

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



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BALCA Case No.: 2017-TLN-00011

ETA Case No.: H-400-16194-058501

In the Matter of:

GERIQ LOGISTICS, LLC
Employer

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

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

Sarah J. Starrett, Esquire
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Geriq Logistics, LLC’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of temporary labor certification under the H-2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On July 12, 2016, Employer applied for temporary employment certification through the H-2B program to fill ten positions for “Heavy and Tractor-Trailer Truck Drivers” for the period of October 3, 2016 through July 3, 2017. (AF 272-301).¹

On July 20, 2016, the CO issued a Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.5, 655.15(a), 655.15(e), 655.16, 655.18, and 655.18(a)(1).² (AF 262-269). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.16 and 655.15 because Employer failed to submit an acceptable job offer. The CO determined that Employer failed to indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements or where they would have to reside in order to perform the services or labor. Further, the job order did not contain all of the required language as required by 20 C.F.R. § 655.18. (AF 265-267).

Also, the CO requested Employer provide a job order that contains all benefits and wages offered to H-2B workers as well as remove all job requirements imposed on U.S. workers not imposed on H-2B workers pursuant to 20 C.F.R. § 655.18(a)(1). (AF 267-268). Additionally, the CO requested the Employer provide a complete and accurate ETA Form 9142, which reflects the Interim Final Rule published on April 29, 2015 as required by 20 C.F.R. § 655.15(a). (AF 268).

Lastly, the CO noted Employer listed more than one area of intended employment as required by 20 C.F.R. §§ 655.15(e) and 655.5. Specifically, the CO requested Employer identify all additional worksites missing in its application or submit a separate attachment listing all anticipated worksites to be covered by the temporary labor certification. The CO also required Employer provide evidence that all additional worksite locations are within normal commuting distance and are in the same area of intended employment. (AF 268-269).

On August 3, 2016, Employer responded to the CO’s Notice of Deficiency and submitted an affidavit of intended employment, an amended SWA advertisement, an updated ETA Form 9142, and a request that the SWA correct and amend the ETA Form 9142 to include nine additional worksites within a single area of employment. (AF 250-261).

On September 14, 2016, the CO issued a Second Notice of Deficiency citing deficiencies regarding 20 C.F.R. §§ 655.6(a) and (b) and Section 655.10(a). Specifically, the CO notified Employer that its H-2B application was deficient pursuant to Sections 655.6(a) and (b) because Employer failed to establish how its need is considered temporary based on a seasonal standard. Also, the job order did not verify that Employer had satisfied the prevailing wage requirements for all worksites on the application under 20 C.F.R. § 655.10(a). (AF 244-249).

¹ In this decision, AF is an abbreviation for “Appeal File.”

² On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. § 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015). These rules are effective and govern this case.

Prior to receiving any response to the Second Notice of Deficiency, the CO issued a Notice of Acceptance informing Employer that its temporary labor certification had been accepted for processing on October 5, 2016. (AF 201-207).

On October 25, 2016, Employer responded to the CO's Second Notice of Deficiency by letter dated September 28, 2016 and provided a supplemental statement of temporary need, an affirmation of Pablo E. Bustos, an article regarding whether produce season was getting longer, certified payroll documentation, border crossing statistics, and a modified SWA advertisement. (AF 208-243). Also on October 5, 2016, Employer submitted a Response to the Notice of Acceptance which included its recruiting report as well as copies of the job order, newspaper advertisement, and job posting. (AF 194-200).

On November 3, 2016, the CO issued a Notice of Rescission of the Notice of Acceptance. In its Third Notice of Deficiency, the CO determined that the facts presented in Employer's application were insufficient for acceptance and certification. Specifically, the CO found that Employer's application failed to show how the job opportunity was temporary in nature. Accordingly, the CO requested further documentation and explanation in order to establish a seasonal need for the ten temporary workers. (AF 186-193).

On November 17, 2016, Employer responded to the Third Notice of Deficiency and submitted copies of a news article and documents previously submitted and a second news article regarding the length of produce season. In sum, Employer contended it had proven its need for temporary workers and had demonstrated that its application should be accepted and certified. (AF 120-185).

On November 23, 2016, the CO made its final determination regarding Employer's H-2B application. (AF 103-109). The CO denied Employer's application due to its failure to establish that its need is seasonal or temporary in nature. Specifically, the CO found Employer failed to establish that the services or labor requested were traditionally tied to a season of the year by an event or pattern and was of a recurring nature. While Employer stated that the produce to be transported was seasonal, it was not clear whether such produce was not available year round such that truckers were not needed during a predictable period each year. (AF 106-107).

The CO also stated that it had requested Employer submit additional information, including an explanation and documentation demonstrating that there is no such produce needing transport during the months that are outside the period of the need requested. However, the documentation submitted by Employer did not indicate a recurring pattern or trend that establishes a clearly defined, predictable temporary need or a consistent surge in activity that would suggest a need for additional drivers. (AF 107-108). Rather, the CO found Employer's records suggest a permanent, year-round need rather than a temporary need. Further, the CO noted Employer's application confused the growing seasons for produce with a defined, labor-related season that establishes a need for additional drivers by submitting documentation indicating the months each crop is in season and not the transport season. Finally, the CO stated Employer failed to substantiate the number of workers requested or why it concluded ten truck drivers were necessary. Thus, the CO determined Employer failed to comply with 20 C.F.R. §§ 655.6(a) and (b) and denied Employer's application. (AF 109-111).

On December 5, 2016, Employer submitted a request for administrative review to the Board of Alien Labor Certification Appeals (“BALCA”) appealing the CO’s Final Determination in the above-captioned H-2B matter. (AF 1-102). On December 13, 2016, BALCA docketed the appeal and issued a Notice of Case Assignment. Pursuant to the Notice of Case Assignment, the CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.33(b) on December 14, 2016. Because H-2B appeals are expedited, and in accordance with 20 C.F.R. § 655.33, the parties were given a brief due date of December 27, 2016. Thereafter, the parties timely submitted briefs.

In addition to its brief, Employer also filed a Nogales Produce Import Report 2015-2016 in support of its contention that the fall harvest in Nogales, Arizona occurs from early October through early July. On January 3, 2017, the CO filed a Motion to Strike New Evidence, contending the Produce Import Report was never presented to the CO. Since BALCA’s review is limited to the appeal file, the legal briefs submitted by the parties, and the request for review itself under 20 C.F.R. § 655.61(e), the CO argued the Produce Import Report should be stricken from the record and not considered. (CO Mtn., pp. 1-2).

DISCUSSION

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” or the “Department”), 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 a Certifying Officer (“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 review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a), (e). In the instant matter, Employer submitted a Nogales Produce Import Report 2015-2016 along with its brief on December 27, 2016. Since this report was not contained in the record before the CO at the time of the final determination, it will not be considered on appeal.

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).

After considering all evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO's denial of temporary labor certification, or
2. Direct the CO to grant temporary labor certification, or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis. *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 regulations provide that 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." 8 C.F.R. § 214.2(h)(6)(ii)(B). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (*Id.*) The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009).

In this matter, Employer requests temporary workers for a seasonal need. In order to establish a seasonal need, 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. 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2). In addition, Employer must specify the period of time during each year in which it does not need the services or labor. *Id.* 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. *Id.*

After reviewing the record in this matter, I find that Employer submitted insufficient evidence to establish that it has a seasonal need for temporary workers. Specifically, I find the Fresh Produce Association of America ("FPAA") article and peak season data as well as data showing the production locations of Mexican produce and data showing the seasons during which produce is available are insufficient to establish a seasonal need for ten temporary truck drivers. (AF 29-36, 41-50).

In addition, the “Four Seasons of Mexican Produce” chart in the FPAA article detailing the season of twenty-one products reveals that only eight of the products are available in Nogales, Arizona in the months of July through October. (AF 161). Although the chart shows that most of the fruits and vegetables listed in the chart are not grown in Nogales, Arizona from July through October, it does show that all of the types of produce are grown in Mexico during these months.

However, on its ETA Form 9142B, Employer wrote that it distributes produce “primarily grown in Mexico” but does not explain why there is a slow season from July through October if all of the produce is available in Mexico year-round and Employer distributes produce primarily grown in Mexico. (AF 112; *See International Destiny Logistics, LLC*, 2016-TLN-00072 (Oct. 21, 2016) (finding that the FPAA chart showing the growing seasons in Nogales does not explain the employer’s seasonal need in light of the fact that the employer transports produce grown in Mexico)). In sum, the chart does not directly relate to Employer’s operations and does not demonstrate that there is no produce needing transport outside of October through July.

Employer also submitted the U.S. Department of Transportation’s statistics on the number of trucks that cross the U.S.-Mexican border into Nogales, Arizona every month. (AF 53, 61-74.) Employer argues these statistics support its contention that there is a peak season for truck drivers crossing the Nogales border that is consistent with Employer’s requested dates of need. However, the CO found this evidence did not correspond specifically to Employer’s own, concrete transactions or actual business model. Rather, the CO found it simply showed the overall fluctuation of border crossings at the Port Level. (AF 110.) While these statistics are consistent with the Mexican Produce chart and may suggest a greater need for produce transportation from October through July, I find the CO properly found this evidence was insufficient to establish a temporary need as the statistics did not specifically correspond to Employer’s own transactions or business or indicate how many time its own drivers crossed the border.

Further, Employer’s own records fail to establish that Employer has an increased need for truck drivers during these months. Employer submitted its payroll records, which do not support Employer’s argument that there is a seasonal need from October through July. Rather, the payroll records do not separate temporary workers from permanent workers nor do they provide monthly totals of the staff employed and hours worked. As a result, it is difficult to determine whether Employer actually has a temporary need for ten foreign truck drivers.

Accordingly, I find that Employer’s personnel records reveal that it does not have a seasonal need for truck drivers from October through July. In fact, the payroll records show that Employer has had an unpredictable and inconsistent need for truck drivers. While Employer provided evidence showing that Nogales, Arizona grows more produce from October through July and there are more truck border crossings during those months, Employer has not established that its business has an increased demand for truck drivers during these months. *See Anselmo Trucking, Inc.*, 2017-TLN-00001 (Nov. 1, 2016) (finding that Employer’s fluctuation in wage payments suggests that Employer’s need is year-round rather than seasonal).

Given the foregoing discussion, I find and conclude the CO properly denied Employer's H-2B application. It is Employer's burden to demonstrate eligibility for the H-2B program, but Employer has failed to demonstrate that it has a seasonal need for ten truck drivers from October 3, 2016 through July 3, 2017. In fact, the documentation submitted by Employer shows that Employer has a year-round need for truck drivers. Accordingly, the denial of Employer's H-2B certification must be affirmed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

ORDERED this 5th day of January, 2017 at Covington, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge