



**Issue Date: 12 January 2010**

**BALCA Case No.: 2010-TLN-00028**

ETA Case No.: C-09300-46829

*In the Matter of:*

**MCGINNIS PAINT & DRYWALL CO.,**

*Employer*

Certifying Officer: William L. Carlson  
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of 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. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. Part 655, Subpart A (2009).

**Statement of the Case**

On October 26, 2009, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from McGinnis Paint & Drywall Co.

(“the Employer”) requesting certification for 20 “Drywall and Ceiling Tile Installers” from January 11, 2010, until November 11, 2010. AF 93-117.<sup>1</sup> The Employer indicated in the boxes provided on the application that the nature of its temporary need was peakload. AF 93. In its statement of temporary need, the Employer further asserted that “a temporary peak-load need has arisen for workers with these skills due in part to ongoing conditions that have developed in our state in the aftermath of Hurricane Katrina as well as to a large number of ongoing construction projects.” AF 103. The Employer listed four construction contracts but did not indicate start or end dates. *Id.*

On November 3, 2009, the CO issued a Request for Further Information (“RFI”), identifying four deficiencies, only one of which is relevant for this appeal. AF 87-92. Citing to 20 C.F.R. § 655.21(a), the CO found that the Employer failed to establish a temporary need. AF 90. More specifically, the CO stated that “the employer’s claim that the aftermath of Hurricane Katrina has created a peakload is not sufficient in proving a temporary need [because] the aftermath of Hurricane Katrina . . . [does not have] beginning and end dates.” *Id.*

The CO requested that the Employer provide, *inter alia*, “an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need.” AF 91. Additionally, the Employer was required to submit “supporting evidence and documentation that justified the chosen standard of temporary need.” *Id.*

On November 10, 2009, the Employer responded to the RFI. AF 52-86. The Employer wrote in its amended statement of temporary need:

Our company . . . has been primarily a commercial and residential painting contractor. In these unprecedented and difficult economic times, we have been searching for viable options to expand our business and, fortunately, have been given the opportunity to supplement our painting specialization with substantial contracts from four principal sources in our area for the installation of drywall.

We consider this one year “trial period” in drywall installation to be a period of temporary need because (a) it is unclear whether the necessary qualified drywall hangers not already employed in our area will be available for permanent employment; (b) whether our initial four trial projects will lead to further contractual opportunities; and (c)

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<sup>1</sup> Citations to the 117-page Administrative File will be abbreviated “AF” followed by the page number.

whether our expansion into drywall hanging and finishing as a complement to our commercial painting capabilities can be viable and profitable for our company.

Our permanent workforce primarily consists of experienced commercial painters with some limited knowledge and experience in drywall hanging. We hope, with these new drywall contracts, to further train our existing painters in these specialized, but critical drywall techniques in close coordination with the requested foreign workers.

AF 70. In addition to the statement of temporary need, the Employer included the dates for the four construction projects as follows: Columbus Middle School, 12/2009-11/2010; Yazoo County Jail, 01/2010-01/2011; Thad Cochran Research Center, 04/2010-11/2010; and Meridian Fire Station-NSA, 03/2010-11/2010. *Id.* The Employer also submitted a payroll summary dating from October 2008 to October 2009. AF 85-86. The summary listed the total number of permanent and temporary workers employed each month but did not detail the employees' relevant occupations. *Id.*

On December 4, 2009, the CO issued a *Final Determination* denying certification. AF 46-51. Citing to 20 C.F.R. § 655.21(a), the CO determined that the Employer had failed to establish a temporary need. AF 48. Specifically, the CO stated:

In order to establish a peakload need the employer must establish that (1) it regularly employs permanent workers to perform the services or labor at the place of employment and 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 (2) the temporary additions to staff will not become a part of the employer's regular operation.

In review of the submitted documentation it was determined that the employer failed to prove they have a peakload need from January 11, 2010[,] to November 11, 2010. . . . The employer has failed to establish that there is a temporary need with a clear beginning and end date. The employer's projects all have various beginning and ending dates with the longest project running through January 2011. The projects failed to prove the employer has a temporary need of ten months. . . . Furthermore, the employer's explanation that the venture into drywall is a one-year trial period contradicts the employers request for workers for ten months.

The employer is given the option of choosing its temporary need as either seasonal, peakload, intermittent or one time need. The burden of proof is on the employer to prove their need falls under one of these standards of temporary need.

AF 50-51. The Employer's appeal followed.

In its Request for Review, the Employer asserted that the nature of its need must be temporary “due to the nature of construction contracts [and] the impossibility of having the requested 10 month period of need under the H-2B regulations conform exactly to the four start and stop dates of the contracts involved.” AF 10. Further, the Employer argued that “the temporary need of 10 months reflected in our paperwork as the employer is a direct, inescapable requirement of the DOL itself that all approvals for H-2B petitions be granted for a maximum period of 10 months.” *Id.* The Employer also reiterated that the drywall contracts are supplementary to its commercial painting business, and the drywall business is a temporary or trial business. *Id.*

In his brief, the CO asserted that a denial of certification was appropriate because “the rule regarding temporary need states that unless an employer’s need is a one-time occurrence, the Secretary will deny certification if the employer’s need lasts more than ten months.” The CO further argued that the Employer’s need should be limited to ten months, “but the four projects that [the Employer] listed as requiring foreign workers spanned over thirteen months.”

### **Discussion**

To obtain certification under the H-2B program, an applicant 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). In the instant case, the Employer attempted to establish a peakload need. To establish a peakload need, the Employer must demonstrate that “it regularly employs permanent workers to perform the services or labor at the place of employment and 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.” 8 C.F.R. § 214.2(h)(6)(ii)(3).

While it is true that the Employer’s contracts, when pieced together, last thirteen months, this alone is not cause for denial. The dates given by the Employer for each of the four projects refer only to the dates within which the Employer must accomplish the project under its contract. The dates are not necessarily reflective of when the Employer may need temporary workers. As the board reasoned in a similar case, “[t]he precise period of time during which the Employer must supplement its permanent

workforce within the larger period circumscribed by its contractual obligations remains a fluid business decision made by the Employer.” *Tampa Ship, LLC*, 2009-TLN-00048, slip op. at 7 (BALCA May 8, 2009). Therefore, the Employer’s contracts, which last thirteen months, do not necessarily preclude the Employer from asserting a temporary need of only ten months.

However, the Employer still failed to establish a peakload need for workers. Under the peakload standard, the Employer must show that it “regularly employs permanent workers to perform the services or labor at the place of employment.” 8 C.F.R. § 214.2(h)(6)(ii)(3). The CO requested in the RFI that the Employer provide an explanation as well as documentation justifying its peakload standard of temporary need, but the Employer failed to provide sufficient information. In its statement of temporary need, the Employer acknowledged that its workforce consists primarily of commercial painters. At no point did the Employer indicate that it regularly employs workers to install drywall. Indeed, its statement suggested the opposite. For the Employer to qualify under a peakload standard, at least a portion of its regular staff must perform drywall services. The Employer simply did not provide enough information to determine if its need satisfies the regulatory definition of peakload. Ultimately, the Employer bears the burden of establishing a temporary need. Since the CO could not determine if the Employer had a peakload need based on the information in the record, he properly denied certification.

### **Order**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

For the Board:

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

