



**Issue Date: 20 November 2018**

**BALCA Case No:** 2019TLN00013  
**ETA Case No.:** H-400-18224-695332

*In the Matter of:*

**CHAMA E FOGO LLC**  
**d/b/a FLAME & FIRE**  
**BRAZILIAN STEAKHOUSE LLC.<sup>1</sup>**  
*Employer*

**Certifying Officer:** Leslie Abella  
Chicago National Processing Center

**Before:** Peter B. Silvain, Jr.  
Administrative Law Judge

### **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant a request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter by Chama e Fogo LLC, doing business as Flame & Fire Brazilian Steakhouse LLC (“the Employer”).<sup>2</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.<sup>3</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in

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<sup>1</sup> It appears that the correct legal name is actually Chamas E Fogo LLC d/b/a Flame & Fire Churrascaria Brazilian Steakhouse LLC. (AF 35).

<sup>2</sup> 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). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.

<sup>3</sup> 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)(B), pursuant to the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

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

On August 17, 2018, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”). (AF 121-140.)<sup>4</sup> The Employer requested certification for 10 “Gauchos’ Meat Servers/Carvers”<sup>5</sup> from November 5, 2018 until September 2, 2019, based on an alleged seasonal need for workers during that period. (AF 121).

On August 27, 2018, the CO issued a Notice of Deficiency (“NOD”), which outlined six deficiencies in the Employer’s Application. (AF 110-120). The CO gave the Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD, or request administrative review before BALCA. (AF 111). Thereafter, the Employer responded to the NOD with a request to amend its application from a seasonal need to a peak load need along with supporting documentation. (AF 42-109).

On October 11, 2018, the CO issued a Final Determination denying the Employer’s Application. (AF 12-31). In support of its denial, the CO concluded that while the Employer resolved three of the previous six deficiencies, three deficiencies remained. (AF 12-31). Specifically, the CO found that the Employer failed to (1) establish the job opportunity as temporary in nature under 20 C.F.R. § 655.6(a) and (b); (2) establish temporary need for the number of workers requested under 20 C.F.R. § 655.11(e)(3) and (4); and (3) submit a complete and accurate ETA Form 9142 pursuant to 20 C.F.R. § 655.15(a). (AF 14-21). For all of these reasons, the CO denied the Employer’s Application. (*Id.*).

By letter filed on October 26, 2018, the Employer requested administrative review of the CO’s Final Determination (“Employer’s Appeal”). (AF 1-11). On November 6, 2018, the Office of Administrative Law Judges received the Appeal File from the CO. On November 8, 2018, the undersigned 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). The Employer filed a brief on November 19, 2018 relaying the history and need for temporary labor in its Brazilian Churrascaria restaurant.<sup>6</sup>

### 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 of the CO’s determination. 20 C.F.R.

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<sup>4</sup> “AF” refers to the Appeal File.

<sup>5</sup> SOC (O\*Net/OES) occupation code 35-3031 and occupation title “Waiters and Waitresses.” (AF 121.)

<sup>6</sup> The undersigned notes that while he does not doubt the motives and intentions of the Employer in filing its application for temporary certification, he is bound by the applicable statutes and regulations governing its process.

§ 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).

#### The Employer Failed to Establish a Temporary Need for Ten H-2B 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, peak load, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. §655.11(a)(3). 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 originally alleged a seasonal need for 10 Gauchos Meat Servers/Carver from November 5, 2018 to September 2, 2019. (AF 121). On its H-2B Application, the Employer included provided the following explanation as its statement of temporary need:

The temporary need for the positions is due to the fact that it is a Brazilian Style Steakhouse (Churrascaria) and although employer is able to find local waiters and waitresses the employer is unable to find local waiters and waitresses with "Gaucho" meat server/carver experience needed in order to handle busy times and season for employer. The positions are for the waiter/waitress position, the only difference is that that they will be serving the meats from skewers/meat swords to the customers along with other foods and drinks and for that they need to have a certain experience and understanding of the meats and how to carve/cut at the table for customers which is different than your normal steakhouse or mainstream restaurants serving steaks and other meats. In the past the employer has hired

local labor and trained them with specific types of meats and how they should be cut/carved but that is too time consuming and the need is urgent as we have employees of our permanent staff come and go and it is very difficult to find local labor with the required experience which is why we are applying to temporarily bring in Brazilian workers with a background in.

(AF 121).

Following the CO's NOD, the Employer requested to amend their application from a seasonal need to a peak load need. (AF 48). As supporting evidence, the Employer also submitted chart with breakdowns of its 2016 and 2017 payroll and monthly gross sales of food and beverages. (AF 54). While the underlying data supporting the payroll breakdown was submitted, the data for the monthly gross sales of food and beverages was not submitted. In its response, the Employer wrote that while its "peak-load is in reality from October to May of every year," it is asking for consideration of the period from "November to May" because of regulatory deadlines, explaining that its "operation is year round with a well defined peak season between the months of November and May every year." (AF 50).

As an initial matter, I note that the peak load season claimed by the Employer, November to May, is different from the dates requested on its application, November 5, 2018 to September 2, 2019. (AF 121). However, the Employer never requested to amend its end date of September 2, despite referring to their peak-season as "November to May." Thus, without even looking at the supporting documentation, I find that the requested dates are not representative of the peak load season and, therefore, constitute grounds for denial. Further, by requesting all but two months of the year and stating that "the steakhouse is busy year round with it being busier in summer time and fall/winter time but is busy as well during other times of the year especially on holidays," the Employer seems to actually have a year-round or permanent, rather than a temporary need for workers. As such, the Employer's Statement of Need for Gauchos meat servers/carvers does not support a finding that the period of need "will end in the near, definable future," as mandated by 8 C.F.R. § 214.2(h)(6)(ii)(B). Moreover, as the Employer has not alleged its temporary need in the form of a one-time occurrence, the requested period of November 5, 2018 to September 2, 2019 also exceeds the 9 months permitted by 20 C.F.R. § 655.6(b).

Additionally, even considering the supporting documentation, I find that the Employer has failed to establish a peak load need. In response to the NOD, the Employer submitted charts summarizing its gross monthly payroll along with its gross monthly sales for food and beverages for the past two years. (AF 54). According to the Employer, the "seasonality of [its] operation is clearly established by the level of sales during the above indicated periods." (AF 50). In order to establish a peak load 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." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *see also D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to

sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peak load, temporary need).

In reviewing the documentation submitted by the Employer, I note that the payroll information does not differentiate between permanent and temporary workers. Therefore, I have no way of ascertaining whether the Employer is using temporary workers to “supplement” its permanent workforce as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Moreover, the gross amount of monthly hours worked by the Employer’s Gauchos meat carvers/servers for 2016 and 2017 reveals no “seasonal or short-term demand” in either the November 5 to September 2 period requested on the application or the November to May period referred to in the NOD response. On the contrary, the payroll hours show that the month with the most hours worked in 2017 was the “non-peak” month of September. (AF 54). Further, there appears to be no identifiable pattern of peak need between years 2016 and 2017. For example, the first month of need, November, was one of the months with the most hours worked in 2016 but one of the months with the lowest hours worked in 2017. Accordingly, the payroll hours do not support the Employer’s allegation of peak load need.

Similarly, the summarized charts of gross monthly sales for food and beverages the Employer submitted also fail to reveal a “seasonal or short-term demand” for the period of November 5 to September 2 or even November to May. According to these charts, the non-peak month of September was one of the highest grossing months in both 2016 and 2017 while the start peak month of November was one of the lowest grossing months for both years. There also appears to be little correlation between the two years with some of the months (April, January, March) being part of the highest grossing months in 2016 and then part of the lowest grossing months in 2017. Thus, despite the Employer’s contention, there is no “well defined peak season” evinced from the documentation submitted.

Based on the evidence of record, and for the foregoing reasons, I find that the Employer has not carried its burden to show that it has a seasonal or short-term demand for temporary workers to supplement its permanent workers to work as Gauchos meat carvers/servers. Therefore, I find that the CO properly denied the Employer’s Application and that the additional reasons for the CO’s denial of certification need not be addressed.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision denying the Employer's Application for Temporary Employment Certification be, and hereby is, **AFFIRMED**.

For the Board:

Peter B. Silvain, Jr.  
Administrative Law Judge