



Issue Date: 11 March 2019

BALCA Case Nos.: 2019-TLN-00047 / 2019-TLN-00048
ETA Case Nos.: H-400-18333-185386 / H-400-18333-002233

In the Matters of:

BARREL O’FUN SNACK FOOD CO., LLC
d/b/a SHEARER’S SNACKS
Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Richard Hepp, *Esq.*
Benesch Friedlander Coplan & Aronoff
Cleveland, Ohio
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIALS OF CERTIFICATION

These cases are before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Barrel O’Fun Snack Foods Co., LLC d/b/a Shearer’s Snacks’ (“Employer”) request for review of the Certifying Officer’s (“CO”) 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 for and receive labor certification from the U.S. Department of Labor

¹ 20 C.F.R. § 655, Subpart A (codified April 1, 2016). 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). The IFR 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).

(“Department”).³ 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.⁴

STATEMENT OF THE CASE

The Employer is a food manufacturing company with a production plant in Perham, Minnesota. (AF-1 97, AF-2 97).⁵ On January 7, 2019, the Employer filed two ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”), signed appendix B, statement of need, job order and prevailing wage determination, requesting certification for fifteen (15) general packaging line workers (night shift) and twenty (20) general packaging line workers (day shift)⁶ from April 1, 2019 until March 31, 2020 based on a peakload need for temporary labor. (AF-1 94-117, AF-2 94-117). In its statement of need the Employer stated that it currently employed 600 workers at its plant in Perham, Minnesota, but that was not enough to run the plant at full capacity, resulting in machine shutdowns due to an insufficient workforce, and that temporary workers were needed in order to meet production demands until permanent full-time workers could be hired. (AF-1 106-108, AF-2 106-108).

On January 16, 2019, the CO issued Notices of Deficiency in both cases (“NOD”), outlining the deficiencies in the Employer’s Applications. (AF-1 86-93, AF-2 86-93). Specifically, the CO stated that the Employer (1) failed to justify nature of temporary need; (2) failed to establish that the job opportunity was temporary in nature; and (3) failed to establish a temporary need for the number of workers requested. *Id.* The CO requested the Employer provide documentation to establish a peakload need for additional workers and to provide documentation to show bona fide job opportunities for additional workers. *Id.*

On January 28, 2019, the Employer submitted additional documents in response to the Notices of Deficiency, including documentation outlining production line vacancies, summaries of its payroll reports to General Packing Line and General Line Workers from 2017 to 2018, a summary of its monthly production numbers, and a projected installation schedule for automation machines to the production lines. (AF-1 64-85, AF-2 64-85). The Employer argued that because that it had fewer permanent full-time and part-time general line workers in 2018 than it did in 2017, it had a peakload need for general packaging line workers as it expected to turn away customer requests for more products because of its inability meet production demands due to staff shortages. (AF-1 66-67, AF-2). The Employer noted that it was in the process of partially automating its production line, which would eliminate up to 80 line worker jobs by 2020. (AF-1 67, AF-2 67). The Employer stated that it would need 29 night shift line workers and 21 day shift line workers to run at full capacity and meet all production demands. (AF-1 67-68, AF-2 67-68).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ In this Decision and Order, “AF” refers to the Appeal File. As there are two Appeal Files in the case, the abbreviation “AF-1” refers to the Appeal File for 2019-TLN-00047 and “AF-2” refers to the Appeal File for 2019-TLN-00048. The two appeal files are identical except with respect to the number of workers requested and the shift the workers were requested for.

⁶ SOC (O*Net/OES) occupation title “Packaging and Filling Machine Operators and Tenders” and code 51-9111. (AF 94).

On February 1, 2019, the CO issued its Final Determination – Denials (“Denial”) concluding that the Employer (1) failed to establish the job opportunity was temporary in nature and (2) failed to establish temporary need for the number of workers requested. (AF-1 56-63, AF-2 56-63). The CO noted that the Employer’s claims of having fewer workers in 2018 than 2017 were insufficient as a labor shortage did not establish a peakload need for workers. (AF-1 61, AF-2 61). The CO noted that the provided documentation did not explain how the Employer’s determined it had a need for additional workers as its employment and production numbers were generally consistent throughout the year. (AF-1 63, AF-2 63). On February 15, 2019, the Employer requested administrative review of the CO’s Denials, as permitted by 20 C.F.R. § 655.61.⁷ (AF-1 1-55, AF-2 1-55).

On February 22, 2019, 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.⁸ On February 28, 2019, BALCA received the Appeal File from the CO. The Employer filed an appeal brief on March 5, 2019.

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.⁹ 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.¹⁰

The Employer bears the burden of proving that it is entitled to temporary labor certification.¹¹ The CO may only grant the Employer’s Application to admit H-2B workers for temporary non-agricultural 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.¹²

⁷ 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

⁸ 20 C.F.R. § 655.61(c).

⁹ 20 C.F.R. § 655.61.

¹⁰ 20 C.F.R. § 655.61(e).

¹¹ 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLNLN-00004, slip op. at 7 (BALCA Jan. 10, 2011); *Andy and Ed Inc., d/b/a Great Chow*, 2014-TLNLN-00040, slip op. at 2 (BALCA Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLNLN-00073, slip op. at 5 (BALCA July 28, 2009).

¹² 20 C.F.R. § 655.1(a).

Failure to Establish 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.¹³ 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.”¹⁴ Pursuant to § 113 of the 2018 Consolidated Appropriations Act, “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 CFR 214.2(h)(6)(ii)(B).” 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 alleges a peakload need for 15 night shift and 20 day shift general packaging line workers from April 1, 2019, until January 31, 2020.¹⁵ In order to establish a peakload need for temporary workers, 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 petitioner’s regular operation.

After reviewing the appeal files, I agree with the CO that the Employer has failed to establish a temporary peakload need for workers. While the Employer has established that it regularly employs permanent workers to perform the services or labor at the Perham plant, it has not established a need to supplement that permanent staff on a temporary basis due to a seasonal or short-term demand. As indicated by the CO, the record shows that the Employer’s staffing and production levels are generally consistent throughout the year. (AF-1 71-77, AF-2 71-77). The Employer states that it operates its plant year-round. (AF-1 66, AF-2 66). There is no evidence in the record to show an increased number of contracts or increased demand for the Employer’s product during a specific period or months of the year. Thus, I find there is no seasonal demand for increased workers.

The Employer argues that it has a short-term demand for additional workers in order to fulfill new contracts for \$51.6 million dollars in product in 2019. (AF-1 2-3, AF-2 2-3). Citing

¹³ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

¹⁴ 20 C.F.R. § 655.6 (a).

¹⁵ In response to the deficiency that it did not request workers for a proper temporary amount of time, the Employer altered its dates of need from April 1, 2018 through March 31, 2020 to April 1, 2019 through January 31, 2020. (AF-1 65, AF-2 65).

to *Jose Uribe Concrete Construction*, 2018-TLN-00044 (BALCA Feb. 2, 2018), the Employer argues that these additional contracts support a peakload need for workers. In *Jose Uribe Concrete Construction*, BALCA found the evidence in the record of two letters from the employer's major client's stating they had an additional need for employer's services during specified months of the year supported the employer's need for additional temporary workers due to a peakload basis. (*Id. slip op.* at 11-13). However, unlike in *Jose Uribe Concrete Construction*, where the record contained documentation from the employer's clients specifically explaining their need for employer's services, similar documentation is not present in these claims. The record here contains no correspondence from the Employer's clients or customers showing the orders they placed, or intend to place, in 2019. There is also no documentation to support the Employer's assertion that it has obtained new contracts from clients or contracts for larger quantities of product than it has in the past. The record contains a spreadsheet entitled "Lost Sales Based on Pending Opportunities," which lists five companies with a corresponding pound of product and annual sales, which totals 17,240,000 pounds of product and \$51.6 million dollars respectively. (AF-1 15, AF-2 15). The spreadsheet is undated and it is not clear from the record what these numbers represent or how they were calculated or obtained. The record also contains a 2019 production forecast, but it is again unclear what those numbers are based on, how they were calculated and whether they represent a concrete contractual need for the Employer's product. (AF-1 76-77, AF-2 76-77). Additionally, the Board has routinely rejected arguments that a large or new contract creates a need to temporarily supplement a workforce, finding that such contracts do not create a temporary need but rather are indications that an employer continues to grow its business.¹⁶

Overall, there is no evidence of the contractual production obligations that the Employer has committed to filling in 2019 and subsequently no evidence to show that the Employer is unable to meet its production demands with the permanent full-time work force they already have. Thus, I find there is insufficient evidence in the record to show that the Employer has a short-term demand for additional workers.

Failure to Justify a Need for the Number of Workers Requested

The other issue on appeal is whether the Employer has demonstrated that it has a need for 35 general packaging line workers and whether its request for those workers represents a bona fide job opportunity. 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."¹⁷ In the NODs and Denials, the CO concluded that the Employer failed to justify a need for 35 general packaging line workers and that it was unclear how the Employer determined the number of worker's requested. (AF-1 92-93, AF-2 92-93, AF-1 61-63, AF-2 61-63).

In its response to the NODs, the Employer provided a summary of the production lines, which demonstrated vacancies for 21 day shift packaging line workers and 29 night shift

¹⁶ *Herder Plumbing Inc.*, 2014-TLN-00010, PDF at 6 (BALCA Feb. 12, 2014); *Cajun Constructors, Inc.* 2010-TLN-00079, PDF at 5 (BALCA Oct. 5, 2010).

¹⁷ 20 C.F.R. § 655.11(e)(3)-(4).

production line workers. (AF-1 70, AF-2 70). After reviewing the record, I find that the Employer has not clearly explained how it determined it would need 35 workers. The Employer argued that unless it filled its production lines to full capacity, it would not be able to meet its client's demands for its products. However, there is no documentation in the record to support this statement. BALCA has held that "a bare assertion without supporting evidence is insufficient to carry the employer's burden."¹⁸ As noted above, there is no evidence of the contractual production obligations that the Employer has committed to filling in 2019 and subsequently no evidence to show that the Employer is unable to meet these demands with the permanent full-time work force they already have. Further, the Employer had not applied for workers to fill every vacancy on its production line that it claims to have and there is no evidence to suggest how it determined 15 night shift and 20 day shift production line workers would be an appropriate number of needed workers. Overall, I find that the Employer had failed to demonstrate a genuine need for the number of workers requested.

Additionally, in response to the Notices of Deficiency, the Employer stated it was in the process of partially automating its production lines, beginning in February 2019 and continuing through September 2019, which would ultimately eliminate its need for 80 production line workers by January 2020. (AF-1 67, 78-80, AF-2 67, 78-80). Essentially, the Employer is stating it has a need for a supplemental workers during the same time period that they would be undergoing a gradual reduction in work force due to the automating of its production lines. Thus, I am unable to determine how the Employer has a bona fide job opportunity for 35 temporary workers from April 1, 2019 to January 31, 2020 when they have admitted they intend to eliminate those jobs, and 45 additional production line jobs, during that same time period. Accordingly, 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).

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:

Larry A. Temin
Administrative Law Judge

¹⁸ *BMC West Corp.*, 2016-TLN-00039/40, slip op. at 5 (May 18, 2016)(citing to *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013)).