



Issue Date: 18 July 2016

BALCA Case No.: 2016-TLN-00054
ETA Case No.: H-400-16078-147014

In the Matter of:

JAJ HAULING, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances:

Penelope S. Parker, Agent
The Law Offices of Santiago E. Juarez
Albuquerque, New Mexico
For the Employer

Jeffrey L. Nesvet, *Esq.*
C. Cleveland Fairchild, *Esq.*
U.S. Department of Labor
Office of the Solicitor
Washington, D.C. 20210
For the Certifying Officer

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING NON ACCEPTANCE DENIAL

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to JAJ Hauling, LLC’s request for review of the Certifying Officer’s 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, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis, as defined by Department of Homeland Security regulations.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of

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 and 29 C.F.R. Part 503). 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* on March 18, 2016, with a start date of need on May 1, 2016 (subsequently amended to October 1, 2016). 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).

Labor (“Department”).³ A Certifying Officer (“CO”) 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.⁴

STATEMENT OF THE CASE

H-2B Application

JAJ Hauling, LLC (the “Employer”) is a transportation company in Mission, Texas. AF 123-173.⁵ On March 18, 2016, 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) written permission to make changes to Application; (4) 2015 Payroll Summary; (5) Notice of Deficiency (“NOD”) Response Letter; (6) General Power of Attorney; (7) State Workforce Agency (“SWA”) Job Order Advertisement text; a copy of job order number 327816; and (8) *Prevailing Wage Determination* P-400-15267-810649. *Id.*⁶ The Employer requested certification for three “heavy and tractor-trailer truck drivers”⁷ from May 1, 2016, to February 28, 2018,⁸ based on an alleged seasonal need during that period. *Id.*

CO’s Notice of Deficiency & Employer’s Response

On May 5, 2016, the CO issued a NOD, pursuant to 20 C.F.R. § 655.31. AF 108-118. The CO described five deficiencies in the Employer’s Application.⁹ With regard to the nature of the job opportunity, the NOD requested that the Employer include attestations regarding temporary need in the appropriate sections of its application. The NOD provided that this must include a detailed statement of temporary need containing the following:

- A description of the business history and activities (i.e., primary products or services) and schedule of operation through the year;
- And explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need;
- 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

³ 8 C.F.R. §214.2(h)(6)(iii).

⁴ 20 C.F.R. §655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

⁶ The Appeal File also contains the Employer’s application in case number H-400-15289-977626, for three “Heavy and Tractor-Trailer Truck Drivers” submitted on January 11, 2016. AF at 175-177. This Application requested workers based on a purported seasonal need between March 1, 2016, and July 15, 2017, but was denied due to a untimely response to a Notice of Deficiency.

⁷ SOC (O*Net/OES) occupation title “Truck Drivers” and occupation code 53-3032. AF 123.

⁸ The Employer later amended its Application to reflect its dates of need as October 1, 2016, to July 31, 2017. AF 43.

⁹ Only the two outstanding deficiencies of the initial five deficiencies will be addressed in this Decision and Order.

being presented was compiled from the employer's actual accounting records or system; or

- Other evidence and documentation that similarly serves to justify the requested dates of need.

AND

The employer must amend its ETA Form 9142, Section B., Items 5 and 6, to show a period of need that does not exceed ten months in duration.

AF 37.

Regarding the travel associated with the position, the NOD requested that the Employer amend Section F.c, Item 7a. of the ETA Form 9142 and job order:

to indicate street addresses for all additional worksite locations for the job opportunity

AND

1. The employer must provide evidence that any additional worksite locations are within normal commuting distance and are in the same area of intended employment, as defined by 20 CFR § 655.5; or
2. The employer must provide a written explanation establishing that its travel requirements do not reflect additional worksite locations. This explanation must detail:
 - The frequency with which the workers will travel;
 - The overall percentage of time the workers will spend at travel location(s) vs. the percentage of time in the area of intended employment indicated in Section F.c., Items 1 through 6; and
 - The length of time that the workers will spend at each travel location.

AF 42-43. Pursuant to 20 C.F.R. § 655.31(b)(2), the CO informed the Employer that it was permitted to submit a modified application within ten business days of the date of the NOD. *Id.* On May 18, 2016, the Employer responded to the CO's NOD via e-mail. AF 43-101. The Employer included the following information in its response:

- (1) A copy of the NOD, dated May 5, 2016;
- (2) *Prevailing Wage Determination* P-400-15267-810649;
- (3) *Application for Temporary Employment Certification* with signed Appendix B;
- (4) SWA Job Order;
- (5) General Power of Attorney;
- (6) 2015 Payroll Summary;
- (7) Written permission to make changes to application;
- (8) Recruitment information and newspaper advertisements from *The Monitor*;

- (9) SWA Job Order Advertisement text; and
- (10) Copy of United States Postal Service delivery confirmation receipt.

AF 47-101.

CO's Non Acceptance Denial

The CO issued a Non Acceptance Denial denying the Employer's Application on May 31, 2016. AF 15-23. The CO provided that it was unable to issue an acceptance in the case as two deficiencies in the Employer's application remained outstanding even after the Employer responded to the NOD dated May 5, 2016. *Id.* The CO noted that the Employer failed to establish the job opportunity as temporary in nature and failed to establish the area of intended employment.

Based on the Employer's response to the NOD with regard to the alleged temporary nature of the job opportunity, the CO noted that:

the Employer change[d] its dates of need from May 1, 2016, through February 28, 2017, to October 1, 2016, through July 31, 2017. The payroll documents did not identify workers for each month and separately for full-time permanent and temporary employment in the requested occupation. The payroll simply identifies the name of employees, their gross and net pay for 2015 along with the taxes deducted therefore it does not support a peakload standard for the requested number of workers or dates of need.

In addition, the employer failed to substantiate a seasonal standard of need since, based on the employer's NOD response, the employer's dates of need changed substantially from May 1, 2016 through February 28, 201[8] to October 1, 2016 through July 31, 2017, Pursuant to Departmental regulations, Seasonal need is traditionally tied to a season of the year by an event or pattern; and is of a recurring nature. Employment is not seasonal if the period during which the service or labor is needed is, unpredictable, subject to change, or considered a vacation period for the employer's permanent employees. Since the employer has not provide[d] documentation to support a temporary need for either of the requested set of dates, the employer has not justified a temporary need based on the seasonal standard either.

Finally, the employer failed to substantiate a temporary need as the employers dates of need have changed over the course of two filings. Specifically, the employer previously filed under case number H-400-15289-977626, for dates of need March 1, 2016 through July 15, 2017, thereby showing that in addition to its current filing for case number, H-400-16078-147014, the employer's need appears to be year-round, and not temporary. The employer therefore, did not overcome this deficiency.

AF 11. Based on the Employer's response to the NOD with regard to the alleged area of intended employment, the CO noted that:

The employer was to provide evidence that any additional worksite locations are within normal commuting distance and are in the same area of intended employment, as defined by 20 CFR 655.5.

In its Application for Temporary Employment Certification, the employer stated that there was one area of intended employment (McAllen, Edinburg, Mission, TX MSA), and argued that it is normal to the occupation for some long-haul routes to be driven. The Department does not agree with this. Section F.a Item 5, of the ETA Form 9142 (job duties), indicates that workers will "check truck for mechanical issues, check all important documents such as insurance, registration and verify that they are up-to-date, clean trailer before loading and after unloading, make sure logs are complete and receipts are obtained for all expenses for every load, keep in contact with broker and complete other duties that may arise." As this statement indicates, the duties of the position (the work) will be undertaken at sites outside the stated area of intended employment. Thus, worksites include all the area across each state where this work will be undertaken.

Pursuant to Departmental regulations at 20 CFR 655.5(2), an area of intended employment "means the geographical area within normal commuting distance of the place (worksite address) of the job opportunity for which certification is sought." The distance within a normal commuting area may be affected by varying circumstances, but such circumstances are confined to the commuting area, not to locations outside of it.

The area of intended employment is the area that is within normal commuting distance of a specific work address. As a result, any work that is performed at locations outside of the normal commuting distance cannot be included in the employer's application. The employer itself indicated that workers would be required to perform the duties as described in the application in Oklahoma, New Mexico, Illinois, Iowa, and Pennsylvania. The employer clearly intends for its drivers to perform these duties at worksites outside of the specified MSA. A worksite is a location at which the work, the duties of the position, are undertaken. It is clear that there are multiple worksites which are not within a single area of intended employment.

Conversely, the employer also argues that these worksite locations are just "delivery destinations" and that the "application of travel to extend the range of the worksite location is a misnomer." If this were true, in order to be in compliance with the Department's definition of area of intended employment, the commuting distance to the place of employment, as specified by the employer to be the McAllen, Edinburg, Mission, TX MSA, would have to be deemed as "normal" from each "delivery destination" the employer requires it[s] drivers to

commute to and from. To commute from the long-haul “delivery destinations” to the employer’s specified worksite cannot be deemed as to be within a normal commuting distance and therefore this point of view is unacceptable as well.

AF 11-13. For both of the above-mentioned reasons, the CO denied certification.

Employer’s Appeal

In a letter dated June 15, 2016, the Employer requested administrative review of the CO’s Non Acceptance Denial, pursuant to 20 C.F.R. § 655.61.¹⁰ AF 1-14. On June 17, 2016, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule permitting the Employer and the Solicitor to file briefs within seven business days of receiving the Appeal File. On June 23, 2016, BALCA received the Appeal File from the CO. The Solicitor filed a brief on behalf of the CO on July 5, 2016, which was received by the undersigned on July 7, 2016, urging BALCA to affirm the CO’s decision to deny certification. The Employer did not file a brief.

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 was actually submitted to the CO before the date the CO issued a Final Determination.¹¹ 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.¹²

The Employer bears the ultimate burden of proving that it is entitled to temporary labor certification.¹³ 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 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.¹⁴

¹⁰ Under 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.

¹¹ 20 C.F.R. § 655.61.

¹² 20 C.F.R. § 655.61(e).

¹³ 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., d/b/a 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).

¹⁴ 20 C.F.R. § 655.1(a).

Each job opportunity identified within an *Application for Temporary Employment Certification* must meet various requirements outlined in 20 C.F.R. § 655. In its Non Acceptance Denial, the CO determined that the Employer failed to establish the job opportunity as temporary in nature in accordance with 20 C.F.R. § 655.6(a) and (b) and failed to establish an area of intended employment in accordance with 20 C.F.R. § 655.15(e). AF 9-11.

As to the first deficiency regarding the temporary nature of employment, the CO concluded that the Employer “did not submit sufficient information in its H-2B Application for Temporary Employment Certification to establish that the requested period of need is temporary in nature.” AF 9-10.

In its request for administrative review, the Employer provided that the change of dates for its job opportunity “were to (a) fix typos [such as the listed frame of 22 months], and (b) having to adjust the timeframe listed to acquire the maximum possible portion of approved dates during the Employers’ period of season need against a seemingly endless cycle of delays while USDOL was processing the application.” Employer’s Administrative Appeal at 2. The Employer acknowledged it was “difficult to align the dates in which the Employers’ seasonal need falls in a timeframe that DOL will accept and process H2B application, [notwithstanding] the difficulty of attempting to anticipate administrative or procedural delays to the application.” *Id.* The Employer explained it was “cognizant of the fact that DOL has a large caseload but that unfortunately the approval process for foreign labor certification results in an undue burden in gathering both required and requested documentation to support the underlying issues.” *Id.*

In accordance with 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. The applicable regulations provide that the employer's need is considered temporary when the employer needs a worker for a limited period of time and can establish that the need for the employee will end in the near, definable future.¹⁵ 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 three years. The employer's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than nine months.¹⁶

The Employer requested three truck drivers from October 1, 2016, to July 31, 2017, (a period of ten months)¹⁷ based on a seasonal need. To meet the requirements of ‘seasonal need’ under DHS regulations, an employer must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.¹⁸ Additionally, the employer shall specify the period(s) of time during each year in which it does not need the services or labor.¹⁹ According to regulation, the employment is not seasonal if the period during

¹⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹⁶ 20 C.F.R. § 655.6(b).

¹⁷ These dates were amended from the former dates of May 1, 2016, to February 28, 2018, a period of 22 months.

¹⁸ 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹⁹ *Id.*

which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the employer's permanent employees.²⁰

In the instant case, the Employer's amended application shifted its purported trucking season by a full year, and its various applications allege a trucking season during every month of the year. As noted in the CO's brief, the shifting of its required dates by a full year to an entirely different time of the year tends to show that the Employer's need appears to be limited by the regulation's duration requirement, and not by the constraints of its own seasonal demand. The Employer failed to demonstrate that the labor or services of a truck driver are tied to a season of the year by an event or pattern, other than to list several holidays tied to specific months of the year and claiming an increase in demand during these periods. Although the CO requested information regarding the Employer's business history, activities and yearly operation schedule, the Employer failed to provide such documentation. While the Employer submitted annual payroll records for several employees, the payroll records only provided yearly totals, and thus provided no basis from which to compare the months of seasonal demand to those during which the Employer's demand purportedly drops. Without further evidence to support the Employer's claims regarding its seasonal need, the fluctuation in timeframes suggests that the Employer's need appears to be that of a year-round need rather than seasonal, and its claim for seasonal demand may be artificial. Although I agree with the Employer that there may be administrative or procedural delays to an application that may make the H-2B process confusing and time-consuming, that does not excuse noncompliance with the applicable regulations.

Furthermore, in the NOD dated May 5, 2016, the CO explained to the Employer that the job opportunity needed to meet all of the requirements listed in 20 C.F.R. § 655.6(a) and (b). AF 71-72. At that time, the Employer was given an opportunity to modify its application and provide a detailed statement and documentation to support a temporary need for the requested dates, and adhere to the regulations before the CO issued its final decision. As the Employer did not provide adequate information to the CO to support its application, I find that the CO correctly concluded that the application failed to establish the job opportunity as temporary in nature, as required by 20 C.F.R. § 655.6(a) and (b), and properly denied the Employer's certification.²¹

²⁰ *Id.*

²¹ The CO also concluded that the Employer failed to establish an area of intended employment for the job opportunity. AF 11-13. Although the CO denied the Employer's certification on both of these bases, there is no need to discuss the merits of the Employer's second deficiency with regard to the alleged area of intended employment, as I find that the CO properly denied certification based on the Employer's failure to establish its job opportunity as temporary in nature.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's Non Acceptance Denial be, and hereby is, **AFFIRMED**.

For the Board:

PETER B. SILVAIN, JR.
Administrative Law Judge