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**Issue Date: 16 November 2016**

**BALCA Case Nos.: 2017-TLN-00006**

ETA Case No.: H-400-16188-569873

*In the Matter of:*

**WS Trucklines, LLC,**

*Employer.*

## DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary non-agricultural employment provisions of the Immigration and Nationality Act ("INA," or "the Act"), 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart A.[1] The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States "if unemployed persons capable of performing such service or labor cannot be found in [the United States]." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a "labor certification" from the United States Department of Labor ("DOL" or the "Department"), Employment and Training Administration ("ETA"). 8 C.F.R. § 214.2(h)(6)(iii). For the reasons set forth below, the Certifying Officer's ("CO") denial of temporary labor certification is affirmed.

## STATEMENT OF THE CASE

### H-2B Application

On July 6, 2016, WS Trucklines, LLC, ("Employer") filed an H- 2B Application for Temporary Employment Certification ("ETA Form 9142B") for the job titled "Heavy Tractor-Trailer Truck Drivers," Standard Occupational Classification ("SOC") code/occupation title 53-3032. (AF 113.)[2] Employer requested seven truck drivers from October 3, 2016 to July 3, 2017. (Id.) Employer listed the nature of the temporary need as a "seasonal need." (Id.) In support of its seasonal need, Employer provided the following explanation:

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[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 2015 IFR applies if an employer filed its temporary labor certification application after April 29, 2015 and requested a start date after October 1, 2015. In the present case, Employer filed its temporary labor certification application after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

[2] For purposes of this opinion, "AF" stands for "Appeal File."

> There is a seasonal need for an increase in truck drivers near the beginning of October to the beginning of July every year. Specifically, from October 3, 2016 through to July 3, 2017, there is an increase for truckers to transport: Asian vegetables from the end of October through to the beginning of June; for bell peppers from the beginning of October through to the beginning of May; for chili peppers from the beginning of October through to the beginning of June; for cucumbers from the beginning of September to the beginning of April; for eggplants from the beginning of October through to the beginning of April; for green beans from mid-October through to the beginning of April; for lettuce from mid-October to mid-March; for melons from the beginning of September to mid-June; for squash from the beginning of September through to the beginning of May; for tomatoes from the beginning of November through to mid-May; and for watermelons from mid-October through to the beginning of June.

(AF 135.) Employer wrote that it is a trucking company near the Mexican border and the company "distributes produce, fruits, and vegetables, primarily grown in Mexico but also in the United States of America." (AF 135.)

Notice of Deficiency

On July 15, 2016, the CO issued a Notice of Deficiency ("NOD"), notifying Employer that its application failed to meet the acceptance criteria in light of two deficiencies. (AF 96-99.) Employer responded on July 29, 2016, curing both deficiencies. (AF 84.)

The CO issued a second NOD on September 7, 2016 stating that Employer failed to establish that its job opportunity is temporary in nature pursuant to 20 C.F.R. 655.6(a)-(b).[3] (AF 79-82.) The CO wrote that while "employer detailed which produce is in season during the requested dates of need, the employer did not explain nor document that there is no produce in season outside of the requested dates of need." (AF 82.)

To remedy the deficiency, the CO directed Employers to submit the following items:

1) A description of the employer's business history and activities (i.e. primary products or services) and schedule of operations through the year;
2) An explanation regarding why the nature of the employer's job opportunity and number of foreign workers being requested for certification reflect a temporary need, *including a detailed description of the produce being transported and an explanation and documentation to demonstrate that there is no such produce needing transport during the months that are outside the period of need requested*; and
3) 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.

(AF 83.)

[3] The CO did not identify this deficiency in the first NOD.

## Employers' Response to Notice of Deficiency

On September 22, 2016, Employer responded to the CO's request. (AF 56.) Employer submitted an "income-loss statement and payroll" and an affidavit of temporary need. The payroll documents show payroll for Employer's employees from May 2014 through August 2016. According to the payroll records, Employer had two employees in 2014, two to six employees in 2015, and six to seven employees in 2016. The number of employees did not fluctuate between seasons.

In the Affidavit of Temporary Need, Employer wrote that as shown on the Income-Loss Statement and Payroll, the net expenses and profit have been more or less the same every month because Employer "only had three truck drivers and "[t]he company had the same amount of truckers every month, taking as much as it could." (AF 67.) Employer attached to its statement the U.S. Department of Transportation's statistics on the number of trucks that cross the U.S.-Mexican border into Nogales, Arizona every month. The attached copies covered the years 2010 to the present. (AF 67.) Employer also included a table showing that the percentage of truck crossings in the months of January to June and October to December was higher in those months than in the months of July to September. (AF 68.)

## Final Determination

On September 8, 2016, the CO issued a Non-Acceptance Denial ("Denial"). (AF 6.) The CO found that Employer failed to show that its job opportunity is temporary in nature. (AF 9.) The CO wrote that the Income-Loss/Payroll submitted does not include the income-loss information and the payroll information shows that Employer has at least two truck drivers throughout the year. (AF 11.) The CO also found that Employer's Affidavit of Temporary Need contradicts Employer's payroll records: the Affidavit states that Employer has had the same three workers over the years whereas the payroll shows that Employer has had as many as seven workers. (Id.) Regarding the truck and border crossing numbers, the CO wrote that Employer did not provide "documentation connecting the produce transportation business to these numbers," thus this information cannot be used to determine employer's temporary need. (Id.) Consequently, the CO denied the application because Employer failed to establish a seasonal need for seven truck drivers from October 2016 to July 2017.

## Appeal

On October 18, 2016, Employer submitted a request for review before the Board of Alien Labor Certification Appeals ("BALCA"). (AF 1-120.) Employer's request included a brief and copies of the following documents: 1) Exhibit A: Fresh Produce Association of the Americas' (FPAA) growing season summary; 2) Exhibit B: Affidavit from Isaias Salas, President of Employer company; and 3) Article from the Nogales International. (Id.) On October 18, 2016, BALCA docketed Employer's appeal. The undersigned received the Appeal File on November 3, 2016. In support of its appeal, Employer wrote that in another case, Geriq Logistics LLC, H-400-16194-058501, the DOL approved the labor application based on the same arguments. (AF 2.) Employer argued that judicial consistency requires approval in this case. Employer also argued that the FPAA's growing season is consistent with Employer's dates of need. (AF 1.)

The CO's Brief

The Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief on November 10, 2016. The Solicitor argued that Employer failed to establish that its need for seven truck drivers is temporary. The Solicitor wrote that Employer was required to identify the period during which it did not need truck drivers and show that the period is unpredictable. However, according to the Solicitor, Employer failed to do so because its payroll records show that it needs truck drivers year-round. The Solicitor also found that Employer failed to show that October through June are its busiest months because the number of truck drivers have not changed based on the seasons. Furthermore, the Solicitor noted that BALCA has denied certification in five similar cases. The Solicitor wrote that BALCA cannot consider Geriq Logistics LLC, H-400-16194-058501 because this application is not part of the appeal file.

## SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file, the parties' legal briefs, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). As discussed above, Employers submitted several exhibits along with their legal brief. The Nogales International article was not before the CO, thus it will not be considered on appeal. After considering the evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO's denial of temporary labor certification, or
(2) Direct the CO to grant temporary labor certification, or
(3) Remand to the CO for further action.

20 C.F.R. § 655.61(e)(1)-(3).

## DISCUSSION

The sole issue on appeal is whether Employer established a temporary need for workers. 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 DHS. 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). That period of time is usually limited to less than one year but may last up to three years in cases of a one-time event. (Id.) 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).

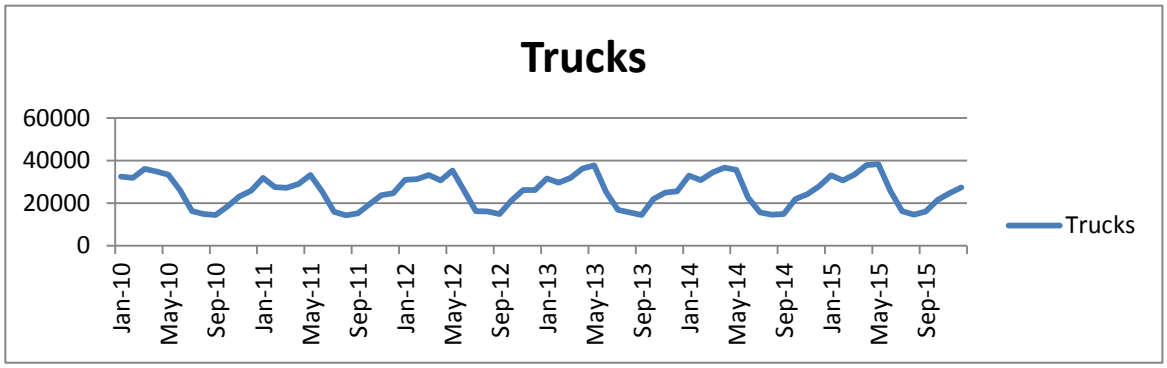
Here, Employer requests temporary workers for a seasonal need. In order to establish a seasonal need, Employer

> 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). Employer submitted insufficient evidence to establish that it has a seasonal need for temporary workers. As summarized above, Employer's evidence included the FPAA's statement on Mexican produce, charts showing the production locations of Mexican-grown produce and charts showing the seasons during which produce is available. (AF 136-138.) The "Four Seasons of Mexican Produce" chart lists twenty-one products and reveals that only four of the products (bananas, citrus, limes, and mangos) are available in Nogales, Arizona in the months of July through September. (AF 138.)

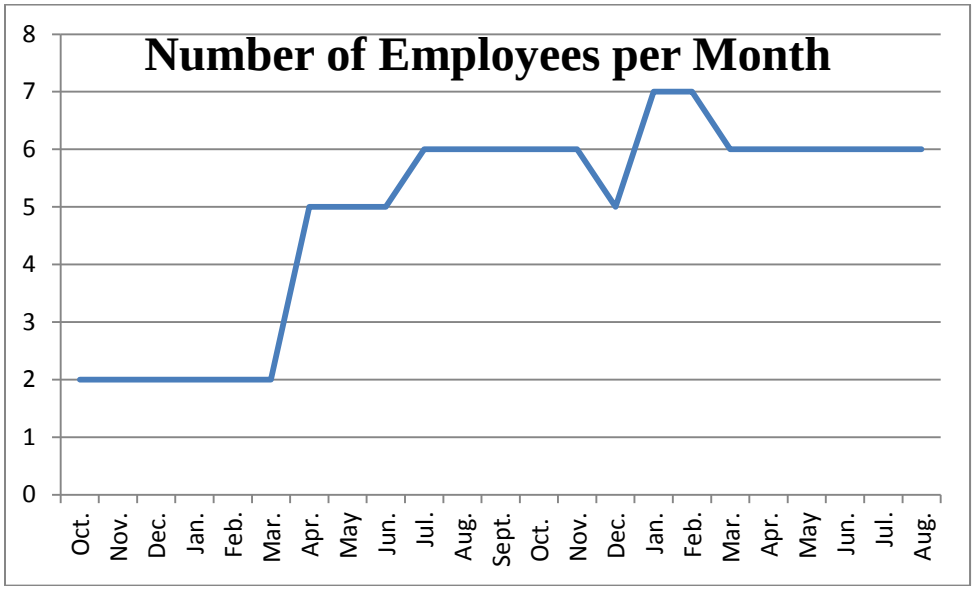
This chart demonstrates that there is a peak season in harvesting Mexican produce from October through June in Nogales, Arizona. However, although the chart shows that most of the fruits and vegetables are not grown in Nogales, Arizona from July through September, all of the types of produce are grown in Mexico during these months. On its ETA Form 9142B, Employer wrote that it distributes produce "primarily grown in Mexico." (AF 135.) Employer does not explain why there is a slow season from July through September if all of the produce is available in Mexico year-round and Employer distributes produce primarily grown in Mexico. See International Destiny Logistics, LLC, 2016-TLN-00072 at *5 (Oct. 21, 2016) (finding that the FPAA chart showing the growing seasons in Nogales does not explain the employer's seasonal need in light of the fact that the employer transports produce grown in Mexico).

Employer also submitted the U.S. Department of Transportation's statistics on the number of trucks that cross the U.S.-Mexican border into Nogales, Arizona every month. (AF 70-76.) These statistics support Employer's contention that there is a peak season for truck drivers crossing the Nogales border. This peak season is consistent with Employer's requested dates of need and the Four Seasons of Mexican Produce chart showing that the peak season is from October through June:



The CO found that this evidence was insufficient because Employer did not provide "documentation connecting the produce transportation business to these numbers." (AF 11.) Although Employer did not specifically link these statistics to the produce business, these statistics are consistent with the Mexican Produce chart and therefore suggest that there is a greater need for produce transportation from October through June.

While the evidence above demonstrates that there is a peak season for importing produce in the Nogales region, Employer's own records fail to establish that Employer has an increased need for truck drivers during these months. Employer submitted its payroll records, which do not support Employer's argument that there is a seasonal need from October through June. The payroll records do not separate temporary workers from permanent workers nor do they list the position of the workers. In its affidavit, Employer wrote that it has consistently employed only three truck drivers, whereas its payroll records show up to seven employees. Employer did not list the employees' job titles or provide a separate list of truck drivers. Employer's payroll records show that the number of employees has generally increased from October 2014 through August 2016. This number did not fluctuate based on the season.




Employer explained that it had the same net expenses and profit every month because Employer had three truck drivers every month. (AF 67.) Presuming that Employer only had three truck drivers, Employer's payroll records do not show that any one of its employees worked more from October through June. In fact, the payroll records fail to show any pattern.

Employer's personnel records reveal that it does not have a seasonal need for truck drivers from October through July. In fact, the payroll records show that Employer has had a continued need for truck drivers and this need has not fluctuated from month to month. Its employees do not earn more in the months of October through June. While Employer provided evidence showing that Nogales, Arizona grows more produce from October through June and there are more truck border crossings during those months, Employer has not established that its business has an increased demand for truck drivers during these months. See Anselmo Trucking,

Inc., 2017-TLN-00001, at *7 (Nov. 1, 2016) (finding that Employer's fluctuation in wage payments suggests that Employer's need is year-round rather than seasonal).

Finally, Employer argued that the undersigned should approve this application because the CO approved another H-2B application, In the matter of Geriq Logistics, LLC, with similar facts and evidence. As the CO correctly noted, the undersigned cannot consider this application because it is not part of the record. 20 C.F.R. §655.61(a)(5). In a similar case, BALCA declined to consider the employer's same argument because the Geriq application was not part of the record before the CO or before BALCA. Manuel Huerta Trucking Inc., 2016-TLN-00069, at *4 (Oct. 19, 2016). BALCA found that it "is not bound by a determination made by a certifying officer in another temporary labor certification matter." Id. Employer also noted that there were six similar H-2B applications for six trucking companies distributing Mexican produce in Arizona. (AF 2.) The CO denied four of those applications because the employers failed to establish temporary need and BALCA affirmed the denials. Anselmo Trucking Inc., 2017-TLN-00001; International Destiny Logistics, LLC, 2016-TLN-00072; Manuel Huerta Trucking Inc., 2016-TLN-00069; L & R Trucking LLC, 2016-TLN-00070 (Oct. 17, 2016).

Accordingly, Employer has failed to demonstrate that it has a seasonal need for seven truck drivers from October 3, 2016 through July 3, 2017. Employer's payroll records show that Employer has a year-round need for truck drivers. Thus, the CO properly found that Employer failed to establish a temporary need.

## ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification is AFFIRMED.

For the Board

Digitally signed by THERESA TIMLIN
DN: CN=THERESA TIMLIN,
OU=JUDGE, O=US DOL Office of
Administrative Law Judges, L=CHERRY
HILL, S=NJ, C=US
Location: CHERRY HILL NJ

**THERESA C. TIMLIN**
Administrative Law Judge

Cherry Hill, New Jersey