

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 June 2020

BALCA Case No.: 2020-TLN-00048
ETA Case No.: H-400-20092-450092

In the Matter of:

VENEZIA'S NEW YORK STYLE PIZZA – T&G,
Employer.

Before: Noran J. Camp
Administrative Law Judge

Appearances: Rafael Tirado, Esq.
Rafael Tirado & Associates, PLC (Phoenix, AZ)
For Employer

Nichole Schroeder, Esq.
For the Solicitor
*Employment and Training Legal Services*¹

DECISION & ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from the request of Venezia's New York Style Pizza – T&G ("Employer"), for review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

¹ Counsel for the Solicitor appeared at a telephone conference I called to discuss the case, but did not file a brief on appeal, relying instead on the Notice of Deficiency.

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. If the CO denies 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter will be *affirmed*.

I. BACKGROUND

A. H-2B Application.

On or about March 27, 2020, Employer filed an H-2B Application for Temporary Employment Certification (Form ETA-9142B). Administrative File (“AF”) at 190-216. Employer sought to employ one (1) “Prep cook/Kitchen line Cook” for Venezia’s Pizzeria, 15620 N. Tatum Blvd, Phoenix, AZ. *Id.* at 196. The application was based upon a temporary “Peakload” need, from *June 16, 2020*, to March 16, 2021. *Id.* at 196.

“Peakload” need is defined in the regulations of the Department of Homeland Security (“DHS”). *See* 20 C.F.R. § 655.6(b) (“peakload need” is “as defined by DHS regulations”). Those regulations state that in order to establish the “peakload” nature of the job opportunity, Employer must establish that:

[1] it regularly employs permanent workers to perform the services or labor at the place of employment and [2] 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 [3] that the temporary additions to staff will not become a part of the petitioner's regular operation.

Special requirements for admission, extension, and maintenance of status, 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (DHS regulation); *Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations*, 72 Fed. Reg. 38,621, 38,622 (“Notice” of DOL’s Guidance, July 13, 2007) (same).

In its Statement of Temporary Need, Employer stated:

The reason for the H2B visas is we have a shortage of staff to keep up with our demand and workload. We also just opened our commissary where we make a lot of our product in a central

location and this will allow to expand to several more locations in the valley. With the future expansion, we will need more qualified workers. Due to our increase in popularity we need more Prep/Line cooks.

AF 196.

B. Notice of Deficiency & Response.

On April 7, 2020, the Certifying Officer issued a Notice of Deficiency, finding that the Application could not be accepted because of three (3) asserted deficiencies:

1. **Deficiency 1:** Employer failed to “establish the job opportunity as temporary in nature,” citing 20 C.F.R. § 655.6(a) & (b) (requiring the showing of “temporary need”), and setting forth the requirements for establishing “peakload” status. AF at 181.²
2. **Deficiency 2:** Employer failed to “establish temporary need for the number of workers requested,” citing 20 C.F.R. § 655.11(e)(3) (must justify number needed) & (4) (must establish a “bona fide job opportunity”). AF at 182.
3. **Deficiency 3:** Employer failed to “submit an acceptable job order,” citing 20 C.F.R. §§ 655.16 & 655.18. AF at 183.

In what appears to be Employer’s response to the NOD, Employer’s owner, Domenick Montanile (“Montanile”), wrote and signed two (2) undated, unaddressed letters.³ During the telephone conference in this matter, counsel for the Solicitor confirmed that these letters and attachments were submitted to the CO.

In the first letter, Montanile gives a brief history and description of the business. AF 60. He further states that “peak time” is “from *August* through May each year.” AF at 60 (my emphasis). In the second letter, Montanile states that he is providing documentation “to show the sales, employee turnover reports as well as payroll reports for each month over a 2 year span in 2018 and 2019.”⁴ AF 61. Montanile states “we are slower in the summer months from *June* through September,” and that “payroll dips slightly in the summer months.” AF 61 (my

² See 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (DHS regulation) & 72 Fed. Reg. 38,621, 38,622 (DOL guidance).

³ It was apparently received by the CO on April 15, 2020. AR 43 (May 6, 2020 Final Determination Letter).

⁴ In fact, as set forth in the text, Montanile provided payroll reports for only four (4) months in 2018 and only three (3) months in 2019.

emphasis). Montanile further states that his company's goal is to employ a cook "from *September or October* through May since this is our busy time." AF 61 (my emphasis).

Attached to the second letter are the following documents, which I take to be related to the Venezia's Phoenix location at issue here:⁵

1. Sales figures for 2018 and 2019. AF 63.
2. Cook payroll figures and "Employee Turnover Reports" for 2018 and 2019. AF 66.
3. Payroll Allocation Reports for Jan. through Apr. 2018, and Mar. through May 2019. AF 68-172.
4. "Job Details" for a "Food Preparation Worker. AF 173-76.

In addition, Employer submitted a "Review and Post Job Order #3821339," for the Venezia's Pizzeria at issue here. AF 192-95. It appears that this was submitted with the appeal papers, that is, after the CO's determination.

C. Final Determination

The CO found that Employer's Response did not overcome the deficiency. AF 41-55.

1. **Deficiency 1: Not temporary in nature.**
AF 43-47.

The CO found that Employer failed to demonstrate the temporary need for an additional cook from June 2020 through May 2021. Employer's explanation failed to demonstrate the need because Montanile was clear that the first three (3) months of the "peakload" period were in fact the "slower" months, during which sales "dipped." In addition, Montanile explained that he only needed the cook starting in *September*, three months after the "peakload" hire date requested by the Application. Also, consistent with Montanile's explanation, the submitted sales reports showed a significant dip in sales in June, both in 2018 and 2019, with sales really recovering in October of both years.⁶

⁵ The referenced attachments do not actually identify themselves as being for the Phoenix location. However, one set of figures is identified as being for "Venezia's NY Style Pizza – Tempe" (AF 62, 64) another set is identified as being for "Venezia's NY Style Pizza – T&G" or "Venezia's NY Style Pizza – T&G (North Phoenix)" (AF 63, 66), and a third set is identified as "Venezia's C&C" (AF 67). Since neither side helps me out here, I can only guess that the figures that are not for "Tempe" or "C&C" are for the Phoenix location at issue here. (One of them even identifies itself as being for "North Phoenix," which may be a neighborhood in Phoenix, rather than a separate town or city; this Boston judge does not presume to know.) It seems a reasonable, even an educated, guess since it would be bizarre to submit those figures for an otherwise unidentified location that is not in issue in the case. Moreover, the CO appears to have accepted the figures as pertaining to the Phoenix location at issue here. See AF 46, 50.

⁶ The CO also found that Employer did not submit specific information and in the form requested by the CO. AF 47.

2. **Deficiency 2: Need for an additional cook.**
AF 47-51.

Employer's explanation, and the charts showing, that the "summer months," beginning in June, were the "slow months," were the main bases for the CO's conclusion that Employer failed to show the need for an additional cook from June 2020 to March 2021.

3. **Deficiency 3: Job Order.**
AF 51-55.

The CO found that Employer submitted a job order for the wrong work location. AF 55.

D. Appeal

1. **Request for Administrative Review.**

On May 14, 2020, Counsel for Employer filed a "Notice of Appeal Rights" ("Notice") which I take to be a Request for Administrative Review. *See* AF 1. Attached to the Notice are: a May 13, 2020 letter signed by Montanile (AF 16-17); what appears to be a sales chart for "Venezia's NY Style Pizza – T&G" (AF 19); payroll figures for 2018 and 2019 for (Venezia's NY Style Pizza – T&G (North Phoenix)) (AF 20); "Job Details" for a "Food Preparation Worker" (AF 23-26); a Notice of Acceptance (of the H-2B application) for Venezia's C&C (AF 28); and a Notice of Acceptance for Venezia's New York Style pizza – Tempe (AF 34-39).

The Montanile letter asserts that it is addressing "two deficiency items." AF 17. In it, Montanile reiterates that the busy season is "*October* through end of May each year," and that "the summer slows down quite a bit in Arizona so the seasonal employee is needed during this time frame of *October* through May." AF 17 (my emphasis). He further states that he "did not state the period was June 16th to March 16th," but rather that "[t]he period we are looking for H2B Visa employees is from *October* (or *middle September*) until the end of May each year." AF 17 (my emphasis).

2. **Employer's Brief.**

Counsel for Employer submitted a brief at my invitation, on June 5, 2020.⁷ Regarding the temporary need, counsel concedes that "dates were incorrectly placed on the application." ER Brief 2 (Brief of Employer, June 4, 2020, at 2). However, counsel asserts that the error is that the peak season starts one month *earlier* than June (in May), even though his client attests that the peak season starts three (3) months *later* than June (in September), and *ends* in May.

⁷ The Solicitor relies on the NOD, and did not submit a brief.

Counsel also argues that Employer showed the need for the additional cook because of the high turnover of cooks, and the “high stress and business of the seasons.” ER Brief 3-4.

Counsel’s brief makes no reference to the allegedly deficient Job Order. However, in his Notice, counsel asserted that he was attaching a corrected Job Order.

II. DISCUSSION

A. Scope and Standard of Review

Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361.

The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review. The request for review may only contain legal argument, and such evidence that was actually submitted to the CO before the date of the CO’s determination. 20 C.F.R. § 655.61(a).

Accordingly, I disregard the charts and other evidence counsel submitted on appeal,⁸ as well as the corrected Job Order (AF 188-95).⁹ I will, however, take judicial notice of the two Notices of Acceptance.

The standard of review is not specified in the regulations, and prior BALCA decisions puzzled over what standard to apply. *See ETA v. International Carrier Enterprise, Inc.*, 2020-TLN-00008 at 5 (BALCA Nov. 18, 2019) (noting BALCA decisions have variously considered whether the CO’s decision was “arbitrary and capricious,” whether it was “legally and factually sufficient light of the written record,” or whether it withstood *de novo* review).¹⁰ I need not resolve the issue here, as I find that the CO’s decision is correct even if I were reviewing the matter *de novo*.

My review is further limited in what my Decision and Order can do. Upon review, I can only “affirm” the CO’s determination, “reverse or modify” it, or remand it to the CO for further action. 20 C.F.R. § 655.61(e).

⁸ However, I note that they are the same charts that were submitted to the CO, except modified with explanatory language. Accordingly, as a practical matter, I am disregarding only the explanatory matter and the highlighting.

⁹ During the June 4, 2020 telephone conference, counsel for the Solicitor confirmed that the CO had seen the corrected Job Order. However, it appears that it was not submitted before the CO issued the Final Determination, and therefore I do not consider it.

¹⁰ Available at https://www.dol.gov/agencies/oalj/PUBLIC/INA/REFERENCES/CASELISTS/TLN_DECISIONS#2020.

B. Resolution.

Employer's submissions to the CO, showing the 2018 and 2019 sales figures for the Phoenix location, and the summary payroll figures,¹¹ confirm Montanile's attestation that the busy season for the Phoenix location starts in August, September or October, and that the "summer months," beginning in June and July, are the "slow" months.¹² In his brief, counsel for Employer asserts that the busy season starts in May. I reject counsel's assertion as unsupported by any matter in the record, and as specifically contradicted by his client's clear and repeated attestations.¹³

The same figures support the CO's determination on the second deficiency. There is no showing that any additional cooks, or even one (1), are required at the Phoenix location during the "slow" summer months period of at least June and July. Counsel's argument, supported only by his citation to <https://www.chefhero.com/blog/restaurant-turnover-rate>, does not help. The website, even if I were to consider it to be a reliable source of information, makes no reference to the turnover rate for cooks (nor does the website it refers to for its statistics). In addition, the website makes no reference to the turnover rate for the Phoenix location of Venezia's.

Employer has not requested that I correct its application to reflect the actual asserted busy season of August, September or October 2020 through May 2021. Moreover, it has not identified any authority that would permit me to do so.

Finally, Employer does not dispute that it failed to submit a corrected Job Order before the CO made his final determination. As discussed above, I do not consider counsel's submission of a corrected Job Order on appeal.

¹¹ The 100+ pages of raw payroll data (AF 68-172), do not provide any useable information on this point, or any other point at issue in this matter. If there is a way to interpret that data in way that could help Employer's case, counsel for Employer has not identified it, and I do not see it. See 20 C.F.R. § 655.6(b) ("the CO will deny a request for an H-2B Registration or an Application for Temporary Employment Certification where the employer has a need lasting more than 9 months").

¹² There is a surge in sales and payroll in August of each year. See AF 63 (sales), 66 (payroll). This conforms to Montanile's *initial* statement that peak time is "from August through May each year." AF 60. (He later states that peak season starts in September or October.) Even assuming the peak time starts in August, that is still two (2) months after the June 2020 start date requested in the H-2B application. Accordingly, I find that this surge does not undermine the overall fact that the "summer months," including at least June and July, are the slow months, and not the start of the peak load period.

¹³ In addition, if Employer were seeking to employ an H-2B cook for May 2020 through March 2021, the application would be rejected out of hand, as such a position would not be "temporary," since it would last 10 months, longer than the 9 months permitted for such visas.

III. ORDER

The CO correctly issued Notices of Deficiencies on the three issues discussed above. Employer failed to rebut them before the CO, and it failed to rebut them on appeal.

Accordingly, **IT IS HEREBY ORDERED THAT** the Certifying Officer's denial of certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts