



Issue Date: 10 April 2017

BALCA Case No.: 2017-TLN-00029

ETA Case No.: H-400-17007-218578

In the Matter of:

MILLENNIUM OF GOSHEN, INC.,

Employer

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B guest worker program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a onetime occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *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).¹ Following the CO's denial of an application, an employer may request administrative review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). 20 C.F.R. § 655.61(a). The administrative review is limited to the appeal file, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence as was actually submitted to the CO in support of the application. § 655.61(a)(5).

STATEMENT OF THE CASE

On January 7, 2017, Millennium of Goshen ("Employer") submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). AF 6.² Employer requested certification for three cooks from April 1, 2017 to December 31, 2017 on a peakload basis. AF 63. Employer explained that it operates a Mexican food restaurant in the Goshen, Indiana area and needs temporary employees in response to a peakload event which begins in April and extends to December 31. AF 77. Employer wrote

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. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). The Employer filed its application for temporary labor certification after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

² Citations to the Administrative File will be abbreviated "AF" followed by the page number.

that “typically, we experience a decrease in demand after the Holidays, in January and February. Then as the cold weather dissipates, business resumes to peak level.” *Id.*

On February 15, 2017, the CO issued a Notice of Deficiency (“NOD”), notifying the Employer that its application failed to meet the criteria for acceptance due to three deficiencies.³ Specifically, the CO found that Employer failed to establish that the job opportunity is temporary pursuant to 20 C.F.R. §655.6(a)-(b). The CO found that Employer’s explanation does not sufficiently explain how it determined that it has a peakload demand during the requested period of need. AF 57. The CO acknowledged Employer’s explanation that its demand decreases in January and February and picks back up when cold weather dissipates, however, the CO found that Employer provided only conclusory statements that it has a peakload from April through December 31. Thus, the CO concluded that it is unclear “what events or circumstances have caused the employer to have a temporary need for three cooks during the requested period of need.” AF 57-58.

The CO asked Employer to submit the following documentation: 1) summarized monthly payroll reports for a minimum of two previous calendar years, including 2015 and 2016, that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation at its worksite, the total number of workers or staff employed, total hours worked, and total earnings received and 2) summarized monthly food/beverage gross sales reports for 2015 and 2016 for the employer’s worksite.

On March 3, 2017, Employer submitted its response to the NOD. AF 35. Employer’s response included a letter explaining the peakload need, summarized monthly payroll for 2015 and 2016, and summarized monthly food/beverage sales for 2015 and 2016. In its letter, Employer explained that Elkhart County is the RV Capital of the US, stating that more than 60% of recreational vehicles are made in the area. Elkhart County is also the home base for the GE Capital and Slate “Roadshow for Growth” national tour aimed at highlighting middle market businesses. Last year, Elkhart County led the nation in job growth with a jump of 7.4% in employment compared with a national average of 1.9%. AF 38.

Accordingly, the two events that cause the peakload need are sales of RV’s and RV shows. In regards to the RV sales, Employer wrote that “most dealers are looking to sell last year’s inventory during the late summer, however they mark down the prices even more from November to mid-December.” AF 39. Additionally, people visit the RV shows which begin to have more visitors in April and continue through October. AF 39. Because of the RV shows, RV manufacturers, and RV sales, the food and beverage industry begins to pick up in February, peak in April/May and subside in November.

On March 17, 2017, the CO issued a Non-Acceptance Denial (“Denial”). AF 20. The CO concluded that Employer’s submitted documents do not demonstrate that Employer experiences a peakload need for cooks during the request period of April 1 through December 31. The CO charted out Employer’s 2015 and 2016 payroll records. The CO noted that the 2015 payroll report shows a peak in the total hours worked for cooks from May through July. AF 25.

³ Employer cured two of the three deficiencies, leaving one deficiency on appeal.

However, the total hours worked from August through December, as well as April, shows fewer hours worked than during Employer's attested non-peak period of January through March. AF 25. The 2016 payroll also shows peaks in total hours worked for cooks in May, June, and September and the second highest hours worked was in January, outside of the employer's attested peakload need. AF 26. The payroll shows that hours worked for the months of August, October, November, and December were consistently lower than the non-peakload month of March. AF 26.

The CO also charted out Employer's 2015 and 2016 monthly food and beverage sales. The CO found that Employer's monthly food and beverage gross sales do not demonstrate a peakload need. AF 26. Employer's 2015 gross sales report shows that Employer's lowest sales for the year were during the months of September and November, within the peakload period. Employer's 2016 gross sales report shows that sales in the months of June, July, September, October, November, and December were lower than in March. AF 26. Both gross sales reports show consistent monthly sales through the year with no significant peaking. The CO concluded that the gross sales reports do not demonstrate that Employer experiences a peakload period from April 1 through December 31. AF 26.

On March 21, 2017 Employer requested administrative review of the denial of certification. AF 1. The parties had seven business days from their receipt of the appeal file to file briefs. BALCA received the appeal file on March 29, 2017.

The Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief on April 7, 2017. The Solicitor argued that Employer did not establish that its need for three cooks is temporary in nature. The Solicitor noted that Employer failed to establish a bona fide need for three workers as well even though this deficiency was not included in the Denial.⁴

DISCUSSION

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, as defined by the Department of Homeland Security. *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 DHS 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). 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 also Tampa Ship*, 2009-TLN-44, slip op. at 5 (May 8, 2009). Here, Employer requests temporary workers for a "peakload" need. To establish a peakload need, an employer

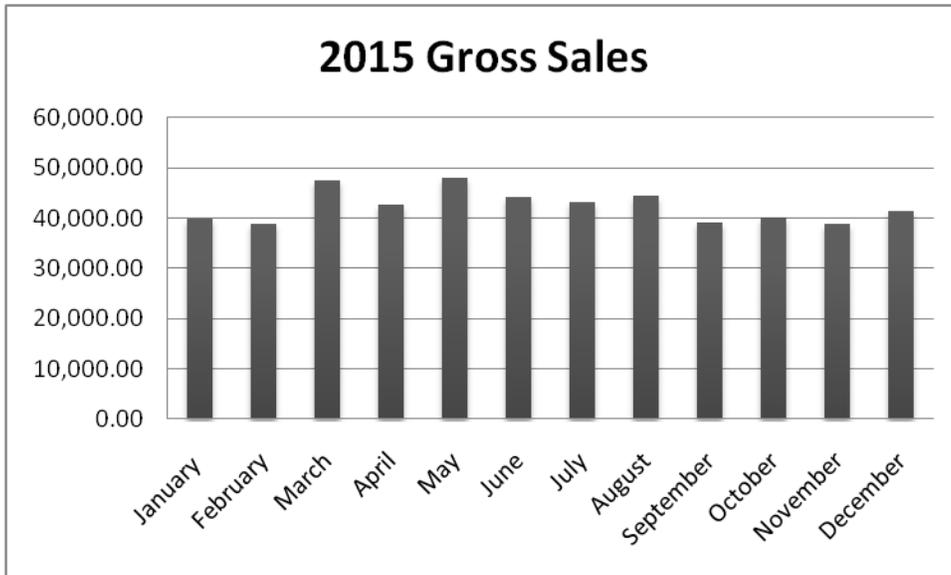
Must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its

⁴ As the Denial letter does not address this deficiency, it will not be addressed on appeal. There is no evidence that the CO found this deficiency in its final determination.

permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

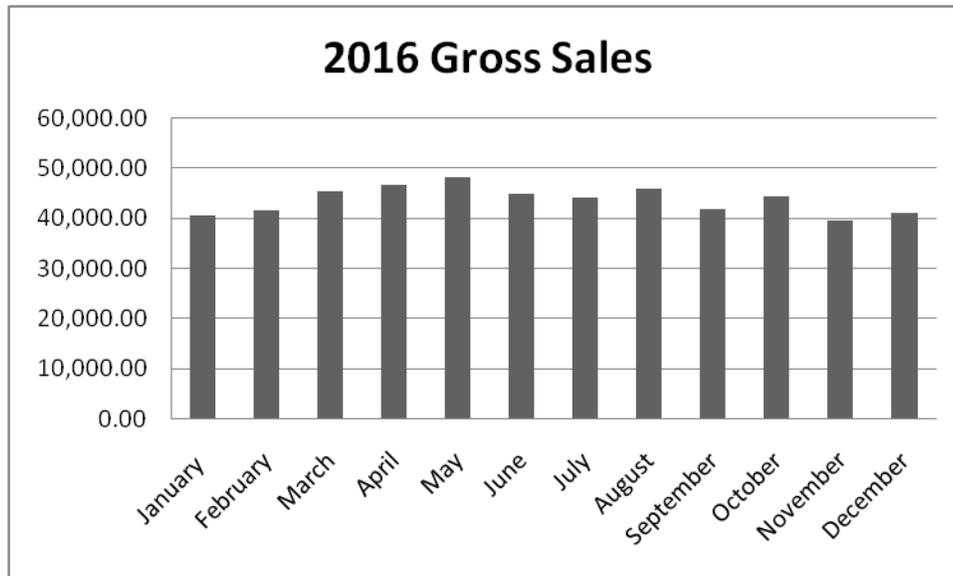
8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Employer has not established that it has a temporary peakload need for three cooks. While Employer provided an adequate explanation for its peakload need, the evidence does not substantiate Employer's dates of need. Notably, the 2015 and 2016 monthly payroll records and gross sales do not match Employer's need. *See D and R Supply*, 2013-TLN-00029 (February 22, 2013) (Affirming CO's denial where the submitted evidence did not match the employer's requested dates of need.) The CO correctly found that Employer's gross sales in 2015 and 2016 do not show an increase in sales for the months of April through December. The 2015 gross food and alcohol sales show the following sales per month:



The chart shows that Employer had higher sales in March, its non-peak month, than in the peak months of September, October, and November. The monthly sales over all do not show a pattern demonstrating a peakload event. A closer look at the data shows that Employer had the lowest sales in September through February. The chart also shows a slight dip in profits in June and July.

The 2016 gross food and alcohol sales show the following sales per month:



The 2016 food and beverage gross sales data also fails to show a peakload need from April through December. The chart demonstrates that Employer had greater sales in March, a non-peak month, than in the peakload months of September, November and December. A closer look at the data shows that Employer had a steady increase in sales from January through May with a dip in sales in June and July. This data does not support a finding that Employer has a peakload need from April through December.

The CO also relied upon Employer’s “Summarized Monthly Payroll Report” for 2015 and 2016 in finding that Employer does not have a peakload need. The 2015 and 2016 summarized payroll report shows that Employer had two permanent staff members throughout the two years. AF 16-17. In 2015, Employer had at least one temporary staff member for the months of January through August and two staff members in May. AF 16. In 2016, Employer had one temporary staff member in January, April through June, and September. AF 17. The number of temporary workers Employer employed in the last two years does not support Employer’s peakload need.

Employer’s provided evidence does not support its peakload need of April 1 through December 31. Employer did not present any other evidence to support its temporary need. Consequently, Employer has not met its burden of establishing that it has a peakload need for temporary workers between April 1, 2017 and December 31, 2017.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey