



Issue Date: 26 March 2018

BALCA Case No.: 2018-TLN-00085
ETA Case No.: H-400-17322-846561

In the Matter of:

ATLAS CONSTRUCTION CORPORATION,
Employer

Appearance: Robert Kershaw, Esquire
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For the Employer

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Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: THERESA C. TIMLIN
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Atlas Construction Corporation's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny 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, peak-load, or intermittent basis, as defined by the United States Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

H-2B Application

On December 7, 2017, Atlas Construction Company (“Employer”) submitted an application for temporary labor certification to the Department of Labor’s Employment and Training Administration (“ETA”). (AF 48.)³ Employer is a construction company engaging in municipal utility construction and offering services that include trenching, digging, and laying pipe in Granite Shoals, Texas. (AF 49, 55). Employer requested certification for ten Helpers-Pipelayers (the standard occupational classification title for which is “Helpers-Pipelayers, Plumbers, Pipefitters, and Steamfitters”) for the period of April 1, 2018 to December 31, 2018 on a peakload basis. (AF 37.)

Employer explained that it requires the services of laborers to perform manual labor associated with helping pipefitters during the peak load season of April 1, 2018 through December 25, 2018 in Central Texas. Employer added that there is a significant lull in construction activity during the winter months in Central Texas, necessitating temporary workers during its peakload season. (Id.) The laborers’ tasks would include measuring, cutting, threading, and assembling new pipe; placing the assembled pipe in hangers or other supports; cutting or drilling holes in walls or floors to accommodate the passage of pipes; performing rough-ins; repairing and replacing fixtures and water heaters; locating, repairing, or removing leaking or broken pipes; assisting pipe fitters in the layout, assembly, and installation of piping for air, ammonia, gas, and water systems; and cutting pipe and lifting up fitters. (AF 39.) Employer also offered a number of supporting documents, including payroll reports from 2015, 2016, and 2017; as well as a document entitled “2018 Contracts and Worker Orders.” (AF 43, 44, 45.)

Notice of Deficiency

On January 30, 2018, the CO issued a Notice of Deficiency (“NOD”), identifying three deficiencies in Employer’s ETA-9142B. First, the CO found that Employer did not sufficiently demonstrate the requested standard of temporary peakload need pursuant to 20 C.F.R. § 655.6(a)

² On April 29, 2015, the Department of Labor (“DOL”) 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. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

³ References to the appeal file will be abbreviated with an “AF” followed by the page number.

and (b). Employer had indicated, in Section B, Item 9 of the ETA-Form 9142, that its busiest season from April 1 through December 31 requires an increased number of Helpers-Pipelayers. Because business tends to slow in the winter months in Texas due to harsh weather conditions, Employer contended that it can normally predict when its need for peakload workers will decline, even though Employer continues to employ some year-round workers. The CO countered that Employer's work takes place in San Antonio and Seguin, Texas, which is favorable to year-round outside work. Although Employer offered supporting documentation that the construction business in San Antonio is doing well, it did not provide information that sufficiently demonstrated how these events cause the peakload standard of need and therefore did not meet the regulatory standard, according to the CO. (AF 31-32.)

To correct this deficiency, the CO requested that Employer submit an updated temporary need statement that includes a detailed explanation as to why the nature of this job opportunity reflects a temporary need and how the request for temporary labor certification meets the regulatory standard of peakload need of as defined by DHS regulations. The CO also directed Employer to offer supporting documentation such as a summary of all projects in the area that require temporary workers, including anticipated start and end dates; monthly payroll reports reflecting its total number of employees, their hours, and earnings that distinguish permanent from temporary employees; and documentation of its business history and activities which substantiate why this work cannot be performed under certain weather conditions. (AF 32-33.)

The CO next identified Employer's failure to justify the number of worker positions, period of need and that its request represents a bona fide job opportunity under 20 C.F.R. § 655.11(e)(3) and (4). In its application, Employer did not indicate how it determined that it needs ten Helpers-Pipelayers for the period of April 1, 2018 through December 31, 2018. As such, the CO requested supporting evidence and documentation showing that the Employer's request is true, accurate, and represents bona fide job opportunities. Such documentation includes contracts and letters of intent specifying the number of workers and dates needed; summarized monthly payroll reports identifying full-time permanent and temporary employment in the requested occupation, total number of employees, their hours, and earnings, and an explanation as to its request. (AF 34-35.)

Finally, the CO cited Employer's non-compliance with 20 C.F.R. § 655.18(a)(1), which requires the Employer to offer U.S. workers no less than the same benefits, wages, and working conditions it offers to H-2B workers. Specifically, Employer's job order contains certain requirements that are not listed on its ETA-Form 9142 and therefore appear not to be required of foreign workers. The job order provides the end date for the position as December 1, 2018, while Section B, Item 9 of the ETA-Form 9142 states the end date as December 25, 2018. In addition, the job order lists a work schedule from 7 am to 4 pm, while the ETA-Form 9142 indicates a work schedule of 7:05 am to 4 pm. To amend these errors, the CO directed Employer to correct Section B, Items 6 and 9 of the ETA-Form 9142 to show the end date of need as December 1, 2018 as reflected in the job order and to amend ETA-Form 9142 to include all job requirements listed in the Employer's job order. Alternatively, Employer could submit the job order language containing all benefits and wages offered to H-2B workers and consistent with the ETA-Form 9142 or submit an already-amended job order containing all of the required language. (AF 35-36.)

Employer's Response to the Notices of Deficiency

Employer resubmitted its ETA-Form 9142 with a letter dated February 13, 2018 and other attached documents. This ETA-Form 9142 was virtually unchanged from Employer's previous submission. (AF 21-26.) Employer's letter explained that with winter coming to an end, many workers will migrate north for better paying jobs, which would leave it understaffed to finish an existing contract and another one starting in April. Seven of Employer's requested ten workers would work on the current River, San Marcos, Mountain, Heideke (RSMH) Street Reconstruction- Phase II contract worth \$5,901,790. The other three would be assigned to the 2018 Water and Sewer Contract starting in April 2018 worth \$1,627,432. With these ten workers, Employer explained, it could finish these projects by the contractual due date and maintain good working relationships with these customers to retain their future business. Employer also attached a table of 2017 sales and man-hours, 2018 projected sales and man-hours, and temporary man-hours needed in 2018. (AF 27-28.)

Final Determination and Appeal

On February 21, 2018, the CO issued a Non-Acceptance Denial to Employer. As Employer's ETA-Form 9142 remained unchanged from its prior submission, the CO reiterated its belief that Employer had not remedied the original three deficiencies. However, the CO also discussed Employer's newest submission attached to its application.

In the context of the first deficiency, the CO addressed Employer's letter attachment explaining its need and payroll summaries and once again concluded that Employer did not sufficiently demonstrate the requested standard of temporary need. The CO found Employer's justification that many workers will migrate north for better paying jobs and leave it with a smaller labor force to finish existing and new contracts unconvincing. This rationale points to a labor challenge, and not a peakload temporary need where Employer needs to supplement its permanent staff due to a short-term demand. Employer also did not provide any documentation to support its contention that construction work in general slows down in the area of intended employment during the winter months. To the CO, it remained unclear whether or how area weather conditions affect Employer's business operations. The CO also addressed Employer's 2017 monthly payroll/sales report and 2018 projections. In its previous denial, the CO requested payroll information that would identify, for each month and separately for full-time permanent and temporary Helpers-Pipelayers, the total number of staff, hours worked, and earnings received. The document offered by Employer did not make clear if the hours apply to permanent or temporary workers. Therefore, the payroll could not be used to evaluate Employer's temporary need. Moreover, although the document reflected Employer's 2017 sales, sales do not equate to work performed. (AF 16-17.)

As to the second deficiency, the CO reasoned that though Employer indicated that it needed seven workers for an existing project and three workers for a future project, it did not show how it determined that a total of ten workers were needed during the requested period of need. The CO also found that the payroll information submitted was not used to evaluate Employer's need for ten workers for the same reasons as stated in the first deficiency. (AF 18-

19.) The CO did not further elaborate on the Employer's third deficiency related to 20 C.F.R. § 655.18(a)(1) from its prior denial.

On March 7, 2018, Employer appealed the CO's Final Determination that it did not perfect a timely response to the NOD and failed to establish a temporary need. (AF 1.) Neither party submitted a final brief.

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).

The evidence is reviewed *de novo*, and the Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review, the Board "has fairly consistently applied an arbitrary and capricious standard" in reviewing the CO's determinations. See The Yard Experts, Inc., 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); see also Brook Ledge Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016). The decision must be affirmed if the CO considered the relevant factors and did not make a clear error of judgment. See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (describing the requirements to satisfy the "arbitrary and capricious" standard of review).

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 because it did not provide an explanation as to why its need changes seasonally nor did it offer 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 1, 2018 through December 31, 2018.

a. 2015, 2016, and 2017 Payroll Reports (AF 43, 45)

Employer must first prove that it regularly employs permanent workers to perform the labor at its construction sites in Central Texas to demonstrate a peakload need pursuant to 8 C.F.R. § 214.2(h)(6). To that extent, Employer's calendar year payroll reports for 2015 through 2017 constitute sufficient supporting evidence that it regularly employs laborers on a permanent basis.

For each of these years, the reports consist of a payroll table divided into two sections: permanent employees and temporary employees. Under each section, the table features three columns: the number of Employer's workers (with permanent employees distinguished from temporary), their total hours worked, and their total earnings received. The table breaks down these figures on a monthly basis from January to December.

Employer bears the burden to of establishing the temporary nature of its need. The payroll reports submitted by Employer show that it regularly employed between eight and ten permanent employees per month who worked between 1,200 and 2,400 total hours and earned between \$16,500 and \$31,000 in 2015 and 2016. The 2017 payroll report reflects that Employer retained between seven and twelve permanent employees per month. These employees logged between 1,300 and 2,800 hours per month and their earnings ranged from about \$17,000 to \$38,000. Given that Employer's Administrative Manager certified the accuracy of these payroll records, the undersigned finds this documentation sufficient to prove that it regularly employed permanent workers from 2015 to 2017.

b. 2018 Contracts and Work Orders (AF44)

In addition to showing that it regularly employed permanent workers, Employer must also demonstrate that it needs to supplement its permanent staff 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. Employer asserted that the winter months bring a lull in construction activity and, based on the weather patterns of Central Texas, Employer can predict when its demand for peakload workers will decline. Employer added that with the end of winter in sight, many workers will migrate north for better paying jobs, which would leave it understaffed to finish an existing contract and another project starting in April, necessitating its request for ten Helpers-Pipelayers.

The "2018 Contracts and Worker Orders" document shows a contract with the City of Seguin for a River, San Marcos, Mountain, Heideke Street Reconstruction, Project II in the amount of \$5,901,104 which will take fifty to fifty-five hours per week to complete. This document lacks some very important details about this project, such as the length of time it will take to complete, what time of year construction will take place, and how many workers it will require. In the initial Notice of Deficiency, the CO explicitly directed Employer to provide the anticipated start and end dates for each project. (AF 33.) Employer did not comply with this directive, as its February 13, 2018 letter merely indicated that its City of Seguin project was in-process and its Water and Sewer project would start in April. It did not provide an end date for either project. Without this information, particularly end dates, one cannot glean whether the project necessitates temporary employees. Therefore, AF 44 does not help the undersigned to ascertain whether Employer needs to supplement its existing staff on a short-term basis.

c. 2017 Sales and Man-hours; Projected 2018 Sales, Hours, and Man-hours Needed (AF 28)

Despite setting out Employer's estimated temporary man-hours for 2018, neither this document nor the other evidence in the record supports the temporary nature of these potential H-2B hires. More pertinently, the information does not adequately prove that Employer needs to supplement its staff due to a seasonal or short-term demand. Employer does provide Employer's sales and man-hours for 2017 and its projected number of temporary man-hours in 2018. This document indicates that it will employ between 120 and 770 workers per month. However, as the CO notes, this document does not provide any underlying explanation why Central Texas weather dictates this hiring pattern, causing a peakload standard of need, nor does it prove or explain why its employees migrate north at the end of winter causing a temporary peakload need.

d. Conclusion

As provided in 8 C.F.R. § 214.2(h), Employer must demonstrate a need to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand. Its "2018 Contracts and Worker Orders" reveals that the City of Seguin project will take fifty to fifty-five man-hours to complete, but without information as to the timeframe from start to completion of the project, the document

does nothing to show a short-term demand. Likewise, the projected 2018 sales figures, man-hours, and temporary man-hours needed do not, standing alone, explain the nature of Employer's hiring cycle.

The CO found that Employer did not provide any documentation to support its statement that the construction business slows down in the winter months and that Central Texas weather will result in workers migrating north, leaving Employer understaffed at the end of winter. (AF 6-7.) As the documentation submitted by Employer did not support either trend, the undersigned finds that the CO evaluated the relevant factors and did not err in finding that Employer did not meet its burden of establishing the temporary, peakload nature of its need.

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

a. 2015, 2016, and 2017 Payroll Reports (AF 43, 45)

b.

At first blush, Employer's 2015 and 2016 Calendar Year payroll records (AF 43) support its assertion that it needs temporary employees during the non-winter months. In both years, the number of Employer's permanent employees remained steady at eight to ten from January through December. In January, February, and December 2015, Employer employed no temporary workers. From March through November 2015, however, Employer employed six additional temporary employees per month. Employer followed a similar hiring pattern in 2016, but hired two additional temporary workers to bring its total to eight per month from March 2016 to November 2016. These tables, taken at face value, are consistent with the hiring cycle described by Employer.

However, a closer inspection reveals several omissions and inconsistencies that do not necessarily square with Employer's asserted hiring patterns. First, of Employer's 2015 through 2017 payroll records, only Calendar Year 2016 reflects the number of hours logged by temporary employees. In 2016, Employer retained eight temporary workers from March to November. But for a brief uptick in the month of June, the number of permanent employee man-hours steadily dipped from April to August. Conversely, the number of permanent man-hours actually increased in the mid-to-late winter months from January to March. Without evidence proving otherwise, these contrasting patterns suggest that the spring and summer months, not the winter months as Employer contends, tend to bring a lull in construction.

Once the number of permanent man-hours hit its nadir in August, the number spiked in September and proceeded to decline in the fall months. Despite these fluctuations in permanent employee man-hours in 2016, Employer retained precisely eight temporary workers each month, each of whom worked precisely 1,280 hours from March through November. One would think that the number of temporary worker man-hours would bear at least some sort of corollary to the number of permanent employee man-hours if Employer truly needed temporary workers to supplement its permanent staff. Here, however, the number of temporary workers and their hours worked flat-lined

regardless of whether Employer experienced an increase or decrease in permanent man-hours.

Employer's Calendar Year 2015 payroll report omits important information that renders it difficult to extract any helpful information. While that year's record shows that Employer employed six temporary workers per month from March through November, it does not reflect how many hours per month those six workers logged. Without these figures, the undersigned cannot draw the same comparison as with the 2016 record, which did include the number of temporary man-hours. Even without this information, however, Employer's 2015 permanent man-hours increased from January to April, which again undermines Employer's contention that its construction business slows in the winter. Moreover, like 2016 and despite fluctuations in permanent employee man-hours from May to December, the total number of temporary employees remained flat at six each month. Employer's Calendar Year 2017 payroll report provides no temporary worker information at all and therefore is of no help in extrapolating how many temporary workers Employer may need in 2018.

Finally, these payroll records undercut Employer's assertion that its permanent workers tend to move north for better paying jobs at the end of winter. In 2015, Employer retained nine permanent workers every month from January to July, suggesting they did not lose a single employee in that period. In 2017, Employer consistently employed eight permanent workers from January to May, except in April when it had seven permanent workers. Employer did lose two permanent employees from March 2016 to May 2016. That said, the undersigned finds that Employer's payroll records suggest a relatively steady permanent workforce from the end of winter to the beginning of spring, which refutes Employer's contention that it regularly loses permanent employees to other jobs located further north. Moreover, Employer does not present evidence that, even if it regularly lost permanent workers at the end of winter, that they lost them to more lucrative opportunities north of Central Texas.

The CO requested that Employer provide summarized monthly payroll reports identifying full-time permanent and temporary employment in the requested occupation. To the extent that the payroll records failed to document such a breakdown of its workforce, Employer needed to supplement them with other types of supporting documentation. See Baranko Brothers, Inc., 2009-TLN-00051, slip op. at 6 (Apr. 16, 2009) (affirming CO's finding that employer's bar chart was insufficient to prove its temporary need.) Because Employer did not supplement its payroll records so as to provide a more complete picture of its workforce and its need for temporary workers, the undersigned does not find this payroll documentation sufficient to show it needs ten H-2B workers for the period of April 2018 through December 2018.

c. 2017 Sales and Man-hours, Projected 2018 Sales, Hours, and Man-hours Needed; 2018 Contracts and Work Orders (AF 28, AF 44)

On appeal, Employer offered a document reflecting its sales and man-hours worked by month in 2017. The document also shows Employer's projected sales,

projected man-hours worked, and projected temporary man-hours needed in 2018. This information, even when paired with the other evidence submitted by Employer, does not help in determining whether Employer needs its requested number of temporary employees.

As to the 2017 data, the “2017 Man-hours” column values for the months of January through October at AF 28 are nearly identical to the 2017 “Total Hours Worked” by permanent workers column at AF45. The one marginal difference is that AF 28 shows 2,614 man-hours whereas AF 45 shows 2,612 man-hours for the month of June. Due to the similarity of these figures and because AF 45 only supplies figures for the number of permanent and not for the temporary employees working for Employer, it stands to reason that the total “2017 Man-hours” column at AF 28 reflects only those hours worked by permanent workers. Based on these two documents, it would seem that permanent employees worked almost every man hour in 2017 as neither AF 28 nor AF 45 provides any information as to 2017 temporary workers. Employer has not provided any documentation to conclude otherwise. Thus, these documents do not provide any insight as to how many temporary workers Employer hired in 2017, and by extension, whether Employer has a need for ten temporary workers in 2018.

The document at AF 28 also provides Employer’s sales figures. However, Employer has not articulated a correlation between sales and man-hours, or how such a correlation could predict the temporary labor needed for its projects in 2018. In the absence of such an explanation, sales figures do not equate to the number of man-hours needed to complete projects, as the CO concluded. This same reasoning applies to Employer’s 2018 projected sales and projected man-hours. Even assuming Employer could do so, its omission of data related to temporary workers it employed in 2017 would render the importance of the 2017 sales figures useless. Because Employer has not explained how sales figures equate to man-hours and which of those hours belonged to permanent versus temporary employees, this data does not assist in determining whether Employer needs the ten Helper-Pipelayers it requests.

In addition, Employer includes a “Temporary Man hrs. needed in 2018” column at AF 28, which reflects zero temporary workers needed in January, February, March, and December, but between 120 and 770 temporary employees each month from April through November. The only supporting evidence Employer offers to buttress its argument that it needs this quantity of temporary employees for 2018 is its “2018 Contracts and Work Orders” at AF 44, which as discussed above, lacks specific details such that this number of projected temporary employees cannot be substantiated.

d. Conclusion

To the extent that Employer’s payroll records help predict the number of temporary workers it needs in 2018, these records reflect a hiring trend inconsistent with the one asserted by Employer. Namely, its number of permanent employee man-hours increased in the months of January through March each year from 2015 to 2017, while permanent employee man-hours either declined or fluctuated in the spring and summer.

Because the latter contravenes the notion that Employer needs to supplement its permanent workforce with temporary employees, it has not proven its need for ten H-2B Helpers-Pipelayers for April through December 2018.

The CO found that Employer did not indicate how it determined that it needed ten Helpers-Pipelayers, specifically finding that the hours reflected on the payroll records did not differentiate its permanent workers from its temporary workers. (AF 8). The record supports the CO's finding. Thus, the CO's decision was not arbitrary and capricious.

3. Did Employer Fail to Provide Job Order Assurances and Contents

As an employer must offer to U.S. workers the same benefits, wages, and working conditions that it offers to H-2B workers, the CO found discrepancies regarding the details of the position on the Job Order (AF 55) and the ETA Form-9142 (AF 37-42.) In particular, the job order lists the end date for the position as December 1, 2018. According to the ETA Form-9142, however, the position terminates on December 31, 2018. In addition, the job order provides that the work day runs from 7 am to 4 pm, while the ETA Form-9142 shows 7:05 am to 4 pm. The CO further directed Employer to amend the ETA Form-9142 to reflect all job requirements listed on the job order.

Employer failed to remedy these errors in its subsequent submission. The end date in Section B, Item 9 of the ETA Form-9142 remains December 31, 2018. While the undersigned does not find the difference between start times of 7 am and 7:05 am at Section F, Item 3 material, the job order indicates that the position will last eight months whereas the ETA Form-9142 shows the duration of the job as nine months. The undersigned finds this disparity material because an H-2B applicant may not have otherwise applied for the position if he or she did not know the job extended thirty days after the posted end date of December 1, 2018 on the job order.

Employer also omitted important information about the position on the job order from the ETA Form-9142. For example, the job order reflects that Employer will assist workers in finding and securing boarding and lodging at no additional cost to the worker; reimburse visa and related fees in the first workweek; provide all tools, supplies, and equipment for the job; and guarantee to offer work for hours equal to at least three quarters of the workdays in each six or twelve week period of employment. (AF 55.) The ETA Form-9142 omits this information. The undersigned finds these omissions material because they reference fringe benefits of the position unique to immigrant workers. Moreover, the latter item provides a guarantee of the amount of work promised to the temporary worker and therefore a minimum guarantee of wages earned, assuming Employer compensates the worker hourly. The ETA Form-9142 prepared by Employer did not reflect these material aspects of the position.

Because Employer submitted a nearly identical ETA Form-9142 on appeal and did not remedy the errors pursuant to the CO's directions and due to the lack of uniformity as to material aspects of the position on the job order versus the ETA Form-9142, the undersigned finds that the CO did not commit an error of judgment in ruling that Employer did not provide the proper job order assurances on both the job order and ETA Form-9142.

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