



Issue Date: 21 October 2016

BALCA Case No.: 2016-TLN-00072
ETA Case No.: H-400-16188-831478

In the Matter of:

INTERNATIONAL DESTINY LOGISTICS, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Pablo E. Bustos, *Esq.*
Bustos & Associates, P.C.
Nogales, Arizona
For the Employer

Leticia Sierra, *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 International Destiny Logistic LLC’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, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply

¹ On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). These rules apply to this case.

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 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).

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 is a trucking company that distributes fruits and vegetables that are primarily grown in Mexico, but also some that are grown in the United States. (AF 95.)³ It is located in Nogales, Arizona, near the border between Mexico and the United States. (*Id.*) On July 6, 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) a copy of a BALCA Decision and Order; (4) various job advertisements and data regarding the Employer’s monthly operations from January 2015 until May 2016; (5) an *Affidavit of Alejandro Andrade*; (6) an *Attestation of No Agent or Recruiter*; (7) a *Statement of Temporary Need*; (8) an *Affidavit of Temporary Need*; (9) information from the Fresh Produce Association of the Americas; and (10) a *Legal Services Retainer Agreement*. (AF 95-168.) The Employer requested certification for ten truck drivers⁴ from October 3, 2016, until July 3, 2017, based on an alleged seasonal need during that period. (AF 95.)

On July 13, 2016, the CO issued a Notice of Deficiency, which outlined four deficiencies in the Employer’s Application. (AF 82-89.) Specifically, the CO determined that the Employer failed to: (1) establish that its job opportunity was temporary in nature; (2) indicate that workers would perform the same services or labor, on the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment, and provide evidence that any additional worksite locations were within normal commuting distance; (3) accurately complete Section F.c, Item 7, on ETA Form 9142; and (4) submit the correct version of Appendix B to ETA Form 9142B. (AF 82-89.)

As to the first deficiency, which is the only one at issue on appeal, the CO explained, “In order to establish a seasonal need, the 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.” (AF 86.) The CO concluded that the Employer had not shown that its request for the services or labor met the “seasonal” standard. (*Id.*) The CO advised that in order to establish that it has a seasonal need, the Employer needed to amend its Application to explain why its job opportunity and the number of foreign workers it was requesting reflected a temporary need. To do so, the CO requested that the Employer submit monthly payroll reports from one previous calendar year listing the number of full-time permanent and temporary workers the Employer has historically employed each month as truck drivers, including total hours worked and earnings received. (AF 86-87.) 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” and an

³ In this Decision and Order, “AF” refers to the Appeal File.

⁴ SOC (O*Net/OES) occupation title “Heavy and Tractor-Trailer Truck Drivers” and occupation code 53-3032. (AF 95.)

explanation regarding the “period(s) of time during each year in which it does not need the services or labor.” (AF 87.)

Thereafter, on July 29, 2016, the Employer filed a response to the CO’s Notice of Deficiency. (AF 42-81.) With its response, the Employer submitted the following documentation: (1) a letter of explanation; (2) an *Affidavit of Francisco Flores regarding Areas of Intended Employment*; (3) signed Appendix B to ETA Form 9142B; (4) a *Certification of Payroll and Payroll General Ledger* from January 2015 until July 2016; (5) text from the SWA job order; (6) an *Affidavit of Temporary Need Early October - Early July*; (7) e-mail correspondence; and (8) an *Amended Affidavit of Francisco Flores*. (AF 42-81.)

On September 13, 2016, the CO issued a Non Acceptance Denial. (AF 26-41.) Although the Employer cured three of the four 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 H-2B workers. (*Id.*) On September 27, 2016, the Employer requested administrative review of the CO’s Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.⁵ (AF 1-25.)

On October 5, 2016, the undersigned 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 October 5, 2016, BALCA received the Appeal File from the CO. Thereafter, both parties filed briefs.⁶

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).

⁵ 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

⁶ The Employer submitted a “Supplemental Brief” on October 19, 2016, which was past the deadline to file briefs. Although entitled a “Supplemental Brief,” the filing was in fact the Employer’s initial brief. Thereafter, in a filing dated October 19, 2016, the Certifying Officer objected to the Employer’s filing as untimely, requested that the Employer’s brief be disregarded, and requested an opportunity to respond to the Employer’s arguments. Thereafter, on October 19, 2016, the Employer filed a response to the Certifying Officer’s objection. Despite the Employer’s untimely filing, I have nonetheless considered the arguments contained in its brief. Any further filings or arguments made by either party will not be considered.

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 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 Seasonal 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 alleged that it has a seasonal need for ten truck drivers, from October 3, 2016, until July 3, 2017. (AF 95.) In order to establish a seasonal need, the 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. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the 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(i)(F)(2)(ii)(B)(2). Therefore, in order to determine whether the Employer's need for truck drivers is seasonal, it must establish when the season occurs and how its need for labor during that time of year differs from other times of the year.

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 seasonal need for H-2B workers from October 3, 2016, until July 3, 2017. Although the Employer has demonstrated that it has a need for truck drivers, it has failed to show that its need for them is for a limited period and will end in the definable future. Moreover, it has not produced evidence establishing that its need for services or labor is traditionally associated with a season of the year, by an event or pattern, and is recurring in nature. Therefore, for the reasons articulated below, I find that the Employer has failed to establish that its need for truck drivers is temporary.

In its Application, under the Statement of Temporary Need, the Employer explained that the produce it transports is seasonal, in that it is only grown during specified periods. (AF 95, 101.) As such, the Employer alleged, it has a seasonal need for more truck drivers from the beginning of October until the beginning of July each year. (AF 95.) Specifically, the Employer explained that it has seasonal need to transport specific types of produce during the following periods: (1) Asian vegetables from the end of October until the beginning June; (2) bell peppers from the beginning of October until the beginning of May; (3) chili peppers from the beginning of October until the beginning of June; (4) cucumbers from the beginning of September until the beginning of April; (5) eggplants from the beginning of October until the beginning of April; (6) green beans from the middle of October until the beginning of April; (7) lettuce from the middle of October until the middle of March; (8) melons from the beginning of September until the middle of June; (9) squash from the beginning of September until the beginning of May; (10) tomatoes from the beginning of November until the middle of May; and (11) watermelons from the middle of October until the beginning of June. (AF 95, 101.) Because of these varied growing seasons, the Employer argued that for a period of nine months, from October 3, 2016 until to July 3, 2017, it needs additional truck drivers to deliver produce. (*Id.*)

In support of its position that it has a seasonal need for workers, the Employer submitted an affidavit signed by the Employer's Director, Alejandro Andrade, who explained that there are three main growing seasons in Nogales, Arizona. (AF 155.) The Employer attached a document from the Fresh Produce Association of the Americas, which showed the peak season for growing specific fruits and vegetables in Nogales. (AF 163.) Although the peak periods for each fruit and vegetable that the Employer listed in its Statement of Temporary Need correspond to the chart from the Fresh Produce Association of the Americas, the Employer attested that the produce it transports is primarily grown in Mexico. (AF 95.) Therefore, it is unclear how the growing seasons in Nogales affect the Employer's increased need to transport produce from Mexico to the United States from early October until early July.

Moreover, attached to Alejandro Andrade's affidavit was an "Operations by Month" report, which showed the number of loads that were driven during each month from January 2015 until May 2016. (AF 152.) The number of loads in 2015 ranged from a low of 368 in February, to a high of 647 in June. (*Id.*) Employer did not explain how it has a seasonal need to transport produce in February when its own data shows that it actually transported less produce in February than any other month in 2015. Moreover, the Employer did not include the entire month of July in its period of temporary need, even though it transported more loads of produce in July of 2015 than it did in every other month that year except for June of that year. (AF 152.) Based on the foregoing, I find that the Employer's own data pertaining to the number of loads it

has historically driven from Mexico to the United States does not show that it transports more produce from early October until early July.

In response to the CO’s Notice of Deficiency, the Employer submitted its payroll records, which purportedly showed that its busiest season for transporting produce is from October through early July. (AF 75-76.) The Employer wrote, “In 2015, the average per month Payroll payments were \$129,531.93 but for the months of July, August and September it was \$121,215.72 or \$8,316.16 less than average, or 6.4% lower than average.” (AF 76.) Moreover, the Employer argued that in 2016, the average monthly payroll “has been \$73,125.70, or \$26,408.49 higher than the month of July, which for all practical purposes has ended. Put another way, in 2016, July has been 36.11% lower than average for the months of 2016.” (*Id.*)

The chart below contains the information contained in the Employer’s Payroll Summary:

Payroll Summary

Month	2015	2016
January	\$108,565.68	\$88,803.56
February	\$ 94,265.19	\$88,419.06
March	\$102,247.69	\$78,240.03
April	\$139,679.25	\$89,201.18
May	\$117,689.93	\$59,065.77
June	\$178,398.15	\$61,433.09
July	\$136,198.01	\$46,717.21
August	\$117,652.24	
September	\$109,797.05	
October	\$135,097.22	
November	\$118,127.18	
December	\$201,665.61	
Monthly Average	\$129,531.93 ⁷	\$73,125.70

(AG 76.)

I find that the Employer’s payroll data from 2015 and 2016 does not support its allegation that it has historically hired more workers from early October until early July. In five of the months in which the Employer alleged that it has a seasonal need for more workers - January, February, March, May, and November - its payroll numbers were actually *less* than the average monthly payroll for 2015, which was \$129,948.60. (AF 76.) Moreover, although the Employer alleged that its payroll in July of 2016 was 36.11% lower than the average monthly payroll in 2016, it failed to explain how its average payroll in July of 2015 was higher than the average

⁷ Although the Employer listed \$129,531.93 as the monthly payroll average in 2015, in actuality, the total payroll, \$1,559,383.20, divided by twelve months, equals \$129,948.60. (*Id.*)

monthly payroll in 2015.⁸ Based on this data, contrary to the Employer's assertion that it has a seasonal need for temporary workers for a ten-month period due to a growing season, the Employer has not demonstrated that its need for H-2B workers is tied to a specific season. Rather, the Employer's payroll records show that its needs are unpredictable and subject to change each month during the year. Therefore, based on the evidence contained in the Payroll Summary, I find that the Employer has not demonstrated that it has a seasonal need for temporary truck drivers from early October until early July.

Based on the evidence of record, I find that the Employer has not carried its burden to show that it only needs truck drivers for a limited period from early October until early July. 8 C.F.R. § 214.2(h)(6)(ii)(B). If that were the case, the Employer's transportation loads and payroll records would decrease during the months of July, August, and September. Other than merely listing the peak months for producing various fruits and vegetables in Nogales, Arizona, the Employer failed to demonstrate that its need for ten truck drivers is tied to a limited season of the year. *See JAJ Hauling, LLC*, 2015-TLN-00054 (July 18, 2016). Rather, the Employer's evidence pertaining to historical transportation loads and payroll suggests that its employment needs are ongoing, are subject to change every month throughout the year, and are not substantially greater during the months in which it claims to have a seasonal need. 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:

John P. Sellers, III
Administrative Law Judge

⁸ Furthermore, the Employer submitted its payroll data on July 28, 2016, which was three days prior to the end of the month; therefore, the total payroll for July 2016 is presumably higher than that which the Employer reported.