

applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

STATEMENT OF THE CASE

The Employer is a harvesting company that provides crop harvesting services via contractual agreements with farms. (AF 77.)⁵ In this particular instance, the Employer has been contracted to harvest and/or pack pine needles. (AF 168). It is located in Milan, Georgia. (AF 78). 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) ETA Form 9141, Application for Prevailing Wage Determination; (4) an Agent Agreement for H-2B Services with Signature Staffing, Inc.; (5) a *Notice of Entry of Appearance as Attorney or Accredited Representative*; (6) a State Workforce Agency (“SWA”) Job Order; (7) a Farm Labor Contractor Certificate of Registration; and (6) a Harvesting Agreement between Browning Straw Company, Inc. and the Employer to harvest and/or pack pine needles for the six month period from February 17, 2017, to August 15, 2017 (“Harvesting Agreement”). (AF 146-152, 153-158, 165, 168). The Employer requested certification for 30 “pine straw harvesters” from February 15, 2017, until August 15, 2017, based on an asserted seasonal need during that period. (AF 77).

On December 1, 2016, the CO issued a Notice of Deficiency, which outlined five deficiencies in the Application. (AF 131-136). Specifically, the CO determined that the Employer failed to: (1) establish that its job opportunity was temporary in nature; (2) submit an acceptable job order; (3) accurately complete Section B., Items 2 and 3, on ETA Form 9142 with the appropriate SOC Code and the SOC Occupational Title; and (4) submit the correct version of Appendix B to ETA Form 9142B. (AF 131-136).

As to the first deficiency, one of two which remain on appeal, the CO explained, “[t]he 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 DHS regulations.” (AF 131.) The CO concluded that the Employer “did not submit sufficient information in its Application for Temporary Employment Certification to establish its requested standard of need or period of intended employment,” nor had it “provided any information on its business or how it determined it had a need for temporary workers during the dates of need requested.” (*Id.*) The CO advised that in order to establish that it has a temporary need, the Employer needed to include detailed attestations regarding temporary need in its Application. (AF 131). Additionally, the CO requested that the Employer submit a description of its business history and activities (i.e. primary products or services) and schedule of operations through the year along with an explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflected a temporary need. (*Id.*) Further, 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 in the requested occupation, including total hours worked and earnings

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File.

received. (AF 132). Alternatively, the CO stated that the Employer could submit any other evidence and documentation that “similarly serves to justify the requested dates of need.” (*Id.*).

As to the second and final deficiency contested on appeal, the CO explained “an employer must file a completed Application for Temporary Employment Certification, ETA Form 9142.” (AF 135). The CO concluded that while the Employer submitted an ETA Form 9142, the Employer failed to accurately complete Section B., Items 2 and 3 of its ETA Form 9142 with the appropriate SOC Code and the SOC Occupational Title. (*Id.*). The CO advised that this deficiency must be corrected. (*Id.*). The CO further advised that the SOC Code “must be consistent with the SOC Code issued on the ETA Form 9141.” (*Id.*). Additionally, the CO noted that it required the Employer’s written permission to make any corrections to the application on the Employer’s behalf. (*Id.*).

Thereafter, on December 1, 2016, the Employer filed a response to the CO’s Notice of Deficiency. (AF 77-84, 86-127). With its response, the Employer submitted the following documentation: (1) an amended ETA Form 9142B; (2) a statement regarding worker recruitment; (3) payroll information including a Client Invoice Detail report, a Gross Wages Recap report for all employees employed between January to May 2016, and an Employee Pay History report for various employees from January to May 2016; and (4) a job posting for a “Pine Straw Harvester” dated December 2, 2016, from the Georgia Department of Labor website. (AF 87-127).

On December 15, 2016, the CO issued a Non Acceptance Denial. (AF 69-76). Although the Employer cured two of the five deficiencies outlined in the Notice of Deficiency, the CO concluded that the Employer failed to: (1) establish that its job opportunity was temporary in nature; (2) submit an acceptable job order; and (3) accurately complete Section B. Items 2 and 3, on ETA Form 9142 with the appropriate SOC Code and the SOC Occupational Title. (*Id.*).

With regard to the first deficiency contested on appeal, the CO specifically provided the following:

The Client Invoice Detail report lists 25 individual payments for an Armando Barrera, paid from January 8, 2016, through May 25, 2016. However, the employer did not provide a narrative or explanation of how this information supports its temporary need. The Gross Wages Recap report includes wage information for January through May of 2016. Although the employer stated it did not have temporary workers last year, the Gross Wages Recap report does not provide clear information even with regard to the employer’s permanent workers. The report includes the name of employees, regardless of whether the employee earned wages in the given month. Additionally, the report does not indicate the total hours each employee worked each month. In present form, the Gross Wages Recap report does not provide sufficient information to establish the employer’s temporary need.

Finally, the Employee Pay History report lists the names of individual employees, their hours worked, their withholdings, and their net pay for the period from January 1, 2016, through December 1, 2016. However, the report does not

provide a monthly summary of when these hours were worked or when the wages were paid.

Based on the documents submitted in the NOD response, it is unclear how the employer determined it has a need for 30 workers. Therefore, the employer did not overcome the deficiency.

(AF 72-73).

Concerning the second deficiency contested on appeal, the CO noted that the Employer's completed Section B., Items 2 and 3 of the ETA Form 9142 with the SOC Code and SOC occupational title as 45-000, Farming, Fishing, and Forestry did not match the determination on the ETA Form 9141, P-400-16265-385629, SOC Code 2091 Agricultural Equipment Operators. Thus, the CO concluded that the Employer did not overcome the second deficiency.

On December 20, 2016, the Employer requested administrative review of the CO's Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.⁶ (AF 1-68). On December 23, 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.⁷ On December 30, BALCA received the Appeal File from the CO. The Solicitor filed its brief on behalf of the CO on January 11, 2017.

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.⁸ 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.⁹

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹⁰ The CO may only grant the Employer's Application to admit H-2B workers for

⁶ 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

⁷ 20 C.F.R. § 655.61(c).

⁸ 20 C.F.R. § 655.61.

⁹ 20 C.F.R. § 655.61(e).

¹⁰ 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).

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.¹¹

Failure to Establish a Seasonal Need for Workers

The first 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.¹² 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.”

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).”¹³ 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 30 pine harvesters, from February 15, 2017, to August 15, 2017. (AF 77, 137). 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.”¹⁴ Therefore, in order to determine whether the Employer’s need for pine harvesters 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 February 15, 2017, to August 15, 2017. The Employer may have demonstrated a need for pine harvesters based on its Harvest Agreement, but it has not produced evidence establishing that its need for

¹¹ 20 C.F.R. § 655.6(a); 20 C.F.R. § 655.1(a).

¹² 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

¹³ 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).

¹⁴ 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2).

services or labor is traditionally associated with a season of the year, by an event or pattern, and is recurring in nature. Moreover, the Employer has failed to provide any information regarding how it ascertained its temporary need for the requested number of employees. Therefore, for the reasons articulated below, I find that the Employer has failed to establish that its need for 30 pine harvesters is certifiable.

In its Application, under its original and amended Statement of Temporary Need, the Employer explained that the crops it contracts to harvest are seasonal, in that they are “driven by a cultivation, growing, and harvesting season.” (AF 77.) The Employer further explained that the harvesting season, for each crop type, is generally during the same timeframe every year. (AF 77, 137). As such, the Employer asserted that it needs willing, able, qualified, and available workers to provide the labor necessary to perform its contractual agreements during said timeframes. (*Id.*). Concerning its historical business practices, the Employer provided that it has previously contracted to harvest pine straw, blueberries, strawberries, citrus, chilies, bell peppers, cucumbers, squash, tomatoes, eggplant, cabbage, and corn. (AF 77). The Employer stated that the crop that it has specifically contracted to harvest from February 15, 2017, to August 15, 2017, consists of pine straw, and that the straw will be ready for gathering/harvesting during the contracted period. (*Id.*). Because of its inability to find willing, able, qualified, and available workers to perform the harvesting services it has contracted to provide, the Employer argues that it needs an additional 30 foreign workers to harvest/gather pine straw. (AF 77, 83).

In support of its position that it has a seasonal need for workers, the Employer submitted its Harvest Agreement. (AF 168). The Harvest Agreement shows the agreement between the Employer and Browning Straw Company, Inc. for the Employer to provide pine needle harvesting services commencing on February 15, 2017, and ending on or about August 15, 2017.

In response to the CO’s Notice of Deficiency, the Employer submitted a Client Invoice Detail report, a Gross Wages Recap report, and an Employee Pay History report. (AF 168, 88, 89-108, 109-124). In its request for administrative review, the Employer explained that it provided all payroll records for 2016, and that said records combined showed the monthly payroll totals, the total number of employees, and the employees’ total earnings, and a need for employees from January 2016 thru May 2016 only. (AF 5). The Employer stressed that the payroll records showed that its “need in 2016 was only four (4) months,” which “was far less than one year,” and “different than the need for no employees during the remainder of the year.” (*Id.*).

Based on the information submitted, I find that neither the Employer’s Harvesting Agreement nor its 2016 payroll data support its alleged need for 30 temporary pine harvesters. Although the CO requested summarized monthly payroll reports for a minimum of one previous calendar year, the Employer failed to provide such documentation. (AF 132). While the Employer submitted a Gross Wages Recap for each employee from January to May 2016, the Employer did not include a Gross Wages Recap for any employee from June to December 2016. Additionally, the annual Employee Pay History report provides a yearly total for each employee, but fails to provide whether any payments were made from June to December 2016. Thus, the payroll records as submitted do not provide a basis from which to compare the months of purported seasonal demand to those during which the Employer’s demand purportedly drops.

Furthermore, the Employer states that all of its 2016 employees were full-time. However, this statement is contradicted by the Employer's assertion that there was "only a need for employees from January 2016 to May 2016" and its submission of 2016 payroll data for only those five months. (AF 5). For example, one employee only worked in February and March, while another worked only in May during the purported five-month season. Employment during one, two, or five months of the year does not correlate to full-time employment for the purposes of this application. Thus, the Employer's 2016 employees were necessarily temporary in nature. The Employer has failed to explain why these employees would only work one or two months of a purported five-month season. If several employees are only needed for a select few months of a purported season, the Employer's need is not established in the numbers requested for the remainder of the season without additional credible explanation. As a result, the Employer has failed to show that it has a seasonal need during the particular months requested.

Even assuming that the Employer's need is seasonal based on its limited operations in 2016, the Employer has failed to show that its historical seasonal need is related to the requested occupation. The CO requested monthly payroll reports for the requested occupation. (AF 132). While the Employer submitted monthly Gross Wages Recap and an annual Employee Pay History, the 2016 payroll data does not show a seasonal need for pine straw harvesters. The Employer stated that it has historically contracted to harvest a number of various crops, including pine straw. (AF 86). However, none of the payroll data refers to the type of work performed from January to May 2016. Without further evidence to show that the 2016 payroll data was related in any way to pine straw harvesting, it is impossible to discern if the Employer's historical need relates to the requested occupation.

Further, even if the Employer had shown that its historical seasonal need was related to the requested occupation, the payroll records only show a need for the months the records were provided - January, February, March, April, and May. (AF 89-108). However, the records did not provide payroll totals for the months of June, July, or August - the additional months of purported seasonal need in the instant matter - due to an asserted lack of need during these months in 2016. (*Id.*). Given this, it would appear that for three of the months during which the Employer alleged that it has a seasonal need for more pine straw harvesters - June, July, and August - its 2016 payroll records (or lack thereof) actually suggest that it has historically had no need for workers during these months. (*Id.*). Given the apparent shift in months during which workers were needed in 2016 and are purportedly needed for 2017, it is not possible to identify a "season" for pine straw harvesters and when that season occurs.¹⁵ Without further evidence to support the Employer's claims regarding its seasonal need, the Employer's evidence pertaining to historical crop harvesting and payroll suggests that its employment needs are subject to change throughout the year, and are not necessarily greater during the months in which it claims to have a seasonal need.

Contrary to the Employer's assertion that it has a seasonal need for temporary workers for a six-month period due to a cultivating, growing, and harvesting season, the Employer has not demonstrated that its need for H-2B workers is tied to a specific season. Rather, the

¹⁵ *Stadium Club, LLC d/b/a Stadium Club DC*, 2012-TLN-0002, at *9 (Nov. 21, 2011) (employer failed to prove seasoned need, in part because employer's documentation was not sufficient to permit ALJ "to discern a definite and distinct time of year that the Employer has a need for more [workers]").

Employer's payroll records show that its needs are unpredictable and subject to change during the purported season or year. Therefore, based on the evidence contained in the Harvesting Agreement and payroll records, I find that the Employer has not demonstrated that it has a seasonal need for temporary pine harvesters from February 15, 2017, until August 15, 2017.

Moreover, the Employer has failed to correlate the work contracted for in the Harvesting Agreement with the need for 30 temporary pine straw harvesters. The Employer provided in its Response to the NOD that it "generally employ[s] between 30 and 150 employees per season depending upon the crop." (AF 87). Yet, no part of the Employer's application, response, or request for administrative review provide any information whatsoever regarding how the Employer arrived at the number of temporary employees requested. As noted in the CO's brief, in the absence of any specific information regarding the expected volume of work or rationale for the number of employees requested, it is impossible to verify the volume of potential work and to evaluate whether 30 pine straw harvesters are needed to perform any volume of work during the six month period of temporary need requested by the Employer.¹⁶

Based on the evidence of record, I find that the Employer has not carried its burden to show that it needs 30 pine straw harvesters for a limited period from February 15, 2017, until August 15, 2017.¹⁷ The Employer has failed to demonstrate anything more than its need tied to a particular contract.¹⁸ Outside of merely providing the date of the Harvesting Agreement, the Employer has failed to demonstrate that its need for 30 pine harvesters is tied to a limited season of the year.¹⁹ Furthermore, the Employer has failed to establish a need for the number of workers requested. Therefore, I find that the CO properly concluded that the Employer failed to establish a temporary need for H-2B workers.²⁰

¹⁶ See *Tarilas Corp.*, 2015-TLN-0016, at *5 (March 5, 2015) (affirming denial of an H-2B application where documentation was insufficient to show why 125 workers were required); see also *North Country Wreaths*, 2012-TLN-0043, at *6 (Aug. 9, 2012) (stating that "it is the Employer's burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at his word").

¹⁷ 8 C.F.R. § 214.2(h)(6)(ii)(B).

¹⁸ *East Coast Labor Solutions, LLC*, 2010-TLN-0027 at *7 (Jan. 5, 2010) (upholding a CO's denial for failure to show temporary need, noting that employer "failed to demonstrate anything more than its need tied to a particular contract").

¹⁹ See *JAJ Hauling, LLC*, 2015-TLN-00054 (July 18, 2016).

²⁰ The CO also concluded that the Employer failed to accurately complete Section B., Items 2 and 3, on ETA Form 9142 with the appropriate SOC Code and the SOC Occupational Title. (AF 75-76). Although the CO denied the Employer's certification on both of these bases, there is no need to discuss the merits of the Employer's second deficiency with regard to the SOC Code and SOC Occupational Title listed on ETA Form 9142, as I find that the CO properly denied certification based on the Employer's failure to establish its job opportunity as temporary in nature.

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:

Peter B. Silvain, Jr.
Administrative Law Judge