



Issue Date: 18 May 2018

BALCA Case No.: 2018-TLN-00124
ETA Case No.: H-400-18002-667357

In the Matter of:

CEI ROOFING-TEXAS, LLC,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: James A. Renard, President, *self represented*
Dallas, Texas
For the Employer

Jeffrey L. Nesvett, Associate Solicitor
U.S. Dept. of Labor, Office of the Solicitor, Division of Employment and
Training Legal Services
For the Certifying Officer

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from CEI Roofing-Texas, LLC’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, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. *See* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).

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

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).

BACKGROUND

On January 2, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. (AF 85-142).³ Employer requested 20 full-time construction laborers from April 1, 2018 to December 31, 2018. The Employer indicated that the nature of its temporary need is “peak load.” (AF 85). In response to Section B, Item 9 of Employer’s Form 9142, the Statement of Temporary Need, Employer stated that it “has a peak-load need for 20 construction laborers from 04/01/2018 to 12/31/2018 of every year in the area of Dallas County, Texas” and that it had included payroll information from 2015 – 2017, letters of intent, and upcoming contract bids to demonstrate its peak-load period. (AF 85). In a letter supplementing its Statement of Temporary Need, Employer explained that:

CEI Roofing-Texas, LLC., is a commercial and industrial roofing construction company located in Dallas, Texas that has a peak-load need for 20 construction laborers from April 01, 2018 to December 31, 2018 . . . Our company, which specializes in roofing construction . . . [employs] about 110 to 180 employees consisting mainly of our administrative personnel and skilled workers and construction laborers that are part of our permanent staff and we recruit for temporary additional construction laborers as needed to assist our company to perform our services during our peak-load months. We have not been able to find able, willing, and available construction laborers in our region to compensate for the increase in demand for our services this work season.

Our peak-load period is affected by other construction companies that work in structural building construction, but not in the exact same field as ours. For example, during the month of January, construction companies that are involved in structural building construction concrete and foundation work will commence their construction projects laying the foundation for many building projects. Immediately after these foundations are set, framing companies must be ready to begin construction of the framing . . . After the frame of the structure is complete, walls and roofs must be installed to enclose the structure for further work. It may take up to 3 months before a project is ready for our company to commence working on the roof of the structures.

“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.

We can attest to the increase in demand for our services beginning towards April every year. This demand for our services continues throughout the year until the end of December . . . The size of [the 2018 projects] can require the assistance of at least 10 roofers each in order for us to maintain a steady progress in the overall work project. Each roofer requires the assistance of at least 2 construction laborers in order for the work to be effectively performed and completed within schedule, hence the requested 20 construction laborers. Projects of this size take several months full time work or longer to complete. Our individual residential and commercial projects that would require roofers as well, create hundreds of hours of additional work. Our workers are pressured to complete their work at a fast pace in order for the next subcontractors to move in and complete their parts of the project . . .

(AF 95-97) (original emphasis omitted).

Employer also attached to its application certain documents in support of its need for 20 temporary construction laborers, including a contract for an ongoing project with Rogers-O'Brien Construction Company, LTD., a letter of intent with The Christman Company, a bid for StructureTone Southwest for a project beginning in September of 2018, and payroll records for its permanent and temporary workforce for the years 2016 and 2017.⁴ (AF 98-142).

The CO issued a Notice of Deficiency on February 27, 2018, listing five deficiencies in Employer's application. (AF 75-84). For the purposes of this appeal, only the first two deficiencies will be addressed.⁵ First, the CO found that Employer failed to "establish the job opportunity as temporary in nature." 20 C.F.R. §§ 656.6(a) and (b). The CO explained that that "an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." (AF 78). The CO noted that an employer's need is considered temporary if it is justified to the CO as one of the following: (1) a one-time occurrence; (2) a seasonal need; (3) a peak load need; or (4) an intermittent need as defined by DHS regulations. The CO determined that Employer failed to submit sufficient information to establish its requested standard of need or period of intended employment. *Id.* The CO stated that Employer did not explain "what events cause the peak load need and the specific period of time in which [E]mployer will not need the services or labor." *Id.*

The CO requested that Employer submit an updated Statement of Temporary Need containing a detailed explanation regarding why the nature of the job opportunity reflects a temporary need and how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. *Id.* at 78-79. Further, the CO directed Employer to submit a statement describing Employer's business history, activities, and schedule of operations through the year; a summary of all projects in the area of intended employment that have contributed to the need for temporary workers during the requested dates of need; summarized monthly payroll reports for a minimum of two previous

⁴ Employer stated in its Form 9142 that it provided payroll documents for 2015 as well, (AF 85), but it did not.

⁵ The three additional deficiencies pertained to Employer's job order and Section F.b, Item 4 of the Application. (AF 81-84). The CO requested that Employer modify the job order and Section F.b, Item 4, which Employer did. As Employer seemingly cured these three deficiencies, they are not relevant for the purposes of this appeal.

calendar years that separately identify the number of workers or staff employed, the total hours worked, and the total earnings received for both full-time permanent and temporary employees; as well as any other evidence and documentation that similarly serves to justify the dates of need being requested for certification. (AF 79).

Second, the CO found that Employer failed to establish temporary need for the number of workers requested. §§ 656.11(e)(3) and (4). The CO stated that Employer did not indicate how it determined that it needed 20 construction laborers during the requested period of need, stating that additional “explanation and documentation [were] required.” *Id.* at 80.

On March 6, 2018, Employer filed a response to the Notice of Deficiency explaining that its peak-load period is affected by the work schedules of other construction companies, as Employer must “wait for other field construction companies to begin, set-up, construct, and complete their section of the structures in order for our company to move in and begin construction.” (AF 57). Employer explained that there are several phases of construction that must be completed in a particular order: foundation first, then framing, followed by roofing. *Id.* Employer stated that foundation work takes place in January to February “mainly because the latter months of the year November and December are not months where *new* construction projects commence” because of the cold weather conditions, holidays, and end of the year. *Id.* at 57-58 (emphasis added). The framing part of construction is “commenced shortly after foundation work has been completed (February to March).” *Id.* at 58. Employer stated that it “cannot build a roof on a foundation, hence first comes the frame of the building and until they are done we cannot commence construction[,] which pushes our commencement dates towards April of every year.” *Id.*

Then, Employer explained that it determined that it needed 20 construction laborers based on the size of its 2018 projects and estimates done by “professional bidders.” (AF 58). Employer stated that its professional bidders compared the current and upcoming projects to past projects of a similar size, and determined that Employer needed “an additional 10 roofers and 20 construction laborers” to meet its workforce needs. *Id.* at 59. Employer reiterated that it needs two construction laborers to assist every roofer. Employer also included payroll documents from 2017 and 2016 listing, by month and by quarter, the amount of hours worked and money earned by both permanent roofers and temporary construction laborers. (AF 61-63). Additionally, Employer provided a contract with Adolphson & Peterson Construction for a project from April 2, 2018 to September 30, 2018; a bid confirmation with Rogers-O’Brien Construction for a project from May 1, 2018 to October 31, 2018; and a bid confirmation with StructureTone Southwest. (AF 70-74).

On April 16, 2018, the CO issued a Non-Acceptance Denial to Employer because Employer failed to establish (1) the job opportunity as temporary in nature and (2) a temporary need for the number of workers requested. (AF 33-36). *See* 20 C.F.R. §§ 656.6(a)-(b); §§ 656.11(e)(3)-(4). The CO found that the 2017 payroll documentation showed that Employer “only utilized the workers at a fulltime capacity in January (44 hours a week) which is a ‘non-peak’ month.”⁶ (AF 35). The CO stated that Employer’s payroll documents did “not clearly

⁶ The CO reached this figure based on its own interpretation of Employer’s 2017 payroll summary, as seen in the CO’s chart on page 35 of the Appeal File.

show any recognizable pattern or consistent increase in business activity during the requested period of need,” but instead indicated that Employer “has a year round need for construction laborers.” (AF 36). Based on the CO’s interpretation of Employer’s 2017 payroll documents, it found that Employer did not overcome either of the two deficiencies and denied the Application.

Employer made a timely request for administrative review of the CO’s determination. (AF 1-31). The CO and Employer were given the opportunity to file briefs in support of their positions. Neither Employer nor the CO filed a brief in this matter.

SCOPE OF REVIEW

BALCA has a limited scope 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 contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e).

STANDARD OF REVIEW

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard⁷ to its review of the CO’s determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, n. 1 (Mar 4, 2016).

Some BALCA cases have recognized a distinction in BALCA’s review of the CO’s determination involving review of a long established policy-based interpretation of a regulation by the Office of Foreign Labor Certification (“OFLC”), in which case OFLC’s interpretation would be owed considerable deference. However, in the absence of such an interpretation, the CO’s finding would be reviewed *de novo*. *In the matter of Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017). *See also Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2012).

I find that the approach taken in *Zeta Worldforce, Inc.*, is consistent with BALCA’s discussion of the proper standard of review in *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). In *Brook Ledge*, a three-judge BALCA panel held that the CO’s definition of a “worksite” was not entitled to deference where the OFLC or the CO had articulated no clear definition of the term. BALCA noted that the CO offered “no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC,” adding that there is “no legal support for such a contention.” *Id.*

⁷ Similarly, judicial review under the Administrative Procedure Act provides that an agency’s actions, findings and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2).

While the *Brook Ledge* panel acknowledged that it reviewed the CO's decision under an arbitrary and capricious standard, the panel ultimately found that deference to the CO's determination was unwarranted. The panel explained that where the review did not involve a longstanding or clearly articulated interpretation of a regulation, and the CO had not shown that he had considered the relevant factors and articulated a rational connection between the facts found and the choice made, BALCA need not defer to the OFLC's or the CO's interpretation.⁸

In the current case, which does not involve a longstanding policy-based interpretation of a regulation by the OFLC, I find that deference need not be shown to the CO's determination. However, for the reasons discussed below, I find the record supports the CO's determination in this case, as Employer has failed to meet its burden of establishing its temporary "peak-load" need for the requested 20 construction laborers between April 1, 2018 and December 31, 2018.

ISSUES

The two issues on appeal from the CO are whether the Certifying Officer properly denied Employer's H-2B application due to:

- 1) Employer's failure to establish that its request for 20 construction laborers for the period of April 1, 2018 to December 31, 2018 was based on a "temporary" employment need according to Employer's stated standard of "peak load" need; and
- 2) Employer's failure to establish that the temporary need for the number of 20 construction laborers was justified.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation as "any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. §214.2(h)(6)(ii)(A).⁹ Per the DHS regulations, employment is "of a temporary nature" when:

[T]he 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. 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 petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

⁸In *Brook Ledge Inc.*, 2016 TLN 00033, slip op. at 5 (May 10, 2016), the BALCA panel stated, "We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term."

⁹Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. §214.2(h)(6)(ii). See also 20 C.F.R. §655.6(b).

8 C.F.R. §214.2(h)(6)(ii)(B). The DOL regulation similarly defines “temporary need.” 20 C.F.R. §655.6 (stating that an “employer’s need is considered temporary if justified to the CO as...a one-time occurrence; a seasonal need; a peak load need; or an intermittent need, as defined by DHS regulations.”).

However, the DOL regulation specifies that certification will be denied if the “employer has a need lasting more than 9 months,” while the DHS regulation only indicates that the need will generally “be limited to one year or less” except in cases of a “one time event” which “could last up to 3 years.” See 20 C.F.R. § 655.6(b) and 8 C.F.R. §214.2(h)(6)(ii)(B). According to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017) which has been extended by the Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (2018), the definition of temporary need is governed by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii). Therefore, to the extent that the DHS regulation conflicts with the DOL regulation defining temporary need, the DHS regulation will be applied in deciding whether the temporary need in this case has been established. As noted above the DHS regulation does not specifically limit the employer’s need to 9 months or less but does state that “[g]enerally, 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.” See 8 C.F.R. §214.2(h)(6)(ii)(B).

Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). See, e.g., *Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need). An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4). See *Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need); see also *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application and made good faith effort to provide alternative supporting documentation to the requested payroll records).

In the current case, Employer applied for temporary labor certification for 20 construction laborers on a “peak load” basis. In regard to peak-load need, the DHS regulation states, “[t]he petitioner 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)(2).

The CO stated in the Notice of Deficiency that Employer did not submit sufficient information to establish its requested standard of need or period of intended employment. (AF 78). The CO also found that Employer did not adequately explain “what events cause the peak-load need and the specific period of time in which [E]mployer will not need the services or labor.” *Id.* The CO reasonably requested further documentation that included an updated

Statement of Temporary Need with a detailed explanation as to why the nature of the job opportunity reflects a temporary need and how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need; a statement describing Employer's business history, activities, and schedule of operations through the year; a summary of all projects in the area of intended employment that have contributed to the need for temporary workers during the requested dates of need; summarized monthly payroll reports for a minimum of two previous calendar years that separately identify the number of workers or staff employed, the total hours worked, and the total earnings received for both full-time permanent and temporary employees; as well as any other evidence and documentation that similarly serves to justify the dates of need being requested for certification. (AF 78-79).

In response to the Notice of Deficiency, Employer provided additional documentation to support that it has a permanent workforce that it wishes to supplement from April 1, 2018 to December 31, 2018. Specifically, Employer provided a letter explaining why its peak months were between April and December; summarized payroll documents from 2017 and 2016; a subcontract agreement with Adolfson & Peterson Construction for work beginning April 2, 2018 and ending September 30, 2018; a bid confirmation with Rogers-O'Brien Construction for \$394,900.00 for work from May 1, 2018 through October 31, 2018; and a bid confirmation with StructureTone Southwest for \$503,800.00 to \$ 642,000.00, depending on the add-ons and substitutes, if any, selected by the client. (AF 69-74). Additionally, Employer had submitted with its initial Application a letter of intent from The Christman Company dated November 20, 2017 for a subcontract for \$299,248.00.¹⁰ (AF 117). However, it is unclear if this letter of intent pertained to a contract that would commence or run during the alleged peak period of April 1, 2018 to December 31, 2018.

Although Employer complied with the CO's request for additional documentation, the evidence does not support Employer's assertion that it needs to supplement its permanent workforce with 20 additional temporary construction laborers from April 1, 2018 to December 31, 2018 to meet a peak-load need. While Employer has proven that it employs both permanent and temporary workers, it has not documented its temporary need for two reasons.

First, the payroll documentation submitted by Employer does not support its statement that its peak season is between April and December each year. Employer provided a lengthy description of the construction process to explain why its peak months were April through December. However, Employer's payroll summaries for the prior two years do not support this statement.

In Employer's response to the Notice of Deficiency it explained that its slowest months for business are "January and February of every year because [Employer has] no new contracts commencing in those months." (AF 58). Employer went on to state that:

¹⁰ Employer submitted the letter of intent from The Christman Company with its Form 9142. (AF 117). In its response to the Notice of Deficiency, Employer stated that it attached the Christman letter of intent, as well, but it did not. (AF 59).

During [January and February] our long term staff performs repairs and maintenance job orders and our company prepares for the peak period season to begin in April. Our 2016 and 2017 Payroll Summary Reports will demonstrate that we have our highest payroll payout on the last 3 quarters of the year.

(AF 58). While Employer’s statement that the last three quarters of 2016 and 2017 produced the highest payroll payout, the payroll summary documents do not support Employer’s assertion that January and February are its slowest months. The charts below depict the number of hours worked by Employer’s temporary construction laborers for each month in 2016 and 2017, organized by highest to lowest number of total hours worked.

2017 Payroll

Month	Total Number of Hours Worked by Temporary Construction Laborers
November	5,914.4
October	5,433.6
March	4,968
December	4,835.5
June	4,785
August	4,785
January	4,704
May	4,573
September	4,350
February	4,000
April	4,000
July	4,000

2016 Payroll

Month	Number of Hours Worked by Temporary Construction Laborers
August	5,152
March	4,968
December	4,908
October	4,752
September	4,704
November	4,704
February	4,680
June	4,576
July	4,536
May	4,400
January	4,200
April	4,200

The bolded months represent non-peak months, per Employer's own statements. The charts depicted here are based on excerpts from Employer's summarized payroll documents, listed from highest to lowest in relation to monthly totals for number of hours worked by temporary construction laborers. (AF 60, 62). No calculations were performed to reach the above figures.

Review of the payroll documents indicates that Employer's alleged non-peak months were either higher than or equal to its peak months in terms of total number of hours worked by temporary laborers. For example, in 2017, non-peak month March recorded 4,968 total hours worked by temporary construction laborers, which was higher than the peak months of April, May, June, July, August, September and December, or seven of the nine purported peak months. Similarly, January's 2017 total hours worked was higher than May, September, April, and July; February was tied with April and July. This documentation is in direct contravention to Employer's assertions that its peak season is from April to December and that January and February are its slowest months "every year."

Looking back at the payroll data from 2016, the total number of temporary labor hours worked are not considerably different. March, a non-peak month, recorded the second-highest number of total hours worked in a month—4,968 hours—which was higher than eight of the nine alleged peak months. Again, January and February, Employer's stated "slowest months" were either higher than or tied with peak months in terms of the total number of hours worked by temporary construction laborers.¹¹

The CO similarly relied on the payroll documentation to support its finding that Employer failed to establish a temporary need. However, the focus of the CO's decision was that Employer "only utilized the [temporary construction laborers] at a full-time capacity in January (44 hours a week) which is a 'non-peak' month." (AF 35). The CO performed its own calculation to determine the "Average hours per worker per week." *Id.* The CO divided the total number of monthly hours worked by temporary construction laborers by the number of temporary construction laborers, and then divided the sum by four to calculate the average number of weekly hours worked by each temporary construction worker.

Employer argued in its Request for Administrative Review that the CO performed an incorrect calculation in reaching this determination.¹² (AF 10). While the CO's figure may not be accurate, one need not go so far as to perform additional calculations to support the CO's final determination. Rather, looking solely at the total number of hours worked by construction laborers in each month shows that Employer does not have a peak-load need from April through December. As discussed, in both 2016 and 2017 Employer's temporary laborers worked more hours in March than they did in a majority of the peak months. On the whole, Employer's payroll documents show that in the previous two years, Employer's temporary construction laborers logged as many, if not more, hours of work in non-peak months than in peak months.

¹¹ The monthly totals for Employer's permanent workers similarly showed a year-round need for workers, and failed to support Employer's purported peak-load period between April and December of every year. (AF 60, 62).

¹² According to Employer, the CO divided the total number of hours worked by the total number of construction laborers, which is incorrect because the "total [number] of construction laborers does not display the fact that some of those workers may come into work for a day or two and then quit."

The payroll documents do not show any recognizable pattern or consistent increase in business activity during Employer's requested period of need. Instead, the documentation shows that Employer has a year round need for construction laborers.

Turning to the second reason why Employer's provided documents do not support a finding of temporary need, the bid confirmations and letter of intent submitted by Employer do not indicate a peak-load need. First, Employer submitted a subcontract with Adolfson & Peterson Construction for a project beginning April 2, 2018 and ending September 30, 2018. (AF 69-70). However, in the letter Employer provided with its response to Notice of Deficiency, it explained that its "permanent workers would be assigned to this project thus making them unavailable for working in the Dallas, Texas region." (AF 59). Employer stated previously that it needed temporary workers to work in the Dallas area. Taken together, Employer's statements indicate that the temporary laborers would not be working on the Adolfson & Peterson project that would run from April to September of 2018.

Employer also submitted a bid confirmation with Rogers-O'Brien Construction for \$394,900.00 for work from May 1, 2018 through October 31, 2018, and a bid confirmation with StructureTone Southwest for \$503,800.00 to \$ 642,000.00.¹³ (AF 69-74). Additionally, Employer submitted with its initial Form 9142 a letter of intent from The Christman Company dated November 20, 2017 for a subcontract for \$299,248.00.¹⁴ (AF 117). Employer stated that these are the three projects for which it intends to utilize temporary construction laborers in the Dallas, Texas area. (AF 69).

However, Employer did not provide sufficient documentation to establish that these three projects create a peak-load need for temporary construction laborers. The Rogers-O'Brien bid confirmation is the only project with established dates during the alleged peak-load period. The bid confirmation shows that Employer will work on the Rogers-O'Brien project between May 1, 2018 and October 31, 2018. (AF 69). Employer did not provide dates for the StructureTone Southwest or The Christman Company projects and, again, previously stated that temporary construction laborers would not be working on the Adolfson & Peterson project. The evidence submitted by Employer indicates that there are three projects for which it intends to utilize temporary laborers, yet Employer has failed to establish that two of the three projects occur during the alleged peak-load period.

Further, the total price of the Rogers-O'Brien, StructureTone Southwest, and The Christman Company projects is \$1,197,948.00 to \$1,336,148.00, depending on any add-ons selected by StructureTone Southwest.¹⁵ However, Employer's total payroll was \$5,711,856.24 in 2016 and \$5,432,213.68 in 2017. (AF 60, 62). Thus, even assuming that Employer had established that the Rogers-O'Brien, StructureTone Southwest, and Christman Company contracts were to occur during the alleged peak-load period, these contracts account for only a

¹³ The StructureTone Southwest bid confirmation included a list of substitutes or add-ons that would increase the cost of the project, which is why the price is listed here as \$503,800.00 to \$642,000.00. (AF 74).

¹⁴ Employer submitted the letter of intent from The Christman Company with its Form 9142. (AF 117). In its response to the Notice of Deficiency, Employer stated that it attached the Christman letter of intent, as well, but it did not. (AF 59).

¹⁵ *Supra*, note 11.

fraction of Employer's total payroll, let alone Employer's actual profit. Moreover, the contract and bid prices for these three projects are, again, less than Employer's total payroll for the last two years, which does not support Employer's assertion that it performs a majority of its work during the months between April and December each year.

The CO also stated in the Notice of Deficiency that Employer failed to establish a temporary need for the specific number of workers requested; in this instance, 20 construction laborers. (AF 80). *See also* §§ 656.11(e)(3) and (4). The CO determined that Employer did not indicate how it determined that it needed 20 construction laborers during the requested period, stating that additional "explanation and documentation [were] required." *Id.* In response, Employer stated that it needs two construction laborers to assist one skilled roofer, and because the 2018 projects called for 10 skilled roofers, Employer needed 20 additional construction laborers. (AF 58). Employer explained that this determination was based on the size of its 2018 projects and that it had used "professional bidders" to reach this figure. (AF 58). However, Employer did not submit any evidence to support this assertion. In response to the Notice of Deficiency, Employer submitted only its payroll documentation and contracts and bid confirmations for its 2018 projects, none of which speaks to why Employer needs 20 additional construction laborers. While Employer did submit one e-mail from its Chief Estimator with the Form 9142, the e-mail did not support Employer's statement that it needed 20 additional construction laborers to supplement its permanent labor force. (AF 114). Therefore, Employer did not establish a temporary need for the 20 temporary construction laborers that it had requested, in violation of §§ 656.11(e)(3) and (4).

Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. *See, e.g. Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012). Employer has failed to meet its burden of showing the temporary or seasonal need for 20 construction laborers, as the payroll documentation and project contracts do not support Employer's assertion of a peak-load need from April 1, 2018 to December 31, 2018. As both the DHS regulation and the DOL regulation point out, "Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. §214.2(h)(6)(ii)(A), *see also* 20 C.F.R. §655.6(a). Although Employer may have shown that a particular job is seasonal or temporary, the pertinent issue is whether *the petitioner's employment need is temporary*.

The CO stated in its February 27, 2018 Notice of Deficiency that Employer had failed to establish that the job opportunity was temporary in nature. Employer was given the opportunity to address this issue, but the supporting documentation submitted by Employer indicates that Employer has a year round need for construction laborers. The DHS and DOL jointly issued preamble to the most recently passed H-2B regulations, applicable to this H-2B application, also known as the Interim Final Rule ("IFR"), makes it clear that the purpose of the H-2B program is to address temporary and not permanent employment needs.

Routinely allowing employers to file seasonal, peak load or intermittent need applications for periods approaching a year would be inconsistent with the

statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position ... Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H-2B labor certification is not appropriate.

82 Fed. Reg. 24056 (April 29, 2015). Therefore, it is clear that the H-2B program regulations do not contemplate certification of workers for a permanent rather than a temporary employment need.

Although Employer submitted some of the documentation requested by the CO, these documents do not adequately establish its alleged peak-load need for 20 construction laborers between April 1, 2018 and December 31, 2018. *See Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of document-on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers”). In this case, the CO reasonably determined that Employer had not met its burden of providing the necessary documentation, along with an adequate explanation, to establish its request for 20 construction laborers between April 1, 2018 and December 31, 2018.

ORDER

Employer has failed to meet its burden of establishing its seasonal temporary need as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii) for 20 construction laborers between April 1, 2018 and December 31, 2018 or that the request represents a bona fide job opportunity for the number of workers requested. The CO’s determination is supported by the evidence of record. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is **AFFIRMED**.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge