

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 29 November 2019

BALCA Case No.: 2020-TLN-00010
ETA Case No.: H-400-19255-056417

In the Matter of:

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

Appearances: Adan G. Vega
Adan G. Vega & Associates, PLLC.

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

Before: Scott R. Morris
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from Romulo Rosas’ d/b/a Rosas Vine Company (“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

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.

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).

BACKGROUND

On September 12, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received Employer’s application for temporary labor certification from Employer. AF 339 – 405.³ Employer requested certification of “17 Craft Artists, Occupational Title Craft Artists,” for an alleged period of seasonal need from November 28, 2019 to June 25, 2020. *Id.*

On September 19, 2019 the Chicago National Processing Center 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);
- (2) failed to establish temporary need for the number of workers requested under 20 CFR § 655.11(e)(3) & (4);
- (3) failed to submit an acceptable job order 20 C.F.R. § 655.16 and 20 C.F.R. § 655.18;
- (4) failed to submit a complete and accurate ETA form 9142 under 20 C.F.R. § 655.15(a); and
- (5) failed a complete and accurate ETA Form 9142 under 20 C.F.R. § 655.15(a).

AF 375 – 84.

Failure to establish that the job opportunity was temporary in nature

The CO explained that since Employer described November 28, 2019 to June 25, 2020 as its seasonal period of need, then Employer did not need services or labor from June 26 through November 27. The CO noted however that after reviewing Employer’s program history, Employer had requested Craft Artists every month of the year suggesting a permanent rather than temporary need. Since Employer did not demonstrate a seasonal need, the CO instructed Employer to submit additional information and explain how they support its requested dates of need. AF 379 – 80.

Failure to establish temporary need for the number of workers

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

The CO wrote that Employer did not sufficiently demonstrate why it needs 17 Craft Artists during the requested period of need. The CO instructed Employer to provide further explanation and documentation to establish Employer's need for the 17 Craft Artists. AF 380 – 81. The CO instructed Employer to: provide “an explanation with supporting documentation of how the employer figured its specific need for 17 Craft Artists for Texarkana, Texas during the dates of need requested; summarize[] monthly production numbers for 2017 and 2018 that clearly show the number of products being produced each month by workers in the requested occupation at the employer's worksite location; [and] summarize[] monthly production numbers for a minimum of two previous (2017-2018) 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 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.” AF 381. Employer could include “other evidence and documentation that similarly serves to justify the number of workers requested” in its response.” *Id.*

Failure to submit an acceptable job order

Employer's job order contained a statement regarding inbound and outbound transportation which included minimum and maximum amounts provided for daily travel subsistence. The CO explained that the Department had updated its regulations concerning transportation and subsistence rates and Employer's job order did not meet the updated requirements. The CO explained how Employer could cure that deficiency. AF 381 – 83.

Failure to submit a complete and accurate ETA Form 9142

The CO explained that Employer did not submit the correct version of Form 9142, Appendix B. AF 383. Further, Employer did not accurately complete certain fields on the Form 9142. AF 383 – 83. The CO instructed Employer to submit a complete Form 9142, Appendix B application and modify it accordingly. *Id.*

On October 3, 2019, Employer responded to the CO's Notice of Deficiency. AF 201 – 374. Employer stated that it's a wholesale business that creates craft arts such as wreaths, baskets, garlands, and swags from harvested Kudzu vines and contracts to supply gardening businesses and other craft stores around the country with its Kudzu products. AF 202. Employer explained that the vine's growing and harvest season, typically between mid-October or early November until late July, affects its business practices. *Id.* Employer mentioned that consequently it is very busy during the Kudzu vine's harvest season. *Id.* Employer attached purchase orders and invoices from the 2017, 2018, 2019 harvest periods and upcoming orders for the year of 2020. AF 202, 223 –324. Employer also included its payroll records. AF 203, 369 – 372. Employer asserted that it receives the bulk of its orders during the limited harvest season and since the uptick in orders increases its workload, it needs the additional temporary help to maintain its business practices. AF 203. Employer noted that it received similar certifications for

Craft Artists in 2015, 2016, and 2017. *Id.* Employer was denied in 2018. *Id.* at 204. Employer explained that it applied for a peak load need in 2019, but that was denied as well.⁴ *Id.*

In correcting its failure to establish temporary need for the number of workers requested, employer included 2017 and 2018 payroll summaries listing seasonal and fulltime employees, gross earnings, and gross hours in its response. *Id.* at 207; 369 – 372. Employer reiterated that in previous years, its application for additional workers was approved. *Id.* at 207. Employer argued that in 2018 and 2019, the years its application was denied, the Department used a different standard to determine Employer’s need.⁵ *Id.* at 207. Employer also produced its productions tables from 2017-2018, purchase orders, schedule of operations to cure its deficiency. *Id.* at 207 – 09. Employer argued that there is an increase in demand for its product and consequently it requires seventeen workers to harvest and craft the final products to fulfill this increase in demand. *Id.* at 208.

In its response to the CO’s NOD, Employer included text from its updated job order to support its assertion that it cured the deficiency regarding transportation and subsistence rates in its job order. *Id.* at 211. Employer also attached the updated job order. *Id.* at 355 – 62. Employer also attached, what it deemed as a corrected Form 9142. *Id.* at 212. Employer also granted the Department permission to amend the Form 9142 Section Fd and Section I on its behalf. *Id.* at 213.

On October 22, 2019, the CO issued a Final Determination. AF 197 – 200. The CO denied Employer’s application seeking temporary labor certification because of remaining deficiencies. *Id.* The CO again concluded that Employer did not demonstrate the requested standard of temporary need. AF 196 – 98. Employer submitted a yearly schedule of operations along with a production table for 2017 and 2018. *Id.* at 198, 321. The CO noted that Employer’s production table shows a high production level in the months that Employer categorized as its off season thus indicating a year around need.⁶ *Id.* at 198. The CO also pointed to inconsistent revenue stream in 2018 to support its position that “Employer’s job opportunity is not of a recurring nature, and is not connected to a season of the year by an event.” *Id.* According to the CO, the fact that Employer applied “multiple times in different time periods” is further proof that Employer’s need is not a temporary one. *Id.* Similarly, the CO found that Employer’s payroll records and the purchase documents did not support its request for a seasonal need. *Id.*

In its Final Determination, the CO noted that Employer’s response to the NOD included an explanation for number of workers, and a summarized monthly production numbers for 2017

⁴ In 2019, Employer requested temporary workers starting on June 17, 2019 and ending on January 17, 2020. This request was made outside the harvest season. Employer contests that the peakload need was a direct result of the 2018 denial which altered its business customs and caused a backlog of unfulfilled orders. *Id.* at 204 – 06.

⁵ According to Employer “only in 2018 and 2019 the DOL determined that Rosas Vine Company did not demonstrate a need based on ‘raw’ (as opposed to “unraw” accounting records) accounting records presented to DOL. DOL did not bother to define the “raw” accounting terminology nor the requisite accounting records needed for certification.” *Id.* at 207.

⁶ The CO provided data from 2017 as an example: “in 2017, the revenue was lower in November and December (months within [Employer’s] request) than August through October (which are months the employer has indicated no additional workers needed.” *Id.* at 198.

and 2018. *Id.* at 199. The CO however found that to be lacking. According to the CO, Employer failed to provide specific evidence sufficiently explaining why it needed additional workers. *Id.* Consequently, the CO determined that Employer's explanation and documentation of its temporary need did not overcome the deficiency. *Id.*

The CO also found that Employer failed to meet its obligation to submit a complete and accurate ETA Form 9142 Appendix B. *Id.* at 200. The CO wrote that Employer only submitted a portion of the correct Appendix B making its submission incomplete. *Id.*

On November 1, 2019, Employer appealed the CO's denial.⁷ AF 1 – 192. Employer repeated the arguments it made before the CO and asserted that the CO misunderstood its requests and did not carefully consider the documentation it submitted. *Id.* at 1 – 11. Employer argued that its documents clearly show a need for temporary workers. *Id.* Employer also asserted that the Department's denial of its certification is partially motivated by current political rhetoric particularly given the fact that the Department has certified its prior request for seasonal temporary workers. *See e.g.* AF 3 – 6. Employer did not address the issue that it did not submit complete and accurate ETA Form 9142.

This Tribunal received the appeal file and issued a Notice of Assignment and Order for Expedited Briefing Schedule on November 14, 2019. 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

An employer 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; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must

⁷ The Department wrote Employer appealed on November 1, 2020. The Tribunal finds that to be a typographical error.

show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need.⁸ 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).

To qualify as a seasonal need, the 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. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer only made unsupported assertions about how weather conditions and contract patterns cause job openings to fluctuate); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *Nature’s Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012); *Caballero Contracting & Consulting*, 2009-TLN-00015 (Apr. 9, 2009); *Marco, LLC*, 2009-TLN-0043 (Apr. 9, 2009); *KBR*, 2016-TLN-00026 (Apr. 6, 2016).

In this case, the CO denied Employer’s application for temporary labor certification for three reasons:

- (1) failure to establish the job opportunity as temporary in nature;
- (2) failure to establish temporary need for the number of workers requested; and
- (3) failure to submit a complete and accurate ETA form 9142, Appendix B.

AF 193 – 200.

B. Analysis

As explained above, the CO’s denial rested on a finding that Employer failed to substantiate its request for seasonal need of temporary workers from November 28, 2019 to June 25, 2020. Upon review of the Appeal File and Employer’s request for review, this Tribunal finds that the CO’s denial of Employer’s application was not arbitrary and capricious. For the reasons that follow, the Tribunal affirms the CO’s denial of Employer’s application.

1. Temporary Need

Employer argues that the CO’s basis for finding that its job opportunity is not temporary in nature is incorrect. AF 4. Employer argues that the CO incorrectly stated that it is requesting the seventeen additional workers due to previous denials in 2018 and 2019. *Id.* Per Employer, its need is seasonal because it is tied to the harvest season of the Kudzu vine which occurs

⁸ Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

between mid-fall to late summer.⁹ *Id.* at 5. Employer argues that these months are favorable to harvesting and making crafts from the vine. *Id.*

In its response to the NOD, Employer writes that it needs the seasonal workers from “November 28, 2019 to June 25, 2020 to locate, select, cut with shears, and gather by hand Kudzu vines growing in the wild in forested areas surrounding Texarkana and prepare and roll by hand the Kudzu vines for handcrafting into home decorations to be transported to a workshop in Texarkana for further handcrafting.” AF 211. According to Section B., Item 9 of Employers ETA Form 9142: “the work to be performed entails the cutting of Kudzu vines from trees during time/ season when the vines have less leaves which is typically after the summertime when the vines become more dormant and remain dormant until late spring. The vines are cut and then fashioned into holiday wreaths for the fall holiday season and Christmas. The wreaths must be fashioned when the vine is malleable and before the next fall.” *Id.* at 196, 385. Employer additionally argues that it successfully requested seasonal temporary workers prior to being issued a denial. *Id.* at 4 – 5. Employer states that on those occasions, it proved its seasonal need for temporary workers by furnishing similar records to the Department. *Id.* at 7.

For the following reasons, the Tribunal finds that Employer has failed to prove that its need is tied to a season or time of year.

In the NOD, the CO instructed Employer to “submit a statement describing the employer's business history and activities (i.e. primary products or services); a schedule of operations throughout the year and confirm the time period each year when it does not need the services or labor; a summarized monthly production numbers for 2017 and 2018 that clearly show the number of products being produced each month by workers in the requested occupation at the employer’s worksite location; and other evidence and documentation that similarly serves to justify the dates of need being requested for certification. . . .” AF 197. The record shows that Employer failed to follow the CO’s instruction. While Employer submitted a yearly schedule describing monthly activities, Employer did not confirm the months in which it did not need the Craft Artists. Further, Employers description of its July – September obligations is confusing. Employer states that it needs the Craft artists from late November to late June but in the schedule of operations, Employer’s description suggests that workers remain past July to produce crafts.

Due to the presence of the temporary Craft Artists, usually we have an inventory of vines and an inventory of craft products. Thus, we can manage any orders that come in and sell our inventory of craft products during these months. With the presence and work of the Craft Artists during the harvest season, Rosas Vine Company can still generate a revenue during this part of the year where the vines are inaccessible. The company is supported by the limited staff that remains after the seasonal workers depart.

Id. at 367. If *arguendo*, Employer meant that the seasonal workers harvested enough vines that could be fashioned into wreaths by the limited staff after the seasonal workers departed, the

⁹ Employer states that the harvest period begins in “October, or November and continues through the end of July.” AF 203.

record does not support this assertion.¹⁰ Employer's payroll records in 2018, only lists seasonal employees. There was no full-time employee listed on the 2018 payroll, much less an explanation for which employees were full time or temporary workers. On the 2017 payroll only one full time employee, Romulo Rosas Bustamante, was listed.¹¹

Also, Employer's production tables fail to establish a clear pattern for seasonal need.¹² The tables do not show clear seasonal reductions during the months Employer states it has no need of temporary workers. In the 2017 production table for example, Employer reported high vine production for September and October, months that are off season for Employer. In 2018, Employee reported a low production value for February, a month that is within Employer's request. Thus, Employer has not demonstrated a clear seasonal need.

Accordingly, the CO's determination that Employer failed to establish its need was temporary is affirmed.

2. Number of Workers

In its NOD, the CO specified that Employer did "not sufficiently demonstrate[] that the number of workers requested on the application is true and accurate and represents bona fide job opportunities." AF 380. The CO further stated that Employer did not indicate how it determined that it needed 17 Craft Artists and requested additional information. *Id.* In its response to the NOD Employer asserted that in the previous years, it had demonstrated to the Department a temporary need for seasonal workers, the department had certified and approved those requests, with the exception of 2018 and 2019. *Id.* at 207. Employer explained that the demand for its product exceeded demand in the previous years. *Id.* at 208. Consequently, it needed seventeen Craft Artists to seventeen Craft Artists fulfill the larger demand of products. In response to the CO's instruction, Employer attached 2017 and 2018 payroll summaries, purchase orders for the upcoming season, production tables from 2017 and 2018, and its schedule of operations. *Id.* at 209. In the Final Determination, the CO asserted that Employer's documentation was insufficient to overcome the deficiency. *Id.* at 199.

After reviewing the record, this Tribunal finds no reason to disturb the CO's conclusion. Employer explained that it had an increase in demand for its projects and provided documentation to support its assertion. However, Employer did not provide sufficient evidence of *how* it concluded that it needed seventeen workers to harvest and produce craft orders.

¹⁰ In its NOD response, Employer actually argues that the reason why it has production values for each month of the year, including in its off seasons, is due to "the presence of the workers in the harvest season, through the late fall until the following summer, [which] allows the company to keep functioning throughout the year but with a limited staff during the non-harvest period." AF 209.

¹¹ According to the NOD response, Employer is a sole proprietorship. AF 209. Nonetheless this does not support Employer's assertion that its need is seasonal.

¹² Employer's production tables are missing values for October 2018 – December 2018. AF 321. Employer states that "the company did not produce any wreaths or revenue in October, November, or December. A simple correlation can be made between the lack of the temporary workers in 2018 compared to the presence of temporary workers with the company in 2017. It is clear that the company's production suffered in 2018 due to the lack of the temporary work force." AF 209.

Employer's explanation, its purchase orders, payroll records, summarized monthly production tables, and schedule of operations do not demonstrate that there is a clear need for seventeen workers.

Accordingly, the CO's determination that Employer failed to establish its need for 17 workers is affirmed.

3. Incomplete ETA

Employer did not address this issue in its appeal. In the NOD, the CO instructed Employer to submit a complete ETA Form 9142B, Appendix B. AF 387 under 20 CFR § 655.15(a).¹³ The CO stated that the Appendix B must be dated and contain the original signatures of the employer and, if applicable, its agent or attorney. *Id.* In its final determination, the CO noted that Employer only submitted a portion of the correct Appendix B. *Id.* at 200. According to the record, Employer attached Appendix B as exhibit F. *Id.* at 363– 64. The form Employer submitted is 2 pages.¹⁴ Accordingly, the CO's determination that Employer failed to submit a complete and accurate ETA form 9142, Appendix B, is affirmed.

This Tribunal also addresses Employer's arguments the Department certified and approved prior requests. According to Employer, the Department "previously certified the typical harvest season . . . under the applicable federal laws and had correctly viewed the reality of the employer's seasonal need for temporary workers . . ." AF 4. Employer further contended that the denials that occurred in 2018 and 2019 occurred because the Department "chose[] to adjudicate H-2B temporary requests in a manner that is inconsistent with reality as well as federal statutory and regulatory law." *Id.* The Tribunal does not find this argument convincing. There is no evidence that the CO mischaracterized the law. As discussed above, Employer did not overcome its burden of showing why it needed seventeen workers and why its need is seasonal. Further, Board precedent holds that "the fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial." *ATP Agri-Services Inc.*, 2019-TLC-00050, slip op. at 9 (May 17, 2019). Employer's prior approved applications for identical positions therefore do not provide a basis for this Tribunal to direct that its present application be approved.

CONCLUSION AND ORDER

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

¹³ Pursuant to 20 CFR § 655.15(a) "a registered employer seeking H-2B workers must file a completed Application for Temporary Employment Certification (ETA Form 9142B and the appropriate appendices and valid PWD), 20 CFR § 655.15(a).

¹⁴ A Google search revealed that the form is three pages long. *See* https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9142B_Appendix_B_rev_DOL_Appropriations_Act.pdf (last visited Nov. 25, 2011).

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge