



**Issue Date: 23 November 2018**

BALCA Case No.: 2019-TLN-00009

ETA Case No.: H-400-18206-263676

*In the Matter of:*

ROMULO ROSAS  
d/b/a ROSAS VINE COMPANY,  
*Employer.*

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Rosas Vine Company'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 non-immigrant 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this 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. § 655.3, an employment may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.61(a). For the reasons set forth below, the CO's denial of temporary certification is affirmed.

**Statement of the Case**

On July 30, 2018, Employer filed an H-2B application for Temporary Employment Certification for 17 "Craft Artists" from October 26, 2018 to July 24, 2019. (AF 13). The CO

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<sup>1</sup> 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).

<sup>2</sup> 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. 24,024 et seq. (Apr. 29, 2015). The rules provided in 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.

issued a Notice of Deficiency on August 8, 2018, identifying six deficiencies in the original application and requesting additional information. (AF 386-96). On August 22, 2018, Employer filed its first response to the Notice of Deficiency via email, but attached the wrong documents to the filing. (AF 377-85). On September 13, 2018, Employer filed its second response to the Notice of Deficiency, acknowledging its mistake and attaching the correct documents. (AF 204-376). The documents included purchasing reports, invoices, payroll summaries, payroll tax statements, payroll journals, letters of intent, and an amended job order. (AF 226-376).

On October 22, 2018, the CO issued a Final Determination denying temporary employment certification, concluding Employer's application and supporting documentation failed to establish the job opportunity is temporary in nature and that it failed to support a need for 17 workers during the requested periods. The CO questioned why Employer needs Craft Artists to fashion "holiday wreaths" in July, and why the Employer justifies a cut-off date of late July based on hot weather, when the climate of Texarkana, Texas reaches an average of 90 degrees more than two months earlier, in mid-May. (AF 194-95). The CO furthermore could not ascertain how Employer reached the conclusion it needed 17 workers. (AF 197).

With respect to both deficiencies, Employer was instructed to submit summarized payroll reports for a minimum of one previous calendar year that identified for each month and separately for full-time permanent and temporary employment for Craft Artists, the total number of workers or staff employed, total hours worked, and total earnings received. (AF 195, 196). Although Employer submitted payroll records, the CO determined that they were deficient. The CO stated that Employer "submitted 174 pages of raw data that included un-summarized payroll documentation that did not cover all of the months within the employer's period of intended employment." (AF 195). Specifically, the payroll reports from April 2018 through July 2018 were incomplete and only showed a total of 4 workers. (AF 197) The payroll reports from January 2017 through August 2017 were not summarized, and they demonstrated that Employer employed a total of 18 workers of which only 1 worked full-time hours while the others worked less than full-time hours or no hours at all. *Id.*

On November 1, 2018, Employer filed a request for administrative review before BALCA. (AF 1-10). With respect to the first deficiency, Employer argues that its response and attached documents prove Employer's business is tied to the growing season of the Kudzu vine. (AF 3-7). Employer argues that the CO was too focused on the fact Employer's makes "holiday wreaths," and this led the CO to question why Employer needs Craft Artists in July, well beyond the "holiday season." (AF 4). Employer argues the evidence shows that it creates other crafts, such as Easter baskets and Valentine's Day baskets, out of the Kudzu vine, therefore the CO was incorrect in trying to tie Employer's seasonal need to the holiday season. *Id.* Employer furthermore argues that the CO focused too much on heat as the sole reason for setting July as the cutoff date. (AF 5-6) Rather, Employer states that heat was only one of multiple conditions that make harvesting the Kudzu vine more difficult. *Id.*

With respect to the second deficiency, Employer argues that it has proven its need for 17 workers based on past business practices. (AF 7-9). Employer states "[t]here is no statutory or regulatory formula to determine the number of temporary workers." (AF 7). Employer states it arrived at that number because "[t]he owner, Romulo Rosas, assessed the viability of his

company, reviewed purchase orders, and requests for the upcoming year to properly assess the orders and the number of personnel needed to fulfill such orders as any other company owner or manager would do.” (AF 8). Employer states it “submitted payroll records for the last 4 temporary seasons that includes every worker that has ever been sponsored for the H-2B program by Rosas Vine Company,” and points out it “has never had any issues with the type of payroll records that were previously submitted for H-2B certifications.” *Id.* Given the fact that the statute and regulations have not changed, Employer posits the “only explanation is that DOL has mischaracterized the facts and the applicable law.” *Id.*

### **Legal Analysis**

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination. 20 C.F.R. § 655.61(a). A CO may only grant an employer’s H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification and the employment of H-2B workers will not adversely affect wages and working conditions of American workers. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. § 655.1(a). The employer has the burden of proving entitlement to temporary labor certification. 8 U.S.C. § 1361; *see also M.A.G. Irrigation, Inc.*, 2017-TLN-00033, slip op. at 4 (Apr. 25, 2017).

To meet its burden, the employer “must establish that its need for non-agricultural services or labor is temporary.” 20 C.F.R. § 655.6(a). The employer’s need is temporary if the application demonstrates a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by the Department of Homeland Security. 20 C.F.R. § 655.6(b). Under the Department of Homeland Security’s regulations, to prove a “seasonal need,” an 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). The employer must also prove the “number of worker positions ... [is] justified.” 20 C.F.R. § 655.11(e)(3).

In this case, the CO denied Employer’s application for temporary labor certification for failure to prove a temporary need and for failure to prove the number of workers it requested was justified.

### **Temporary Need**

Employer argues that the CO focused too much on the fact Employer manufactures holiday wreaths, and this led the CO to question why Employer needs Craft Artists to make holiday wreaths in July, outside of the holiday season. Employer may have a point; its response to the Notice of Deficiency generally shows that its business is tied to the growing season of the Kudzu vine. Employer’s response does not suggest that Employer’s need for temporary workers is tied to the winter holiday season. Employer’s response indicates it also creates other crafts out of the Kudzu vine, such as Valentine’s Day and Easter baskets; these holidays certainly fall outside the winter holiday season.

In the Notice of Deficiency, though, the CO instructed Employer to submit summarized payroll reports for a minimum of one previous calendar year that identified for each month and

separately for full-time permanent and temporary employment for Craft Artists, the total number of workers or staff employed, total hours worked, and total earnings received. (AF 390). Employer inexplicably failed to follow that instruction whatsoever. First, the payroll documents consisted mostly of un-summarized raw data. Second, the payroll summaries and journals did not cover the previous calendar year.<sup>3</sup> And third, the payroll summaries and journals did not include any information about its full-time employees, let alone distinguish between full-time and temporary employees or provide the total number of workers employed, total hours worked, and total earnings received. Accordingly, the CO's determination that Employer failed to establish its need was temporary is affirmed.

### Number of Workers

Employer correctly points out that the regulations do not provide a formula for calculating the number of workers an employer needs. However, its argument, that Mr. Rosas determined he needed 17 temporary workers from assessing the viability of his company, reviewing purchase orders, and requests for the upcoming year, does not stand up to scrutiny. Employer essentially argues that it satisfies its burden of proof by offering an estimate of the number of temporary workers it needs. This cannot be true. If employers were permitted to do so, theoretically, there would be no limit on the number of temporary workers a business could hire, and the program would likely have a detrimental effect on the wages and working conditions of American workers. The Department of Labor requires employers to explain its calculation using objective evidence. In the Notice of Deficiency, the CO instructed Employer to submit summarized payroll reports for a minimum of one previous calendar year that identified for each month and separately for full-time permanent and temporary employment for Craft Artists, the total number of workers or staff employed, total hours worked, and total earnings received. (AF 391).

Employer objects that in previous H-2B applications, the Department of Labor has never had a problem with the types of payroll documents it submitted, and posits that the "*only explanation* is the DOL mischaracterized the facts and applicable law." Employer is simply wrong. The CO did not mischaracterize either the facts or the law. As discussed above, Employer completely disregarded the CO's requests for summarized payroll reports with specific information. Employer failed to provide summarized payroll reports. Employer failed to provide payroll data for the previous calendar year. Employer failed to distinguish between full-time and temporary employees. And Employer failed to provide the total number of workers employed, total hours worked, and total earnings received. Accordingly, the CO's determination that Employer failed to establish its need for 17 workers is affirmed.

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<sup>3</sup> The payroll summaries covered the following periods: April – July 2018 (AF 296-97); January 1, 2017 – August 22, 2017 (AF 311-20); May 8, 2015 (AF 350-52); May 22, 2015 (AF 353-56); May 29, 2015 (AF 357-60); June 5, 2015 (AF 361-64); June 12, 2015 (AF 365-67).

The payroll journals covered the following periods: February 13, 2015 (AF 321-23); February 20, 2015 (AF 324-26); March 12, 2015 (AF 327-29); March 20, 2015 (AF 330-32); March 27, 2015 (AF 333-35); April 3, 2015-April 6, 2015 (AF 336-38); April 10, 2015 (AF 339-41); April 23, 2015 (AF 342-44); May 1, 2015 (AF 345-49); June 1, 2012 – September 19, 2014 (AF 368-70).

**ORDER**

In light of the foregoing, IT IS ORDERED that the denial of labor certification in this matter is AFFIRMED.

**SO ORDERED.**

For the Board:

PAUL C. JOHNSON, JR.  
Administrative Law Judge

PCJ, Jr./PML/jcb  
Newport News, Virginia