



Issue Date: 23 September 2020

BALCA Case No.: 2020-TLN-00070
ETA Case No.: H-400-20191-706211

In the Matter of:

PRODUCE ONLINE, LLC,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Pablo E. Bustos, *Esq.*
Nogales, Arizona
For the Employer

Before: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Produce Online, LLC’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹ 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.² 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 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).

¹ 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.

² 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).

STATEMENT OF THE CASE

The Employer is an operation that processes food by “taking produce from Mexico and having workers cut this produce up and put them into packages to make them presentable for retail sale.” (AF 32.)³ On July 9, 2020, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”). (AF 68-97.) The Employer requested certification for twelve food processors⁴ from October 5, 2020, until July 5, 2021, based on a seasonal need. (AF 68.)

On July 17, 2020, the CO issued a Notice of Deficiency (“NOD”) that detailed six deficiencies for the Employer to resolve. (AF 55-63.) The Employer submitted a response to the NOD on July 31, 2020. (AF 30-53.) The CO issued a Final Determination denying the Employer’s Application on August 13, 2020. (AF 19-27.) In support of its denial, the CO concluded that the Employer did not meet the requirements of 20 C.F.R. § 655, subpart A, because the Employer failed to establish: (1) the job opportunity as temporary in nature; (2) the temporary need for the number of workers requested; and (3) the job order assurances and contents offered U.S. workers the same benefits, wages, and working conditions that Employer is offering, intends to offer, or will provide to H-2B workers. (AF 19-27.)

By letter filed on August 28, 2020, the Employer requested administrative review of the CO’s Final Determination. (AF 1-17.) On September 8, 2020, BALCA received the Appeal File from the CO. On September 9, 2020, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the CO to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). Neither party filed a brief.

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. § 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

³ “AF” refers to the Appeal File.

⁴ SOC (O*Net/OES) occupation code 35-2021.00 and occupation title “Food Preparation Workers.” (AF 68.)

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).

An employer seeking H-2B temporary labor certification must demonstrate the number of workers and period of need requested are justified, and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3), (4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application).

The CO determined, *inter alia*, that the Employer failed to “establish the temporary need for the number of workers requested” pursuant to 20 C.F.R. § 655.11(e)(3) and (4). (AF 24-26.) In accordance with 20 C.F.R. § 655.11(e)(3) and (4), an employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity. To establish these needs, an employer must include in its filing “documentation evidencing, [f]or job contractors, the job contractor's own seasonal need or one-time occurrence, such as through the provision of payroll records.” 20 C.F.R. § 655.11(a)(4).

The CO stated that the Employer's submitted supporting evidence did not sufficiently demonstrate that the number of workers requested on the application was true and accurate and represented bona fide job opportunities.(AF 24-26.)⁵ The CO noted that, in its current application, H-400-20191-706211, the Employer was requesting certification for 12 Food Processors from October 5, 2020 to July 5, 2021. (*Id.*) However, the Employer did not satisfactorily explain how it determined that it needed 12 Food Processors during the requested period of need. The CO stated that further explanation and documentation were required in order to establish the Employer's need for the 12 Food Processors. (*Id.*)

In response to the NOD, the Employer submitted a written response, an affidavit of Jose Serrano, a record of payment to client FIGA Sales, LLC, a repack report, a document showing the Four Seasons of Mexican Produce from the Fresh Produce Association of the Americas, and a payroll document from January 24, 2020 to July 31, 2020. (AF 30-53.) The Employer stated that, “[s]tarting in May of 2019 PO [Produce Online] began its operations as a Food Processing Company that processed food by taking produce imported from Mexico and having workers cut this produce up and put them into packages to make them presentable for retail sale.” (AF 32.) In addition, the Employer explained that, while its business began its operation in May 2019, the Employer did not hire staff directly, as its operation were “still new”. Due to the company being new, the Employer explained that it “wanted to see how the business was going to run before

⁵ As noted above, the CO identified three deficiencies that were unresolved in the Final Determination. Two of these deficiencies will not be discussed herein as the CO's denial is upheld on the basis that the Employer failed to establish a temporary need for 12 Food Preparation Workers.

committing to a staff working directly for Produce Online.” (AF 32.) As a result, the Employer stated that in 2019 it outsourced all of its work to FIGA Sales, LLC.

The Employer further stated in its NOD response that, PO has asked for 12 workers because based on the previous payroll, and contracting of FIGA, *in the last two years* that's what [was] reasonably expected based on the amount of orders PO has received and would receive if it had a reliable and steady workforce.

PO is caught in a Catch 22 in that it has a need for workers, which I calculate to be twelve for the upcoming 2020-2021 Season based on my anticipated sales, but at the same time without having a reliable number of workers PO can never blossom to its full potential...

(AF 33, *emphasis added.*)

The Employer acknowledged that its request for 12 workers was based on the previous payroll and contracting of FIGA, and that in the “last two years” that’s what it “reasonably expected based on the amount of orders” the Employer received. (AF 33.) However, the Employer did not provide any documentation or support for the “last two years” that it refers to as a basis for the requested number of workers. In its NOD response, the Employer submitted a record of payments to FIGA Sales, LLC as support to resolve the NOD deficiency. (AF 43.) This document shows that Produce Online, LLC issued checks in different amounts to FIGA Sales, LLC from May 17, 2019 through January 9, 2020. But, the Employer did not submit any supporting documentation to show its 2020-2021 projected sales. As the Employer stated in its NOD response that it outsourced all of its work in 2019 to FIGA Sales, LLC, it remains unclear how the Employer’s record of payments in 2019 to FIGA Sales, LLC establishes that the Employer now has a temporary need from October 5, 2020 through July 5, 2021 for 12 workers, and that the request represents a bona fide job opportunity.

Furthermore, regarding its period of need, the Employer states that, I know the Produce Business. That’s why, I would also like to attest to the accuracy of an annexed printout from the Fresh Produce Association of the Americas (“FPAA”).

The annexed FPAA chart shows that there is in fact a “peak season” between early October through early July of every year for Mexican Produce...

Based on my experience, the FPAA’s chart is accurate. It talks of the “Nogales Peak Season” ...

(AF 34.)

As noted above, the Employer refers to a document showing the Four Seasons of Mexican Produce from the Fresh Produce Association of the Americas. (AF 42.) The document shows that different types of produce are available year-round. Therefore, it is not apparent how

the Four Seasons of Mexican Produce document establishes that the employer has a temporary need for 12 workers during the period of need from October 5, 2020 through July 5, 2021.

In addition, the “Affidavit of Jose Serrano” submitted as part of the Employer’s NOD response noted that the Repack Report reflected the Employer’s operations from May 15, 2019 through July 15, 2020. (AF 32.) But, the Repack Report submitted by the Employer begins on page three of eight and shows the period from November 22, 2019 through July 15, 2020. (AF 48-53.) Therefore, the Repack Report dates identified by the Employer in its response (May 15, 2019 through and including July 15, 2020) are not consistent with the dates shown on the Repack Report submitted by the Employer (November 22, 2019 through July 15, 2020). (*Id.*) Therefore, the Repack Report data does not support a finding of a temporary need during the requested period of need since the entire report was not submitted to the CO in its NOD response.

Moreover, regarding its payroll documentation submitted in response to the NOD, the Employer states that,

If you look at the Payroll Records for PO from January 2020 through today you can see that PO has been using about 6-9 workers in 2020. However, those workers are temporary in that they expressed their desire to only work for PO for a few months. None are expected to come back. It is possible some will come back, however they have stated that they were only working for PO temporarily.

(AF 33.)

Applications are properly denied where the employer did not supply requested information in response to an NOD. 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

The Employer was instructed by the CO to submit summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately, full-time permanent and temporary employment in the requested occupation *Food Processors*; as well as the total number of workers or staff employed, the total hours worked, and the total earnings received. (AF 59.) The Employer only submitted a listing of employee payroll information that did not address all of the CO’s deficiency issues. (AF 35-39.) While the Employer has stated that, as a new company, it is not able to provide two years of payroll summaries, it failed to submit the additional documentation requested by the CO. Therefore, the Employer’s payroll documentation, submitted in response to the NOD, is insufficient to establish a temporary need for 12 workers during the requested period of need.

While the Employer explained that it did not yet have the requested two years of payroll documentation due to its operations starting in May of 2019, the Employer has provided no other evidence that would justify the number of workers requested. And while the Employer stated in the Affidavit that it based the request for 12 workers on “previous payroll and contracting of

FIGA” for the “last two years,” it failed to provide any evidence from those “last two years” that would support its request for 12 workers. (AF 33.)

Accordingly, the Employer’s explanation and documentation do not establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity. Therefore, I agree with the CO’s determination that the Employer did not overcome the deficiency.

Although a strict enforcement of the regulations can sometimes lead to harsh results, it also ensures the wages and working conditions of U.S. workers will not be adversely affected by similarly employed H-2B workers. *M.A.G. Irrigation* at 6. As the Employer here did not establish the need for the number of workers requested, it cannot make a case for certification. *See Top Notch Turnout LLC*, 2018-TLN-00159 (Sept. 11, 2018); *Blue Stone Mountain, Inc.*, 2019-TLN-00062 (Apr. 22, 2019.) Accordingly, I find the CO properly denied the Employer’s H-2B Application for Temporary Employment Certification.

CONCLUSION

Based on the foregoing, I find that the Employer failed to establish its temporary need for the 12 Food Processing Workers requested pursuant to 20 C.F.R. § 655.11(e)(3) and (4).

ORDER

It is **HEREBY ORDERED** that the Certifying Officer’s decision denying the Employer’s Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

LARRY S. MERCK
Administrative Law Judge