



Issue Date: 20 November 2019

BALCA Case No: 2020-TLN-00009
ETA Case No.: H-400-19254-055570

In the Matter of:

MR. LUO LLC D/B/A EDO GARDEN HIBACHI,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances:¹ Yongbing Zhang, *Esq.*
Law Offices of Yongbing Zhang
Chicago, Illinois
For the Employer

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER REVERSING FINAL DETERMINATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request filed by Mr. Luo LLC, doing business as Edo Garden Hibachi, (the “Employer”), for review of the Final Determination issued by the Certifying Officer (“CO”) in the above-captioned H-2B temporary labor certification matter.² 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.³ Employers who seek to hire

¹ The Office of the Solicitor, U.S. Department of Labor, did not make an appearance on behalf of the Certifying Officer in this case.

² 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.

³ 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). See 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). The continuing resolution signed into law on September 27, 2019 did not modify this requirement. See Continuing Appropriations Act, 2020, Pub. L. No. 116-59, Division A (2019). The current continuing resolution expires on November 21, 2019.

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).

STATEMENT OF THE CASE

The Employer is a Japanese restaurant located in Wisconsin. On September 11, 2019, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 123-195.)⁴ The Employer requested certification for two hibachi chefs⁵ from November 26, 2019, until May 31, 2020, based on an alleged seasonal⁶ need for workers during that period. (AF 123.)

On September 19, 2019, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in the Employer’s Application. (AF 113-122.) The CO gave the Employer the opportunity to either submit a modified Application and supporting documentation within ten days of the date of the NOD, or request administrative review before BALCA. (AF 114-115.) On October 3, 2019, the Employer responded to the NOD. (AF 54-112.)

On October 15, 2019, the CO issued a Final Determination outlining one outstanding deficiency. (AF 47-53.) The CO concluded that because the Employer failed to demonstrate that it has an intermittent need for workers, it did not meet the requirements of 20 C.F.R. § 655.6(a) and (b). (AF 47-53.) Therefore, the CO denied the Employer’s Application.

By letter dated October 28, 2019, the Employer requested administrative review of the CO’s Final Determination. (AF 1-46.) On November 1, 2019, the undersigned issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). Thereafter, on November 14, 2019, the undersigned received the Appeal File from the CO. Neither the Employer nor the Solicitor 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

⁴ “AF” refers to the Appeal File.

⁵ SOC (O*Net/OES) occupation code 35-1011.00 and occupation title “Chefs and Head Cooks.” (AF 108.)

⁶ In its filing with the CO on September 11, 2019, the Employer submitted an original and an amended ETA Form 9142B. (AF 123-195.) Both forms contain the same ETA case number (H-400-19254-055570). Although the Employer originally checked a box on its ETA Form 9142B attesting that it has an intermittent need for workers (AF 178), it submitted an amended ETA Form 9142B attesting that it has a seasonal need for workers (AF 123).

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 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).

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3). For the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B),⁷ which provides the following:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

The CO denied the Employer's Application after concluding that the Employer "did not sufficiently demonstrate the requested standard of temporary need," which the CO characterized as an "intermittent need." (AF 50.) Thus, in analyzing whether the Employer carried its burden of showing a temporary need for two hibachi chefs, the CO considered whether the Employer has shown an intermittent need for workers. In order to establish an intermittent need for temporary workers under the applicable regulation, the Employer "must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods." 8 C.F.R. § 214.2(h)(6)(ii)(B)(4). The CO weighed the evidence the Employer submitted against the regulatory definition of intermittent need, and concluded that the Employer's evidence did "not fit the definition of an intermittent need." (AF 51-52.) Therefore, the CO denied the Employer's Application.

In its request for administrative review, the Employer argued that the CO's decision was "based on intermittent need," but the Employer stated that it alleged a "seasonal need" for workers in its supplemental "filing." (AF 1.) I find that the Employer's argument has merit.

⁷ The continuing resolution signed into law on September 27, 2019, did not modify this requirement. *See* Continuing Appropriations Act, 2020, Pub. L. No. 116-59, Division A (2019). The current continuing resolution expires on November 21, 2019.

Although the Employer originally checked a box on ETA Form 9142B indicating that it has an intermittent need for workers (AF 178), the Employer submitted an amended ETA Form 9142B indicating that it has a seasonal need for workers (AF 123). The Employer submitted both its original and its amended Applications to the CO with its original submission on September 11, 2019. (AF 123-195.) The evidence shows that where prompted to identify the nature of its temporary need on its amended Application, the Employer filled out the box next to the word “Seasonal.” (AF 123.) Moreover, in a “Sworn Statement” that the Employer included in its original filing on September 11, 2019, the Employer discussed its seasonal need for workers. (AF 131-132.) Specifically, it explained that its “busy seasons starts near the end of October or early November to June of [the] next calendar year” and “business is a little bit slower during the summer between July and October.” (AF 131.) Furthermore, the Employer attested that Wisconsin, where it operates, “is a northern state with [a] long winter and short summer,” and the “demand for hibachi starts to grow in late September and peak in December, January and February, and then becomes stable in March, April, and May.” (*Id.*) The Employer added that its “off-season” is between June and October. (*Id.*) I find that the evidence supports the Employer’s argument that it identified the nature of its temporary need as seasonal, rather than intermittent.

The CO based her decision to deny the Employer’s Application on her view that the Employer alleged an *intermittent* need for workers, whereas the Employer actually alleged a *seasonal* need for workers. After reviewing the record in this matter, I find that the CO’s basis for denying the Employer’s Application is legally and factually insufficient. Because the CO only considered whether the Employer carried its burden to show that it has an intermittent need for workers, fundamental fairness requires that I consider whether the Employer has established that it has a seasonal need for workers. In order to establish a seasonal need for workers, 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” and must “specify the period(s) of time during each year in which it does not need the services or labor.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

I find that the Employer has clearly demonstrated the existence of a recurring seasonal event, which is an increase in business from November through May, and a slowdown in business during the summer months, when the weather in Wisconsin is warmer. In the “Sworn Statement” attached to its Application, the Employer’s owner explained that the restaurant’s busy season starts near the end of October or early November, and its slow season occurs “during the summer between July and October.” (AF 131.) The Employer stated that it normally employs one part-time hibachi chef during its slow season, but it needs at least two to three full-time hibachi chefs during its peak season. (*Id.*) The Employer’s owner explained that when demand for hibachi is high, he hires one or two part-time hibachi chefs, but he asserted that it is “very difficult to find full time hibachi chef[s] during the busy season.” (AF 132.) Moreover, he explained that although he is a hibachi chef himself, and he tries to work additional hours as a hibachi chef when the restaurant is “extremely busy,” he is unable to work full-time given his other duties. (*Id.*)

Consistent with the Employer’s assertions, the evidence shows that the Employer’s revenue has historically increased during its alleged busy season. Accounting records from 2017 and 2018, which the Employer submitted to the CO, show that its revenue began increasing in November, continued to increase through May, and began decreasing in June. (AF 177.)

Moreover, although the Employer only had 2019 accounting records from January through June, they also show that the Employer's revenue remained high from January through May, and began to drop in June. (*Id.*) Thus, I find that the accounting records the Employer presented to the CO establishes a recurring "event or pattern" to justify the need for additional seasonal labor. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

Furthermore, the Employer has demonstrated that it consistently hires more hibachi chefs during its alleged period of seasonal need. The "Work Record" the Employer submitted to the CO shows that in 2017, the Employer employed one part-time hibachi chef, but no full-time hibachi chefs, in June, July, August, September, and October. (AF 176.) However, it hired two part-time hibachi chefs and one full-time hibachi chef in both November and December 2017. (*Id.*) Furthermore, the Employer hired two part-time hibachi chefs and one full-time hibachi chef in January and February 2018, and two part-time and two full-time hibachi chefs in March, April, and May 2018. (*Id.*) In June 2018, which is the beginning of the Employer's alleged slow season, the Employer employed one part-time and one full-time hibachi chef. (AF 176.) Thereafter, from July through October 2018, the Employer only employed one part-time hibachi chef, but no full-time hibachi chefs. (*Id.*) In November and December 2018, the Employer's need for hibachi chefs increased again, as it employed two part-time hibachi chefs and one full-time hibachi chef each month. (*Id.*) The Employer's need for hibachi chefs remained augmented from January through May 2019, when it employed two part-time hibachi chefs and one full-time hibachi chef each month. (*Id.*) I find that the Employer's records clearly document an increased need for hibachi chefs from November through May, which is its period of alleged seasonal need.

Based on the evidence the Employer submitted to the CO, I find that the Employer has demonstrated that it has a seasonal need for two hibachi chefs from November 26, 2019, until May 31, 2020. Therefore, the Employer has met the requirements of 20 C.F.R. § 655.6(a) and (b).

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial is **REVERSED** and this case is **REMANDED** to the Certifying Officer for further processing.

For the Board:

JOHN P. SELLERS, III
Administrative Law Judge