



**Issue Date: 11 September 2017**

BALCA Case Nos.: 2017-TLN-00058

ETA Case Nos.: H-400-17135-372355

*In the Matter of:*

RON MEXICAN PRODUCE, LLC.,  
*Employer.*

**DECISION AND ORDER AFFIRMING THE  
DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Ron Mexican Produce, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Non-Acceptance Denial in the above captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).<sup>3</sup> A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

**STATEMENT OF THE CASE**

Employer is located in Stafford, Texas and employs workers to process cactus for human consumption throughout the year.<sup>5</sup> On 3 Jul 17, Employer applied for H-2B temporary labor certification, seeking approval to hire 20 foreign nationals as Cactus Processors from 1 Oct 17 to 31 Jul 18, based on a peakload need.<sup>6</sup> Employer stated that the peak period was a result of increased cactus consumption “[d]uring the Lenten season.”<sup>7</sup>

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<sup>1</sup> 20 C.F.R. Part 655.

<sup>2</sup> 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).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.61(a).

<sup>5</sup> Appeal File (AF) 22.

<sup>6</sup> AF 77.

<sup>7</sup> *Id.*

On 13 Jul 17, the CO issued a Notice of Deficiency (“NOD”), which outlined two deficiencies in employer’s application.<sup>8</sup> Specifically, the CO determined that employer failed to: (1) establish that its job opportunity is temporary in nature; and (2) submit an acceptable job order.<sup>9</sup> Regarding the first deficiency, which is the sole issue on appeal, the CO stated that the employer did not justify the extended dates of need for labor when the Lenten season is generally February/March.<sup>10</sup> The CO requested that Employer submit supporting evidence justifying the dates of need for labor and requested, among other documents,<sup>11</sup>

[s]ummarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Cactus Processors, the total number of workers or staff employed, total hours worked, and total earnings received.

On 27 Jul 17, Employer filed a response to the CO’s NOD<sup>12</sup> and defended its requested peakload season: “Though a favorite year round, the demand for cacti increased during the holiday season and continues into the Lenten season.”<sup>13</sup> However, the response did not include a “detailed summarized monthly payroll report, as the specifications were outlined in the NOD.”<sup>14</sup> Employer did not include the number of full-time permanent and temporary workers or the total earnings received.<sup>15</sup>

On 7 Aug 17, the CO issued a Non-Acceptance Denial.<sup>16</sup> Although Employer cured one of the two deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing that it has a temporary need for workers.<sup>17</sup> Specifically, the information provided did not support a peakload need coinciding with the requested dates of need.<sup>18</sup>

Based on the limited information provided, the employer’s payroll documentation does not show a peak during the employer’s requested dates of need . . . . The employer’s lowest paid month [in 2016] is January, which is in the employer’s period of requested employment. Additionally, its second highest paid month is

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<sup>8</sup> AF 73.

<sup>9</sup> AF 73-74.

<sup>10</sup> AF 73.

<sup>11</sup> AF 73-74.

<sup>12</sup> AF 45-69.

<sup>13</sup> AF 22.

<sup>14</sup> AF 14.

<sup>15</sup> *Id.*

<sup>16</sup> AF 10-21.

<sup>17</sup> AF 12.

<sup>18</sup> AF 14-15.

September, which is in the employer's nonpeak period. This is not consistent with a true peak period.<sup>19</sup>

The chart of Employer's summary of processed orders each month in 2015 shows more incoming orders for non-peak months of August and September than for January, April, May, June, December. For 2016 the chart shows more incoming orders for non-peak months of August and September than for January, April, May, June, and July. Finally, Employer "did not sufficiently explain in its NOD response how [it] established its peakload need for the dates of need requested or that the cacti consumed during its stated nonpeak period is less than that during the peak period."<sup>20</sup>

On 14 Aug 17, Employer requested timely administrative review of the CO's Non-Acceptance Denial.<sup>21</sup>

On 23 Aug 17, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the CO ("Solicitor") to file briefs within seven business days of receiving the appeal file.<sup>22</sup> On 28 Aug 17 Employer requested a seven day extension to submit its brief, due to the impact of Hurricane Harvey on Employer. I granted that request, and briefs for both Employer and Solicitor were due by close of business on 7 Sep 17. On 23 Aug 17, BALCA received the Appeal File from the CO. The Solicitor and Employer each filed a brief on 7 Sep 17.

## 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 Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.<sup>23</sup> A CO's denial of certification must be upheld unless shown by the employer to be arbitrary or capricious or otherwise not in accordance with law.<sup>24</sup> 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.<sup>25</sup>

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<sup>19</sup> AF 14.

<sup>20</sup> AF 15.

<sup>21</sup> 20 C.F.R. § 655.61.

<sup>22</sup> 20 C.F.R. § 655.61(c).

<sup>23</sup> 20 C.F.R. § 655.61.

<sup>24</sup> See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *Tarilas Corp.*, 2015-TLN-00016, slip op. at 5 (Mar. 5, 2015).

<sup>25</sup> 20 C.F.R. § 655.61(e).

Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>26</sup> The CO may only grant Employer's Application to admit H-2B workers for temporary nonagricultural employment if employer has demonstrated that: (1) insufficiently qualified U.S. Workers are available to perform the temporary services or labor for which 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.<sup>27</sup>

### **FAILURE TO ESTABLISH A PEAKLOAD NEED FOR WORKERS**

The sole issue on appeal is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, 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.<sup>28</sup> Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."<sup>29</sup> Pursuant to Section 113 of the Department of Labor Appropriations Act, 2017, "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 C.F.R. § 214.2(h)(6)(ii)(B)."<sup>30</sup> This regulation 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 petitioners need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

In this case, Employer alleges it has a peakload need for 20 Cactus Processors.<sup>31</sup> In order to establish such a peakload need, 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

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<sup>26</sup> 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); and *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

<sup>27</sup> 20 C.F.R. § 655.1(a).

<sup>28</sup> 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

<sup>29</sup> 20 C.F.R. § 655.6(a).

<sup>30</sup> Department of Labor Appropriations Act, 2017 (Div. H, Title I of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31), § 113 (May 5, 2017).

<sup>31</sup> AF 108.

seasonal or short-term demand in that the temporary additions to staff will not become a part of the petitioner's regular operation."<sup>32</sup>

After reviewing the record in the parties' legal arguments, I concur with the CO that Employer has failed to establish that it has a temporary need for H-2B workers from 1 Oct 17 through 31 Jul 18. I accept Employer's claim that the demand for prickly cactus increases during the Lenton season. However, for the reasons stated below, I find Employer has not shown that it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand as it has not shown that the seasonal or short-term demand coincides with the dates for which additional labor has been requested.

In its brief, Employer points out that:<sup>33</sup>

Employer did not require temporary assistance during its non-peakload months of August and September as reflected in the fact that the chart shows no monthly earnings under "Temporary Workforce" for those months.<sup>34</sup> The Employer's lowest paid month in 2016 was January for Permanent Workers but was one of the highest paid months for Temporary Workers.<sup>35</sup> This indicates that there was a greater need for workers at this time. The payroll summaries do not accurately reflect the Employer's peakload need because it fails to show that the Employer was not able to hire the workers it needed in 2016.

Employer, however, failed to provide the number of full time permanent and temporary workers employed and the total earnings received, failed to show any increase in overtime hours for its employees, and failed to offer other evidence such as contracts declined for lack of labor.<sup>36</sup> Nor has it presented payroll records or other evidence demonstrating that it historically supplements its permanent workforce during the period of alleged temporary need.

Employer also argues that the CO did not consider the information provided in the monthly backlog information document regarding percentage of late shipments. Employer points out that the two months with the highest backlog were March and April 2015, showing the Employer required more workers during these peak times.<sup>37</sup> This argument fails to justify or explain why Employer has a peakload need for Cactus Processors from 1 Oct 17 to 31 Jul 18.

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<sup>32</sup> 20 C.F.R. § 214.2(h)(6)(ii)(B)(3).

<sup>33</sup> *Emp. Bf.* at 7.

<sup>34</sup> AF 26.

<sup>35</sup> *Id.*

<sup>36</sup> AF 14.

<sup>37</sup> AF 43.

Based on the evidence of record, I find that Employer has not carried its burden to show that it regularly employs permanent workers to work as Cactus Processors and that it needs to supplement his permanent staff on a temporary basis due to a peakload demand. Therefore, I find that the CO's decision must be upheld, since it was neither arbitrary nor capricious nor otherwise not in accordance with law, since Employer failed to establish a temporary need for H-2B workers.

**ORDER AND DECISION**

In light of the foregoing, the Certifying Officer's decision denying certification is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**PATRICK M. ROSENOW**  
Administrative Law Judge