



Issue Date: 31 May 2016

BALCA Case Nos.: 2016-TLN-00043
2016-TLN-00044

ETA Case Nos.: H-400-16030-511543
H-400-16031-468723

In the Matter of

**BMC WEST CORPORATION and
BMC WEST CORPORATION DBA BMC**
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 two applications 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 ("DHS"). 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 undersigned consolidated the above-captioned matters by Order dated May 13, 2016.

STATEMENT OF THE CASE

H-2B Applications

On January 30 and 31, 2016, BMC West Corporation ("Employer") submitted two applications for temporary labor certification to the Department of Labor's Employment and

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.

Training Administration (“ETA”). (AF1 3384-3410, AF2 2114-2140.)² The Employer requested certification for twenty-five “Helpers—Installation, Maintenance, and Repair Workers” (AF1 3384) and thirty-five “Helpers—Production Workers” (AF2 2114) from April 15 to December 15, 2016 on a peakload basis. (AF 1338.) 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.)

Notices of Deficiency

On March 30, 2016, the CO issued a Notice of Deficiency (“NOD”) for the first application. On March 25, 2016, the CO issued a NOD for the second application. The NODs notified Employer that its applications failed to meet the criteria for acceptance due to two deficiencies. (AF1 3374-3380, AF2 2106-2111.) Specifically, the CO found that Employer failed to establish that the job opportunities are temporary pursuant to 20 C.F.R. §655.6(a)-(b). (AF1 3378.) The CO found that Section B, Item 9 of the applications 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 opportunities reflect a temporary need; and 3) an explanation regarding how the requests meet the regulatory standards of a peakload need. (AF1 3378-3379.) 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.)

The CO also found that Employer failed to establish temporary need for the number of workers requested pursuant to 20 C.F.R. §655.11(e)(3)-(4). The CO wrote that it was unclear how the employer determined that twenty-five and thirty-five workers would be sufficient to complete its work crews and meet its peakload needs. Accordingly, the CO requested an explanation of how Employer determined the number of workers being requested for certification. (AF1 3380.) The CO asked Employer to submit: 1) summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment, the total number of workers; or 2) other evidence and documentation that similarly serves to justify the number of workers. (Id.)(emphasis added.)

² Citations to the 2016-TLN-00043 Administrative File will be abbreviated as “AF1” followed by the page number. Citations to the 2016-TLN-00044 Administrative File will be abbreviated as “AF2” followed by the page number. For ease of reference, if there is an identical document in both files, the citations will be to AF1.

Employer's Response to the Notices of Deficiency

On April 7, 2016, Employer submitted its responses to the NODs. (AF1 29-3373, AF2 36-2104.) Employer submitted different evidence for each application.

2016-TLN-00043 Evidence

1. Business Explanation Letter (AF1 38-43): Rick Shelly³ wrote a letter dated April 4, 2016, signed by Rick Shelly. The letter describes Employer's business and states that the construction industry's peak season is from April through the summer. Mr. Shelly wrote that Employer needs twenty-five workers because "we need to form 8 more crews in order to handle the upcoming workload." Mr. Shelly wrote that "when folks have settled down in their new home and are ready to bring family for their Thanksgiving celebration and during the Christmas Holidays, they tend to frown at us still hammering in their back yards." He also wrote that the nature of winter hinders productivity due to cooler weather and much shorter sunlight days.
2. Master Subcontract Agreement with Meritage Homes of California, Inc. (AF1 44-73) (Duplicate at AF1 74-103): the contract lists the business address as Sacramento, California and the effective date as November 17, 2014. It does not include a production schedule or end date.
3. 2015 Invoices (AF1 104- 3263): individual invoices for 2015, organized by date.
4. Daily Schedules: (AF1 3264- 3338): Daily schedules from January 27, 2016 through February 10, 2016 and from June 26, 2015 through July 2, 2015. Each schedule lists the contractor name, city, lot number, sales order number, driver's name, and the work that will be performed, i.e. shower enclosures, vanity mirrors, wire shelving, etc.
5. Labor Openings and Labor Turnover Survey (AF1 3339): 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.
6. Master Construction Contract with DeNova Homes, Inc. (AF1 3340-3359): This is a contract between Employer and DeNova Homes with a January 31, 2011 effective date. The location is Concord, CA.
7. 2015 Millwork Headcount (AF1 3360-3361): This document includes a chart and a graph, providing the "staff" number and wages paid each month in 2015. The graph shows that Employer had the lowest number of workers in January, February and March.

³ The letter does not contain Rick Shelly's title in the company. However, Employer's H-2B application contains an "H-2B Work Visa Client Service Agreement." (AF1 3395.) Rick Shelly signed that agreement and wrote that his official title is "Market Manager." (AF1 3398.)

However, the graph shows a general increase in the number of workers from January to December.

8. Seasonal Indexes (AF13362-3365): 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).
9. Article: Where have all the Construction Workers Gone? (AF 3360-3373): The Atlantic published an article dated February 13, 2015 which discusses Nevada's housing boom. The article states that construction companies are employing sixty percent fewer construction workers than needed and the construction field has some of the fastest growing jobs between 2012 and 2022.

2016-TLN-00044 Evidence

1. Business Explanation Letter (AF2 37-41): Rick Shelly wrote a letter dated March 26, 2016. Mr. Shelly described the business and explained that Employer's need is temporary because it is less than one year. He wrote that Employer needs thirty-five workers because "we need to form 9 more crews in order to handle the upcoming load. Mr. Shelly went on to state that "we have determined the need for 35 supplemental guest workers as production helpers for this peak period because we clearly see how we can form 17 new crews during this peak load need and put two of these H-2B men per new crew."
2. Statement of Need for Truss Production Helpers (AF2 42): this is a one page letter describing Employer's business and explaining why Employer has a temporary need. This document re-states the statement of need in Employer's H-2B application.
3. 2015 Truss Headcount (AF2 43): This document includes a chart and a graph, providing the "staff" number and wages paid each month in 2015. The graph shows a peak in headcount from August to October.
4. BMC Monthly Production "Nathan" (AF2 44-124): Employer provided a monthly production table documenting production from January 1, 2015 through December 31, 2015 and from January 1, 2016 through March 31, 2016. The table shows Employer's projects in 2015 and 2016 organized by date. However, the dates are not summarized by month and instead include individual project dates. The table includes the following information: the job number, job name (client), date built, labor, and cost.
5. BMC Monthly Production "Fresno" (AF2 125-166): this document is similar to the Nathan production table. It covers the period from January 1, 2015 through December 31, 2015.
6. 2015 Invoices (AF2 167-2104): individual invoices for 2015.

Final Determination and Appeal

On April 28, 2016, the CO issued a Non-Acceptance Denial (“Denial”) for each application, finding two deficiencies. (AF1 11-19, AF2 20-27.) The CO concluded that Employer’s response to the NOD for each application was insufficient.

2016-TLN-00043

The CO found that Employer’s evidence failed to establish the job opportunity as temporary in nature. (AF1 15-17.) The CO noted that the Daily Work Schedules show that Employer operates from January through March, which is outside of Employer’s dates of need. The Work Schedules also show that Employer operates during these off-peak months with as much frequency as the peakload months. (AF1 17.) The CO found that there is no evidence that the Job Openings and Labor Turnover Survey is relative to Employer’s business operations. The CO found deficiencies with the other evidence. He found that the Master Service Contract with DeNova homes was deficient because the effective date was more than five years prior to Employer’s requested start date and did not support the dates of need. The Millwork Headcount graph was deficient because it did not specify a work location and the job duties in Employer’s application did not mention “millwork.” The “Seasonal Indexes” document was deficient because it is a generic document that does not support Employer’s dates of need. Finally, the CO noted that Employer did not provide the payroll documents as requested in the NOD.

The CO also found that Employer failed to establish a temporary need for the number of workers requested. (AF1 17-19.) The CO wrote that Employer did not provide documentation that supports the number of workers requested and instead provided generic, untitled documents not specific for this Employer and this job title.

2016-TLN-00044

The CO found that Employer’s evidence failed to establish the job opportunity as temporary in nature. (AF2 23.) The CO wrote that Employer’s invoices show that Employer provided its services at substantially the same rate on a year-round basis. According to the CO, the invoices did not demonstrate an appreciable increase in Employer’s business during the requested peakload months. Likewise, the Fresno Production document showed that Employer “had as many projects during the months of January, February, and March,” as it did the rest of the year and Employer did not have an increase in business during the requested peakload months of April through December. On the other hand, the Nathan document showed that Employer had more projects from January through March than from April through July with no projects for June. The CO found that “this document shows more projects being worked in the months not mentioned in the employer’s application than in the employer’s requested peakload months.” Finally, the CO found that the graph depicting an increase in headcount does not coincide with Employer’s dates of need. The CO found that the months of January, February, and March show a higher headcount than the months of April or May. June and July had a lower headcount than January.

The CO also found that Employer failed to establish a temporary need for the number of workers requested. (AF2 26-27.) The CO found that the headcount graph did not support Employer's need for thirty-five workers. The CO wrote that "it is unclear to the Department when the additional workers are needed and exactly how many additional workers are needed to perform the job."

Appeal and CO's Brief

On May 2, 2016, Employer requested administrative review of the CO's Denial. (AF 1-10.) Pursuant to an Order dated May 6, 2016, the parties had seven business days from their receipt of the Administrative File to file briefs. The undersigned received the Administrative File on May 11, 2016. On May 12, 2016, the Solicitor for the CO filed an unopposed Motion to Consolidate the two matters. The undersigned granted the Motion on May 13, 2016.

Employer did not file a brief. The Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief on May 19, 2016. The Solicitor argued that Employer's response consists of a generic template that is not specific to the CO's NOD and includes a "document drop" of over 5,000 pages that does not tie the information to the particular deficiencies. (Brief at 9.) The Solicitor wrote that Employer's documentation shows that it has a permanent need for workers. (Id.) Furthermore, Employer did not submit payroll records or other documentation showing the total number of permanent versus temporary employees in a given month. (Id.) Thus, the Department cannot determine whether Employer has a peakload need. (Id.) Employer also did not submit any documentation to support its need for the number of workers requested. (Id.)

SCOPE OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). Employer did not submit any evidence that is not part of the Appeal File. After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)-(3).

DISCUSSION

1. Did Employer establish that its job opportunities are temporary in nature based on a peakload need?

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). 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).

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’s evidence fails to establish that it has a need for temporary workers on a peakload basis. Although Employer provided an explanation as to why Employer’s need changes seasonally, Employer failed to provide sufficient evidence to substantiate its dates of need. As discussed below, none of the submitted evidence supports Employer’s requested dates of need from April 15 to December 15, 2016.

a. 2015 Invoices

Employer’s 2015 invoices do not provide any useful information on Employer’s peakload need. As noted above, Employer did not provide any monthly summaries or analysis of the invoices. Instead, Employer submitted 3,159 pages and 1,937 pages, respectively, of unsummarized invoices. BALCA has previously affirmed the denial of an H-2B application in which Employer submitted unsummarized invoice records. 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.”). The CO reviewed the invoices and found that Employer operates at substantially the same rate on a year-round basis. While the document shows that Employer billed throughout the year, it is impossible to discern, without creating and analyzing monthly summaries, whether Employer’s need changed over the course of the year.

b. Contracts

The contract agreements with Meritage Homes of California and DeNova Homes do not support Employer's peakload need. Neither contract includes production schedules or other evidence that work will be performed during the requested period of need. Notably, the Meritage Homes contract has a November 2014 effective date, approximately one year and five months before Employer's requested dates of need. The DeNova Homes contract has a January 2011 effective date, approximately five years before Employer's requested dates of need. Employer does not explain how these contracts establish that it has a need for temporary labor from April to December of 2016. At most, these contracts establish that Employer has a need for labor.

c. Labor Openings and Labor Turnover Survey, Seasonal Indexes, Article on Construction Workers in Nevada

The "Labor Openings and Labor Turnover Survey" shows that hiring in the construction industry is highest during the months of March through July and decreases from August through December. Consequently, this document does not support Employer's peakload need and in fact contradicts Employer's peakload need from April to December. Likewise, the seasonal indexes show that the number of authorized housing units increases from March through October and is lowest in November through February. The CO correctly determined that the "Seasonal Indexes" peaks do not coincide with Employer's requested peakload period. (AF1 17.) Finally, the Nevada construction workers article does not discuss the construction industry's seasonal nature. As noted by the Solicitor, the article focuses on the construction industry in Nevada, whereas Employer's location of need is in California. (Brief at 14.)

d. Daily Work Schedules

As noted correctly by the CO, the Daily Work Schedules show that Employer operates during its non-peak months of January through March. The CO found that Employer operates during its non-peak months with as much frequency as during its peak months. (AF1 17.) Similarly, the Solicitor noted that "work was performed on 58 lot numbers on January 28, 2015, which falls outside of the alleged peakload period, AF-42 at 3267, whereas work was performed on only 49 lot numbers on June 30, 2015, within the alleged peakload period." (Brief at 11.) Employer did not provide any summaries or explanation for the Daily Work Schedules document. Specifically, Employer did not explain which category measures its business need. The Daily Work Schedules table lists the contractor, lot numbers, sale order numbers, and the job type, *i.e.*, shower enclosure. (See AF13264.) The table then lists the number for each project, *i.e.*, two shower enclosures and four vanity mirrors.

It is unclear whether the number of lots or the number of projects demonstrates whether Employer has an increased need. Presuming that the increased demand for labor is measured by the number of lots, this document does not support Employer's requested peakload dates. Presuming that the increased demand for labor is measured by the number of jobs for each contractor, the document likewise does not support Employer's peakload dates; the Daily Schedules show that Employer had more jobs in February than in June. Finally, this document is

not sufficient to support Employer's peakload need dates because Employer provided the Daily Work Schedule for only seven days from January 28 through February 10, 2016 (non-peak season) and for only five days from June 26 through July 1 2015 (peak season). Thus, the document does not substantiate Employer's assertion that it needs temporary labor from April through December.

e. 2015 Millwork and Truss Headcount

The headcount documents do not support Employer's dates of need. First, Employer does not explain what jobs these charts summarize. In its job description for the thirty-five production helpers, Employer wrote that "helpers will aid production worker in the manufacturing of wood trusses." (AF2 2130.) However, the Truss Headcount does not divide the chart according to production workers and production helpers. Employer does not explain whether other positions are included in the Truss Headcount and whether this chart is limited to production helpers only.

Second, the changes as seen on the charts do not support Employer's dates of need from April 15 through December 15. The Millwork Headcount graph shows that there was a general increase in the number of workers over the year. Employer's staff generally increased from January through November with a slight drop in December. (See AF1 3360.) This graph does not show any definite peaks in staff numbers. The 2015 Truss Headcount has a different projection but similarly fails to support Employer's dates of need. (AF2 43.) This document shows that Employer's truss headcount was mostly steady from January through July and experienced a spike from August through October. (*Id.*) While this spike falls within Employer's requested dates of need, it does not support Employer's need from April to July and from October through December 15.

f. Statement of Need For Truss Production Helpers

The statement of need does not provide any evidence substantiating Employer's need for the requested dates. The statement is unsigned, undated, and re-states the contents of Employer's H-2B applications.

g. "Nathan" and "Fresno" Monthly Production

The CO found that Employer's Monthly Production documents do not support Employer's peakload need from April through December. The CO wrote that the Nathan document showed more projects in January through March than in April through July. (AF2 8.) As noted above, the Monthly Production documents are not summarized by month but rather provide individual project dates. Employer has not demonstrated how this document shows an increase in production in the months of April through December. The CO correctly noted that Employer did not have more projects in April through July. Employer did not demonstrate whether the number of projects in a month equates to an increase in demand or whether another variable is used to measure business demand. Notably, the production charts list the cost and labor of each project and each job number contains significantly varying labor numbers. Thus, although Employer may have had more jobs in the peak months, it is unclear whether these jobs

required more labor. As with Employer's 2015 invoices, it is impossible to determine, without creating and analyzing monthly summaries, whether Employer has a peakload need from April through December.

Based on the aforementioned evidence, 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.

2. Did Employer establish that it has a temporary need for the number of workers requested?

An employer seeking H-2B labor certification must establish the number of H-2B temporary workers needed and must attest that the number of positions for which certification is requested is accurate. 20 C.F.R. § 655.22(n).

In support of its request for twenty-five "Helpers—Installation, Maintenance, and Repair Workers," Employer provided a letter from Rick Shelly stating that Employer needs twenty-five workers "to form 8 more crews in order to handle the upcoming workload." (AF1 42.) Employer wrote that it is providing the following documents to cure this deficiency: 1) monthly headcount and payroll; 2) Construction Total US Hire Rate; and 3) Article: "Where have all the Construction Workers Gone." (Id.)

In support of its request for thirty-five "Helpers—Production Workers," Employer provided another letter from Rick Shelly stating that "we need to form 9 more crews in order to handle the upcoming workload." (AF2 39.) Mr. Shelly wrote that

These H-2B men will help promote to foreman some of our permanent U.S. lead men so we can form new crews. Meaning that as soon as we get this supplemental guest workforce for this peak period, we will form new crews lead by new U.S. foremen and this drywall installer guest workforce will have the lead men positions in this new crews. Therefore, we have determined the need for 35 supplemental guest workers as production helpers for this peak period because we clearly see how we can form 17 new crews during this peak load need and we can put two of these H-2B men per new crew.

(AF2 40-41.) Employer wrote that it is providing the following documents to cure this deficiency: 1) monthly headcount and payroll; 2) Construction Total US Hire Rate; and 3) Article: "Where have all the Construction Workers Gone." (Id.)⁴

As discussed above, the Construction Total U.S. Hire Rate (Labor Openings and Labor Turnover Survey) and article on the Nevada construction industry is not specific to Employer's business operations. The Construction Total U.S. Hire Rate encompasses the hire rate for construction workers across the country. The article focuses on construction workers in Nevada.

⁴ Employer never submitted the Construction Total U.S. Hire Rate and the article for this application.

Neither document establishes the specific need for twenty-five installation helpers and thirty-five production worker helpers.

The “monthly headcount and payroll” documents fail to establish Employer’s need for the specific number of workers. The Truss Headcount does not demonstrate that Employer utilizes an additional thirty-five workers for the months of April through December. The Truss Headcount shows that Employer had one more worker in April than in March and seventeen more workers in September than in March. Employer had eighty-seven workers in January, its non-peak month, and eighty workers in May, its peak month. The Millwork Headcount likewise does not show a need for twenty-five additional workers from April through December. For example, the Millwork Headcount shows that Employer had nine more workers in April than in March and fifty-one more workers in October than in March. Employer did not state or demonstrate whether it ever hired temporary workers to supplement its workforce. The CO requested summarized monthly payroll records which identify separately the full-time permanent and temporary workers. The provided headcounts are not divided according to permanent and temporary labor. It is unclear from these documents how Employer determined that it needed an additional twenty-five workers and thirty-five workers.

Employer wrote that it needed to form eight new crews which will include the “Helpers—Installation, Maintenance, and Repair Workers” and nine new crews which will include the “Helpers—Production Workers.” However, Employer has not provided any evidence to show how it determined that it will need seventeen crews for the upcoming workload. Specifically, Employer did not state how many crews it has now and how many workers it typically needs to form a crew. Employer merely asserted that it needs twenty-five and thirty-five workers based on its own determination. Employer has not provided any documentation to support its determination.

Consequently, Employer has not met its burden of establishing that it has a need for twenty-five “Helpers—Installation, Maintenance, and Repair Workers” and thirty-five “Helpers—Production Workers.”

ORDER

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

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey