

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 12 September 2019

BALCA Case No.: 2019-TLN-00148
ETA Case No.: H-400-19184-014525

In the Matter of:

BOYD RACING, LLC
d/b/a DELTA DOWNS RACETRACK, CASINO & HOTEL
Employer.

Appearances: Emilio Martinez
Martinez and Sordo, P.A.

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

Before: Scott R. Morris
Administrative Law Judge

DECISION AND ORDER REVERSING
DETERMINATION OF DEFICIENCY

This case arises from Stratton Corporation’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B nonimmigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

² On April 29, 2015, the Department of Labor (“DOL”) 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. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

BACKGROUND

On July 3, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 54-93.³ Employer requested certification of 12 “Food Preparation Workers,” for an alleged period of seasonal need from October 1, 2019 to July 15, 2020. AF 54.

On July 12, 2019, the CO issued a Notice of Deficiency, that Employer failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a)-(b). AF 49-53. The CO noted that Employer’s submitted occupancy rates, revenue information, and food and beverage sales summary data did not show a spike in the period of alleged need from October through July. Further, the CO noted that the payroll report submitted by Employer did not specify the number of temporary workers.⁴ Since Employer did not demonstrate a seasonal need, the CO instructed Employer to submit additional information and explain how the documents support its requested dates of need. AF 52-53.

On July 25, 2019, Employer responded to the CO’s Notice of Deficiency. AF 26-48. Employer explained that it is a luxury resort and casino that runs live horseraces from October to mid-July every year, which causes an increase in guest traffic and hotel occupancy. AF 28-29. It asserted that it needed additional temporary help during this period to maintain its dining establishments, and noted that it had received similar certifications for food preparation workers from 2015 to 2019. In its response, Employer included a food and beverage summary report from January 2016 to May 2019, as well as resort revenues for 2016-2018. Employer maintained that these records showed a decrease in food sales and overall revenue in August, after its horseracing season ends. AF 29-30. Employer also submitted the payroll records of its food preparation workers from 2016 to 2019. These records showed the hours worked and salaries earned by permanent full-time domestic employees, permanent part-time domestic employees, and temporary foreign full-time employees. AF 32-35.

On July 31, 2019, the CO issued a Final Determination, again concluding that Employer had failed to substantiate a seasonal need under 20 C.F.R. § 655.6(a)-(b). AF 20-26. The CO noted that Employer’s resort revenue in August and September 2018—Employer’s alleged slow months—exceeded the revenue from October 2018, and were about the same as revenues from

the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ References to the Appeal File will be abbreviated with an “AF” followed by the page number.

⁴ The CO confusingly wrote: “the payroll report submitted by the employer specify [sic] the number of temporary workers.” AF 52. The undersigned assumes that the CO intended to write “did not specify.”

November 2018 and January 2019. Similarly, the CO noted that Employer's food and liquor sales in August and September 2018 exceeded its sales from October 2018, November 2018, and January 2019. Accordingly, the CO found that Employer's documentation did not support a finding of a seasonal period of need from October to July.⁵

On August 13, 2019, Employer appealed the CO's denial. AF 1-7. Employer repeated the arguments it made before the CO and asserted that the CO failed to view the pattern of need established by the aggregate data.

This Tribunal received the appeal file and issued a Notice of Assignment and Order for Expedited Briefing Schedule on August 26, 2019. The CO has not filed a brief.

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

DISCUSSION

A. Legal Standard

An employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need.⁶ Temporary service or labor "refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A). An employer establishes a "peakload need" if it shows 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

⁵ The CO additionally noted that Employer's payroll report showed disparate employment of temporary workers from years 2016-17 and 2018, which Employer failed to explain.

⁶ Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

To qualify as 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(h)(6)(ii)(B)(2); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer only made unsupported assertions about how weather conditions and contract patterns cause job openings to fluctuate); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *Nature’s Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012); *Caballero Contracting & Consulting*, 2009-TLN-00015 (Apr. 9, 2009); *Marco, LLC*, 2009-TLN-0043 (Apr. 9, 2009); *KBR*, 2016-TLN-00026 (Apr. 6, 2016).

B. Analysis

As explained above, the CO’s denial rested on a finding that Employer failed to substantiate its alleged peakload season from October 1, 2019 to July 15, 2020. Upon review of the Appeal File and Employer’s request for review, this Tribunal finds that the CO’s denial of Employer’s application was arbitrary and capricious. Accordingly, for the reasons that follow, the Tribunal reverses the CO’s denial of Employer’s application.

1. Temporary Need

The CO’s denial rested upon a conclusion that Employer did not demonstrate the existence of a seasonal need for temporary workers. In particular, the CO opined that Employer’s payroll records, food and liquor sales, and resort revenue history did not demonstrate a seasonal need during Employer’s requested dates of need: October 1, 2019 to July 15, 2020. The undersigned disagrees.

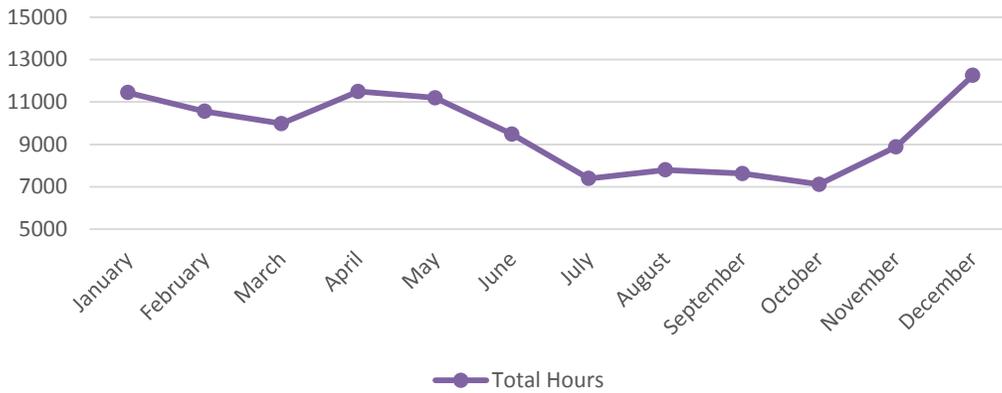
First, Employer has clearly demonstrated the existence of a recurring seasonal event: its horseracing season. AF 28-29, 79-84. At least since 2014, Employer has hosted thoroughbred and quarter horse racing seasons, which last from October to July. Thus, the evidence establishes a recurring “event or pattern,” which may justify the need for additional seasonal labor. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

Second, Employer’s data show that this seasonal event coincides with increased food and beverage sales and greater use of food preparation labor.⁷ The following charts demonstrate these trends:⁸

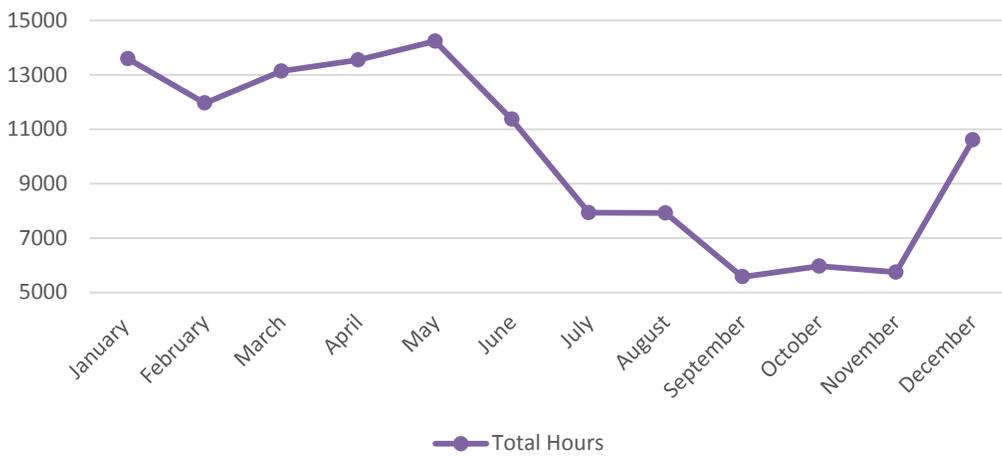
⁷ For purposes of determining a seasonal need for food preparation labor—rather than labor generally—the undersigned finds total resort revenue to be minimally probative.

⁸ Total food preparation employee hours were calculated by adding the regular and overtime hours of all of Employer’s food preparation workers. AF 32. Food and Beverage sales figures are found at AF 78.

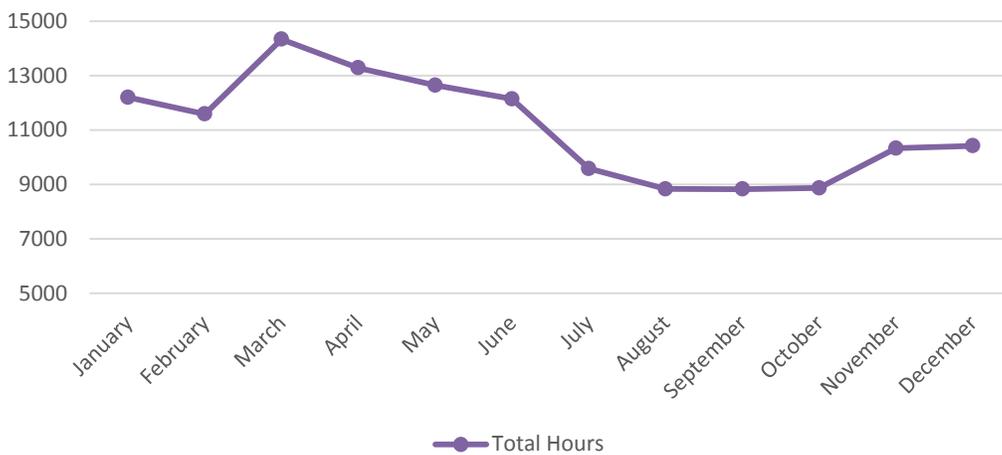
2016 Food Preparation Employee Hours



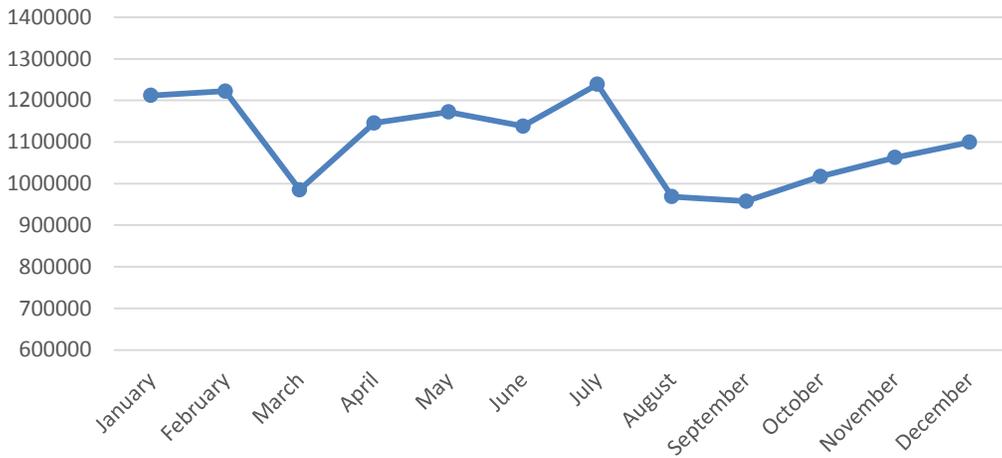
2017 Food Preparation Employee Hours



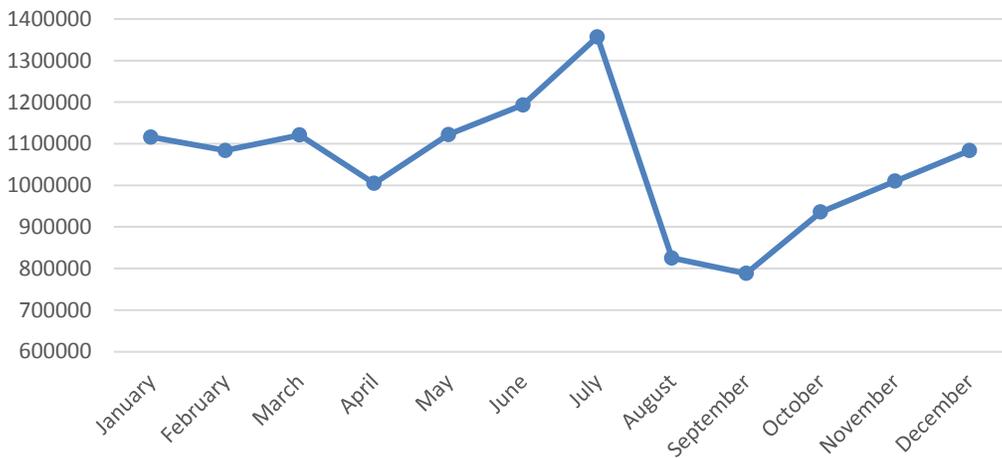
2018 Food Preparation Employee Hours



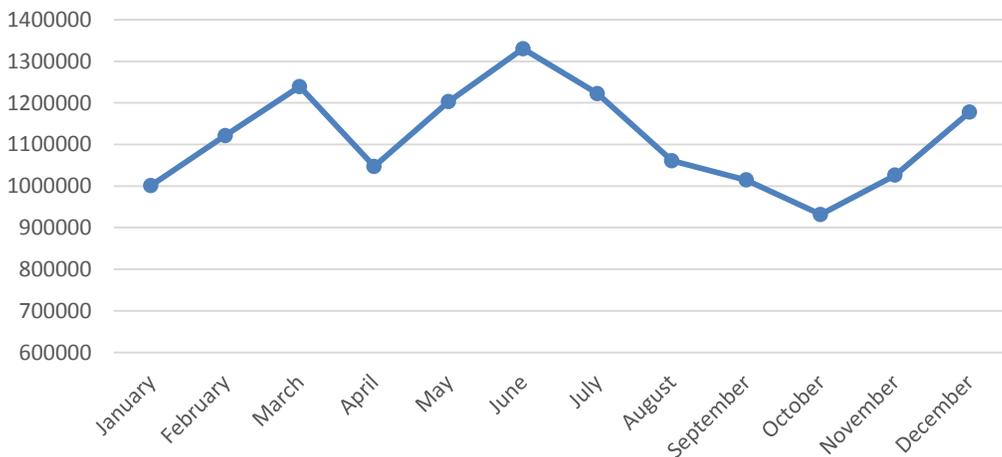
2016 Food and Beverage Sales



2017 Food and Beverage Sales



2018 Food and Beverage Sales



Employer's total food preparation worker hours—arguably the best metric for determining seasonal labor needs—show a clear dip in the fall in each year from 2016 to 2018. Similarly, Employer's food and beverage sales also show a trend of reduced sales in the fall season for these years. While 2017 demonstrates the strongest seasonal drop, both 2016 and 2018 also show reduced food and beverage sales in the fall. Accordingly, the undersigned finds that Employer has established a seasonal need for food preparation workers from approximately October to July 15.

Though the CO accepted the existence of Employer's recurring seasonal event, the CO did not believe that Employer had demonstrated a need for additional workers during this season. In particular, the CO noted that the overall resort revenue and food and beverage sales for 2018 showed that Employer's alleged slow months—August and September—were actually similar to revenue and sales during the months of seasonal need alleged by Employer (October, November, and January). AF 24-25.

However, as noted by footnote above, the undersigned finds Employer's total resort revenue to be minimally probative in a determination of Employer's specific need for food preparation workers. Thus, the CO erred by relying more on this metric than on Employer's prior use of food preparation labor. In addition, the undersigned finds that the CO's focus on 2018 misses the forest for the trees. As shown by the graphs above, Employer's data from 2016 to 2018 show a recurring pattern of increased seasonal need for food preparation workers starting sometime in the fall and persisting until about June or July. The fact that Employer's business in October and November of 2018 was a bit slower relative to other years does not displace the general pattern of seasonal need that Employer's historical data reveal.⁹

For these reasons, the undersigned finds the CO's analysis of temporary need under 20 C.F.R. § 655.6(a)-(b) to be arbitrary and capricious. Employer's documentation justifies its assertion of a seasonal need for temporary food preparation workers from approximately October to July 15.

⁹ The CO also noted that Employer's payroll records show that Employer used no temporary workers in July, August, September, and October of 2016 and 2017, but in 2018 used no temporary workers only in August and September. AF 25. The CO noted that Employer did not explain this difference. However, Employer is correct that its documentation shows that it did employ temporary workers during all of these periods (*see* AF 77), and it appears that the CO confused *temporary* workers with *foreign* workers. *Compare* AF 32 *with* AF 77. But even accounting for the CO's semantic error, the undersigned perceives no additional ground to deny Employer's application. The fact that Employer used foreign labor in more months in 2018 than it did in 2016 and 2017 does not contradict its asserted period of seasonal need.

CONCLUSION AND ORDER

For the reasons explained above, the CO's denial of Employer's application under 20 C.F.R. § 655.6(a)-(b) was arbitrary and capricious. The CO's denial is therefore **REVERSED**, and this matter is **REMANDED** to the CO for additional processing.

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey