



Issue Date: 11 January 2017

**BALCA Case No.:** 2017-TLN-00013  
**ETA Case Nos.:** H-400-16277-742447

*In the Matter of:*

**GREAT HUNAN**

*Employer.*

Appearances: Hugo Arias, Agent  
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For the Employer

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For the Certifying Officer

Before: ALAN L. BERGSTROM  
Administrative Law Judge

**DECISION AND ORDER - AFFIRMING**  
**DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a)<sup>1</sup> Employers who seek to

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<sup>1</sup> The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and are effective as of April 29, 2015.

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR §655.50 If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53 During the administrative review only the material contained within the appeal file upon which the denial determination was made may be considered as evidence while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 CFR §655.61(e). Accordingly, the documents attached to Employer’s filings after the November 28, 2016, denial determination are not considered.

### STATEMENT OF THE CASE

On October 19, 2016<sup>2</sup> the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Great Hunan (“Employer”) for 2 “Traditional Chinese-Vietnamese-Thai cuisine cook” as peakload workers in a restaurant to be employed from November 30, 2016 through August 30, 2017 (AF<sup>3</sup> 37, 43-51). The position is classified as O\*Net Code 35-2014, Cooks-Restaurant, and is to be performed in Ammon, Idaho (AF 43-44). No specific educational requirement was specified in Section F.b of the application. The Employer indicated that no training for the job opportunity or employment is required in Section F.b Item 3; but, indicated 6 months of experience as a “Traditional Cook” with knowledge of cutting techniques for vegetables, poultry and seafood is required in Section F.b Items 4 and 5 (AF 253). The Employer retained Arias Hugo of Hola International, LLC, as its agent (AF 45, 48-51).

On October 27, 2016 the CO issued a “Notice of Deficiency” (AF 34-42243-247) indicating the following deficiencies:

**“Deficiency 1: Failure to satisfy application filing requirements.**

In accordance with Departmental regulations at 20 CFR 655.15(b), a completed Application for Temporary Employment Certification, ETA Form 9142 must be filed no more than 90 calendar days and no less than 75 calendar days before the employer’s date of need ... The employer submitted an application which did not meet the application filing timeframe. The employer indicated on its ETA Form 9142 that its dates of need are November 30, 2016 through August 30, 2017, and the employer filed its application on October 19, 2016. This is 42 days before the employer’s start date of need for H-2B workers. The employer did not submit an emergency request with this application.

**Additional Information Requested:**

1. The employer must submit an emergency request that meets the requirements outlined in 20 CFR 655.17; or

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<sup>2</sup> Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

<sup>3</sup> “AF” refers to the Appeal File and is followed by the pertinent page number of the relevant page in the Appeal File.

2. The employer must amend Section B, Item 5. To reflect a start date of need that is in compliance with the above regulation.

**Deficiency 2: Failure to justify the dates of need requested.**

In accordance with Departmental regulations at 20 CFR 655.6(a) and (b), an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. The employer's need is considered temporary is 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.

... The employer's statement of temporary need ... states: 'Therefore there is a temporary high demand for our business during the months of May through October of each year which corresponds to summer and fall seasons of every year.' The employer also states that there is 'high tourist fluency during the ski and hunting season, and during the summer fishing, water sports, and tourist visiting parks.'

The employer has requested a start date of need of November 30, 2016; however, its temporary need statement discusses activities which encompass the full year. Additionally, the employer's previous case H-400-16043-212402, indicated dates of need from May 15, 2016 through October 30, 2016 and this current application requests dates of need from November 30, 2016 through August 30, 2017; therefore the time requested across both applications encompasses 11 months. The employer's true dates of need are unclear due to contradictory information provided in its statement of temporary need.

**Additional Information Requested.**

The employer must include a revised, detailed statement of temporary need containing the following: (1) a description of the employer's business history and activities ... and schedule of operations through the year; (2) an explanation of why the employer indicates that its season begins in May but requested a start date of need of November 30, 2016; (3) an explanation of how the employer determined its requested dates of need; and, (4) 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.

The employer must submit supporting evidence and documentation that justifies the dates of need requested. The employer's response must include, but is not limited to, the following: (1) signed monthly invoices from previous calendar years clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B, Items 5 and 6; and/or (2) 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.

**Deficiency 3: Failure to establish temporary need for the number of workers requested.**

... The employer has not demonstrated that its current request represents a bone fide job opportunity. Specifically, the employer provided recommendation letters and passport copies for [two foreign individuals]. It appears as though the employer may have hired applicants for the positions prior to its recruitment period. Therefore, further documentation and explanation is required to support the employer's request for two temporary workers from November 30, 2016 to August 30, 2017.

**Additional Information Requested.**

The employer must provide additional evidence and/or documentation establishing that the position requested reflects a bone fide job opportunity.

**Deficiency 4: Disclosure of foreign worker recruitment.**

In accordance with Departmental regulation at 20 CFR 655.9(a) and (b), the employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification* ... The employer's application did not include any agreements between itself or its attorney/agent and an agent or recruiter engaging in the recruitment of H-2B workers.

**Additional Information Requested.**

The employer and its attorney/agent must provide copies of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*, including the identity and location of all persons and entities hired by or working for the recruiter or agent ... or, the employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H-2B workers under this *Application for Temporary Employment Certification*.

**Deficiency 5: Failure to submit a complete and accurate ETA Form 9142.**

... The employer did not submit the correct version of ETA Form 9142B, Appendix B. Please note that the current version of Appendix B, which reflects the Interim Final Rule published April 29, 2015, must be submitted with each new application.

**Additional Information Requested.**

The employer must submit a complete ETA Form 9142B, Appendix B. Appendix B must be dated and contain the original signatures of the employer and, is applicable, its agent or attorney.

**Deficiency 6: Failure to submit a complete and accurate ETA Form 9142.**

... The employer submitted an ETA Form 8142; however, the employer did not accurately complete the following fields/items: (1) Section D, Item 14, point of contact e-mail address, has been completed with the e-mail address of the employer's attorney, (2) County in Section F.c.7 is inconsistent with county on 9141, and; (3) Section J of employer's submitted 9142 has been completed with information from the person identified in section E. According to the ETA Form 9142, section J is only to be completed if the preparer of this application is a person other than the one identified in either section D ... or E ... of this application.

**Modification Required.**

1. Section D, Item 14, must be completed with the e-mail address of the point of contact or left blank.
2. The employer must amend the county name in Section F.c.7 of the ETA Form 9142 to be consistent with the employer's submitted 9141 PWD.
3. The employer must amend section J of the ETA Form 9142 to contain information of the person who prepared the application if it is different than a person who is identified in Section D or E; or,
4. If applicable, the employer must amend section J of the ETA Form 9142 in order to remain blank if the person who prepared the application is identified in section D or E.

On November 10, 2016 the Employer filed its response to the “Notice of Deficiency” by e-mail transmitted at 2:14 PM, Thursday, November 10, 2016 to “TLC, Chicago – ETA SVC (AF 28-33).

The Employer addressed Deficiency 1 stating: “The need has been adequately proven with the documentation provided thus far. I have made consistent attempts to tap into the labor market. These attempts have gone unsuccessfully. There is an emergency need to fill these positions with employees who are willing, knowledgeable, experienced and able to perform the jobs.” He requested that the date of need be changed to January 3, 2017 through October 3, 2017.

The Employer addressed Deficiency 2 stating: “The Great Hunan Restaurant is open from 11:00 a.m. to 10:00 p.m. Monday through Saturday offering unique Chinese-Thai-Vietnamese cuisine. The Great Hunan is located in Idaho Falls, Idaho, which is a tourist stop city for those visiting areas such as Yellowstone National Park, Jackson Hole Wyoming, Targhee National Forest Ski Resort, Snake River, and other areas of beauty nearby. It is also considered a good hunting and fishing sports area. Therefore, there is high tourist fluency during hunting season, and during summer fishing, water sports, and tourists visiting the parks. Therefore, there is a temporary high demand for our business during the months of May through October of each year which corresponds to the summer and fall season of every year. For this reason we are requesting assistance during the busy season.”

The Employer addressed Deficiency 3 stating: “We have tried to fill the positions with willing and qualified U.S. workers; however, we have yet to find employees who are both able to perform the necessary tasks associated with the positions and who are willing to stay on for the entire time period necessary. By filling the request for temporary labor certification, we will be able to employ workers who are known to possess the necessary skills and knowledge for these positions and who are willing and able to remain employed during the peak season here at Great Hunan Restaurant. These workers will be employed only during the peak season, during which the amount of restaurant patrons increases substantially. We believe at this point our only hope to find willing and qualified workers is through the H-2B labor certification process due to the knowledge of the cultural elements that the Great Hunan has in Chinese-Thai-Vietnamese cuisine.”

The Employer addressed Deficiency 4 stating: “Great Hunan is notifying that it is not utilizing an agent or recruiter for the H-2B workers under this application for Temporary Employment Certification. As a reference, we knew about [these] potential applicants by a school that trained cooks and cook helpers in the country of Cambodia. During this trip we [made] personal contact at this school and have kept in contact with the applicant.”

The Employer addressed Deficiency 5 by submitted the correct ETA Form 9141B, Appendix B.

The Employer addressed Deficiency 6 by requesting ETA Form 9142, Section D, Item 14 be left blank; Section F.c.7 be changed to reflect “Bonnerville”; and section J be left blank.

No further relevant information was submitted in response to the “Notice of Deficiency.”

By the “Non Acceptance Denial” issued on November 28, 2016, the CO denied the application for “2 Cooks, Restaurant” requested by Employer in ETA Case Number H-400-16277-742447 (AF 15-27). The CO set forth the following reasons for the denial of the *Application for Temporary Employment Certification*:

**Deficiency 1: Failure to justify the dates of need requested.**

The CO set forth the information originally set forth in Deficiency 2 of the October 27, 2016 “Notice of Deficiency” and then noted the following:

“In response to the NOD, the employer resubmitted portions of the Statement of Temporary Need from the ETA Form 9142 section B.9. Additionally the employer gave hours of operation and days of the week the business is open. However, the employer was to demonstrate in the NOD response with the requested invoices and payroll records that it had a seasonal need from November 30<sup>th</sup> through August 30<sup>th</sup> each year.

Contrary to the employer’s assertion that it has a seasonal need for temporary workers for a nine-month period due to a specific tourist activities (sic) during the fall through summer seasons that include ski, hunting, fishing, water sports and park seasons, the employer has not demonstrated that its need for H-2B workers is tied to a specific seasons (sic). The employer was to provide invoices and payroll records to demonstrate the requested dates of need in this application and to clear up the confusion with the already established seasonal need from the previous certification from May 15<sup>th</sup> to October 30<sup>th</sup> each year.

Based on the lack of evidence in the record, the employer has not carried its burden to show that it only needs cooks for a limited seasonal period from the end of November through the end of August each year. Therefore, the employer did not overcome the deficiency.”

**Deficiency 2: Failure to establish temporary need for the number of workers requested.**

The CO set forth the information originally set forth in Deficiency 3 of the October 27, 2016 “Notice of Deficiency” and then noted the following:

“In its NOD response, the employer explained that it had tried to fill the requested positions with qualified U.S. workers and that they have been unsuccessful. The employer explained the inclusion of [two foreign individuals] in its application ‘As a reference, we knew about this potential applicants (sic) by a school that trained cooks and cook helpers in the country of Cambodia. During this trip we may (sic) personal contact with this school and have kept in contact with the applicant.’ In addition, the employer was to provide additional evidence and/or documentation establishing that the position requested reflects a bone fide job opportunity.

The employer’s statement above mentions wanting to hire a foreign worker during a time that is meant for recruitment of U.S. workers, which indicates that, the employer’s need is not a bone fide job opportunity. The inclusion of foreign workers in the employer’s application leads the Department to believe that the employer is predisposed to hiring the foreign worker over qualified US applicants. The employer did not overcome this deficiency.”

On December 15, 2016, the Employer filed a formal request for administrative review of the denial determination with additional documentation (AF 1-14).

In response to the “Notice of Docketing” issued on December 16, 2016, counsel for the CO filed a timely written brief. The Employer’s agent did not file further written argument or brief.

## DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job “must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment,” 20 CFR §655.20(e). Additionally, 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 ... 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 [the Department of Homeland Security] regulations.

**These regulations provide that in order for an employer to establish a “peakload need,” the 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 to staff will not become a part of the [employer’s] regular operation.” 8 CFR §214.2(h)(6)(ii)(B)(3)**

Except where the employer’s need is based on a one-time occurrence, the CO will deny a request for an H-2B Registration or Application for Temporary Employment Certification where the employer has a need lasting more than 9 months.” 20 CFR §655.6

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. Failure to comply with an NOD, including not providing all documentation within the specified time period, will result in a denial of the application. 20 CFR §655.31(b)(4).

The CO submits, based on the original information submitted by the Employer in the AF, that the Employer’s need for the 2 requested restaurant cooks exceeded the nine month maximum for H-2B applicants because the application as originally submitted was for the period November 1, 2016 through August 30, 2017 and this abutted the prior H-2B application for 2 similar restaurant cooks for the period May 15, 2016 through October 30, 2016.<sup>4</sup> Thus the request reflected a period of continuous need for the 2 restaurant cooks from May 15, 2016 through August 30, 2017, a period of 15-1/2 months. Such a period of need must be denied pursuant to 20 CFR §655.6(b).

The Employer amended the starting date to January 3, 2017 and ending date to October 3, 2017. The Employer states that the restaurant’s peak season is May to October and stated that “these workers will be employed only during the peak season, during which the amount of restaurant patrons increases substantially.” Such an affirmation is disputes the January 3, 2017 modified

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<sup>4</sup> ETA application number H-400-16043-212402

initial date of need, as well as the three months of February, March and April 2017. Additionally, the Employer failed to submit the requested calendar year of payroll information, attested to by the Employer, setting forth the monthly breakout for each temporary and full-time permanent employee: the total number of workers and staff employed, the total hours worked by the employees, and the total earnings paid to the employees. Such information is used to establish the actual work history and employment needs of an employer over time and may clearly document a peakload or seasonal period of need for additional employees, as asserted by this Employer. Failure to submit such additional information requested by the CO in a NOD “will result in a denial of the application” pursuant to 20 CFR §655.32(a).

After deliberation on the AF, this Administrative Law Judge finds that, while the Employer subjectively projected a need for two Cooks – Restaurant, the Employer has failed to meet its burden of establishing a peakload/seasonal need for the requested two H-2B Cooks - Restaurant for the modified dates of need from January 3, 2017 through October 3, 2017, in Idaho Falls, Idaho, pursuant to 8 CFR §214.2(h)(6)(ii)(B)(3) and (B)(2)<sup>5</sup> and failed to submit requested relevant documentation in response to the NOD. Accordingly, the CO properly denied the Employer’s February 4, 2016, *Application for Temporary Employment Certification* pursuant to 20 CFR §655.6(b) and 20 CFR §655.32(a).

### ORDER

**It is hereby ORDERED that the Certifying Officer’s DENIAL of the Employer’s October 19, 2016, Application for Temporary Employment Certification is AFFIRMED.**

ALAN L. BERGSTROM  
Administrative Law Judge

ALB/jcb  
Newport News, Virginia

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<sup>5</sup> 8 CFR 214.2(h)(6)(ii)(B)(3) *Peakload need*. The petitioner 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 to staff will not become a part of the petitioner’s regular operation.”

8 CFR 214.2(h)(6)(ii)(B)(2) *Seasonal need*. The petitioner 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.