



Issue Date: 29 August 2019

BALCA Case No.: 2019-TLN-00143
ETA Case No.: H-400-19184-014438

In the Matter of:

DKM, INC., DBA COPPERHEAD GRILLE,
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Thomas P. Bortnyk, Esquire
Vice President and General Counsel, MAS Labor H2B, LLC
Lovingson, Virginia
For the Employer

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

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A.¹ 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 Department of Homeland Security. *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).²

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (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 the IFR apply to applications

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to DKM Incorporated, dba Copperhead Grille’s (“the Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of the temporary labor certification under the H-2B non-immigrant program. For the following reasons, the Board affirms the CO’s denial of certification.

STATEMENT OF THE CASE

On July 3, 2019, the Employer applied for temporary labor certification through the H-2B program to fill four positions for “Food Preparation Workers” for the period of October 1, 2019 through June 30, 2020.³ (AF 41-46). The Employer stated the nature of the temporary need for workers was a peakload need. (AF 41).

On July 17, 2019, the CO issued a Notice of Deficiency identifying two deficiencies regarding 20 C.F.R. § 655.6(a)-(b). (AF 34-40). First, the CO notified the Employer that it failed to show the job opportunity was temporary in nature. (AF 38). On this basis, the CO stated that in order for Employer to establish a peakload need, the Employer must show that it regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand, and the temporary additions to staff will not become part of the employer’s regular operation. *Id.* However, the CO noted that Section B, Item 9 of the Employer’s ETA Form 9142 indicates the following:

DKM, Inc. is a family owned restaurant located in Bethlehem, PA. Our restaurant is a place where handcrafted recipes and sports merge to form The Ultimate Sports Dining Experience. The number of our patrons have been increasing seasonally, requiring us to try to supplement our permanent staff. Restaurants in the area experience high peakload-based demand for labor in order to handle the work from early fall through the subsequent academic season. DKM Inc. has been in business since 2002, and this is the business cycle we have come to rely upon as it predictably recurs every year.

Id. Notwithstanding the foregoing, the CO found Employer did not sufficiently demonstrate how its need meets the regulatory standard. *Id.* The CO concluded Employer did not provide adequate documentation to support its explanation of a temporary peak load or support its explanation as to what events cause the seasonal or short-term demand that leads to its peakload need. *Id.*

Consequently, in the Notice of Deficiency the CO requested additional information from the Employer, including the following: (1) a schedule of operations through the year; (2) summarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings

“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 In this decision, AF is an abbreviation for “Appeal File.”

received; (3) summarized monthly food/beverage gross sales reports for a minimum of two previous calendar years for the Employer's business location at Bethlehem, Pennsylvania; and (4) any other evidence or documentation that similarly serves to justify the dates of need being requested for certification. (AF 38-39).

Secondly, in the Notice of Deficiency the CO also found the Employer failed to establish temporary need for the number of workers requested pursuant to 20 C.F.R. § 655.11(e)(3) and (4). (AF 39). The CO stated the Employer must establish that the number of worker positions and periods of need are justified, and that the request represents a bona fide job opportunity. *Id.* However, the CO found the Employer did not sufficiently demonstrate the aforementioned requirement. *Id.* More specifically, the CO stated the Employer did not show how it determined its need for "four Food Preparation Workers" during the requested period of need. *Id.* As a result, the CO requested further documentation from the Employer, which included: (1) an explanation with supporting documentation of why the Employer is requesting four Food Preparation Workers for Bethlehem, Pennsylvania during the dates of need requested; (2) applicable documentation in support of its need such as contracts, letters of intent, etc.; (3) summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received; (4) and any other documentation that similarly serves to justify the number of workers requested. *Id.*

On July 24, 2019, the Employer responded to the CO's Notice of Deficiency, stating that its peakload need is driven by its proximity to a large student population, and its reliance upon seasonal sports and related events because it is a "sports bar." (AF 24). Thus, the Employer averred that it has an increased need for workers from October to June, in relation to when students arrive in the fall for school and depart in the summer months. *Id.* Employer stated that "Paws-Bucks" sales from students, its primary customer demographics, show that the sales of Paws-Bucks dramatically increase in the fall when classes resume and decline in the summer months after school graduations.⁴ (AF 25). In addition, Employer averred that its business volume correlates with various seasonal sports such as the NCAA and NFL seasons that run from September through February. *Id.* Further, the Employer stated it also offers catering services and has two large banquet rooms that host private events, which increase in the fall and winter months due to student events, athletic events, and holiday parties.⁵ *Id.* Employer noted that while its permanent Food Preparation Workers perform the same activities year round, additional temporary workers are needed to supplement its permanent staff during the peak operating months because the permanent workforce cannot keep pace with growing demands. *Id.*

⁴ The Employer explained that "Paws-Bucks" is a system that allows local students to pre-pay into an account for meal plans, in which Employer participates so that students can dine at its restaurant using Paws-Bucks in lieu of cash or credit cards. (AF 25). The Employer provided a chart showing its Paws-Bucks sales from January through December (for an unknown year). (AF 27).

⁵ The Employer provided charts and/or information about upcoming fall and winter reservations, including major holiday bookings, and catering events. (AF 27-32).

Lastly, with respect to demonstrating that the number of workers requested on Employer’s application represent bona fide job opportunities, Employer responded that it is “nearing” completion of a new outdoor patio that will add approximately 90 additional seats amounting to an estimated \$318,000.00 in additional revenue. (AF 26). Therefore, based on its current staffing allocation relative to the number of seats, the Employer projects a need for an additional four Food Preparation Workers. *Id.* The Employer avers that 90 additional seats will require another “prep position,” two “dinner shift positions,” and one “mid-shift position,” and represents an additional 228 production hours per week. *Id.*

Upon examining the additional information provided by the Employer in response to the Notice of Deficiency, the CO determined on July 29, 2019, that although Employer provided copies of invoices, 2018-2019 payroll reports, sales report, and an upcoming events list, Employer failed to show it has a peakload need. (AF 7-14). The CO noted that the Employer averred it needs temporary workers due to an increase in the number of patrons during the school season (which diminishes in the summer months), as well as its catering and banquet hall. (AF 11). The CO provided a chart that summarized information supplied by the Employer in support of its peakload need, which is reflected below. *Id.*

Month	# of Workers 2018	# of Workers 2019	Paws-Buck Sales	Major Reservations	Catering-Banquet Contracts 2018	Catering-Banquet Contracts 2019
January	14	15	\$3,285.44	0	0	0
February	14	14	\$4,437.24	0	0	0
March	13	15	\$3,903.46	0	0	1
April	16	17	\$3,363.12	0	0	1
May	13	18	\$1,146.40	0	0	0
June	14	18	\$0.00	0	0	0
July	14	15	\$149.64	0	1	0
August	17		\$1,747.51	0	0	0
September	16		\$4,914.25	0	0	0
October	15		\$3,888.69	10	0	0
November	14		\$3,172.93	7	0	0
December	14		\$1,805.91	5	0	0

The CO noted that, according to the Employer, its period of need from October to June is due to an increase in sales and banquet reservations. (AF 12). Nevertheless, the CO found the aforementioned number of reservations and catering contracts do not warrant a peakload need during the time requested. *Id.* The CO noted the Employer has zero major reservations from January through June, and only a total of 22 reservations from October through December. *Id.* Moreover, the CO stated the Employer only provided five invoices for catering events, all of which are past dated events, or include events (in July 2019) that are outside the Employer’s “peak” season. *Id.* Lastly, the CO noted that Employer’s “off-peak month” of September shows the highest sales volume (in Paws-Bucks) than any other alleged “peak” months. *Id.* Therefore, the CO determined Employer did not sufficiently demonstrate a peakload need. *Id.*

Additionally, the CO stated the Employer averred it required four Food Preparation Workers because it created a new outdoor patio area and estimated an increase in revenue. (AF 13). However, the CO found the Employer did not provide any documentation to show the progress of, or completion date of the patio, and the Employer's "contracts" do not warrant the need for additional workers during the time period requested. (AF 14). Furthermore, the CO noted that during the month of "June 2019," eighteen of the Employer's workers held the position of Food Preparation Workers, which is an "off-peak month," yet the Employer has a higher number of workers in June than the requested period of need.⁶ *Id.* Thus, the CO concluded the Employer did not overcome its deficiencies. *Id.*

On July 30, 2019, the Employer submitted a request for administrative review to BALCA appealing the CO's Final Determination ("Denial") in the above-captioned H-2B matter. (AF 1-14). BALCA docketed Employer's appeal on July 30, 2019. The case was assigned to the undersigned on August 2, 2019, and a Notice of Assignment and Expedited Briefing Schedule was issued on August 5, 2019, notifying the parties that BALCA docketed the above-captioned appeal and providing the parties an opportunity to submit briefs on an expedited basis. The undersigned received the Appeal File on August 16, 2019. Neither party offered briefs.

In support of its request for review before BALCA, the Employer argues that, pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), it has shown in all of its documentation that: (1) it regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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) the temporary additions to staff will not become a part of the petitioner's regular operations. *Id.* Specifically, the Employer notes that in the Denial the CO stated the Employer's peakload need is due to an increase in the number of patrons during the school year, but that "the number of reservations nor [sic] the catering contracts warrant a peakload need during the time period requested." Further, according to the Employer, the CO supported her conclusion by citing to the fact that the Employer "has zero major reservations from January through June and only a total of 22 reservations from October through December." On this basis, the Employer argues the CO arbitrarily and capriciously imposed an impossible evidentiary standard because it is not common within the restaurant industry to book reservations "a half a year" in advance as the CO states. Thus, Employer asserts it is entirely unreasonable for the CO to balk at the lack of reservations in January when the present application is being adjudicated in July. The Employer avers that nowhere did it claim the reservations identified were the total amount anticipated for the year; any reasonable, objective observer would understand that these bookings were the reservations to date, and as a result, that more reservations are expected should be implied.

Consequently, the Employer contends it has fully complied with all H-2B regulatory requirements, and it has satisfied the burden of proof with respect to its peakload need.

⁶ The CO noted that June 2019 is an "off-peak" month, yet the Employer has employed a higher number of workers, that being, eighteen Food Preparation Workers, than during other periods of the requested time of need. However, the Employer stated that it required temporary workers from October 1, 2019 through **June 30, 2020**. (AF 41). Thus, the month of June is a month during which the Employer has a "peakload" need. Nevertheless, as will be discussed below, the CO's error concerning June being an "off-peak" month does not demonstrate that the CO arbitrarily or capriciously concluded the Employer failed to demonstrate its peakload need for four "Food Preparation Workers."

Therefore, the Employer asserts the CO's Denial was arbitrary, capricious, an abuse of discretion, and is otherwise contrary to law. Accordingly, the Employer requests that the CO's determination should be reversed, and that the CO be directed to grant certification in the instant case.

SCOPE & STANDARD OF REVIEW

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. 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). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), “[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).”

After considering evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; or (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e). BALCA may overturn a CO’s decision if it finds the decision is arbitrary or capricious. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011); *see also Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016). Therefore, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.* A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.*

DISCUSSION

To obtain certification under the H-2B program, an applicant 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. *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). 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 Tampa Ship*, 2009-TLN-00044, slip op. at 5 (May 8, 2009).

To establish a peakload need, 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 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 peakload, temporary need).

In the present matter, the Employer attempted to establish a “peakload” need for the period of October 1, 2019 through June 30, 2020. Nevertheless, I find the Employer has failed to do so. While the Employer provided adequate documentation to show it regularly employs permanent Food Preparation Workers, I find the Employer failed to provide sufficient evidence demonstrating it needs to supplement its permanent staff on a temporary basis due to a peakload need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

As requested by the CO, the Employer provided monthly payroll reports for two previous calendar years concerning its full-time permanent employees in the requested occupation of Food Preparation Workers. The Employer also provided its Paws-Bucks sales (for an unknown date) from January through December, as well as a listing of 22 major reservations for October through December (presumably for 2019), and five contracts dating from November 30, 2018 through July 16, 2019. However, I find the information provided does not support a finding that the Employer indeed has a “peakload” need. First, the Employer’s Paws-Bucks sales show an increase in revenue during the Employer’s stated period of need, but the sales are nominal at best in showing the Employer has need of four additional Food Preparation Workers, with revenue not even exceeding \$5,000.00 in any given month.⁷ Further, the Employer was directed by the CO to provide summarized monthly food/beverage gross sales for a minimum of two previous calendar years, but it failed to provide any such information. Therefore, it is not possible to determine according to the Employer’s gross sales, whether its sales support a peakload need for temporary workers. In addition, the Employer only provided 22 major reservations for the months of October through December. The Employer argues that it cannot provide documentation for any reservations beyond these months because it is not common for restaurant

⁷ Significantly, the Employer showed it already consistently employs thirteen to eighteen permanent Food Preparation Workers, in addition to the requested four temporary workers. (AF 33).

customers to book reservations “a half a year” in advance. Nevertheless, the Employer could have provided reservations from previous years to show that they do in fact experience a greater influx of reservations from October through June, during its stated peakload need. Moreover, the Employer only provided five catering-banquet contracts dated November 30, 2018 (for \$185.50); December 13, 2018 (for \$318.00); March 29, 2019 (\$1144.69); April 24, 2019 (for \$747.30); and July 16, 2019 (showing a \$200.00 deposit), in support of its peakload need. As such, I find this is also inadequate in demonstrating a peakload need for four temporary Food Preparation Workers from October 1, 2019 through June 30, 2020, given the number of permanent workers already employed.

Lastly, I also find the Employer’s assertion that the expansion of its business to include a patio creates a peakload need, to be unpersuasive. Employer averred the patio was “near” completion and it would generate \$318,000.00 in additional revenue. Nevertheless, the Employer provided no documentation to show progress of the construction of the patio or when it was in fact going to be completed. Furthermore, while the Employer averred it would generate an added \$318,000.00 in sales, the Employer has provided no revenue information, other than its Paws-Bucks to show this is an accurate projection of sales to warrant four temporary Food Preparation Workers.

Based on the foregoing discussion, I find and conclude the CO properly denied the Employer’s H-2B application. It is the Employer’s burden to demonstrate eligibility for the H-2B program, but the Employer failed to demonstrate its temporary peak-load need for four “Food Preparation Workers” for the period of October 1, 2019 through June 30, 2020. Therefore, I do not find the CO’s decision is arbitrary or capricious. *See Judulang, supra* at 53. Thus, I find and conclude the denial of the Employer’s H-2B certification must be **AFFIRMED**.

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

ORDERED this 29th day of August, 2019, at Covington, Louisiana.

For the Board:

LEE J. ROMERO, JR.
Administrative Law Judge