

**U.S. Department of Labor**

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**Issue Date: 19 October 2016**

**BALCA Case No.:** 2016-TLN-00069  
**ETA Case No.:** H-400-16189-462687

*In the Matter of:*

**Manuel Huerta Trucking, Inc.,**

*Employer.*

**Certifying Officer:** Chicago National Processing Center

**Appearances:** Pablo E. Bustos, Esq.,  
*For the Employer*

Jeffrey L. Nesvett, Assistant Solicitor and  
Jessica G. Lyn, Senior Attorney  
U.S. Dept. of Labor, Office of the Solicitor, Division of Employment and  
Training Legal Services  
*For the Certifying Officer*

**Before:** Richard A. Morgan  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Manuel Huerta Trucking, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant 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 United States Department of Homeland Security,<sup>1</sup> “if unemployed persons capable of performing such service or labor cannot be found in [the United States].” *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655.<sup>2</sup> Employers seeking to utilize this program must apply for

<sup>1</sup> The definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 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 (Dec. 18, 2015). *See also* 20 C.F.R. § 655.6(b).

<sup>2</sup> On April 29, 2015, the Department of Labor (“DOL”) 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. *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The IFR applies to applications “submitted on or after April

and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

## **STATEMENT OF THE CASE**

### **H-2B Application**

On July 7, 2016, Manuel Huerta Trucking, Inc. (“Employer”) filed an H-2B Application for Temporary Employment Certification for the job title of “Truck Driver.” (AF 162-192).<sup>3</sup> Employer requested 25 full time workers from October 3, 2016 to July 3, 2017. Employer indicated that the nature of its temporary need is “seasonal.” Employer’s statement of temporary need states the following:

The Petitioning Company is a trucking company located near the border of Mexico and the United States. The company distributes produce, fruits and vegetables, primarily grown in Mexico but also in the United States of America. The produce being transported are seasonal, in that they grow during specific periods. There is a seasonal need for an increase in truck drivers near the beginning of October to the beginning of July every year. Specifically, from October 3, 2016 through July 3, 2017, there is an increase for truckers to transport: Asian vegetables from ... October through ... June; for bell peppers from October to ... May; for chili pepper from October through ... June; for cucumbers from September to ... April; for eggplants from October to April; for green beans from mid- October to ... April; for lettuce from mid-October to mid-March; for melons from ... September to mid- June; for squash from ... September to... May; for tomatoes ... November to ... May; and for watermelons from mid-October to ... June.

In support of its application Employer submitted a copy of literature from the Fresh Produce Association of the Americas (FPAA) regarding the seasons of Mexican produce as well as an affidavit from the Employer regarding its seasonal need for truck drivers. (AF 184-187).

### **Notice of Deficiency**

By letter dated July 18, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) for three deficiencies in Employer’s application including “failure to establish the job opportunity as temporary in nature.” (AF 154-161). (As the other two deficiencies were successfully remedied, they will not be addressed in this decision. See AF 99).

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29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). As the application in this case meets these conditions, the IFR applies to this case. All citations to 20 C.F.R. Part 655 in this order are to the IFR.

<sup>3</sup>For purposes of this opinion, “AF” refers to “Appeal File.”

The CO stated in its July 18, 2016 NOD that the Employer had not sufficiently demonstrated the requested standard of temporary need citing 20 C.F.R. § 655.6(a) and (b) and noting that under these regulations “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” The CO pointed out that the “employer was previously certified (H-400-15328-214135) for 25 truck drivers for the dates of March 1, 2016 through November 18, 2016. The employer’s requested dates of need are not consistent with the previously certified application, and combined, the total requested dates of need are over 16 months (March 1, 2016 through November 18, 2016 and October 3, 2016 through July 3, 2017).” (AF 159). The CO requested additional information in support of the employer’s position that the job opportunity reflected a temporary need and how it met one of the regulatory standards of a “one time occurrence, seasonal, peak load, or intermittent need.” The CO directed the employer to include “[s]igned monthly invoices from previous calendar years clearly showing that work will be performed for each month during the requested period of need, as well as “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.”

#### Employer’s Response and CO’s Non-Acceptance Denial

Employer responded to the NOD on August 1, 2016. In addition to information submitted regarding the other two deficiencies, Employer submitted certified payroll information for 2014, 2015 and 2016 (January through July) showing average gross truck driver wages paid, as well as the average weekly wages paid for this period. (AF 109-153). These figures were not broken down by permanent and temporary employees.

On September 8, 2016, the CO issued a Non-Acceptance Denial denying the application for temporary employment certification for “failure to establish the job opportunity as temporary in nature.” (AF 94-108). The CO determined that the employer did not sufficiently demonstrate the requested standard of temporary need and pointed out that, in order to demonstrate temporary employment need based on a seasonal need, the petitioner must show 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. Additionally “the petitioner shall specify the period(s) of time during each year in which it does not need the services or labor...” The CO again pointed out that the employer was previously certified for 25 truck drivers for the dates of March 1, 2016 through November 18, 2016 and therefore the employer’s requested dates of need are not consistent with the previously certified application since the combined requested dates of need are over 16 months. The CO also stated that the payroll chart provided by employer did not differentiate between temporary and permanent workers.

#### Administrative Review

On September 22, 2016, Employer emailed a request for Administrative Review of the September 8, 2016 Non Acceptance denial of Employer’s H-2B application.<sup>4</sup> AF 60. Employer

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<sup>4</sup> The regulation at 20 C.F.R. § 655.61 states that the employer may request review of the CO’s determination within 10 business days from the date of the determination. The Solicitor asserts in a footnote in her brief (Solicitor’s brief

provided additional information supporting its seasonal need for the delivery of Mexican produce between early October and early July consisting of statistical data from the U. S. Department of Transportation pertaining to international border crossings by truck into Nogales, Arizona for the years 2010 through 2015. Employer argues that the seasonal need requested is supported by the weather and specifically the seasons which control the agricultural harvests. Employer argues that it has specifically identified the produce that it will deliver beginning in early October through early July. Additionally Employer asserts that if it is only entitled to one season that season would be found in early October through early July. See AF 19-93.

Employer filed a supplemental brief by email filing through OALJ-filings on October 7, 2016. Employer argues that the Department of Labor approved a Temporary Labor Certification in a similar case, *In the matter of Geriq Logisitcs, LLC*, Application Number: H-400-16194-058501 (“*Geriq*”) on October 5, 2016. Employer asserts that the documentation was similar and that the Department recognized a seasonal need for the delivery of produce between early October through early July in the *Geriq* case. Employer argues that judicial consistency would require approval of its application as well. As the scope of review in this case is limited to the record which was before the CO in this matter, consideration of this point alleged by the employer will not be addressed. The *Geriq* application is not part of the record which was before the CO, nor is it part of the record before the undersigned. Further, the undersigned, who is reviewing this matter on behalf of the Board of Alien Labor Certification Appeals, is not bound by a determination made by a certifying officer in another temporary labor certification matter.

Attorney Jessica G. Lyn of the office of the U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief in this matter on October 13, 2016, on behalf of the Certifying Officer. The Solicitor argues that the CO’s denial of the Employer’s application for temporary labor certification should be affirmed because the employer failed to establish that its need was temporary in nature as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii). In particular, the Solicitor stated “the regulation makes clear, an employer cannot establish a temporary seasonal need if its need for the labor or services is present year-round,” citing *Marco LLC d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043 (Apr. 9, 2009) (analyzing whether a landscaping business has permanent employees year-round in order to determine whether it established a seasonal need).

The Solicitor cites several cases for the proposition that the operative question is whether the employer’s need is temporary and not whether the duties of the position are temporary. See *Pleasantville Farms LLC*, 2015-TLC-00053 at \*3 (June 8, 2015); see also *Cressler Ranch Trucking, LLC*, 2013-TLC-00007 at \*3 (Nov. 26, 2012). Therefore, “[i]n determining whether the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other

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at 4, fn. 3) that the Employer’s request for review was untimely since it was submitted one day late (September 23, 2016) and was due within 10 days of the CO’s September 8, 2016 final determination which would have been September 22, 2016. To the contrary, I find that the Employer’s request for administrative review was submitted by email to the CO on September 22, 2016, (See AF 60) and therefore was a timely request for administrative review. Further, a USPS priority mail tracking stamp found at AF 41 establishes that a hard copy of the request for review was sent to the CO on September 20, 2016 and received by the CO on September 22, 2016, which clearly establishes that the request for review was timely.

times of the year,” quoting *Fegley Grain Cleaning*, 2015-TLC-00067 at \*3; see also *Larry Ulmer*, 2015-TLC-00003, at \*3(Nov. 4, 2014).

The Solicitor asserts that the Employer “cannot demonstrate a seasonal need for truck drivers, because it has conceded through both of its H-2B applications (the one at issue and the one previously certified) that it has a year round need for truck drivers,” noting the dates of need in the two applications of March 1, 2016 to November 18, 2016, and October 3, 2016 to July 3, 2017, respectively. The Solicitor reasserts the CO’s position as stated in the July 18, 2016 Notice of Deficiency and the September 8, 2016 Non-Acceptance Denial, that combined, Employer’s dates of need represent a continuous period of more than 16 months, indicating there is not a single month in which it does not need the services or labor. See *William Ashby Maltberger d/b/a Maltberger Ranch*, 2016-TLC-00078, 86 (Sept. 28, 2016)(finding employer’s two labor certification applications, though separate, demonstrated a year-round need when combined, because of the overlapping nature of the dates of need and the similarities in job requirements and duties).

For these reasons the Solicitor requests that the denial of Employer’s H-2B application be affirmed.

### **SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO’s determination; or
- (2) Reverse or modify the CO’s determination; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

### **ISSUE**

Whether the Certifying Officer properly denied the Employer’s application for an H-2B temporary labor certification due to Employer’s failure to meet its burden of establishing that its request for 25 truck drivers for the period of October 3, 2016 through July 3, 2016 is based upon a “temporary” employment need, according to the Employer’s stated standard of a “seasonal” need?

### **DISCUSSION**

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is

“temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii).<sup>5</sup> This regulation states as follows in regard to temporary services or labor:

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s 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)).

The DHS regulation further states in regard to the nature of petitioner’s need:

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.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states as follows:

The employer’s need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

(20 C.F.R. §655.6).

The DOL regulation also specifies that certification will be denied if the “employer has a need lasting more than 9 months” (20 C.F.R. §655.6(b)) while the DHS regulation only indicates that the need will generally “be limited to one year or less” except in cases of a “one time event” which “could last up to 3 years.”

In the current case the Employer is applying for temporary labor certification for 25 truck drivers on the basis of a “seasonal need.” To establish a seasonal need according to the DHS regulation,

[t]he petitioner 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. The petitioner shall specify the period(s) of time during each year in which it does not need the service or labor. The employment is not seasonal if the period during which the

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<sup>5</sup> Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

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

(8 C.F.R. §214.2(h)(6)(ii)(B)(2)).

The employer submitted evidence to the CO supporting that its request for certification of 25 truck drivers was based on its need for additional drivers due to seasonal delivery of several types of Mexican produce which due to the various growing seasons required delivery in early October through early July. Employer's request for temporary labor certification in its current application covered the period October 3, 2016 through July 3, 2017. The information supplied by Employer to the CO from the Fresh Produce Association of the Americas (FPAA) regarding the seasons of "Mexican produce" supports that the need for delivery of this type of produce is primarily in the months of October through June with a lesser need in the months of July through September. Payroll information supplied by the Employer also supports that its payroll decreased in the months of July through September.

Employer's request for certification for the nine months between early October and early July is also consistent with both the DOL regulation which limits a request for temporary certification in cases other than a one-time occurrence to 9 months, as well as the DHS specification that the period is "limited to one year or less," if other than a one-time event.

In denying the Employer's request for temporary labor certification the CO pointed out that the Employer had previously been approved for a temporary labor certification for 25 truck drivers covering the period between March 1, 2016 and November 18, 2016, under application H-400-15328-214135, which is currently in effect, and which overlaps with the current application. (AF 159, 101). When considered together, Employer's two applications would cover a period of sixteen consecutive months between March 1, 2016 and July 3, 2017.

Although the Employer's current application on its face would appear to establish a seasonal need for truck drivers between October 3, 2016 and July 3, 2017, when considered in conjunction with the previous certification which is ongoing, the two applications considered together appear to show that Employer's need is not temporary or seasonal. To the extent that Employer's need covers all seasons of the year it is no longer consistent with a "seasonal" need or a temporary need as defined by the DHS and DOL regulations which implement the H-2B program. As previously pointed out, the DHS regulation specifies that "[e]mployment 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." 8 C.F.R. §214.2(h)(6)(ii)(B). Employer has not shown that its need will last less than a year or that it is for a limited period of time, since the need, as noted in its two applications, covers a period of sixteen consecutive months.

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g. Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial

where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

Employer has failed to meet its burden of showing the temporary or seasonal need for 25 workers in this case where it has submitted two requests for temporary certification that cover sixteen consecutive months. As both the DHS regulation and the DOL regulation point out, “Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s 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), *see also* 20 C.F.R. §655.6(a). Although Employer may have shown that a particular job is seasonal or temporary, the pertinent issue is whether the petitioner’s employment need is temporary. If the Employer’s need for workers is covering sixteen consecutive months as indicated in its two overlapping applications, it cannot be found to be seasonal or temporary. *See also JAJ Hauling, LLC*, 2016 TLN 00054(ALJ July 18, 2016)(affirming denial of certification where fluctuation in application timeframe suggested that Employer’s need appeared to be “year-round need rather than seasonal”).

Employer was given the opportunity to address this issue which was raised by the CO in its initial July 16, 2016 Notice of Deficiency. The CO asked the employer to address the inconsistency in its overlapping applications alleging seasonal need lasting sixteen months, and to explain whether the temporary employment request could fall within the guidelines under a different type of need other than seasonal. Employer has failed to submit any evidence which addresses this inconsistency. It is clear that the H-2B program regulations do not contemplate certification of workers for a permanent rather than a temporary employment need.

The DHS and DOL jointly issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule (“IFR”), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position ... Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.

(82 Fed. Reg. 24056 (April 29, 2015)).

## **CONCLUSION**

For the reasons stated above, Employer has failed to meet its burden of showing how its employment need for 25 workers covering 16 consecutive months as determined by its two overlapping temporary labor certification applications, is temporary or seasonal, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii). Accordingly, the CO’s denial of Employer’s application for temporary labor certification is affirmed.

**ORDER**

**IT IS HEREBY ORDERED** that the Certifying Officer's Decision is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN  
Administrative Law Judge