



Issue Date: 05 July 2016

OALJ Case No.: 2016-TLN-00051  
ETA Case No.: H-400-16074-350562

*In the Matter of*  
**SKODA DINING, INC. DBA CZECH IT OUT,**  
*Employer*

Before: **LARRY S. MERCK**  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Skoda Dining Inc., dba Czech It Out (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> 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, as defined by U.S. Department of Homeland Security regulations. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.1(h)(6); 20 C.F.R. § 655.6(b). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor. 8 C.F.R. § 214.2(h)(6)(iii). 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 certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

**STATEMENT OF THE CASE**

Employer is a restaurant located in Breckenridge, Colorado, that serves American and European cuisine. (AF 143). On March 14, 2016, the Employer filed with the CO the following documents: (1) ETA Form 9142B, *H-2B Application for Temporary Employment Certification*

---

<sup>1</sup> On April 29, 2015, the U.S. Department of Labor and the U.S. 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 U.S. Department of Labor 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 requirements under the IFR. *Id.* at 24,110. The Employer filed an Application for Temporary Employment Certification on March 14, 2016, with a start date of need on May 30, 2016. Therefore, the IFR applies to this case. All citations to 20 C.F.R. Part 655 refer to the IFR.

(“Application”); (2) Appendix B to ETA Form 9142B; (3) a Form G-28 *Notice of Entry of Appearance as Attorney or Accredited Representative*; (4) a copy of an advertisement posted on the website “Connecting Colorado” for job number 6457325; and (5) ETA Form 9141, *Application for Prevailing Wage Determination*. (AF 134-153). The Employer requested certification for five “Food Preparation Workers”<sup>2</sup> based on alleged peak load need for workers from May 30, 2016 to February 14, 2017.<sup>3</sup> (AF 134).

On May 2, 2016, the CO issued a Notice of Deficiency, pursuant to 20 C.F.R. § 655.31. (AF 126-30). The Notice of Deficiency stated that Employer did not meet its burden of establishing that it has a temporary peak load need from May 30, 2016 to February 14, 2017 as required by the DHS regulations. (AF 129). The CO stated in pertinent part:

The employer indicated its temporary need is based on increased business operations during the Colorado ski season. However, the employer is requesting dates of need outside of the normal ski season. The employer has not demonstrated a temporary peak load need from May 30, 2016 through February 14, 2017.

(AF 129). Further, the CO requested the following additional information:

A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year;

An 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 being presented was compiled from the employer’s actual accounting system; and

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

(AF 129-30).

On May 13, 2016, the CO received Employer’s timely response to the Notice of Deficiency. (AF 63). Employer submitted an amended statement of temporary need, a written letter response to the Notice of Deficiency, internet printouts of Breckenridge’s spring break reputation and the ski season, internet printouts of Employer’s menu, and the 2015 Payroll

---

<sup>2</sup> SOC (O\*Net/OES) occupation title “Food Preparation Workers” and occupation code 35-2021. (AF 134).

<sup>3</sup> Employer stated that its actual peak load need is from April 15, 2016 to February 14, 2017. (AF 134) However, as Employer applied late for certification, it requested a start date of May 30, 2016.

Summary. (AF 66-124). In its written letter response to the Notice of Deficiency, Employer stated that during non-peak months, Employer experiences “a decrease in foot traffic at the restaurant due to the influx of younger, college, ‘spring break’ individuals to the city of Breckenridge.” (AF 73). As Employer provides a fine dining menu with “dishes . . . targeted to a more sophisticated clientele who enjoy authentic cuisine” which is not a “‘go-to’ food option for the younger, college crowd.” (AF 74). Also, because the city turns into a spring break destination in the off-peak months, Breckenridge experiences a decrease in non-college aged individuals during that time. Finally, Employer explained that its peakload is not limited to ski season because Breckenridge attracts tourists in non-ski season due to its warm, sunny weather. (AF 64).

On May 31, 2016, the CO issued a Non-Acceptance Denial Letter based on Employer’s failure to establish the job opportunity as temporary in nature. (AF 63). The Non-Acceptance Denial Letter states in pertinent part:

The employer states in the amended statement of temporary need: “Due to the cool, sunny, warm weather of Colorado as well as the ski season in Breckenridge (November through April), Skoda dining sees the most foot traffic in its restaurant during the months of April through February (of the subsequent year). It is during these months that the services the Company provides cater the most to the tourist and individuals visiting the city of Breckenridge.”

In addition, the Employer provided a detailed discussion regarding the non-peakload months of mid-February through mid-April, and how the company experiences a decrease in clientele due to an increase of college students or spring-breakers to the city of Breckenridge. The reasoning is that Skoda’s “find European and American cuisine” is presumed to be beyond that of the college student budget. However, the employer did not submit any documentation to support the statements that its business operations decrease during the months in which the area of intended employment experiences an influx of tourists.

The employer provided the payroll records for 2015 to solidify the peakload and non-peakload months. However, the records show that the three permanent employees only worked 75 hours total each month from January through December 2015. Based on the payroll records, the employer’s three permanent workers each work approximately 25 hours every month, which is less than full time.

The employer was to justify why the requested dates of need were outside of the normal ski season. However, together with the statements above and the payroll records the employer did not demonstrate a “Peakload” time of the year. Therefore, the employer did not overcome the deficiency.

(AF 64-65). Accordingly, the CO denied Employer’s application.

On June 13, 2016, Employer requested administrative review of the CO's Final Determination, as permitted by 20 C.F.R. § 655.41.<sup>4</sup> On June 17, 2016, I received the Appeal File and issued a *Notice of Assignment and Expedited Briefing Schedule*, permitting the Employer and counsel for the CO to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). The Employer filed a brief on June 21, 2016, urging BALCA to reverse the CO's denial of Employer's application. The CO filed a brief on June 28, 2016, stating that the CO correctly determined that Employer did not establish a temporary need and requesting that BALCA affirm the CO's denial of Employer's application.

### **DISCUSSION AND APPLICABLE LAW**

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”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA's Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer's application has been accepted for processing, it is reviewed by the 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).

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. 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. 29 C.F.R. § 655.61(e).

To obtain certification under the H-2B program, an applicant 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. *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). While an applicant need only submit a detailed statement of temporary need at the time of the application's filing, failure to provide substantiating evidence or documentation in response to the CO's Request for Information (“RFI”) “may be grounds for

---

<sup>4</sup> 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 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 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.

the denial of the application.” 20 C.F.R. § 655.21(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In the instant case, Employer attempted to establish a peakload need for the period of May 30, 2016 to February 14, 2017. To show a peakload need, 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 staff will not become part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Furthermore, “the determination of temporary need rests on the nature of the underlying need for the duties of the position” and not “the nature of the job duties.” 80 Fed. Reg. 24042, 24005. Unsubstantiated assertions by Employer that its need is temporary is not sufficient to meet Employer’s burden to establish eligibility for a temporary alien labor certification. *See BMC West Corporation*, 2016-TLN-00039 (May 18, 2016) (citing *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013) (“A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof.”); *Guzzino Leasing & Rentals, Inc.*, 2016-TLN-00002 (Nov. 6, 2015) (finding that the employer’s unsupported assertions of temporary need were insufficient to establish temporary need).

In the Notice of Deficiency, the CO requested that Employer provide: 1) “A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year”; (2) “[a]n explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need”; (3) “[s]ummarized 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 being presented was compiled from the employer’s actual accounting system”; and (4) “[o]ther evidence and documentation that similarly serves to justify the requested dates of need.” (AF 129-30).

The Employer did not comply with the specific requirements of the Notice of Deficiency, which requested specific documentation to support its application. As discussed above, Employer provided an explanation of its peakload need and its payroll records from 2015 to support its assertion of peakload and non-peakload months. As the CO correctly pointed out, Employer’s payroll records establish that its three permanent employees worked 75 hours total each month from January through December 2015, which equates to approximately twenty-five hours per month for each employee. This is less than a full-time work schedule. I agree with the CO that Employer did not meet its burden of establishing temporary need.

Accordingly, I find that the CO properly denied Employer’s H-2B application. It is Employer’s burden to demonstrate eligibility for the H-2B program, and Employer failed to provide documentation that demonstrates its temporary peakload need for five “Food Preparation Workers” for the period of May 30, 2016 to February 14, 2017.

**ORDER**

Therefore, **IT IS HEREBY ORDERED** that the Certifying Officer's decision denying Employer's application is **AFFIRMED**.

**LARRY S. MERCK**  
Administrative Law Judge