



Issue Date: 10 June 2019

BALCA Case No.: 2019-TLN-00134
ETA Case No.: H-400-19070-159393

In the Matter of:

ROMULO ROSAS
dba ROSAS VINE COMPANY,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review filed by Romulo Rosas and Rosas Vine Company (“Employer”), seeking review of the Certifying Officer’s (“CO”) Final Determination denying 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);¹ 20 C.F.R. § 655.6(b).² 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” or the “Application”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews

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 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.

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).

In this case, the CO issued a Final Determination on May 3, 2019, denying Employer's application for temporary alien labor certification. Employer timely filed a request for review on May 16, 2019.

BACKGROUND

On April 2, 2019, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Employer. AF 560-575.³ The application requested H-2B temporary labor certification for 17 Craft Artists from June 17, 2019 through January 17, 2020. AF 560. The "Statement of Temporary Need" on Employer's application stated:

The work to be performed entails the cutting of Kudzu vines from trees. Rosas Vine Company has year round business, but have a significantly higher amount of orders that need to be fulfilled. Rosas Vine Company has an exceptionally high number of orders to fill in 2019 due to a lack of workers in 2018. Thus this year they have a peak load in which they require 17 workers.

AF 560.

On April 9, 2019, the CO issued a Notice of Deficiency ("NOD") informing Employer that its application failed to meet the criteria for acceptance. AF 547-559. The NOD detailed six deficiencies in Employer's application, including failure to establish the job opportunity as temporary in nature in two respects.⁴ AF 552-559. First, the CO cited 20 C.F.R. 655.6(a) and (b) and stated that "[t]he employer did not sufficiently demonstrate the requested standard of temporary need," because its Statement of Temporary Need suggested its need resulted from a labor shortage, which does not support a temporary need. AF 552. The CO stated that Employer had not explained what events cause a seasonal or short-term demand that leads to its peakload need. AF 552. To address the deficiency, the NOD directed Employer to submit the following:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period;

³ References to the appeal file will be abbreviated as "AF" followed by the page number.

⁴ The other four deficiencies involved discrepancies or omissions in the Application and its supporting documents, which the Employer addressed in its Response to the Notice of Deficiency. Those errors did not form the basis of the denial of certification.

3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Craft Artists*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;
4. Summarized monthly production numbers for two calendar years that clearly show the number of products being produced each month by workers in the requested occupation at the employer's worksite location; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

AF 552-553.

The Notice of Deficiency also stated that Employer failed to establish the job opportunity as temporary in nature because the Employer had not sufficiently established its requested period of intended employment. AF 553. The CO noted that the Employer's prior certification, H-400-18206-263676, requested 17 Craft Artists from October 26, 2018 through July 24, 2019. AF 553. The CO found that the Employer had not included an adequate attestation justifying the change in the dates of need, and the reason for the change in the period of need was unclear. AF 553. To address this deficiency, the CO directed the Employer to submit (1) a description of the business history and activities, and a schedule of operations throughout the year; (2) an explanation of why the nature of the job opportunity and the number of requested workers reflect a temporary need; (3) an explanation of how the request for certification meets the peak load need standard; (4) an explanation for why the requested dates of need have changed from the Employer's prior application; and (5) supporting documentation, including summarized monthly payroll reports and other evidence that serves to justify the chosen dates of need. AF 553-554.

Employer filed a 259-page response to the NOD after business hours on April 23, 2019. AF 287. Employer's response included an 11-page letter (AF 288-298); federal income tax documents from 2017 and 2018; 160 individual invoices for wreath orders dated from November

2014 through December 2018, the vast majority of which were delivered to three businesses (Ellis Pottery, The General Store, and Hardcore Inc.); a Payroll Summary showing yearly totals by employee for hours, gross pay, and net pay for calendar years 2015-2018; a chart titled “Full Time and Part Time Employee Table for 2018 and 2017,” showing that Rosas Vine Company employed 11 full-time employees in April – September 2018, no full-time employees in the other months of 2018, 18 full-time employees in January – July 2017, no full-time employees in the other months of 2017, and no part-time employees in 2017 or 2018; a chart titled “2017 and 2018 Production Tables,” showing the number of units produced per month and the revenue per month in 2017 and 2018; an amended job order; the iCERT form submission printout; a signed Appendix B; and a copy of a TLN decision issued by BALCA in 2018. AF 287-546.

In its letter, Employer explained that it is a wholesale business operation that has contracts with gardening businesses and other craft stores who buy Employer’s products to sell in their stores. Employer creates craft arts (including wreaths and baskets) from Kudzu vines. To do this, its employees harvest the Kudzu vine by entering the forest, identifying the vine, and removing it from the tree, which is a “very tedious process” that involves mostly manual labor. After the Kudzu vine is harvested, it must be cut to the appropriate length, then shaped to make wreaths, baskets, and other products. The “ideal” harvesting season “usually takes place between mid-October or early November until late July,” because during this period of time the vines are easily accessible and in good condition to be retrieved from the wild, and the work conditions are favorable. If the vines must be harvested in the summer, the work conditions are unpleasant: the temperature is very hot, mosquitos are prevalent, and the vines are overgrown with brush and shrubs that make them difficult to collect. However, the vines “are still accessible, can be harvested, and can still be used to create the products” Employer sells. Due to the difficulty of harvesting the vine outside of the harvest season and “the overall unpleasantness of the work,” Employer has historically struggled to find U.S. citizen workers willing to perform this work to fulfill Employer’s business needs. AF 288-295.

Employer stated that all of its employees “are deployed to harvest the Kudzu vine until enough of the vines are harvested to fulfill the company’s orders.” It stated that during its non-peak period, it continues to produce products made from Kudzu vines but shifts its production work to an “order to order” basis, rather than working to fulfill the bulk orders received during the peak period. Employer’s permanent employees “follow the same trajectory” as its temporary workers: “harvest the vines, cut the vines to the appropriate size, and finally fashion them into the woven products sold by Rosas Vine Company.” Employer contended that it needs temporary workers “to fulfill its numerous bulk purchase orders during their ‘peak’ season.”

Employer stated that it had 18 full-time temporary workers approved by DOL in 2017, but in 2018, it “only had 11 employees, and did not receive any temporary workers to assist in the overall production of its craft products” after DOL denied the request for 17 temporary workers. Employer’s gross revenue decreased by \$103,000 in 2018, “almost a thirty-three percent (33%) loss in revenue.” Employer argued that DOL’s denial of temporary workers in 2018 “has led to Rosas Vine Company to be in a ‘peak load’ need of temporary workers” in 2019, to avoid “looking at lost revenue, a lack of workers, and another year’s worth of purchase orders that are not being fulfilled.” Thus, it argued that its dates of need changed from its prior application because the denial of that application led to unfulfilled orders and lost revenue that

now create a peak load need to fill in 2019. While the new period of need is not ideal for the temporary workers due to the difficult harvesting conditions in the summer, Employer “believes additional workers are needed as soon as possible ... in order to not face another shortage in production and revenue” in 2019. AF 289-295.

On May 3, 2019, the CO issued a Final Determination on Employer’s application. AF 276-286. The CO denied Employer’s application for temporary labor certification after concluding that Employer did not overcome the two deficiencies related to failure to establish the job opportunity as temporary in nature. AF 280-286. The CO first noted that Employer’s statement of need suggests that its need is the result of a labor shortage, which “does not support a temporary need” no matter how severe the labor shortage. AF 281. The CO also noted that Employer’s dates of need cover the summer months in which it is difficult for workers to obtain the vines, and stated it was unclear how Employer determined its dates of need. AF 282. The CO found that Employer did not submit the documentation requested, including summarized monthly payroll reports, and instead submitted “259 pages of raw data” The CO found that Employer’s documents showed that it has business, but did not show a temporary need during the requested period. AF 282-283. The CO also found that Employer had not justified the change in the dates of need from its prior application for certification. The CO noted that Employer’s prior applications had requested dates of need of November 2016 through August 2017, and October 2018 through July 2019, which requested workers in hot summer months. The CO again found that Employer did not submit all the documentation requested in the NOD, and instead submitted voluminous raw data. Further, the data submitted was incomplete and parts were not summarized, and the 2018 payroll summary showed that Employer employed only 5 workers in 2018, only one of whom worked full time. The CO found that the documentation did not support Employer’s request for 17 temporary workers during the requested period of need. Consequently, Employer’s application for temporary labor certification was denied.

Employer timely filed an appeal of the CO’s Denial on May 16, 2019. AF 1-275. Employer submitted a 14-page letter setting forth its challenge to the denial (AF 1-14), followed by duplicates of Employer’s response to the Notice of Deficiency and all of its enclosures. Employer’s request for review stated that DOL “properly interpreted” the law and “correctly viewed” Employer’s need for temporary workers for four years and granted certification for temporary workers, but then “backtracked” in 2018 and denied its Application for “seasonal” help. Consequently, Employer requested temporary workers based on a “peak load” need in the instant 2019 Application, because the employer needs to fulfill outstanding customer orders, cannot locate U.S. workers to do so, and the denial of H-2B workers in 2018 “has resulted in a dire need in 2019 for additional workers to begin harvesting the vines” Employer asserted that it will lose revenue again in 2019 if its Application is denied.

Employer contended that it submitted the requested documents in its response to the NOD, and those documents proved its peakload need for temporary workers. Employer asserted that it has permanent employees who fulfill purchase orders on a daily basis, but the permanent workers cannot fulfill the amount of orders during the peakload period without additional assistance from temporary workers. Employer argued that the CO’s suggestion that Employer’s need stems from a labor shortage is “false,” because Employer “has made the job positions

available to U.S. citizen workers and has consistently and historically failed to hire any qualified, willing, and able U.S. citizens for the “Craft Artist” position.

Employer pointed to past applications for certification which also demonstrated its temporary need. It reiterated its argument that it has a larger number of orders to fill in 2019, based on its loss of revenue in 2018 after its request for H-2B workers was denied. Employer contended the CO incorrectly believed it had said vines could not be harvested in the summer; vines can be harvested year-round, but it is much more difficult in the height of summer, so Employer historically had requested temporary workers for fall through early summer. This year, however, Employer needs to fill its large amount of outstanding orders, so it requested H-2B workers as soon as possible. Employer argued that its “business practice” of hiring temporary seasonal workers was “dramatically altered” when DOL denied its application in 2018, and “the lack of temporary seasonal workers in 2018 caused and produced a *peakload* need in 2019.” Employer asserted that it had proved it has a permanent staff that requires the assistance of foreign workers to fulfill its bulk purchase orders, and it had established that a peakload need exists from June 2019 to January 2020.

I issued a Notice of Assignment and Expedited Briefing Schedule on May 24, 2019, which allowed the CO to file a brief in support of the denial within seven business days of receipt of the Appeal File. The CO did not file a brief.

LEGAL STANDARD

BALCA’s scope of review is limited to the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may only contain legal argument and such evidence actually submitted to the CO. 20 C.F.R. § 655.61. The employer bears the burden of proof concerning its entitlement to certification. 8 U.S.C. § 1361; *Cajun Contractors*, 2011-TLN-00004 (Jan. 10, 2011); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017).

DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. 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). Employment is of a temporary nature when the employer needs a worker for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer must establish that its need for temporary services or labor “will end in the near, definable future.” *Id.*

The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son*

General Engineering, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient).

To qualify as a peak load 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); *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); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer’s documentation revealed that the employer’s alleged “peakload” need spanned at least a 19-month period).

Here, Employer requested certification for 17 Craft Artists to cut Kudzu vines from trees, alleging a peakload need from June 17, 2019, through January 17, 2020 to fulfill “an exceptionally high number of orders” due to “a lack of workers in 2018.” Employer’s submissions fail to demonstrate that it is entitled to certification.

Employer did not submit the documentation requested by the CO in the Notice of Deficiency. Among other documents, the CO directed Employer to submit a schedule of operations throughout the entire year; summarized monthly production numbers for two calendar years that clearly show the number of products being produced each month by Craft Artists; a detailed explanation as to the activities of the employer’s permanent workers in this same occupation (Craft Artists) during the non-peak period; and summarized monthly payroll reports for a minimum of two previous calendar years (2017 and 2018) that identify the total number of workers employed, total hours worked, and total earnings received each month by Craft Artists, separated by permanent and temporary employees. Employer did not provide this information, and without it, it is very difficult to assess Employer’s Application.

First, it is unclear whether Employer employs any permanent Craft Artists. Employer did not submit the monthly payroll reports requested by the CO, and the yearly payroll summaries it submitted instead did not identify which workers were permanent employees and which were temporary employees. (See AF 503-524). The table submitted by Employer shows the number of *full-time* versus *part-time* employees in 2017 and 2018, but does not show the number of *temporary* full-time workers versus *permanent* full-time workers. (See AF 525). Moreover, the table shows no employees for six months of the year for both 2017 and 2018, suggesting that Employer does not have any permanent Craft Artists on staff. Employer’s letter to the CO in response to the Notice of Deficiency stated that it had “eighteen (18) full-time temporary workers that were requested and approved the DOL” in 2017 (AF 290), which is the same number of full-time employees shown in its Employee Table for 2017 (AF 525)—meaning all of the Craft Artists in 2017 were temporary H-2B workers, and Employer had no permanent Craft Artists on staff. For a peak load need under the H-2B program, an employer “must establish that

it regularly employs permanent workers to perform the services or labor at the place of employment” and needs to supplement its permanent staff on a temporary basis. Here, as an initial matter, Employer has not shown that it regularly employs permanent workers to perform the services or labor for which it requests temporary supplemental workers, and thus it has not shown that it satisfies the regulatory requirements of the H-2B program.

Second, Employer did not provide the documents requested by the CO in the Notice of Deficiency to assist in evaluating its Application. As stated above, Employer did not provide monthly payroll reports (it provided yearly summaries instead), and did not separately identify the total number of workers, hours, and earnings by permanent Craft Artists and temporary Craft Artists. Additionally, Employer did not provide a schedule of operations for the entire year, or a detailed explanation of the activities of Employer’s permanent Craft Artists (if it employs any) during the stated non-peak period (mid-January to mid-June), which were required by the NOD. Instead, Employer submitted 160 individual invoices for wreath orders dated from November 2014 through December 2018. It is not the CO’s responsibility to compile a schedule of operations from the large volume of individual invoices submitted by the Employer; on the contrary, “[t]he burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.” *DTM Trucking, Inc.*, 2018-TLN-00174 (Oct. 10, 2018). And even if the CO tried to do so, it could not be accomplished in this case, because the invoices show little more than the date of the order and number and type of items ordered, which does not provide enough information about how much time each individual item takes to produce (for example, do 1,000 wreaths take 5 days to produce? 5 weeks? 5 months?) or how long Employer has to fulfill the order⁵ for the CO to deduce an operations schedule from the raw data provided by Employer. While Employer submitted Production Tables for 2017 and 2018 (AF 526), it is unclear what the numbers in the table represent. The table is labelled as showing the “Production of Vines Per month,” with table entries stated in the number of “units,” but it is not clear if this is the number of actual vines harvested, or the number of baskets, wreaths, or other items produced from the vines. Adding to the uncertainty is the fact that there are production numbers for every month of 2017, and each month from January through September of 2018, even though Employer’s Employee Table showed no Craft Artists employed from August–December 2017 and January–March 2018. If there were no Craft Artists employed during those months, then at the very least, the production numbers in the Production Tables cannot represent “the number of products being produced each month *by workers in the requested occupation* at the employer’s worksite location,” as directed in the Notice of Deficiency.

Applications for temporary labor certification are properly denied when the employer does not supply requested information. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017); *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017). Because Employer did not supply several pieces of information and documentation it was directed to submit by the NOD, the CO properly denied certification in this case.

⁵ Employer’s argument that it faces a large number of unfulfilled orders in 2019 from not having enough workers in 2018 suggests that the orders can be fulfilled over time.

Third, especially given the shortcomings and omissions in the materials submitted by Employer, its argument for certification relies heavily on its own assertions and representations. However, “the CO is not required to take the employer at its word.” *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012). BALCA has repeatedly held that “a bare assertion without supporting evidence is insufficient to carry the employer’s burden.” *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017) (citing *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013)); *BMC West Corporation*, 2016-TLN-00039/40 (May 18, 2016) (same); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017).

Finally, the fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial. See *Rollins Sprinkler & Landscape, LLC*, 2017-TLN-00020 (Feb. 23, 2017).

For each of these reasons, the denial of temporary labor certification will be affirmed. The employer bears the burden of demonstrating eligibility for the H-2B program. As discussed above, Employer failed to establish that its request for temporary labor certification meets the regulatory criteria for a peak load, temporary need for 17 Craft Artists. Therefore, after reviewing the record in this matter, I find that the CO’s denial of certification should not be disturbed.

Accordingly, the CO’s denial of labor certification is AFFIRMED.

SO ORDERED.

For the Board:

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA