

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 April 2018**

**BALCA Case No.: 2018-TLN-00109**  
ETA Case No.: H-400-17363-481394

*In the Matter of:*

**COMPONENT MANUFACTURING CO.,**  
*Employer.*

Certifying Officer: Leslie Abella  
Employment and Training Administration  
Office of Foreign Labor Certification  
Chicago National Processing Center

Appearances: John Bedell  
H-Visa Solutions  
Sioux Falls, South Dakota

**DECISION AND ORDER ON RECONSIDERATION**  
**VACATING DENIAL OF CERTIFICATION**  
**AND REMANDING TO CERTIFYING OFFICER**

This case arises from a 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, 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).<sup>1</sup> 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).

On April 5, 2018, I received the appeal file in this matter. For the reasons explained below, I vacate the CO's Final Determination denying certification and remand this matter to the

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<sup>1</sup> On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the "2008 Rule" found at 73 Fed. Reg. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015 whose period of need begins after October 1, 2015. *See* 20 C.F.R. 655.4(e) (explaining transition procedures).

CO for further processing of the application so she can determine whether to exercise her discretion to approve a period of need shorter than that requested in the application.

### **STATEMENT OF THE CASE**

On January 1, 2018, the Department of Labor's Employment and Training Administration ("ETA") received an *Application for Temporary Employment Certification* from Component Manufacturing Co. (the "Employer"). Appeal File ("AF") 159, 242-52. The Employer requested certification for ten Team Assemblers from April 1, 2018, to December 15, 2018. AF 242, 244.

On February 2, 2018, the CO issued a *Notice of Deficiency* ("NOD"), notifying the Employer that its application "fails to meet the criteria for acceptance." AF 235-241. The CO initially identified three deficiencies: (1) "[f]ailure to establish the job opportunity as temporary in nature" in violation of 20 C.F.R. §§ 655.6(a) and (b); (2) "[f]ailure to establish temporary need for the number of workers requested" in violation of 20 C.F.R. § 655.11(e)(3) and (4); and (3) "[f]ailure to submit a complete and accurate ETA Form 9142" in violation of 20 C.F.R. § 655.15(a). AF 235-241. On February 19, 2018, the Employer responded to the NOD. Finally, on March 13, 2018, the CO issued its Final Determination, in which the CO denied the Employer's certification based on two deficiencies: (1) "[f]ailure to establish the job opportunity as temporary in nature" in violation of 20 C.F.R. §§ 655.6(a) and (b); and (2) "[f]ailure to submit a complete and accurate ETA Form 9142" in violation of 20 C.F.R. § 655.15(a). AF 157-163.

With respect to the first deficiency on which the CO based the denial of certification, the NOD requested that Employer "submit an updated temporary need statement" including an explanation of why the employer has a temporary need, and how the application "meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need." AF 238-39. Additionally, the CO required the Employer to

[s]ubmit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to, the following:

1. Signed service contracts from customers for the previous one calendar year; and
2. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system.

AF 238-39.

The Employer's February 19, 2018 response to the NOD included an updated temporary need statement, which stated in relevant part:

In the late spring and early summer, the company experiences an increase [sic] demand for it [sic] work as the weather turns warmer and seasonal construction companies begin to build commercial and residential construction projects. . . .

Sioux Falls, SD has seen exponential growth as demonstrated by the number of building permits requested and the dollar amounts of the projects (see exhibit A). With larger construction projects as shown by the dollar amounts trusses for commercial structures have become more difficult to assemble. So, the request for ten additional workers is to meet the increasing demand of the size and types of trusses that are used to make commercial, multifamily and residential roofs.

. . . [W]e are requesting a start date that begins 01 April 2017<sup>2</sup> because this is when temperature warm [sic] and construction companies can begin construction projects. In December of each year construction companies are not building due to weather temperatures therefore trusses, which, are the components that are used to build roofs are not needed therefore, truss assemblers are not needed. We request the additional 15 days in December to complete the process of putting the trusses in a secure location in our factory, so they are not damaged while sitting over the winter months.

AF 172.

The Employer submitted supporting evidence, including a 2017 Sioux Falls building permit report, and 2016 and 2017 monthly payroll reports. The Employer did not submit signed service contracts as requested, but it explained that the Employer "[t]ypically, [does] not get contract [sic] or letters of intent since [truss assembly] is a component of the project and not the entire project. General contractors contact us typically via phone and send a spec sheet. . . ." AF 173. The Employer provided construction permit statistics from the City of Sioux Falls and Employer's own monthly payroll reports from 2016 and 2017 for its fulltime staff and seasonal workers. AF 178-234.

In the Final Determination, the CO summarized the Employer's 2017 payroll as follows:

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<sup>2</sup> Logic dictates, and the remainder of Employer's application makes clear, that the Employer intended to request a date of need beginning in 2018.

<b>Month</b>	<b>Payroll for 2017</b>
January	\$206,848.20
February	\$196,524.65
March	\$255,531.87
April	\$232,969.93
May	\$261,961.32
June	\$367,944.97
July	\$297,115.00
August	\$405,988.40
September	\$358,470.60
October	\$371,196.74
November	\$401,128.04
December	\$374,617.41

AF 161-62. Neither the Employer nor the CO summarized Employer's 2016 payroll; however the Employer's 2016 payroll may be summarized as follows:

<b>Month</b>	<b>Payroll for 2016</b>
January	\$216,100.33
February	\$200,520.70
March	\$268,158.62
April	\$271,367.99
May	\$313,567.81
June	\$391,043.07
July	\$324,049.38
August	\$355,436.70
September	\$420,718.17
October	\$258,879.48
November	\$289,241.00
December	\$343,535.23

See AF 178-208.

In the Final Determination, the CO found that:

In response to the NOD, the employer submitted: an updated Statement of Need; Permit Statistics for the City of Sioux Falls, SD; and monthly payroll for 2016 and 2017. The employer was requested to submit, but did not submit signed service contracts from customers for the previous calendar year.

The employer did not overcome the deficiency. In the amended Statement of need, the employer states "we have requested 10 assemblers because with our current and past recruitment efforts coupled with our dense populations and low unemployment rate we can never recruit enough seasonal workers to assemble the

trusses.” However the presence of a labor shortage not does [sic] constitute a temporary need for the employer specifically.

...

Furthermore, the submitted payroll for 2017 does not demonstrate a definitive seasonal need for the employer’s requested dates of need of April 1, 2018 through December 15, 2018. . . .

The employer may have a temporary need; however, the employer’s documentation does not support a need beginning on April 1. Further, the employer’s application could not be partially accepted with a start date after April 1, 2018, as H-2B regulations mandate that an H-2B application be submitted no more than 90 days before the start date of need. . . .

The employer did not provide signed service contracts for the previous calendar year which could have helped support the employer’s attestation of its dates of need.

Therefore, the employer did not overcome the deficiency. . . .

AF 161-162.

With respect to the second deficiency on which the CO based the denial of certification, in the NOD the CO requested that the Employer correct its entries in Sections Fc Item 4 and Fc Item 7a of the ETA Form 9142. AF 241. Employer’s Response granted express permission to amend Section Fc Item 4 “to reflect Minnehaha county.” AF 173. The Employer did not expressly address the deficiency in Section Fc Item 7a. *See* AF 172-73.

[T]he employer did not give CNPC permission to update Section F.c, Item 7a of the employer’s ETA Form 9142. . . .

Therefore, the employer did not overcome the deficiency.

AF 162-163.

On March 26, 2018, the Employer requested administrative review of the denial of certification on the grounds that “[i]t is crucial that [C]omponent [M]anufacturing be able to supplement its current workforce from April to December when the construction season is in full swing to keep up with the demand of the current growth rate in Sioux Falls, SD.” AF 1-2. The Board received the request for review on March 26, 2018, and the appeal file on April 5, 2018. The Board did not receive a brief submitted by either party.

## DISCUSSION

The scope of the Board's review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.<sup>3</sup> 20 C.F.R. §§ 655.61(a), (e). A review of the record compels a conclusion that the Employer established a temporary need beginning April 1, 2018, and that Employer's response to Section Fc Item 7a is not incomplete or inaccurate. For the reasons explained in detail below, it is appropriate to remand this matter to the CO so she can decide whether to grant partial certification by reducing the requested period of need, in a manner consistent with the Board's findings, and as authorized by 20 C.F.R. § 655.54.<sup>4</sup>

### *The Employer Has Established a Temporary Need for the Workers Requested Beginning on April 1, 2018*

In the Final Determination, the CO stated that “[t]he employer may have a temporary need; however, the employer's documentation does not support a need beginning on April 1.” AF 162. After reviewing the record, I find that the Employer has established a temporary need for the requested period of April 1 through December 15, 2018.

The CO recognized that the Employer asserted that its temporary need “is tied to a season which is recurring in nature,” AF 160, however, the CO concluded that the Employer failed to “provide[] any information as to how it has determined the need for temporary workers for the dates of need requested.” AF 160. In particular, the CO identified three factors, which led the CO to conclude that Employer failed to establish the job opportunity as temporary in nature. First, the CO asserted that “the presence of a labor shortage not does [sic] constitute a temporary need for the employer specifically.” AF 161. Second, the CO noted that the Employer failed to submit signed service contracts, as requested in the NOD, which the CO stated could have helped establish dates of need. AF 161-162. Third, the CO found that the Employer's payrolls failed to establish a temporary need beginning April 1, 2018. AF 161-162. The CO stated that the payrolls were not submitted in the manner requested and found that they were “unclear.” AF 161. Moreover, the CO emphasized that the 2017 payroll shows that Employer's total pay output for March was greater than its total pay output for April, the first month identified in the Employer's application for temporary need. AF 161-162.

First, I agree with the CO's statement that “the presence of a labor shortage not does [sic] constitute a temporary need for the employer specifically.” AF 161. However, a showing of seasonal work does constitute a temporary need. *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). Here, the CO recognized that the Employer's temporary need “is tied to a season which is recurring in nature. . . .” AF 160. The Employer's application

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<sup>3</sup> The Employer's request for review in this matter contained additional evidence that has not previously been submitted to the CO. The Board will not consider the Employer's additional evidence in its review of this matter.

<sup>4</sup> In the Final Determination, the CO noted that it cannot grant partial certification beginning on a date after April 1, 2018, due the 90 day filing limits. AF 162. Although it is now past April 1, 2018, for the reasons explained in this decision, the Board finds that the CO erred in denying Employer's application with a start date of need on April 1, 2018. Thus, Employer's application was timely.

provided statements and evidence in support of establishing April 1, 2018 as the initial date of need for temporary, seasonal workers.

The Employer asserted that its temporary need for workers begins on April 1 “because this is when the temperature warm [sic] and construction companies can begin construction projects,” AF 173, and that its temporary need concludes on December 15, after workers secure the trusses in the Employer’s factory “so they are not damaged while sitting over the winter months.” AF 173.

The Employer explained that it determined the requested dates of need for temporary workers based on the weather patterns and demand from the construction industry. AF 248, 253-54 (“Our season starts in April of each year and ends in December of each year and our seasonality is based on weather patterns in South Dakota.”). The Employer stated that construction is not feasible in Sioux Falls during the winter because severe winter weather conditions “make[] it impossible. . . and extremely dangerous to work outside. . . .” AF 248, 253-54. Moreover, “[w]hen general contractors and home builders no longer order trusses. . . a full-time assembly staff is no longer needed.” AF 248, 253-54. The Employer stated that “because of the difficulty in completing construction projects in the winter, Component Manufacturing has found that it does not have a need for permanent workforce for team assembler’s workers from January to March of each year.” AF 248, 254.

In support of its requested dates of need, the Employer provided, *inter alia*, annual weather reports for the city of Sioux Falls, SD. The weather reports showed that the average snowfall in Sioux Falls, is seven or eight inches each month from November through March, five inches in April, and zero inches in May. *See* AF 255. The reports also showed that April is the first month of the year when both the average high and low temperatures in Sioux Falls, SD, are above freezing. *See* AF 255.

The Employer stated that it is challenging to recruit a sufficient number of local workers to meet the demands of the construction industry due to the seasonal nature of the truss assembly job. AF 254. As stated, above, seasonal work constitutes a temporary need. *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). Moreover, the CO recognized the Employer’s need “is tied to a season which is recurring in nature. . . .” AF 160. Accordingly, I find that Employer’s statement does not defeat the Employer’s ability to establish a temporary need.

Second, the CO noted that the Employer failed to submit signed service contracts, as requested in the NOD. The CO stated that signed service contracts could have helped Employer to establish the precise dates of need for its application. Although the Employer did not provide signed service contracts as requested in the NOD, it explained the reason for their absence. Employer explained that it “[t]ypically. . . do[es] not get contract or letters of intent since [truss assembly] is a component of the project and not the entire project. General contractors contact us typically via phone and send a spec sheet. . . .” AF 173. Accordingly, I find that Employer’s failure to provide signed contracts does not defeat Employer’s ability to establish a temporary need.

Third, the CO found that the Employer's payrolls failed to establish a temporary need beginning on April 1, 2018. The CO noted that the Employer's monthly payroll documentation was not presented in the manner requested; the CO stated that "[t]he occupation title is missing from the payroll reports making it unclear whether the payroll is only for the occupation of Team Assemblers or whether the report is a compilation of all occupations within the company." AF 161. The CO also noted that Employer's 2017 payroll shows that Employer's total pay output for March that was greater than its total pay output for April, the first month identified in the Employer's application for temporary need. Based on the foregoing, the CO concluded that the "payroll for 2017 does not demonstrate a definitive seasonal need for the employer's requested dates of April 1, 2018 through December 15, 2018." AF 161.

To demonstrate its need for temporary workers beginning on April 1, 2018, extending through December 15, 2018, the Employer attached, *inter alia*, payroll records from 2016 and 2017. *See* AF 172-234. Although the Employer's payroll was not presented in the manner requested in the NOD, the payroll records did distinguish between fulltime staff and seasonal employees. *See* AF 178-234. Additionally, the Employer explained that it maintained a fulltime staff of "wood cutters. . . . Then in April when our seasonal workers arrive we begin assembling the trusses." AF 172.

The CO did not discuss the 2016 payroll, which showed that Employer incurred a lower total payout in October 2016 than in either of its surrounding months, each of which would have been encompassed in a similar temporary need request. The CO also did not address the actual number of seasonal workers hires or the general trend of increased payrolls during March through December as shown by the 2016 and 2017 payrolls.

The 2016 payroll report shows that the Employer employed six seasonal employees in March, twenty-two seasonal employees in April, and thirty-six seasonal employees in May. *See* AF 182-188. The 2017 payroll report shows that the Employer employed zero seasonal employees in March, nine seasonal employees in April, and thirty-five seasonal employees in May. *See* AF 213-218. Both the 2016 and 2017 payroll reports show that the Employer hired more seasonal workers in April than during the month of March, which was outside Employer's requested dates of need. Both the 2016 and 2017 payroll reports show that the Employer's total payroll is less during the winter months of January and February than during the remainder of the year, from March through December.

Accordingly, I find that Employer's payroll records support a finding that Employer's date of need began on April 1, 2018.

Upon reviewing the evidence as a whole, I find that Employer established a temporary need beginning on April 1, 2018. Employer's statement of need, local weather reports, and its explanation for its failure to provide signed service demonstrate the need for a seasonal workforce, which is weather dependent and which tends to begin in April. The Employer's 2016 and 2017 payroll reports demonstrate that for the past two years, Employer in fact began to increase its number of seasonal workers beginning in April. Accordingly, I find that Employer has established a temporary need for workers, beginning on April 1, 2018.

*The Employer's Response to Section Fc Item 7a of Form 9142 Is Consistent with Its Description in the Job Order*

The CO denied certification of the Employer's application, in part, for "[f]ailure to submit a complete and accurate ETA Form 9142" in violation of 20 C.F.R. § 655.15(a). AF 162. In the NOD, the CO requested that the Employer grant permission to amend Sections "Fc Item 4" and "Fc Item 7a of the ETA Form 9142." AF 162. In its response to the NOD, the Employer expressly granted permission to amend Section Fc Item 4 "to reflect Minnehaha county," AF 173, but did not expressly grant permission to amend Section Fc Item 7a. In its Final Determination, the CO stated that the Employer did not "submit an updated job order to be consistent with its ETA Form 9142." AF 163.

Section Fc Item 7a requires that Employer "identify the geographic place(s) of employment with as much specificity as possible. If necessary, submit and attachment to continue and complete a listing of all anticipated worksites." AF 167 (emphasis in original). Employer's response to Section Fc Item 7a, indicated that the work would be performed in Minnehaha County, South Dakota. AF 167. Employer's Job Order explained that "[w]ork will be performed in multiple worksites throughout Minnehaha County in South Dakota." AF 263. Although the Job Order specified three addresses in the city of Sioux Falls, South Dakota, where Employer has assembly plants, Employer stated that "[w]orkers may travel throughout Minnehaha [C]ounty." AF 263.

Accordingly, I find that the Employer's description of the worker's geographic worksite as "Minnehaha County" in the Job Order is consistent with its response in Section Fc Item 7a of the ETA Form 9142.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that: (1) the Certifying Officer's denial of labor certification is **VACATED**; and (2) this matter is **REMANDED** to the Certifying Officer for further processing of the application so she can determine whether to exercise her discretion to approve a reduced period of need, not inconsistent with the Board's findings.

**SO ORDERED.**

For the Board:

**PAUL R. ALMANZA**  
Associate Chief Administrative Law Judge