



Issue Date: 26 January 2018

BALCA Case No.: 2018-TLN-00042
ETA Case No.: H-400-17262-487610

In the Matter of:

3-G CONSTRUCTION COMPANY, INC.,
Employer.

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

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to 3-G Construction Company, Inc.’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) Non-Acceptance Denial in the above captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ 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.⁴

STATEMENT OF THE CASE

Employer is located in Phoenix, Arizona and employs workers to provide framing services in residential, commercial and custom homes throughout the year.⁵ On 27 Oct 17, Employer applied for H-2B temporary labor certification, seeking approval to hire 60 foreign nationals as Carpenter Helpers from 25 Jan 18 to 25 Oct 18, based on a

¹ 20 C.F.R. Part 655.

² 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).

³ 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

⁵ Appeal File (AF) 108.

peakload need.⁶ Employer stated that the peakload period was a result of increased demand for their framing services, specifically, a projected growth of 9% to 11% over 2017.⁷

On 6 Nov 17, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in employer’s application.⁸ Specifically, the CO determined that employer failed to: (1) establish that its job opportunity is temporary in nature; (2) establish temporary need for the number of workers requested; and (3) submit an acceptable job order.⁹ Regarding the first two deficiencies, which are the only issues left on appeal, the CO stated that Employer neither submitted sufficient information to establish its requested standard of need for the period of intended employment, nor distinguished how many permanent and temporary Carpenter Helpers it has in its current workforce.¹⁰ The CO requested that Employer submit supporting evidence justifying the dates of need for labor and requested, among other documents,¹¹

a detailed statement of temporary need containing . . . [a] description of the business history and activities (i.e. primary products or services) and schedule of operations through the year; and . . . [a]n explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need;

along with¹²

[s]ummarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Helpers of Carpenters, the total number of workers or staff employed, total hours worked, and total earnings received.

⁶ AF 98.

⁷ AF 109.

⁸ AF 89-97.

⁹ AF 92-95.

¹⁰ AF 92-94.

¹¹ AF 93.

¹² AF 95.

On 20 Nov 17, Employer filed a response to the CO's NOD¹³ and submitted a revised statement of need, summarized payroll reports for 2015 and 2016, a work project itinerary report for 2016 through forecasted 2018, and a letter of intent to contract.¹⁴

On 20 Dec 17, the CO issued a Non-Acceptance Denial.¹⁵ Although Employer cured one of the three deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing the job opportunity as temporary in nature and temporary need for the number of workers requested.¹⁶ Specifically, Employer did not provide any documentation to support its statement regarding the cause of its peakload need.¹⁷

On 27 Dec 17, Employer requested timely administrative review of the CO's Non-Acceptance Denial.¹⁸ BALCA received the Administrative File on 5 Jan 18 and a Supplemental Administrative File on 12 Jan 18.

On 11 Jan 18, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the CO ("Solicitor") to file briefs by close of business on 17 Jan 18, with next-day delivery.¹⁹ The Solicitor filed a notice on 17 Jan 18 that it would not be filing a brief in this matter. Due to inclement weather the Covington, LA BALCA office was closed from 17-18 Jan 18. Due to lapse in funding, the office was additionally closed on 22 Jan 18. On 24 Jan 18, Employer filed a brief²⁰ seven days beyond the 17 Jan 18 deadline provided in the Notice of Docketing, without requesting an extension of time from the court.

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 Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.²¹ A CO's denial of certification must be upheld unless shown by

¹³ AF 70-77.

¹⁴ AF 74-75; 79-80.

¹⁵ AF 39-47.

¹⁶ AF 41-45.

¹⁷ AF 43

¹⁸ AF 1; 20 C.F.R. § 655.61.

¹⁹ 20 C.F.R. § 655.61(c).

²⁰ This 4 page brief is not paginated but, when referenced, will still be referenced with page numbers.

²¹ 20 C.F.R. § 655.61.

Employer to be arbitrary or capricious or otherwise not in accordance with law.²² After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.²³

Employer bears the burden of proving that it is entitled to temporary labor certification.²⁴ The CO may only grant Employer's Application to admit H-2B workers for temporary nonagricultural employment if employer has demonstrated that: (1) insufficiently qualified U.S. workers are available to perform the temporary services or labor for which 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.²⁵

Employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary."²⁶ Temporary need, for the H-2B program, is defined as:²⁷

Employment is of a temporary nature when Employer needs a worker for a limited period of time. 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 petitioners need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

To establish a peakload need, the law requires a petitioner to "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."²⁸

²² See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *Tarilas Corp.*, 2015-TLN-00016, slip op. at 5 (Mar. 5, 2015).

²³ 20 C.F.R. § 655.61(e).

²⁴ 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); and *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

²⁵ 20 C.F.R. § 655.1(a).

²⁶ 20 C.F.R. § 655.6(a).

²⁷ 8 C.F.R. § 214.2(h)(6)(ii)(B). See also Department of Labor Appropriations Act, 2017 (Div. H, Title I of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31), § 113 (May 5, 2017).

²⁸ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

If I affirm the CO's denial on any singular basis, I need not look further to other denial reasons to decide whether those would also be affirmed.

THE CO'S NON-ACCEPTANCE DENIAL

The CO explained in the 20 Dec 17 Non-Acceptance Denial that:

Employer states in Section B, Item 9 of the ETA Form 9142, that it has a short-term demand for 60 temporary Carpenter Helpers to supplement its permanent staff at its job site. Employer explains that it will experience a short-term demand from 25 Jan 18 to 25 Oct 18, and that it projects a growth in its business of 9% to 11% for 2018 that necessitates 60 Carpenter Helpers to supplement its permanent workforce.

Employer submitted a letter of intent and a job itinerary report for 2016 through projected 2018. The letter of intent indicates that Employer is projected to provide services in the area of intended employment from February 1 to November 15 in 2018. While the letter demonstrates that Employer does have work to be performed during the requested period of need, it does not show the extent of work Employer will be contracted to provide and whether such would create a peakload demand that would necessitate temporary workers to supplement its permanent workforce. The job itinerary report, on the other hand, shows a trend of increased work starting in May and June instead of late January or early February. The job itinerary as presented is also unclear on whether the listed workers needed per month are permanent or temporary, and whether the workers are Carpenters or Carpenter Helpers. It is therefore unclear whether Employer has an actual peakload need for Carpenter Helpers from late January through October 2018.

Employer explains that it experiences a peakload need for workers, "...because we work in a fast pace environment and home[s] must be built on a schedule. Most builders imposed [sic] themselves yearly goals, based on some myriad economic variables and we need to fulfill the demand sold and additional spec homes demanded by builders for year-end closings and public reporting." However, Employer did not provide any documentation to support its statement regarding the cause of its peakload need.

Since Employer was certified for 50 Helpers of Carpenters from 1 Apr 17 to 15 Dec 17 in the same area of intended employment, Employer's number of workers in 2017 reflects the use of those workers. Employer's current application has a new period of need beginning 25 Jan 18. In looking at Employer's two applications together, it appears that Employer has a permanent need for these workers and if Employer is able to secure workers, it has the work to keep them

busy year round. This illustrates a permanent need for workers and not a temporary need.

Although Employer provided 2015 and 2016 payrolls as requested, the payrolls do not support Employer's peakload requested dates of need, 25 Jan 18 through 25 Oct 18, as its total hours worked fluctuate from year to year. For instance, in 2015, Employer's least amount of hours worked were in the beginning of the year from January through April. In 2016, Employer's least monthly hours worked were in January and from October through December. Again, the reason for Employer's peak remains unclear as it seems to alter from year to year and does not seem to be temporary.

Employer submitted one letter of intent from Pulte Development Corporation that indicates its peak months that services are performed in Maricopa County are from 1 Feb 18 to 31 Oct 18. This single letter of intent does not support Employer's change in dates of need that were attested to in its previous application, 1 Apr 17 through 15 Dec 17. Again, Employer appears to have a year-round need for these workers.

Employer has not adequately supported a temporary need for Carpenter Helpers from 25 Jan 18 to 25 Oct 18 in Maricopa County, AZ. While Employer states that it has a peakload need based on its acquired contracts, Employer did not sufficiently explain how such contracts are unique to Employer as to create a change in its requested dates of need from its previous application. Furthermore, Employer has implied that its peakload need is based on a peak in the building industry in Arizona but it has not provided any documentation to support its statement. Therefore, Employer did not overcome the deficiency.

EMPLOYER'S BRIEF

Failure to establish the job opportunity as temporary in nature

The CO stated that "The job itinerary report . . . shows a trend of increased work starting in May and June instead of late January or early February,"²⁹ Employer argues that February, March, and May have the same amount of work and workers needed, so the CO erred by concluding that its increased need of Helpers of Carpenters does not appear to begin until May.

Employer shows a need of 125 Helper of Carpenters in December 2018 and January 2018 – non peakload months. Its second lowest need is in November 2018 – also a non peakload month – during which it needs 133 Helpers of Carpenters. However, Employer

²⁹ AF 42.

considers February, March, and May peakload months, and is requesting 60 additional Helpers of Carpenters, when it shows a need for a mere 8 more Helpers of Carpenters (142) during these months. Employer's months of highest need are August 2018 and September 2018, where it states a need for 200 Helpers of Carpenters.

While Employer is correct that February, March, and May all have the same amount of work and workers needed, the CO was actually acting in Employer's favor by suggesting the trend of increased work started in May and June. The fact that February, March, and May were included in Employer's requested peakload need when they are within the lowest six months of need shown on the job itinerary, is one reason Employer was denied the requested H-2B workers for the time period requested.

Employer also points out that the CO states, "The job itinerary as presented is also unclear on whether the listed workers needed per month are permanent or temporary, and whether the workers are carpenters or helpers of carpenters." Employer responds that it "would like to demonstrate that section 3 of the job itinerary chart clearly identifies the job classification..." Employer is correct; it did provide a breakdown of the classification of the requested workers.³⁰ However, the CO also needed the breakdown of how many of these positions are already fulfilled by Employer's permanent staff. This number was not provided to the CO, though it does appear for the first time in Employer's brief.³¹

Employer then highlights that the CO, at one point, appears to have used the wrong standard in evaluating Employer's need. The CO looks at Employer's certified application for 50 Helper of Carpenters for April – December 2017 and points out that Employer has not justified the change in dates of need when requesting Helper of Carpenters from January – October 2018.

Employer cites to the USCIS website:³²

The Difference Between a Seasonal and Peakload Need

Although the definition of peakload need uses the phrase "seasonal or short-term demand," there are significant differences between these two types of temporary needs. Unlike in the case of a seasonal need, a petitioner claiming a peakload need must demonstrate the existence of a permanent workforce. Moreover, a peakload need may recur at different times of the year and/or multiple times in the same year. On the other hand, a seasonal need might be based around a sports season

³⁰ AF 6; 13; 74; 81.

³¹ Not only was this information included in an untimely brief, it was never provided to the CO and, thus, should not have been included in the brief. However, the information would not have changed my decision in any event. Employer's Brief at 4.

³² <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/guidance-temporary-need-h-2b-petitions>. Last visited on 26 Jan 18.

that extends for the same six months, year after year. A peakload need would typically last for a shorter amount of time and may recur several months later during the same year (for example, during the Memorial Day weekend and again during Labor Day weekend). Depending on the facts of a specific case, a peakload need may also recur at the same time year after year. Generally, extension petitions covering consecutive periods of time without a significant break do not establish either peakload or seasonal need.

In some cases, peakload needs may be unpredictable in nature. In contrast, our regulations state that seasonal needs may not be unpredictable or subject to change.

The CO's denial does seem to suggest at one point that Employer has not justified its change of dates in need:³³

This single letter of intent does not support the employer's **change in dates of need** that were attested to in its previous application, April 1 through December 15. Again, the employer appears to have a year-round need for these workers.

The employer has not adequately supported a temporary need for Helpers – Carpenters from January 25, 2018 to October 25, 2018 in Maricopa County/Phoenix-Mesa-Scottsdale, AZ MSA. While the employer states that it has a peakload need based on its acquired contracts, the employer did not sufficiently explain how such contracts are unique to the employer as to create a **change in its requested dates of need** from its previous application.

The regulations do require justification for any change in dates of need for a Seasonal need.³⁴ That same justification is not included in the peakload need requirements³⁵ and, in fact, provided guidance states the contrary that “a peakload need may recur at different times of the year[.]”³⁶ However, the CO looked at Employer's filing history in expressing a legitimate concern about whether an initial need of 50 helpers from April – December 2017, coupled with a subsequent request for 60 helpers from January – October 2018, shows a year-round need for “temporary” employees. Moreover, within the entire rest of the Non-Acceptance Denial, the CO applies the correct standard. Consequently, I find that to the extent the CO erroneously applied a requirement for Seasonal need to this case, it is harmless error.

³³ AF 45 (emphasis added).

³⁴ 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

³⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

³⁶ See USCIS website, note 29.

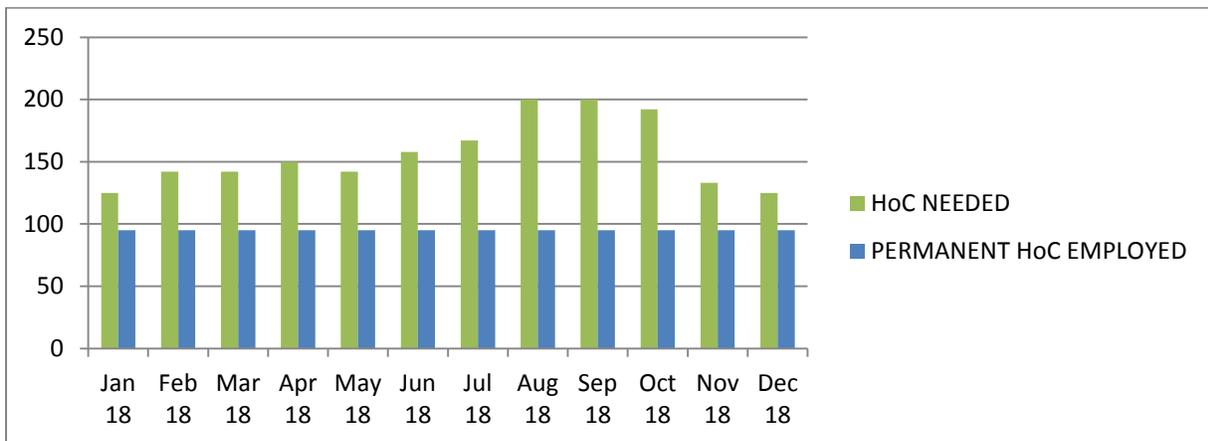
Failure to establish temporary need for the number of workers requested

Employer points out that the CO erroneously used the phrase “15 Carpenters” when discussing how Employer had quantitatively determined that it had a need for the requested H-2B workers.³⁷ Employer has a sister case that was also denied by the CO, where it is requesting 15 Carpenters for the same dates of need.³⁸ While this was an error, it appears to have been merely a typographical one, and is harmless.

DISCUSSION

On review, one issue is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, 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.³⁹

Employer alleges it has a peakload need for 60 Carpenter Helpers.⁴⁰ In order to establish such a peakload need, 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 in that the temporary additions to staff will not become a part of the petitioner’s regular operation.”⁴¹



Helpers of Carpenters Needed versus Employed⁴²

³⁷ Employer’s Brief at 3.

³⁸ 2018-TLN-00048.

³⁹ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

⁴⁰ AF 98.

⁴¹ 20 C.F.R. § 214.2(h)(6)(ii)(B)(3).

⁴² AF 6; Brief at 4.

Employer provided its numbers of permanent and temporary staff in its Summarized Monthly Payroll Reports for 2015 and 2016. It did not provide the CO with the current numbers of permanent and temporary staff by classification, or the summarized monthly payroll for 2017, which would have been helpful.

Employer provides a chart entitled “Units to Complet[e] Per Month 2018.”⁴³ The first row, “WORK TO BE COMPLETED”, ranges from 75 to 120 units to complete per month. Though Employer states “[t]his report shows the **contracted** units per month for 2018 (emphasis added),” Employer has not provided the supporting summarized contracts. Employer states “[t]his increase is a demand from our clients, mainly from Pulte Homes and AV Homes (letters of intent attached).”⁴⁴ It did provide two letters of intent, one from Pulte Development Corporation⁴⁵ and the other AV Homes,⁴⁶ stating that these clients intend on using Employer for carpentry services from 1 Feb 18 until 31 Oct 18. These letters do not include any data to suggest how many Helpers of Carpenters will be required to complete these jobs for either client, but both say “[t]o perform the required services will require a substantial number of workers, and it is difficult, if not impossible, to find U.S. workers ready, willing and able to perform this work.” Employer needed to provide the underlying data as to how it determined the number of projects to complete in 2018.

A peakload need assumes that an employer has enough permanent staff on its payroll to cover its baseline need and needs to augment that permanent staff on a temporary basis with foreign national workers. Employer’s “Units to Complet[e] Per Month 2018” chart shows that in January and December, the two months of lowest need, Employer states a need for a total of 125 Helpers of Carpenters.⁴⁷ Employer’s brief states “If we remove the H-2B workers from the total Helpers of Carpenter, then we will have 95 Helpers of Carpenter.”⁴⁸ Employer is showing that many (30 Helpers of Carpenters) of its number of Helpers of Carpenters requested are actually needed on a permanent, year-round basis. Though there are immigration programs designed to fill these types of positions, but the H-2B program is not one of them.

⁴³ AF 6.

⁴⁴ AF 10; AF 112.

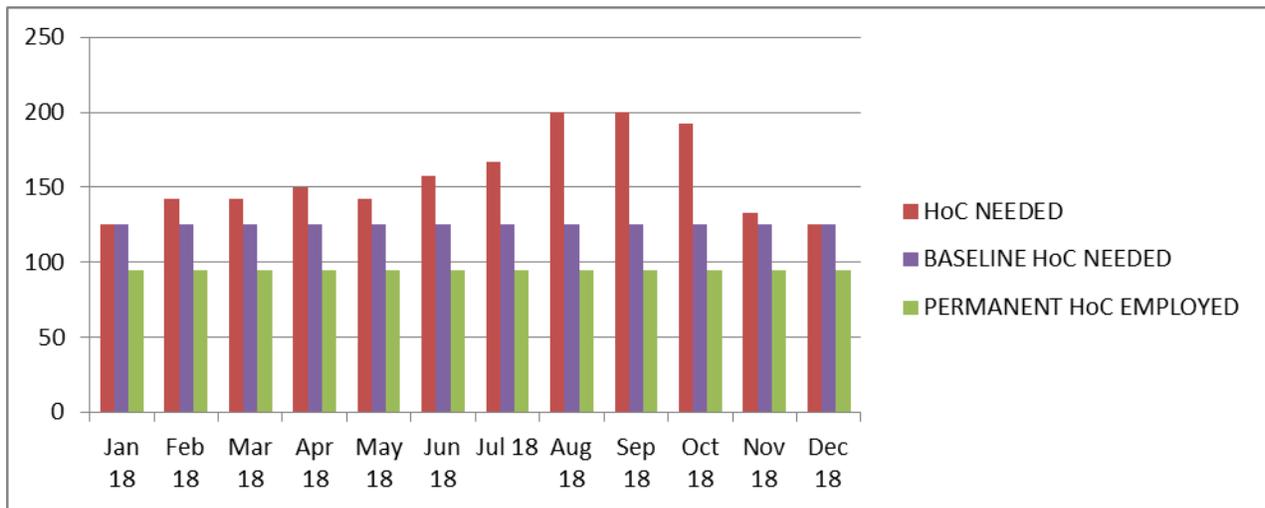
⁴⁵ AF 10.

⁴⁶ AF 112.

⁴⁷ *Id.*

⁴⁸ See note 26.

On the other hand, Employer states “When our peakload ends, we will no longer need temporary workers, our permanent workers will thereafter, fully assume the slower months’ demand for our services.”⁴⁹ Either Employer only needs 95 Helpers of Carpenters during their non-peakload months, or Employer should increase its permanent staff to account for the baseline need throughout the year, a minimum of 125 Helpers of Carpenters. If Employer increased its permanent staff to its baseline need of 125 Helpers of Carpenters, the amount of workers needed in addition that baseline might qualify as a peakload.⁵⁰ Employer cannot use a peakload request to augment its staff numbers up to its baseline, year round need.



Baseline Helpers of Carpenters Needed

Assuming, arguendo, that Employer had provided the background data to support the work to be completed (summarized contracts, etc.) as the CO requested, it would appear that Employer does have a peakload need. The dates of that need, however, seem to be from June 2018 through October 2018, and a reasonable number would be an average of the workers needed each of those months MINUS the baseline amount of Helpers of Carpenters needed per month (125), which amounts to 58 workers.

Given that the nine month peakload is a regular part of the yearly demand cycle (which appears to be at least partly seasonal), it would be much more accurate to call the three months a slow period.⁵¹

⁴⁹ AF 7.

⁵⁰ See chart on page 8 entitled Baseline Helpers of Carpenters Needed.

⁵¹ Schools employ most teachers for nine months out of the year. A small number of teachers are employed year-round to teach summer school during the other months. Using Employer’s logic, a school’s need of regular, full time, nine month teachers would be considered a peakload need. Teachers employed during the regular school

The regulations require that the temporary employees not “*become a part of the petitioner’s regular operation.*”⁵² Additionally concerning is Employer’s statement that “We have been operating with temporary workers since our inception[.]”⁵³ This seems to strongly suggest that Employer’s need is a year-round need, not a peakload need.

After reviewing the record and the parties’ legal arguments, I cannot find that the CO’s decision that Employer has failed to establish that it has a temporary need for H-2B workers from 25 Jan 18 through 25 Oct 18 was either arbitrary, capricious, or otherwise not in accordance with law.

ORDER AND DECISION

In light of the foregoing, the Certifying Officer’s decision denying certification is **AFFIRMED.**

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge

year are not considered a temporary addition to a school’s staff, and in the instant case, a nine month need each year for many more workers than in holiday months should not qualify as a peakload need.

⁵² 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

⁵³ AF 5.