



Issue Date: 28 April 2020

BALCA Case No.: 2020-TLN-00037
ETA Case No.: H-400-20002-224470

In the Matter of:

GUSTAVO'S MEXICAN GRILL, LLC
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from Gustavo Mexican Grill, LLC'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 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).

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.

BACKGROUND

On January 2, 2020, the Department of Labor's Employment and Training Administration ("ETA") received Employer's application for temporary labor certification. AF 61 – 133.³ Employer requested certification of "20 Combined Food Preparation and Serving Worker" [sic] based on a temporary "peak-load" need from April 1, 2020 to December 31, 2020. *Id.*

In its application, Employer reports that it owns two restaurants, both located in Kentucky.⁴ AF 72. The restaurants are open throughout the year but "experience a peak-load need for Combined Food Preparation and Serving Workers during [Employer's] busy season which for the current year will begin April 1st and conclude December 31st." *Id.* Employer explains that, although it has been certified for earlier start dates in previous years, its "monthly sales and payroll summaries at this time support an April 1st start date and an end date that extends through the Christmas holiday on December 31st for FY year 2020." *Id.* Employer adds that the end date for the temporary period of need this year is based on the supporting documentation . . . that demonstrates that the true busy season is now longer in nature than in some years past. Employer "experiences a significant reduction in its monthly receipts during the post-holiday winter period from January through March. *Id.* From January through March is when Employer experiences its lowest sales and lowest number of customers served. *Id.* Employer stated that it can operate with only its permanent staff during this slow period. *Id.*

The duties of the temporary workers are to "serve customers; accept payment from customer and make change as necessary; request and record customer orders and compute bills; clean and organize eating, serving, and kitchen areas; prepare and/or cook daily food items and prepare and serve beverages, and/or relay food orders." AF 63. In its application, Employer writes that the place of employment is in Crestwood. AF 64.

On February 13, 2020, the CO issued Employer a Notice of Deficiency (NOD) explaining that Employer's application contained several deficiencies. According to the NOD, Employer:

- (1) Failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a)-(b); and
- (2) Failed to establish temporary need for the number of workers requested under 20 CFR § 655.11(e)(3) & (4).

AF 54 – 60.

1. Failure to establish that the job opportunity was temporary in nature

The CO wrote that Employer requested "20 Combined Food Preparation and Serving Workers from April 1, 2020 to December 31, 2020 based on a peakload need." AF 58. To establish a peak-load need, an employer must show that it regularly employs permanent workers

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

⁴ One restaurant is located in Crestwood and the other in LaGrange. AF 72.

to perform the services or labor at the place of employment, 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.

The CO determined that Employer failed to sufficiently demonstrate how its need meets the regulatory standard. According to the CO:

The employer provided food and liquor sales reports along with its 2018 and 2019 payroll report and which demonstrates that information for its permanent employees and not its temporary employees. The data reveals that the permanent employees worked from January through September and did not work during the months of October through December. The employer indicates that its peak is during April through December which is not consistent with its payroll. Furthermore, the food and liquor sales demonstrate sales during January to September. Neither the food and liquor sales report nor the payroll demonstrate a peak in business activities during the months of April through December.

AF 58. The CO requested additional information and documentation from Employer. The CO requested:

- Schedule of operations through the year;
- 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, *Combined Food Preparation and Serving Workers* the total number of workers or staff employed, total hours worked and total earnings received;
- Summarized monthly food/beverage gross sales report for a minimum of two previous calendar years for the employer's worksite location, Crestwood, Kentucky. 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;
- An explanation of the data in submitted payroll documentation; and
- 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.

Id.

2. Failure to establish temporary need for the number of workers

The CO also found that Employer had not sufficiently demonstrated that the number of workers it was requesting was true and accurate and represented bona fide job opportunities. The CO pointed out that Employer was seeking certification for 10 additional workers in 2020. In its current application, Employer requested 20 workers from April 1, 2010 through December 31, 2020 but in 2019, it received certification for 10 workers from February 15, 2019 to November 30, 2019. According to the CO, Employer did not indicate how it determined that it needed an additional 10 workers during the requested period. The CO requested additional information and documentation from Employer. The CO asked that Employer's response include:

- An explanation with supporting documentation of why the employer is requesting 20 Combined Food Preparation and Serving Workers for Crestwood, Kentucky during the dates of need requested. The explanation must include supporting documentation concerning why the employer is requesting an additional 10 for the same worksite; and
- An explanation of the data in submitted payroll documentation.
- Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 59.

On February 24, 2020, Employer responded to the CO's Notice of Deficiency. AF 34 – 53. In its response, Employer's counsel explained that in previous years, Employer submitted applications for temporary certifications received after the first half cap was reached. Consequently, Employer was forced to withdraw its "first half cap applications, resulting in its resubmission of its temporary H-2B application under the second half cap." AF 36. According to Employer's counsel, Employer's temporary period recurs annually and actually begins February 15th of each year.⁵ "However, because of the early reaching of the first half cap, Employer's temporary period of need is pushed back to reflect a start date of April 1st." *Id.* Employer's counsel also asserts that in previous years, Employer was certified for its previous temporary periods of need for the same number of workers certified under the first half cap." *Id.* Employer attached a sales report and noted that Employer is seeing an increase in its sales and demand which demonstrates its need for the requested number of workers. Employer added that if the Department found the evidence did not support a need for 20 workers, the Department should either approve at least 10 temporary workers or the maximum number the Department deems justifiable.

On March 23, 2020, the CO issued a Final Determination. AF 22 – 30. The CO denied Employer's application because it still contained deficiencies. *Id.* The CO again concluded that Employer's explanation and documentation in its NOD response did not overcome the deficiency. The CO also noted that Employer had altered its documentation. *Id.* at 29.

On April 7, 2020, Employer appealed the CO's denial. AF 1 – 21. Employer argued that it's application "under the second half cap for fiscal year 2020 was erroneously denied." *Id.* at 1.

⁵ In its appeal request, Employer contradicts this statement. Employer states that its true need actually begins in March. AF 1.

Employer asserted that because of the nature of the H-2B program, Employers are forced to create artificial start dates. Employer added that based on submitted data, it is evident Employer had a “true period of need that begins in March of each year.” *Id.* However because of the “divided cap” Employer is relegated to filing either for February 1 or April 1 of each year because if it “filed for its true period of need in March it will be capped out.” *Id.* “Ergo, the employer is forced each year to pick a start date that is not well substantiated by its payroll and sales summary.” *Id.* Employer’s counsel also explained that because Employer neither understood the difference between permanent and temporary workers nor the occupational titles that should be used for the company, Employer requested that the bookkeeper “learn the regulatory difference between permanent and temporary workers and make adjustments/modifications for same for the 2019 payroll report.” *Id.* at 2. They also asked that the bookkeeper “correct the occupational titles for each group of workers for the required payroll summary, grouping together the combine food/service workers.” *Id.* Employer provided the Department with the accurate payroll summary once the corrections were made. Employer also added that due to the sales figures demonstrated a spike in profit beginning in March but because of “the pitfalls of the H-2B visa program, Employer cannot file for a March 1 start date under the first half of the FY.” *Id.*

This Tribunal received the appeal file on April 14, 2020 and issued a Notice of Assignment and Order for Expedited Briefing Schedule on April 15, 2020. Neither the CO nor the Employer 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

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 Employer’s request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.⁶ A CO’s denial of certification must be upheld unless shown by Employer to be arbitrary and

⁶ 20 C.F.R. § 655.61.

capricious or otherwise not in accordance with the law.⁷ After considering the evidence of record de novo, 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.⁸

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 Employer's Application to admit H-2B workers for temporary nonagricultural employment if Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which 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). Employer bears the burden of demonstrating eligibility for the H-2B program. *See* 8 U.S.C. § 1361. To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload or intermittent. 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Temporary need generally lasts for less than a year. 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the CO is instructed to deny the Application if the need exceeds nine (9) months. 20 C.F.R. § 655.6(b).

The employer also 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; *see also* *Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (ALJ 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, peak-load, or intermittent need.

To qualify for peak-load need, an employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, 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. 20 C.F.R. § 655.6(b).

The issue here is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for "20 Combined Food Preparation and Serving Worker[s]" during its alleged peakload period from April 1, 2020 to December 31, 2020. The CO denied Employer's application for temporary labor certification for two reasons:

- (1) failure to establish the job opportunity as temporary in nature; and
- (2) failure to establish temporary need for the number of workers requested. .

B. Analysis

⁷ *See* *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *Tarilas Corp.*, 2015-TLN00016, slip op. at 5 (Mar. 5, 2015).

⁸ 20 C.F.R. § 655.61(e); *The Original Roofing Company, LLC*, 2017-TLN-00027, slip op. at 5 (Apr. 11, 2017).

Here, Employer alleges it has a temporary peak-load need for 20 Combined Workers from April 1, 2020 to December 31, 2020. As explained above, the CO's denial rested on a finding that Employer failed to substantiate its request for a peak-load need for temporary workers. Upon review of the appeal file and the Employer's request for review, the undersigned finds that the preponderant evidence of record does not support Employer's request. That is, the record does not preponderantly establish that Employer: (1) has a permanent workforce, which temporary workers supplement; and (2) has a temporary peak-load need from April 1, 2020 to December 31, 2020 for its restaurants. Accordingly, the Employer has not demonstrated a temporary peak-load need and the undersigned must affirm the CO's denial which did not demonstrate arbitrary and capricious reasoning.

1. Deficiency 1: Failure to Establish the Job Opportunity as Temporary in Nature.

In its response to the NOD, Employer explains that its need begins on February 15th but as result of reaching the cap it adjusted its start date to April 1st. The CO however determined that the evidence Employer submitted did not demonstrate that the job opportunity was temporary in nature. After reviewing the record, the undersigned finds that the CO accurately determined that Employer had failed to establish that its need was temporary.

At first glance, it seems that the materials Employer submitted show that Employer has established a peak-load need. Based on the materials submitted (particularly the 2018 and 2019 payrolls)⁹ Employer has a permanent work force throughout the year. In 2019, Employer had three to four employees with the title "Manager and Assistant Manager." AF 43. They had one to two-2 employees working as a "dishwasher." *Id.* Five to eight employees worked as "hostesses" and nine to eleven workers worked in the kitchen. The 2019 payroll data shows that Employer had nine Combined Food Preparation and Servers working from March through December. AF 45. There were no workers in January and there were four in February. The data also shows Employer had permanent employees in 2018 and eight temporary combined food workers from March through October and 9 in November and December. The sales data also indicate that sales in the alleged peak-load months were higher than sales outside the period (though there were some variation within the peak-load season).¹⁰ AF 50-51.

However, after reviewing the record and Employer's explanation for why the 2019 sales data for Crestwood differed from the ones that accompanied its application, the undersigned

⁹ The data was for Employer's restaurant in Crestwood, Kentucky. There is no payroll available for the restaurant in LaGrange. Attached to Employer's application are payroll summaries. Some of them are titled Gustavo's Mexican Grill, L.L.C. with data for various job positions and others are designated as Gustavo's Mexican Grill, LLC (Crestwood). *See* AF 87-104. The undersigned hesitates to establish that the ones not Crestwood designated represent data for LaGrange especially since it notes that this defect was not addressed in Employer's response to the NOD.

¹⁰ The sales data were for PR, LG, and CW. The undersigned infers that LG refers to the restaurant in LaGrange and CW to Crestwood. However, there is no information that will inform the undersigned on what PR represents. More importantly, since Employer's application listed Crestwood as the location for Employment, and the payroll data provided was only for Crestwood, the undersigned will only consider data for this location. *See* AF 43-48.

finds that Employer has failed to meet its burden.¹¹ Cf. AF to AF 107. In its initial application, Employer does not have permanent workers for the Crestwood Restaurant from October to December of 2019. See AF 93- 98. The sales data also do not show sales from October to December 2019. AF 107. The undersigned does not find Employer’s explanation for the lack of data in these months credible. Employer’s explanation about the discrepancy is unclear and does not resolve the issue.

Thus considering all these factors, Employer has not established that it regularly maintains permanent workers, and has a temporary peak-load need for the dates requested.

2. Number of Workers

Here, Employer states that it has a need for 20 workers. Based on Employer’s application, the undersigned finds that Employer was considering splitting the workers between its restaurants in LaGrange and in Crestwood. See AF 68. However, Employer’s application does not contain sufficient information to justify the need for 20 temporary workers. According to Employer, the uptick in sales and demand clearly establish its need for 20 workers. After reviewing the record, this Tribunal finds no reason to disturb the CO’s conclusion. Employer explained that it had an increase in demand and provided documentation (sales and payroll records for 2018 to 2019) to support its assertion. However, Employer did not provide sufficient evidence of *how* it concluded that it needed an extra 10 workers to serve in the restaurants. Employer’s explanation and the evidence it provided in support do not demonstrate that there is a clear need for 20 workers.

Accordingly, the CO’s determination that Employer failed to establish its need for 20 workers is affirmed.

CONCLUSION AND ORDER

For the reasons explained above, the CO’s denial of labor certification in this matter is **AFFIRMED**.

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

¹¹ The record shows that the information for April 2019 sales were swapped with information for March 2020 sales. Even if this were an oversight or error in computation, Employer’s explanation does not sufficiently address this issue. Further even if it is true that due to federal cap, Employer “must choose to either file for a February 1st start date or an April 1st start date each year” because an application “filed for its true period of need in March it will be capped out” that explanation does not address the sales issue. AF 1.