

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 November 2016

Case No.: 2017-TLN-00001

ETA Case No. H-400-16203-966296

In the Matter of

ANSELMO TRUCKING, INC.

Employer

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

Appearances: Pablo E. Bustos
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For the Employer

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For the Certifying Officer

Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for five temporary nonagricultural workers and an administrative review of the application's denial.¹

2. Findings of Fact.

a. On July 20, 2016, the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) accepted for filing Anselmo Trucking, Inc.'s (Employer) ETA Form 9142B application for temporary labor certification for five temporary "Heavy and Tractor-Trailer Truck Drivers" (truck drivers) to work from October 6, 2016 through July 6, 2017 based on Employer's claimed seasonal need for temporary workers. (AF 159-181)²

b. Attached to ETA Form 9142B, Employer's Statement of Temporary Need stated the five truck drivers would be needed to transport a variety of produce harvested during the requested period of need. (AF 170, 172) Specifically, the Statement of Temporary Need provided "[t]hat it is well known among all working in the vegetable and fruit transportation business from Mexico to the United States that fruits and vegetables can . . . be grown more or less year around, but that there is a peak season where certain fruits and vegetables are grown more than at other times." (AF 170) The application also included an affidavit from Employer's president, Mr. Jesus Anselmo, that stated Employer has an increased need for truck drivers to deliver produce based on an increased supply during specific months for various fruits and vegetables. (AF 172) Employer also attached website printouts from the Fresh Produce Association of the Americas (FPAA) with a bar chart identified as the "Four Seasons of Mexican Produce." (AF 175)

c. On August 1, 2016, the CO issued a Notice of Deficiency (NOD). The CO explained the application contained the following two deficiencies: (1) Employer failed to establish the job opportunity as temporary in nature, as required by 20 C.F.R. § 655.6(a)-(b); and (2) Employer's application appeared to contain "multiple areas of intended employment," as prohibited by 20 C.F.R. § 655.15(f).³ In accordance with 20 C.F.R. § 655.31(b)(2), the CO permitted Employer to submit a modified application. (AF 141-146)

d. The CO explained Employer "did not demonstrate how its need is temporary based on a seasonal standard" and "[i]t appears that [Employer] may have a permanent need for truck

¹ On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

² References to the Appeal File are by the abbreviation AF and page numbers.

³ The second deficiency was not a basis for the CO's ultimate denial of certification. Thus, the merits of the second deficiency set forth in the CO's NOD are not addressed in this Decision and Order.

drivers based on the nature of the job.” The CO required Employer to amend ETA Form 9142, Section B., Item 9., to contain and attach the following:

- 1) A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year;
- 2) An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need, including a detailed description of the produce being transported and an explanation and documentation to demonstrate that there is no such produce needing transport during the months that are outside the period of need requested;
- 3) An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; and
- 4) Supporting evidence and documentation that justifies the chosen standard of temporary need, including, but not limited to 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 records or system.

(AF 144-145)

e. On August 16, 2016, the CO received Employer’s reply to the NOD. (AF 97-98) Employer submitted the following: a written response to the CO’s Notice of Deficiency; a “Certification of Payroll” records; a job description for the truck driver position; Employer’s check ledger from January 2, 2015 through June 30, 2016; an affidavit from Mr. Dale Paul Jones, the president of another local produce distribution company; an affidavit from Mr. Jesus Anselmo, Employer’s president; an Affidavit of Temporary Need; and an “Affirmation” from Employer’s counsel. (AF 97-140)

f. Employer’s written response to the NOD explained that it attached Employer’s 2015 and 2016 payroll records, along with a certification of its authenticity. (AF 99) The Affidavit of Temporary Need included a table styled “Average - Gross Truck Driver Pay Per Month For the Years 2015 and to date for 2016.” The Affidavit of Temporary Need acknowledged that Employer failed to produce payroll records prior to 2015 because “they were done by hand and are not available for the purposes of this response.” Employer’s check ledger detailed the checks issued for contract labor from January 2, 2015 through June 30, 2016 and only included the check date, number, amount, and name of employee. (AF 135-138) The Affidavit of Temporary Need also stated that although there are “other seasons for produce . . . if you had to choose one,

one season that had the biggest increase, it would be early October through early July, with July, August, and September being the slowest months of the year.” (AF 135) The Affidavit of Temporary Need acknowledged that during 2015, “the months October-June do now show significantly more activity than the months of July through September,” but explained this increase was the result of Employer’s purchase of additional trucks. Employer further explained that although “July through October are usually slower, in general . . . [I]n the case of [Employer] the general the trend is upwards. There’s an increase in business month after month regardless of season.” (AF136)

g. Employer’s response to the NOD also included an affidavit from Mr. Dale Paul Jones, the president of the Santa Cruz Trucking Conglomerate (SCTC), an industry conglomerate pooling the trucking resources of many produce distribution companies along the Mexican border with the United States. (AF 128-131) The affidavit maintains that October through early July is “by far the busiest time of the year, year after year, with possible slight fluctuations in particular months” (AF 131) The affidavit also asserts that current business growth is limited by the lack of truck drivers in the Nogales, Arizona area. (AF 129) The affidavit explains that local companies have an increased need for truck drivers during the following three periods each year: October 1 to July 1; February 1 to November 1; and July 1 to March 31. (AF 130-131)

h. On September 19, 2016, the CO determined Employer’s response to the NOD was unacceptable and denied Employer’s application for temporary labor certification based on Employer’s failure to establish the job opportunity as temporary in nature, in violation of 20 C.F.R. § 655.6(a)-(b). (AF 83-89)

i. In part, the CO denied Employer’s application based on ETA Form 9142, Section B, Item 9, which provided:

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 [sic] 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.

The CO determined this assertion “did not demonstrate how [Employer’s] need is temporary based on one of the four standards” and Employer failed to explain “what events cause the seasonal need and the specific period of time in which [Employer] will not need the services or labor.” (AF 87)

j. The CO also found that Employer’s Affidavit of Temporary Need did not support the seasonal standard of need as requested in Employer’s application. This statement provided:

Now if you look at the attached payrolls, the reader will notice that, for 2015, the months of October-June do not show significantly more activity than the months of July through

September. However, the reason for this is simple, [Employer] bought more trucks.

In response, the CO explained this statement was “insufficient to support a showing of seasonal need. If [Employer] purchased additional trucks with timing such that would negate a showing of seasonal need, further documentation and explanation to support that argument should also have been submitted. As it stands, insufficient information was provided for the Certifying Officer to determine that additional trucks would result in the company’s payroll now showing significantly more activity than the months of July through September.” (AF 88)

k. Employer’s Affidavit of Temporary Need also provided that the months of “July through September are usually slower, in general, year after year. However, in the case of [Employer], in general the trend is upwards. There’s an increase in business month after month regardless of season.” In response, the CO concluded Employer’s increase in business does not depend on the season and “[t]he fact Employer bought more trucks and the business increases independently of the season does not support the argument for a seasonal temporary need.” (AF 88)

l. The CO acknowledged that although Employer provided payroll records, the CO explained these payroll records failed to differentiate between temporary and permanent workers and failed to support the dates of requested need on the application, as required by the NOD. The CO concluded Employer appeared to have an ongoing need, as demonstrated by the payroll documentation and Affidavit.⁴ (AF 88)

m. On October 5, 2016, Employer requested administrative review of the CO’s denial of certification pursuant to 20 C.F.R. § 655.61 and submitted a reply brief in response to the CO’s denial. (AF 1-48)

n. On October 4, 2016, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On October 5, 2016, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. The CO transmitted the Appeal File to the Office of Administrative Law Judges (OALJ) on October 12, 2016.

o. Consistent with 20 C.F.R. § 655.61(c), on October 21, 2016, the CO submitted a brief urging BALCA to affirm the CO’s decision denying Employer’s ETA Form 9142B application.

3. Applicable Law and Analysis.

a. *H-2B Program.* The H–2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 20 C.F.R. § 655.20.

⁴ The CO’s denial letter incorrectly identified March 2016 as the month with the highest monthly payroll amount as falling within Employer’s claimed off-season. (AF 88)

b. *Standard of Review.* BALCA's standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that 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 in support of the employer's application.⁵ After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Temporary Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). 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 Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer's need is temporary if the need is limited and will "end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). To demonstrate a temporary need based on a seasonal need, an employer must establish:

[T]hat 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(h)(6)(ii)(B)(2) as adopted by 20 C.F.R. § 655.6(b); 80 Fed. Reg. at 240-55-56.

p. *Analysis.* Employer's Statement of Temporary Need identified a seasonal need for five truck drivers to work from October 6, 2016 through July 6, 2017. Employer's claimed seasonal need was general in nature and explained there was an increased supply of certain fruits and vegetables produced from the beginning of October through the beginning of July each year. After the CO issued the NOD seeking additional details concerning Employer's seasonal need,

⁵ In this case, Employer's request for administrative review attached information from the U.S. Department of Transportation, which Employer claims is evidence of its "season" from October to July. However, this documentation was never submitted to the CO during the course of these proceedings. Accordingly, the undersigned will not consider this documentation or any other documentation not submitted to the CO for the purposes of this Decision and Order.

Employer's president, in the Affidavit of Temporary Need, declared that "[t]here's an increase in business month after month regardless of season." (AF 88) Further, although Mr. Jones' affidavit maintained that October through early July is "by far the busiest time of the year," he conceded local companies have an increased need for truck drivers during the following three periods per year: October 1 through July 1; February 1 through November 1; and July 1 through March 31. Thus, these claimed periods of seasonal need range throughout the entire calendar year. Consequently, based on these attestations, the CO reasonably concluded that Employer's need was not seasonal or temporary in nature. (AF 130-131) *See JAJ Hauling, LLC*, 2016-TLN-00054, *8 (July 18, 2016) (affirming the CO's denial of certification where the employer's applications identified a seasonal need for truck drivers and alleged a trucking season during each month of the year).

In response to the CO's NOD, Employer submitted a check ledger, which detailed the checks Employer issued to contract laborers from January 2, 2015 through June 30, 2016. This ledger only included the check date, number, amount, and name of employee. (AF 104-127) Employer also submitted a chart providing the average gross truck driver pay for each month in 2015 and for each month until July 2016. However, as required by the NOD, Employer failed to include documentation detailing the amount of workers engaged in 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 in prior calendar years in each of these two attachments. *See Pronto Sandblasting & Oilfield Servs. Co., Inc.*, 2015-TLN-00038, *7 (Apr. 2, 2015) (finding it was "not possible to analyze the payroll records in a meaningful way, as Employer did not separately identify full-time permanent and temporary employment in the requested occupation."). Employer's failure to comply with the NOD was alone grounds for the CO's denial of certification. *See* 20 C.F.R. § 655.32(a) ("The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification."); *see also Tarilas Corp.*, 2015-TLN-00016 (Mar. 5, 2016) (upholding the CO's denial of certification based on the employer's failure to show temporary need and for failing to submit the requested additional information in response to the NOD).

Further, Employer's 2015 records containing the average gross truck driver pay fail to establish a seasonal need from early October through early July. Notably, Employer paid \$26,544.28 in wages in July 2015, which was Employer's second highest payroll month of the year, and not a month included in Employer's requested period of seasonal need. (AF 138) Additionally, Employer paid gross wages in the amounts of \$18,685.69 in August 2015 and \$19,444.23 in September 2015, which are months outside the requested period of need. The August and September wage payments reflect higher payments than those made in January (\$17,630.59), February (\$14,500.45), and March 2015 (\$18,500.84), which are months during Employer's requested period of need. Although the CO specifically permitted its submission, Employer failed to produce wage records prior to 2015 because Employer claimed prior wage records "were done by hand and [were] not available for the purposes of this response." (AF 136) Without further evidence to support Employer's claim of seasonal need, the fluctuation in wage payments suggests this specific Employer's need is a year-round need rather than a seasonal need, and Employer's claimed seasonal demand is either inaccurate or artificial. *See JAJ Hauling, LLC*, 2016-TLN-00054 (July 18, 2016) (affirming the CO's denial of certification

of the employer's claimed need for seasonal truck drivers where the employer failed to submit adequate payroll evidence to establish a seasonal demand).

Employer claims the higher wage payments during the months outside the identified period of need are the result of the purchase of additional trucks to transport produce. (AF 136) Employer stated that it owned six trucks in January 2015 and that in April 2015, October 2015, and July 2016, Employer purchased "two more trucks respectively, raising the total amount of trucks [Employer] had from 6 in January of 2015 to nine trucks today."⁶ (AF 136) Employer further argues the only way to accurately compare Employer's payroll from one year to another is to compare the relevant time periods where Employer owned nine trucks or the same amount of trucks, which ranges from October 2015 to July 2016. (AF 137) However, the undersigned finds the CO acted reasonably in refusing to accept this unexplained and unsupported assertion. As the CO explained in the denial of certification letter, Employer should have produced additional documentation and evidence to the CO in support this argument.

The undersigned concludes that, based on the inconsistencies concerning Employer's claimed temporary seasonal need in the application documents and failure to present adequate documentation and evidence in support of its application to the CO, Employer failed to carry its burden to establish a temporary seasonal need for H-2B workers from October 6, 2016 through July 6, 2017.

4. Ruling. Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO's denial of certification is affirmed in this matter.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge

⁶ However, if Employer owned six trucks in 2015, and then purchased two additional trucks in April 2015, October 2015, and July 2016, then Employer would currently own twelve trucks, rather than nine trucks as stated in the Affidavit of Temporary Need.