



Issue Date: 16 November 2016

BALCA Case No.: **2017-TLN-00005**
ETA Case No.: **H-400-16189-3500998**

In the Matter of:

SANTA CRUZ TRUCKING CONGLOMERATE, LLC,
Employer.

Certifying Officer: Leslie Abella Dahan
Chicago National Processing Center

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

Nicholas D. Beadle, *Esq.*
Jeffrey L. Nesvet, *Esq.*
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Santa Cruz Trucking Conglomerate, 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.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States on a one-time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply

¹ On April 29, 2015, the Department of Labor (the “Department”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). These rules apply to this case.

² 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 definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the 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).

for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A CO 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. 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

The Employer is a trucking company that distributes fruits and vegetables that are grown primarily in Mexico, but also some that are grown in the United States. AF 138.³ The Employer is located in Nogales, Arizona, near the border between Mexico and the United States. AF 139. On July 7, 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) a copy of a BALCA Decision and Order, dated April 15, 2016; (4) an *Affidavit of Dale Paul Jones*, the President of Santa Cruz Trucking; (5) an *Attestation of No Agent or Recruiter*, dated July 7, 2016; (6) a *Statement of Temporary Need*, dated July 7, 2016; (7) an *Affidavit of Temporary Need*, dated July 7, 2016; (8) information from the Fresh Produce Association of the Americas; (9) a *Legal Services Retainer Agreement*; and (10) ETA Form 9141, *Application for Prevailing Wage Determination*. AF 138-177. The Employer requested certification for 103 truck drivers⁴ from October 3, 2016 until July 3, 2017, based on an alleged seasonal need during that period. AF 138.

On July 15, 2016, the CO issued a Notice of Deficiency, which outlined two deficiencies in the Employer’s Application. AF 132-137. Thereafter, on July 17, 2016, the Employer responded to the Notice of Deficiency with the following documents: (1) a response letter signed by Pablo Bustos; (2) an *Affidavit of Dale Paul Jones Areas of Intended Employment*, dated July 17, 2016; and (3) a signed Appendix B to ETA Form 9142B. AF 121-131.

Following the Employer’s response, the CO issued a second Notice of Deficiency on August 26, 2016. AF 112-120. Specifically, the CO determined that the Employer failed to: (1) explain why it modified the nature of the job opportunity from its original Application and ETA Form 9142; (2) establish that its job opportunity was temporary in nature; and (3) establish a temporary need for the number of H-2B workers it requested. *Id.*

As to the first deficiency, the CO explained that, through its response to the first Notice of Deficiency, the Employer sought to amend the nature of the job opportunity from its original Application and its ETA Form 9141. AF 116. Specifically, the CO stated that the job opportunity as described in the Employer’s original Application involved driving produce from Arizona to distribution centers across the United States. *Id.* However, in its response to the Notice of Deficiency, the Employer wrote that it sought workers to transport produce across the United States-Mexico border to Nogales, Arizona. *Id.* The CO asked the Employer to explain why it modified the nature of the job opportunity and show that the job opportunity it applied for was the same one listed in its request to modify its Application. *Id.* The CO informed the Employer

³ In this Decision and Order, “AF” refers to the Appeal File.

⁴ SOC (O*Net/OES) occupation title “Heavy and Tractor-Trailer Truck Drivers” and occupation code 53-3032. AF 95.

that if it were unable to demonstrate that the job opportunities were the same, the Employer would be required to withdraw its Application and file a new one. *Id.*

As to the second deficiency, the CO explained that the Employer failed to submit sufficient information in its Application to show that it has a seasonal need for workers. AF 117. The CO explained, “In order to establish a 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.” *Id.* The CO found that while the Employer stated that the produce it transports from October until July is seasonal, it did not adequately explain “whether or why there is no produce that is grown and harvested and subsequently transported during the months not included in the employer’s requested dates of need.” *Id.* The CO requested the Employer to submit monthly payroll reports from the previous calendar year listing the number of fulltime permanent and temporary workers it has historically employed each month as truck drivers, including the total hours the truck drivers worked and the earnings they received. AF 118.

As to the third and final deficiency, the CO concluded that the Employer failed to show that its need for 103 H-2B workers represented bona fide job opportunities. AF 119. Specifically, the CO was unclear as to why the Employer needed 103 truck drivers if it was only transporting produce from Mexico to Nogales, Arizona, as opposed to delivering produce to customers nationwide. *Id.* The CO asked the Employer to provide a detailed statement of temporary need for the number of workers requested. AF 119-120.

The Employer responded to the CO’s second Notice of Deficiency on September 6, 2016. AF 79-111. Along with its response, the Employer submitted the following documents: (1) a response letter signed by Pablo Bustos; (2) an *Affidavit of Dale Paul Jones Detail of Job Opportunity*; (3) an *Affidavit of Temporary Need Early October-Early July*; (4) an *Affidavit of Dale Paul Jones Need for 103 Workers*; (5) articles from Nogales International and Arizona News; and (6) photographs from the Employer’s worksite locations. *Id.*

On September 29, 2016, the CO issued a Non Acceptance Denial, after concluding that the Employer failed to cure all three of the deficiencies outlined in the second Notice of Deficiency. AF 59-78. On October 18, 2016, the Employer requested administrative review of the CO’s Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.⁵ AF 1-58.

On October 24, 2016, I 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. 20 C.F.R. § 655.61(c). On

⁵ 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

November 3, 2016, BALCA received the Appeal File from the CO. The Solicitor filed a brief on November 9, 2016. The Employer did not file a brief.

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. 20 C.F.R. § 655.61. 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. 20 C.F.R. § 655.61(e).

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).

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. 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3). Moreover, 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." 20 C.F.R. § 655.6(a).

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 C.F.R. 214.2(h)(6)(ii)(B)." 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). 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 103 truck drivers from October 3, 2016 until July 3, 2017. AF 138. 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.” 8 C.F.R. § 214.2(i)(F)(2)(ii)(B)(2). Therefore, in order to show that its need for truck drivers is seasonal, the Employer must establish both 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 October 3, 2016 until July 3, 2017. BALCA has recently considered, and rejected, appeals from various trucking companies located in Nogales, Arizona, all of which alleged nearly identical arguments and periods of supposed seasonal need as the Employer in this case. *See e.g.* 2016-TLN-00072, *International Destiny Logistics, LLC* (Oct. 21, 2016); 2017-TLN-00001, *Anselmo Trucking, Inc.* (Nov. 1, 2016); 2016-TLN-00070, *L & R Trucking, LLC* (October 17, 2016).

In its Statement of Temporary Need, and in an Affidavit signed by the Employer’s President, the Employer explained that the produce it transports is only grown during specified periods of the year. AF 88, 138. As such, the Employer alleged, it has a seasonal need for truck drivers from the beginning of October until the beginning of July each year. Specifically, the Employer explained that it has seasonal need to transport specific types of produce during the following periods: (1) Asian vegetables from the end of October until the beginning June; (2) bell peppers from the beginning of October until the beginning of May; (3) chili peppers from the beginning of October until the beginning of June; (4) cucumbers from the beginning of September until the beginning of April; (5) eggplants from the beginning of October until the beginning of April; (6) green beans from the middle of October until the beginning of April; (7) lettuce from the middle of October until the middle of March; (8) melons from the beginning of September until the middle of June; (8) squash from the beginning of September until the beginning of May; (9) tomatoes from the beginning of November until the middle of May; and (10) watermelons from the middle of October until the beginning of June. AF 88, 138. Because of these varied growing seasons, the Employer argued that for a period of nine months, from October 3, 2016 until to July 3, 2017, it needs 103 truck drivers to deliver produce. *Id.*

In support of its position that it has a seasonal need for workers, the Employer emphasized that “not only would early October through early July” be its ““peak season,”” but it will be its “only operating time every year.” AF 80. The Employer’s President explained that the Employer “is a new company that plans to deliver certain seasonal produce from early October through early July of every year.” AF 88. He added that the Employer “will only operate from early October through to early July of every year, and from early July through September of every year will remain inactive.” *Id.* Because the Employer has never operated before, it did not submit monthly payroll reports from last year listing the number of fulltime permanent and temporary workers that it has historically employed each month as truck drivers.

Based on the evidence of record, I find that the Employer has not carried its burden to show that its need for services or labor is traditionally associated with a season of the year, or by an event or pattern, and is recurring in nature. As previously noted, the governing statute provides that “employment is not seasonal if the period during which the services or labor is not needed is... considered a vacation period for the petitioner’s permanent employees.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Here, the Employer admits that during 100 percent of the period in which it intends to operate, it has a need for truck drivers. Thus, it appears that the Employer has a fulltime, permanent need for truck drivers from early October until early July, which is its entire operating season. Moreover, the months in which the Employer does not operate are akin to vacation months for what would be the Employer’s permanent employees. Simply by stating that it only operates from early October until early July is insufficient to show that it has a seasonal need for workers. Based on the foregoing, I find that the CO properly concluded that the Employer failed to establish a temporary need for H-2B workers.

Failure to Justify a Need for 103 Truck Drivers

The second issue on appeal is whether the Employer has demonstrated that it has a need for 103 truck drivers and whether its request for those workers represents bona fide job opportunities. The regulations provide that the CO will “review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors... (3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.” 20 C.F.R. § 655.11(e)(3)-(4).

In its Non Acceptance denial, the CO concluded that the Employer failed to justify a need for 103 truck drivers from early October until early December, particularly when the Employer was only delivering produce to customers in Nogales, Arizona, as opposed to customers nationwide. AF 68. The CO asked the Employer to submit documentation, such as payroll reports, contracts, or agreements, to show that it needed 103 truck drivers. AF 69.

In its response to the CO’s request for more information, the Employer wrote that it was “impossible to know exactly how many Truck Drivers will be needed as described in the instant application... .” AF 89. The Employer stated that “whatever the number is, the market demand far exceeds 103 Truck Drivers and if anything is only limited by available infrastructure.” *Id.*

By its own admission, the Employer does not know how many truck drivers it actually needs during its period of alleged seasonal need. Thus, consistent with the CO’s conclusion, the Employer has failed to show that it has 103 bona fide job opportunities. Moreover, as the CO emphasized, the Employer did not submit any evidence - such contracts or agreements with its business partners, photographs of its fleet of trucks, data regarding the amount of produce it plans to deliver - demonstrating how many truck drivers it actually needs from early October until early July. Therefore, I find that the CO properly determined that the Employer failed to meet the requirements of 20 C.F.R § 655.11(e)(3)-(4).

Modified Job Opportunity

The final issue on appeal is whether the job opportunity described in the Employer's Initial Application is different from the job opportunity described in its response to the CO's first Notice of Deficiency.

In its response to the CO's second Notice of Deficiency, the Employer alleged that it did not modify the nature of the job opportunity for which it was seeking H-2B workers. Rather, it stated that the job opportunity had consistently been for the same SOC (O*Net/OES) occupation title, "Heavy and Tractor-Trailer Truck Drivers," and occupation code, 53-3032. AF 79. Even assuming, *arguendo*, that the Employer's argument has merit, it has nonetheless failed to establish a seasonal need for 103 H-2B workers. Therefore, its request for temporary labor certification must be denied.

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:

Alice M. Craft
Administrative Law Judge