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BALCA Case Nos.: 2018-TLN-00151
2018-TLN-00152

ETA Case Nos.: H-400-18101-770105
H-400-18101-974555

In the Matters of:

BOSSIER CASINO VENTURE, INC.,
Employer.

BEFORE: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIALS

This proceeding is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to Employer Bossier Casino Venture, Inc.'s requests for administrative review of the Certifying Officer's (CO) denials of temporary labor certification under the H–2B program. For the following reasons, the Board affirms the CO's denials of certification.

I. BACKGROUND

Employer submitted its ETA Forms 9142, H-2B Applications for Temporary Employment Certification, on April 16, 2018, attaching thereto prior certifications and requesting certification for 21 cooks and 25 housekeepers. Employer identified July 1 through January 31 as its seasonal, peakload dates of need. AF-A 159-249; AF-B 153-245.[1]

On April 16, 2018, the CO issued Notices of Deficiency, finding that Employer's documentation showing occupancy rates and payroll records did not establish either the job opportunities or Employer's need as temporary in nature, citing to 20 C.F.R. §§ 655.6(a)-(b) and 655.11(e)(3)-(4). AF-A 153-58; AFB 147-52. Employer responded on May 2, 2018, and provided: 1) payroll records from January 2015 to January 2018; 2) prior approvals for temporary workers in 2015, 2016, and 2017; 3) employee turnover lists showing discharges and resignations for 2017; 4) tourism data and local event listings; and 5) monthly revenue and

[1] AF-A refers to the Administrative File in 2018-TLN00151 (H-400-18101-770105), and AF-B refers to the Administrative File in 2018-TLN-00152 (H-400-18101-974555).

visitor summaries. Employer further amended its end date of need to January 15, 2019. AF-A 38-152; AF-B 39-146.

The CO issued Final Determinations denying Employer's applications on May 30, 2018, finding that Employer's occupancy report indicates a year-round need for labor, the labor shortage does not establish a temporary need, net sales and guest traffic do not establish temporary need, any peakload need indicated by the records does not align with Employer's requested dates of need, and greater hours worked during months outside of Employer's requested dates. Again, the CO cited to §§ 655.6(a)-(b) and 655.11(e)(3)-(4). AF-A 20-35; AF-B 20-35.

Employer requested administrative review on June 12, 2018, in which it argued "the CO failed to properly analyze the payroll documentation which reflects a sharp increase in working hours during the requested months of need." Employer stated that the CO relied on the hours worked in an anomalous month, March 2017, when the CO determined Employer could not establish a peak season. Although Employer conceded that March and July showed similar revenue and guest traffic numbers, it argued that it nevertheless required an additional 1,643 hours of housekeeping work and 3,826 hours of cooking work in order to meet operational needs in July. Employer further argued that the CO misconstrued the payroll summary, which showed numbers of permanent and temporary employees by month in 2017. AF-A 1-19; AF-B 1-19.

These matters were assigned to me on June 18, 2018. I issued the Notice of Assignment and Expedited Briefing Schedule; and Order Consolidating Cases on June 25, 2018. The administrative files uploaded on June 28, 2018. The decision that follows is based upon the entire record and the applicable law.

II. DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. An appropriations rider, *see* 20 C.F.R. § 656.6(b)-(c), requires the Department of Labor to utilize the Department of Homeland Security's regulatory definition of temporary need, which states, generally, a period of temporary need will be limited to one year or less, but in the case of a "one-time event," could last up to 3 years. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Temporary service or labor "refers to any job in which the petitioner's need for the duties to be performed…is temporary, whether or not the underlying job can be described as…temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer needs a worker for a limited period of time. An employer must establish that its need for temporary services or labor "will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: one-time occurrence; seasonal need; peakload need; or intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (employer did not provide

an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc*., 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient); *accord*, *BMC West*, 2016-TLN-00039 (May 18, 2016). While temporary need is generally established through payroll data and similar historic information, start-ups can still establish a temporary need. *Midwest Poured Foundations*, 2013-TLN-00053 (Jun. 18, 2013); *Los Altos Mexican Restaurant*, 2016-TLN-00067 (Oct. 28, 2016) *(Midwest* distinguished on the facts); *accord*, *The Garage Tavern*, 2016-TLN-00074 (Oct. 28, 2016). Furthermore, "the determination of temporary need rests on the nature of the underlying need for the duties of the position" and not "the nature of the job duties." 80 Fed. Reg. 24042, 24005.

To qualify as a peakload need, the employer must establish (1) "that it regularly employs permanent workers to perform the services or labor at the place of employment"; (2) "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 (3) "that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015) (employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload, temporary need); *Kiewit Offshore Services, LTD*., 2013-TLN-00020 (Jan. 15, 2013) (employer's documentation revealed that the employer's alleged peakload need spanned at least a 19-month period); *Paul Johnson Drywall*, 2013-TLN-00061 (Sep. 30, 2013); *Kiewit Offshore Services*, 2012-TLC-00031, -32, -33 (May 14, 2012); *Tarrasco Steel Company*, 2012-TLN-00025 (Apr. 2, 2012); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *DialogueDirect, Inc.*, 2011-TLN-00038, -39 (Sep. 26, 2011); *Top Flight Entertainment, Ltd*., 2011-TLN-00037 (Sep. 22, 2011); *Workplace Solutions LLC*, 2009-TLN-00049 (Apr. 22, 2009) (notwithstanding a calculation error, it was evident that the employer had a permanent staff that is supplemented by temporary workers); *Hutco, Inc*, 2009-TLN-00070 (Jul. 2, 2009); *Jim Connelly Masonry, Inc*., 2009-TLN-00052 (Apr. 23, 2009) (employer's submission of agreement letters did not provide adequate evidence of employer's need to supplement its permanent workforce); *Deober Brothers Landscaping, Inc*., 2009-TLN-00018 (Apr. 3, 2009) (need can recur if it lasts no longer than 10 months each year); *Magnum Builders*, 2016-TLN-00020 (March 29, 2016); *Erickson Framing Az*, 2016-TLN-00016 (Jan. 15, 2016) (remands to determine if partial certification should be granted for a reduced period); *accord*, *Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015) (remanded to permit certification for a shorter period of need); *BMC West*, 2016-TLN-00043 (May 16, 2016) (evidence of industry peak season need did not match employer's need); *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016) ("The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers."); *Chippewa Retreat Spa*, 2016-TLN-00063 (Sep. 12, 2016).

Employer requests that the Board consider its historically granted certifications, its forecasted occupancy rates for 2018, and the "pattern revealed by the aggregate payroll data." AF-A 7; AF-B 7. In this case, Employer noted its anticipated 100% occupancy during 18 days in

July, while only three days in February and March saw 99% occupancy. Employer also pointed to two separate, "better" indicators from its 2017 records that it has a peakload need. First, it looked to hours worked; then, it looked to total number of workers. Those charts show the following:

2017 Total Hours Worked			2017 Total Number of Workers		
Month	**Cook Hours**	**Housekeeper Hours**	**Month**	**Cooks**	**Housekeepers**
January	6,662	4,775	January	58	63
February	6,960	4,380	February	63	64
March	8,725	5,741	March	89	66
April	8,783	5,889	April	77	60
May	10,193	6,525	May	87	55
June	11,328	7,560	June	83	55
July	12,551	7,384	July	81	59
August	11,808	7,117	August	83	57
September	12,837	8,387	September	93	69
October	13,130	10,195	October	83	85
November	12,378	10,273	November	83	79
December	5,210	4,267	December	86	76

AF-A 5, 7-8; AF-B 5, 7-8.

Taken in the aggregate, these charts do not show a peakload need from July through mid-January. Moreover, the CO relied on guest traffic numbers submitted by Employer, which also belie the stated dates of need. These figures, below, do not demonstrate any particular span of time in which the demand on Employer's services temporarily increased:

2017 Guest Numbers	
Month	**Guests**
January	57,546
February	55,780
March	82,673
April	70,940
May	71,998
June	71,121
July	79,725
August	68,004
September	66,765
October	71,012
November	65,703
December	69,247

AF-A 24; AF-B 24.

Employer argued that March, the month that the CO noted had the greatest amount of guest traffic, was an anomaly. So, too, then are April, May, and June, all of which show greater guest numbers than four of the six months within Employer's dates of need. The Board has consistently affirmed denials of certification applications where, as here, an employer's own records belie its claimed peakload periods of need. *See, e.g.*, *Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016); *Erickson Construction*, 2016-TLN-00050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need). Based thereon, the Board does not find the CO's denials of certification arbitrary or capricious as those denials relied on Employer's records and are supported by an aggregate view of those records demonstrated by the charts herein above.

The Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. As discussed above, the Employer failed to meet that burden. Therefore, after reviewing the record in this matter, the Board finds that the CO's denials of certification were not arbitrary and capricious and should not be disturbed.

III. ORDER

In light of the foregoing, the Certifying Officer's Final Determinations denying the Employer's ETA Forms 9142, H-2B Applications for Temporary Employment Certification, are **AFFIRMED.**

So ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge