Issue Date: 14 April 2016

BALCA Case No.: 2016-TLN-00031
ETA Case No.: H-400-15334-349192

In the Matter of:

HILL'N'DALE SALES AGENCY, INC.,
Employer.

Certifying Officer: Charlene G. Giles
Chicago National Processing Center

Appearances: Glen M. Krebs, *Esq*.
Wyatt, Tarrant & Combs, LLP
Lexington, Kentucky
For the Employer

Jane Garrido, *Esq*.
Jeffrey L. Nesvet, *Esq*.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Hill'N'Dale Sales Agency, Inc.'s ("Employer") request for review of the Certifying Officer's ("CO") Non-Acceptance Denial in the above-captioned H-2B temporary labor certification matter.[1] The H-2B program permits employers to hire foreign workers to perform temporary,

[1] On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule ("IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 (Apr. 29, 2015) (to be codified at 20 C.F.R. Part 655). Pursuant to this rule, the Department will process an *Application for Temporary Employment Certification* filed on or after April 29, 2015, with a start date of need after October 1, 2015, in accordance with all application filing requirements under the IFR. *Id*. at 24110. The Employer filed an *Application for Temporary Employment Certification* after April 29, 2015, with

non-agricultural work within the United States ("U.S.") on a one-time, seasonal, peakload, or intermittent basis.[2] Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor ("Department"). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

The Employer, located in Lexington, Kentucky, prepares and presents horses for sale. (AF 120-121.)[3] On November 30, 2015, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *Application for Temporary Employment Certification* ("Application"); (2) Appendix B to ETA Form 9142B; (3) a statement regarding prohibited fees, dated November 30, 2015; (4) DHS Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*; (5) a copy of job order number 401013068; and (6) ETA Form 9141, *Application for Prevailing Wage Determination*. (AF 100-119.) The Employer requested certification for five stable attendants[4] from February 15, 2016 until November 11, 2016, based on an alleged peakload need during that period. (AF 100.)

On December 9, 2015, the CO issued a Notice of Deficiency, which outlined three deficiencies in the Employer's Application. (AF 91-99.) Specifically, the CO determined that the Employer failed to: (1) establish that its job opportunity is temporary; (2) submit an acceptable job order; and (3) provide a disclosure pertaining to foreign worker recruitment. (*Id*.) Regarding the first deficiency, which is the sole issue on appeal, the CO stated that the Employer did not explain why its dates of temporary need changed from its prior applications, where the Employer also sought certification for five stable attendants.[5] (AF 95.) The CO requested that the Employer submit supporting evidence documenting that it has a temporary need for labor. (AF 95-96.) The CO explained that in order to establish that it has a peakload need, the Employer could submit signed monthly payroll reports listing the number of full-time permanent and temporary workers the Employer has historically employed each month as stable attendants, including total hours worked and earnings received. (AF 96.) Alternatively, the CO stated that the Employer could submit any other evidence that "similarly serves to justify the period of need being requested for certification." (*Id*.)

Thereafter, on December 23, 2015, the Employer filed a response to the CO's Notice of Deficiency. (AF 68-90.) The Employer filed a letter explaining how its need for workers has changed from prior years, a General Ledger showing the amount of money it spent on contract

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a start date of need after October 1, 2015. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

[2] *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 definition of temporary need is now governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

[3] In this Decision and Order, "AF" refers to the Appeal File.

[4] SOC (O*Net/OES) occupation title "Nonfarm Animal Caretakers" and occupation code 39-2021. AF 100.

[5] The Employer has filed three applications for temporary labor certification. In all three, the Employer has argued that it has a temporary peakload need for five stable attendants for varrying time periods. AF 120, AF 129, AF 100.

workers from January 1, 2014 until December 31, 2015, and an Account Variance showing the total wages the Employer paid its workers in 2014 and 2015. (AF 70.) In its letter, the Employer acknowledged that it had filed two prior applications for temporary labor certification, noting, "Obviously, there is quite a bit of overlap in these date ranges, but our current request asks for additional workers from February (earlier in the year) through November." (AF 78.) Moreover, the Employer stated it was "trying to catch the front end of the training / sales season for additional help instead of the previous end of our sales season. This earlier staffing will allow us to better train the temporary workers so that they are able to better prepare horses for sale." (*Id.*)

On March 11, 2016, the CO issued a Non-Acceptance Denial. (AF 56-62.) Although the Employer cured two of the three deficiencies outlined in the Notice of Deficiency, the CO concluded that the Employer failed to submit evidence establishing that it has a temporary need for workers. (*Id.*) On March 22, 2016, the Employer requested administrative review of the CO's Non-Acceptance Denial, as permitted by 20 C.F.R. § 655.61.[6] (AF 1-55.)

On March 24, 2016, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer ("Solicitor") to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). On March 30, 2016, BALCA received the Appeal File from the CO. Thereafter, on April 6, 2016, BALCA received an updated Appeal File from the CO. Both the Solicitor and the Employer filed briefs on April 8, 2016.

DISCUSSION AND APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's Application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified

[6] Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO's adverse determination, an employer may request that BALCA review the CO's denial. Within seven (7) business days of receipt of an employer's appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO's decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO's brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

Failure to Establish a Peakload Need for Workers

The sole issue on appeal is whether the Employer has established a temporary need for workers. To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). The Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." 20 C.F.R. § 655.6(a). Pursuant to § 113 of the Department of Labor Appropriations Act, 2016, "for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B)." Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113), § 113 (Dec. 18, 2015). Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

> 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. 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. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

In this case, the Employer alleges it has a peakload need for five stable attendants. (AF 100.) In order 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).

After reviewing the record and the parties' legal arguments, I concur with the CO that the Employer has failed to establish that it has a temporary need for H-2B workers from February 15, 2016 through November 11, 2016. Although the Employer has demonstrated that it regularly employs contract workers, for the reasons stated below, I find it has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand.

In its brief on appeal, counsel for the Employer emphasized that the Employer "submitted copies of its general ledger for 2014 and 2015, which show [the Employer] has hired additional contract labor during the months of [the Employer's] request." (*Employer's Brief* at 1.) Furthermore, counsel for the Employer stated that all of the "Contract Labor" listed on the General Ledgers "are employed to assist [the Employer] in its annual horse sales." (*Employer's Brief* at 2.)

I have charted below the relevant information contained in the Employer's General Ledger for 2014 and 2015. (AF 79-84.) The tables include the "Current Period Change" for each month in 2014 and 2015. (*Id*.)

General Ledger - Contract Labor 2014

Month	**Debit Amount**
January	$18,515.83
February	$7,460.00
March	$200.00
April	$0
May	$0
June	$0
July	$7,230.00
August	$7,688.44
September	$100,647.99
October	$21,267.10
November	$68,413.77
December	$1,200.00

General Ledger - Contract Labor 2015

Month	**Debit Amount**
January	$29,669.77
February	$6,785.35
March	$0
April	$0
May	$0
June	$0
July	$5,018.59
August	$5,950.00
September	$99,154.46
October	$27,243.10
November	$94,486.85
December	$0

I find that the data from past years does not support the Employer's allegation that it historically hired more contract workers from February through November than it did during the rest of the year. According to the General Ledger for 2014, the Employer did not spend *any* money on contract laborers in April, May, and June, and it only spent $200 on contract labor in March. (AF 79.) These are four of the months in which the Employer alleges it has a peakload need. (*Id*.) Similarly, in 2015, the Employer did not hire *any* contract laborers in March, April, May, and June, which, once again, are four of the months in which the Employer alleges it has a peakload need. (AF 82.) Thus, contrary to the Employer's assertion that it has historically hired additional workers to assist with its annual horse sales from February through November, in

many of the months that it alleges it has a peakload need, it actually did not spend any money on contract labor. Moreover, although the Employer does not allege that January is one of the months in which it has a peakload need for workers, the General Ledger reveals that it spent significant sums of money on contract labor in January in both 2014 and 2015. Based on the evidence contained in the General Ledger, I find that the Employer has not demonstrated that it has a peakload need for temporary workers from February until November.

In addition to submitting a General Ledger for 2014 and 2015, the Employer submitted an Account Variance for 2014 and 2015. (AF 85-88.) In its request for administrative review, counsel for the Employer stated that the wages category in the Account Variance for 2014 and 2015 "clearly shows that more is paid to workers during the months from February to November than other months of the year. This is the period of peakload need." (AF 2.) Moreover, in its brief, counsel for the Employer reiterated that the Account Variance shows "the total wages paid out by the [E]mployer, which peaked in February through November." (*Employer's Brief* at 2.)

After examining the evidence, I note that the Account Variance for 2014 demonstrates that the Employer paid wages from a low of $60,699.63 in January, to a high of $120,429.96 in October. (AF 85.) The Account Variance for 2015 demonstrates that the Employer paid wages from a low of $50,733.23 in December, to a high of $146,856.40 in April. (AF 87.) Therefore, I acknowledge that the amount of wages the Employer has historically paid its workers varies significantly by month. However, the Employer did not clarify precisely who was earning these wages. Rather, in the letter attached to its request for administrative review, the Employer simply stated that a "large portion of these wage payments went to contractors who were doing the work of a Stable Attendant." (AF 11.) Mere evidence of the "total wages" the Employer paid in 2014 and 2015 does not establish how much the Employer paid either to permanent workers in the stable attendant position or to temporary workers in the stable attendant position. Moreover, the Employer did not provide data evidencing how many fulltime and temporary stable attendants it hired, how much money each type of worker earned, or how many hours each type of worker worked. Therefore, I find that the Account Variance does not establish that the Employer has a peakload need for temporary workers from February until November.

In addition to finding that the Employer has failed to show that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand, I find that the Employer failed to establish that temporary workers would not become part of its regular operations. 8 C.F.R. 214.2(h)(6)(ii)(B)(3). The Employer has filed three applications seeking temporary labor certification for five stable attendants. (AF 100, 120, 129.) In each application, the Employer has claimed a different period of temporary need. In its first application, which the CO denied, the Employer alleged it had a peakload need for workers from October 7, 2015 until June 24, 2016. (AF 120.) In its second application, which the Employer later withdrew, the Employer alleged it had a peakload need for workers from December 1, 2015 until July 8, 2016. (AF 129.) In its current Application, at issue in this appeal, the Employer alleged it has a peakload need for workers from February 15, 2016 until November 11, 2016. (AF 100.) Taken together, I note that the dates of temporary need the Employer alleged in its three applications amount to a temporary need from October 7, 2015 until November 11, 2016, which is over a year. Accordingly, I find that the Employer has not shown that its need for temporary stable attendants "will end in the near, definable future," as mandated by 8 C.F.R. § 214.2(h)(6)(ii)(B).

Based on the evidence of record, I find that the Employer has not carried its burden to show that it regularly employs permanent workers to work as stable attendants and that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand. Moreover, the Employer has not established that any temporary additions to its staff will not become a part of its regular operations. Therefore, I find that the CO properly concluded that the Employer failed to establish a temporary need for H-2B workers.

ORDER

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

Digitally signed by John P. Sellers III
DN: CN=John P. Sellers III,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

John P. Sellers, III
Administrative Law Judge