



Issue Date: 18 May 2016

BALCA Case No.: 2016-TLN-00039

ETA Case No.: H-400-16029-328892

In the Matter of

BMC WEST CORPORATION

Employer

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 ("CO") denial of an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B guest worker program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a onetime occurrence, seasonal, peakload, or intermittent basis, as defined by the 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 Following the CO's denial of an application under 20 C.F.R. § 655.32, an employer may request administrative review by the Board of Alien Labor Certification Appeals ("the Board" or "BALCA"). 20 C.F.R. § 655.33(a). The administrative review is limited to the appeal file, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence as was actually submitted to the CO in support of the application. § 655.33(a), (e).

STATEMENT OF THE CASE

On January 29, 2016, BMC West Corporation ("Employer") submitted an application for temporary labor certification to the Department of Labor's Employment and Training Administration ("ETA"). (AF 134-159.)² The Employer requested certification for forty-five "Helpers—Production workers" from April 15, 2016 to December 15, 2016 on a peakload basis.

¹ On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) ("2015 IFR"). The Employer filed its application for temporary labor certification after April 29, 2015, requesting a start date of need after October 1, 2015. Thus, the 2015 IFR applies.

² Citations to the Administrative File will be abbreviated "AF" followed by the page number.

(AF 134.) Employer explained that it operates year-round and needs temporary workers due to a “peak load event which typically begins in April and extends to Mid-December of each year.” (Id.) Employer went on to state that most developers build and ready homes for the showroom season, which is in the spring. (Id.) Employer’s busy season then peaks in the summer and slows down in late December through March. (Id.)

On March 24, 2016, the CO issued a Notice of Deficiency (“NOD”), notifying the Employer that its application failed to meet the criteria for acceptance due to one deficiency. (AF 125-130.) Specifically, the CO found that Employer failed to establish that the job opportunity is temporary pursuant to 20 C.F.R. §655.6(a)-(b). (AF 129.) The CO found that Section B, Item 9 of the application was not sufficient because the Statement of Temporary Need did not adequately establish a peakload need. Thus, the CO requested that the Employer amend its ETA Form 9142, Section B, Item 9 to include: 1) a description of the Employer’s business history; 2) an explanation regarding why the Employer’s job opportunity reflects a temporary need; and 3) an explanation regarding how the request meets the regulatory standards of a peakload need. (AF 129-130.) The CO also found that the Employer did not provide any documentation to support its statement. Accordingly, the CO asked the Employer to submit the following documentation: 1) signed work contracts and/or monthly invoices from previous calendar year(s) showing work will be performed during the period of need; 2) annualized and/or multi-year work contracts; 3) summarized monthly payroll reports; and 4) other evidence that establishes the temporary need. (Id.)

On April 1 and April 2, 2016, Employer submitted its response to the NOD. (AF 24-124.) The Employer’s response included:

- 1) Employer’s explanation letter: (AF 110-113) Brett Heffner³ wrote a letter dated March 26, 2016. He described Employer’s business history and activities. The letter states that Employer’s need is less than one year and that the peakload need depends on the new home construction permit start dates. Mr. Heffner wrote that the industry slows down during the Christmas Holidays through January.
- 2) Nevada Subcontractors Association Letter: (AF 114-115) Rebecca Keenan, Executive Director of Nevada Subcontractors Association, wrote a letter stating that the new home construction industry has a peak season. She wrote that the peak season is from March through the end of November. Ms. Keenan also included a graph by the Center of Business and Economic Research which shows that the construction business has hot and cold seasons.
- 3) Southern Nevada Home Builders Association Letter: (AF 116-118) Nat Hodgson, Chief Executive Officer of Southern Nevada Home Builders Association, wrote a letter explaining the seasonal nature of the new home construction industry. He wrote that the peak season is from late January through November. (AF 117.) Mr. Hodgson also provided the graph from the Center for Business and Economic Development.

³ Mr. Heffner did not list his position in the company.

- 4) Construction Total US Hire Rate: (AF 119) Employer provided a report of “Job Openings and Labor Turnover” from the Bureau of Labor Statistics from 2006 through 2016. The graph shows that there are definite hiring peaks in the construction industry, the number of job openings is higher in the summer months and slows down in the winter. Hiring generally increases in the months of March through July.
- 5) Seasonal Indexes for Housing Permits: (AF 120-123) Employer provided a chart of the seasonal indexes used to adjust housing units authorized in permit-issuing places. The indexes show that the number of housing units is higher in the summer and fall (March through October) and lower in the winter (November through February).
- 6) Employer’s 2014 and 2015 Invoices: (AF 32-91) Employer provided its 2014 and 2015 invoice register. The invoices are organized by client. The invoices show that Employer billed clients throughout the year, from January through December. It is unclear whether Employer had higher billing during a particular season.

On April 25, 2016, the CO issued a Non-Acceptance Denial (“Denial”). (AF 10-15.) The CO concluded that Employer’s response to the NOD was insufficient. First, the CO wrote that Employer’s invoices show that Employer “entered into contracts with other builders and provided its services at substantially the same rate on a year-round basis” and the invoices “do not indicate an appreciable increase in the employer’s business during the requested peakload months of April through December...” (AF 15.) Second, the CO found that the statements from the trade associations do not coincide completely with Employer’s requested period of need. (Id.) The CO noted that the provided graphs “illustrate the issuance of permits for home building, not the actual construction of the homes.” (Id.) The CO concluded that because building permits are issued in advance, the graphs do not establish what season construction actually begins. (Id.)

On April 25, 2016, Employer requested administrative review of the denial of certification. (AF 1-8.) Pursuant to an Order dated April 27, 2016, the parties had seven business days from their receipt of the appeal file to file briefs. The undersigned received the appeal file on May 4, 2016. Employer did not file a brief.

The Associate Solicitor for Employment and Training Legal Services (“Solicitor”) filed a brief on May 11, 2016. The Solicitor argued that Employer did not establish that its need for forty-five production helpers is temporary in nature. Specifically, the Solicitor found that none of the submitted evidence substantiated Employer’s request for temporary workers on a peakload basis. The Solicitor agreed with the CO’s determination that the invoices did not show an appreciable increase in Employer’s business from April through December. The Solicitor also argued that the trade association statements were not specific to Employer’s business, stating that the statements “only give generalized statistics regarding building cycles in the housing industry in general.” Furthermore, the Solicitor noted that the statements somewhat contradict Employer’s period of need because the peaks in the graphs do not coincide

precisely with Employer's period of need. Finally, the Solicitor found that Employer did not provide any payroll records, as requested by the CO.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the 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). The DHS regulations provide that 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." 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); see also Tampa Ship, 2009-TLN-44, slip op. at 5 (May 8, 2009). Here, Employer requests temporary workers for a "peakload" need. To establish a peakload need, an employer

Must establish 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)(B)(3).

Employer has not established that it has a temporary peakload need for forty-five production helpers. While Employer provided an adequate explanation for its peakload need, the evidence does not substantiate Employer's dates of need. Most of the evidence is not specific to Employer's business, the peak construction season does not exactly match Employer's stated period of need and the 2014 and 2015 invoices, the only evidence specific to Employer's business, fail to show that Employer has a peakload need. Furthermore, although Employer asserted that it employs a permanent staff and needs to supplement this staff with temporary workers due to a seasonal need, Employer has not provided any evidence to support its assertion.

First, the evidence demonstrating the construction industry's peak season does not match Employer's need. See D and R Supply, 2013-TLN-00029 (February 22, 2013) (Affirming CO's denial where the submitted evidence did not match the employer's requested dates of need.) The Nevada Subcontractors Association letter states that the construction industry's peak season is from March through the end of November. The Southern Nevada Home Builders Association letter states that the peak season is from late January through November. The Construction Hire Rate graph shows that hiring in the construction industry is usually higher in March through July. Finally, the seasonal indexes for housing permits reveal that there are more housing permits authorized for the months of March through October. None of the submitted evidence supports Employer's need for temporary workers from April 15 through December 15. Notably, based on the submitted evidence, the construction industry's peak season begins in March and ends no later than the end of November. In light of this evidence, Employer fails to explain why its

temporary need begins in April rather than March⁴ and why the need continues through December 15 and does not end at the end of November like the rest of the industry.

Second, the CO correctly noted that the submitted evidence is not specific to Employer's peakload need and merely provides generalized statistics on the construction industry. While the evidence supports Employer's contention that the construction industry experiences peaks and lulls in business, it is insufficient to meet Employer's burden that Employer has a seasonal demand for temporary workers from April 15 to December 15. Notably, the US Construction Hiring Rate and seasonal indexes may show when construction companies hire workers and receive permits, but does not show when construction actually begins.

Third, Employer has not provided evidence that it regularly employs permanent workers and needs to supplement its permanent staff with temporary workers based on a short term or seasonal demand. For an application based on peakload need, failure to establish a permanent workforce is grounds for a denial. Masse Contracting, Inc., 2015-TLN-00026 (Apr. 2, 2015) (“[I]f permanent workers are not employed at a specific job site, temporary foreign workers cannot possibly ‘supplement’ them at that location, as required for a ‘peakload need’ under 8 C.F.R. §214.2(11)(B)(3).”) The CO asked Employer to provide payroll records, identifying Employer's full-time permanent and temporary staff. Employer has not provided any payroll records or any other evidence on its employees. A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. AB Controls & Technology, Inc., 2013-TLN-00022 (Jan. 17, 2013).

Finally, Employer's invoices fail to establish a peakload need. Employer submitted its invoice register organized by client. The invoice register exhibit is fifty-nine pages and shows each client's payments in different months from 2014 to 2015. A general review of this data shows that Employer billed its clients year-round. However, because the invoice register is not organized by month, it is unclear whether Employer experienced an appreciable increase from April to December. This evidence fails to meet Employer's burden because Employer has not provided any summaries or analysis of the invoice data. See BMC West Corporation, 2016-TLN-00034 (May 6, 2014) (“As the burden is on the Employer to establish its peakload need, it is not reasonable for the Employer to attempt to transfer its obligation to prepare and support its application to the CO by submitting 60 pages of unsummarized invoices.”) Thus, Employer's submission fails to show, in a meaningful way, that Employer has a greater demand during its requested period of need of April 15 to December 15, 2016.

Consequently, Employer has not met its burden of establishing that it has a peakload need for temporary workers between April 15, 2016 and December 15, 2016.

ORDER

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

⁴ Employer explained that its date of need is actually from April 1 to December 15 of each year but Employer had to change the start date to April 15 because it filed the petition late. (AF 149.)

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey