, 2015) for support. (CO Br., p.3). The RFI provided clear notice of the CO's concerns about the purported temporary need and what Employer needed to submit to address the identified deficiencies, and Employer failed to do so. (*Id.*). The Final Determination detailed how Employer's documentation supported the denial, and the available information suggests that Employer has a need for permanent, not temporary workers. (*Id.*). Thus, the denial was proper.

On May 29, 2015, Employer filed an additional brief supporting its position. Employer contends there is a severe shortage of potential employees with Mexican cooking experience due to the demographics of Rockledge, Florida, which was documented in the recruitment report (AF 95-96) and the statement from Employer (AF 72), and the shortage has prevented it from hiring temporary workers during those months in the past. (Emp. Br., pp. 1-2). The shortage is so severe, Employer adds, that in the past it has been unable to find cooks to hire on a temporary basis during the peakload period from January to October. Employer reiterated its contentions that January has historically been a peakload month and that January was not included because it was unable to file its application until February 2015, as well as the revenue in late 2013 being an anomaly due to the change in location that year. (*Id.* at p. 2). Finally, the CO ignored Employer's explanation and evidence in denying the application, specifically regarding the month of January as a historically peakload month, the 2013 spike in sales due to the move to a new location, and the severe shortage of workers due to the demographics of Rockledge, Florida as to why it did not hire temporary workers in past years. (*Id.* at p. 3). Thus, the CO's Final Determination should be reversed and Employer's application should be approved.

DISCUSSION

A. H-2B Program

The H-2B program permits employers to hire foreign workers on a temporary basis to "perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a "labor certification" from the United States Department of Labor ("DOL" or the "Department"), Employment and Training Administration ("ETA"). 8 C.F.R. § 214.2(h)(6)(iii).

On April 29, 2015, the Department of Labor ("DOL") 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. *See* 80 Fed. Reg. 24042 (Apr. 29, 2015). Pursuant to this rule, DOL will "continue to process an *Application for Temporary Employment Certification* submitted prior to April 29, 2015, in accordance with 20 CFR Part

655, subpart A, revised as of April 1, 2009.” *See id.* at 24109, to be codified at 20 C.F.R. § 655.4. Accordingly, this case will be decided under the regulations at 20 C.F.R. Part 655, subpart A (2009).

To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (ETA Form 9142B) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20 (2009). After an employer’s application has been accepted for processing, it is reviewed by a CO, who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

B. Temporary Need

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: 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). The DHS regulations provide that 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).

The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. *A B Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

When determining whether an employer’s need for labor or services is temporary, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982).

B. Peakload Need

Here, Employer requests temporary workers for a “peakload” need. To establish a peakload need, the 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).

The CO focuses on a lack of a consistent increase in staffing levels during Employer’s peak months. (AF 26). Employer maintains that it has gone without temporary workers for

some years because it cannot consistently find workers in Rockledge, Florida with Mexican cooking experience due to the demographics of the area, and cites its recruiting report as proof. I find Employer's assertions credible in that regard.

The CO also focuses on gross receipts, i.e. sales, as evidence, particularly that the month of January is a non-peak month but has high sales. However, Employer repeatedly explained that its application could not be submitted until February, thus it excluded January for the period requested in its ETA Form 9142B. I find Employer's assertions credible in that regard as well.

In the RFI, the CO expressed a concern regarding the spike in gross receipts during the period of September 2013 to December 2013, which greatly exceeded the non-peak time period identified in 2011, 2012, and 2014 and Employer's peak months as stated throughout its application. In response, Employer provided four years of sales charts:

	2011	2012	2013	2014
January	\$42,482.62	\$40,388.81	\$42,978.04	\$73,320.41
February	\$45,636.59	\$45,325.42	\$42,473.66	\$75,683.00
March	\$48,085.94	\$50,745.55	\$50,431.13	\$83,849.09
April	\$47,527.68	\$45,811.61	\$45,405.86	\$80,575.99
May	\$47,455.27	\$50,459.36	\$54,418.26	\$86,406.50
June	\$40,430.24	\$41,316.80	\$48,385.94	\$73,988.12
July	\$42,776.50	\$41,996.66	\$49,568.52	\$73,562.50
August	\$46,063.21	\$43,012.90	\$48,366.92	\$76,278.21
September	\$38,949.97	\$37,376.85	\$68,776.31 ²	\$65,764.93
October	\$40,907.61	\$37,204.69	\$77,846.21	\$64,602.23
November	\$38,699.83	\$35,841.39	\$73,662.20	\$65,279.51
December	\$40,455.11	\$37,418.87	\$70,942.18	\$64,300.89

Employer has proven a 13% to 15% decrease in gross receipts from August to September in 2011, 2012, and 2014, and as much as a 30% drop off from the high months of March/May 2012 and 2014 when compared to gross receipts in September 2012 and 2014.

The CO requested a "description of the employer's business history and activities" as an additional forum for Employer to address these concerns. (AF 83). In response, Employer offered a credible explanation from its CFO, an amended ETA Form 9142B, and sales charts in explaining that it moved to a new location and facility in September 2013, resulting in the spike in gross receipts during its traditional non-peak months, and that its 2014 gross receipts follow the trend already established in years 2011 and 2012. In the Final Determination, the CO did not even address the anomaly in 2013 due to the new location and reasons cited by Employer in its response the RFI, and simply focused on the numbers from charts that were already in his possession from the outset.

² Employer moved to a new location and renamed its restaurant during this month.

The CO correctly states that business growth is not an acceptable basis for temporary need. The CO then asserts that Employer has not demonstrated that the growth it has experienced is temporary in nature. In my review of the record, Employer's original Statement of Temporary Need in Section B.9 of ETA Form 9142B was vague, and its supporting charts did not explicitly discuss the move to a new location. However, the CO expressed his concerns in the RFI, and Employer more than adequately explained the anomaly in the 2013 non-peak months, why it did not include the peak month of January, and the lack of employees in Brevard County/Rockledge, Florida with Mexican food cooking experience. These items were a part of the record on which the CO based his Final Determination. However, in the Final Determination, the CO barely acknowledged what it had received from Employer as a result of the RFI.

Indeed, Employer has established, based on its gross receipts, amended ETA Form 9142B, and the CFO's description, a peakload period from January to August – but the same cannot be said for the months of September and October. Employer acknowledges in its amended ETA Form 9142B, the CFO's statement of business history and operations, its Request for Review, and the additional brief that its demand for services drops off significantly beginning in September of each year. Yet it requests the additional two workers during those months as well so that the permanent staff can take vacations from being “overworked.”

Thus, Employer's explanation of a peakload need for the months of September and October is deficient. While the regulations state that a temporary need will generally be limited to a year or less, and requests based on a peakload need have historically been granted up to 10 months, the granting of certification for those time periods is not automatic. Employer must meet the burden of proving its temporary need for the entire period requested, not just 80% of the period and then justify the rest of the time with the permanent staff's vacations.

In addition, the H-2B regulations defining a “seasonal” need specifically state that “employment is **not seasonal if the period** during which services or labor is not needed ... **is considered a vacation period for the petitioner's permanent employees.**” 8 C.F.R. § 214(h)(6)(ii)(B)(2) (emphasis added). The spirit of that regulation spills over into the peakload regulation, which speaks of “demand.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Employer acknowledges, and its evidence and the record show, that demand drops off precipitously beginning in September and through December (“**slowest period in the months of September to December.**” (AF 30-31, 74). Employer cannot simultaneously claim a “peakload” need from January to early November while acknowledging that the business demand slow down begins much earlier. As for the vacations, Employer has four months of “slow down” time to stagger time off for the permanent staff while maintaining its business.

Accordingly, I find that the CO incorrectly determined that Employer was unable to establish a “temporary” need for the requested H-2B employees. However, I find Employer has not carried its burden for establishing a peakload need from September through November 2, 2015.³

³ Pursuant to 20 C.F.R. § 655.32(f), the CO has the discretion to issue a partial certification by reducing the requested period of need. There is no indication in the record that the CO considered exercising his discretion to issue a partial certification.

In granting partial certification to Employer and choosing a date in September when the certification period shall end, the Board will take into account the Labor Day weekend, which is a traditionally busy period in the restaurant industry.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the CO's determination is **REVERSED** in part and **AFFIRMED** in part. Employer's application is **REMANDED** for further processing on behalf of two H-2B workers for the period of **February 15, 2015 to September 9, 2015 only**.

For the Board:

CLEMENT J. KENNINGTON
Administrative Law Judge