



Issue Date: 12 January 2018

BALCA Case No.: 2018-TLN-00037

ETA Case No.: H-400-17284-271005

In the Matter of:

DDM HAULERS LLC,
Employer

DECISION AND ORDER

This proceeding is before the Board of Alien Labor Certification Appeals (BALCA) pursuant to DDM Haulers LLC’s (Employer) request for administrative review of the Certifying Officer’s (CO) denial of temporary labor certification under the H–2B program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

Employer submitted its ETA Form 9142, H-2B Application for Temporary Employment Certification, on October 11, 2017, requesting certification for 18 construction laborers from 01/01/2018 to 08/31/2018. Employer described that time period as its “[peak load] period for construction laborers.” AF 192-221.¹ On October 19, 2017, the CO requested confirmation from Employer whether it wished to proceed with its application in light of another pending application (H-400-17142-707551), which had been denied by the CO and, ultimately, denied on appeal. *See In re DDM Haulers, LLC*, 2017-TLN-00069 (Oct. 18, 2017). Employer responded that it wished to continue with the present application. AF 180-91.

On October 20, 2017, the CO issued the first Notice of Deficiency, requesting an explanation from Employer why its peak load need shifted from October 1, 2017—July 1, 2018 to January 1—August 31, 2018. AF 172-79. Employer responded to the Notice of Deficiency on October 25, 2017, and stated that it renegotiated its dates of need with its customers following the denial of the earlier application for recruitment deficiencies. Employer provided five letters of intent from its customers, Lipham Asphalt, Troy Vines, Endeavor Energy Resources, Soil Express, and Leeco Properties, each requesting 18 laborers during Employer’s stated dates of need. Employer’s Revised Statement of Temporary Need indicated that its “peakload need is for 18 full time, temporary construction laborers Monday – Friday, 8-5, from January 1, 2018 to August 31, 2018 to perform field assembly at construction sites. By December’s end most

¹ AF refers to the Administrative File.

construction deliveries have been made. Therefore..., we need to supplement our permanent workers.” AF 149-71.

On November 14, 2017, the CO issued the second Notice of Deficiency, requesting additional attestations regarding temporary need that contain explanations why the dates of need changed from the first H-2B application. AF 135-41. Employer responded on November 21, 2017, and provided, *inter alia*, payroll and monthly work summaries for 2016 and 2017 and additional letters of intent, which documented renegotiations with another five customers following the denial of the first H-2B application. The payroll records for 2016 and 2017 indicated that Employer had no temporary workers and the following permanent workers:

Month-Year	Total Permanent Workers	Total Hours Worked
Jan-16	3	480.00
Feb-16	2	320.00
Mar-16	2	32.00
Apr-16	36	5760.00
May-16	5	800.00
Jun-16	30	4800.00
Jul-16	1	160.00
Aug-16	1	160.00
Sep-16	1	160.00
Oct-16	1	160.00
Nov-16	1	160.00
Dec-16	1	160.00
Jan-17	3	480.00
Feb-17	2	320.00
Mar-17	2	32.00
Apr-17	36	5760.00
May-17	5	800.00
Jun-17	25	4000.00
Jul-17	1	160.00
Aug-17	1	160.00
Sep-17	2	320.00
Oct-17	2	320.00
Nov-17	2	320.00

Employer also provided monthly work summaries for September 2016 through December 2017, which delineated the customer it had served that month and the number of workers it requested to perform the work. A distilled version of Employer’s summaries is as follows:

Month-Year	Dates of Need	Customer	No. of Workers Requested
Sep-16	9/1 – 9/30	Troy Vines	18

Month-Year	Dates of Need	Customer	No. of Workers Requested
Oct-16	10/1 – 10/31	Troy Vines	18
Nov-16	11/1 – 11/30	Troy Vines	18
	11/2 – 11/30	Thompson Materials	18
Dec-16	12/1 – 12/31	Troy Vines	18
	12/1 – 12/31	Thompson Materials	18
Jan-17	1/1 – 1/31	Troy Vines	18
	1/1 – 1/31	Thompson Materials	18
	1/12 – 1/31	PB Materials	18
Feb-17	2/1 – 2/28	Troy Vines	18
	2/1 – 2/28	Thompson Materials	18
	2/1 – 2/28	PB Materials	18
Mar-17	3/1 – 3/31	Troy Vines	18
	3/1 – 3/31	Thompson Materials	18
	3/1 – 3/31	PB Materials	18
	3/10 – 3/31	SBM Earthmoving Company	18
Apr-17	4/1 – 4/30	Troy Vines	18
	4/1 – 4/30	Thompson Materials	18
	4/1 – 4/28	PB Materials	18
	4/1 – 4/25	SBM Earthmoving Company	18
	4/8 – 4/30	BFG	18
May-17	5/1 – 5/31	Troy Vines	18
	5/1 – 5/31	Thompson Materials	18
	5/1 – 5/31	BFG	18
Jun-17	6/1 – 6/30	Troy Vines	18
Jul-17	7/1 – 7/31	Troy Vines	18
Aug-17	8/1 – 8/31	Troy Vines	18
Sep-17	9/1 – 9/30	Troy Vines	18
Oct-17	10/1 – 10/31	Troy Vines	18
Nov-17	11/1 – 11/30	Troy Vines	18
Dec-17	12/1 – 12/31	Troy Vines	18

Employer also provided letters of intent from its customers, which it noted had been previously provided. The letters of intent attached to Employer’s response were from Victory Rock Texas, BFG Solutions, Danny’s Asphalt Paving, Thompson Materials, and Charger Services, four of which requested 18 laborers and one 15 laborers. The dates of need listed on Employer’s first H-2B application (October 1, 2017, through July 1, 2018) had been crossed out and replaced with the dates of need Employer specified on the present H-2B application (January 1 through August 31, 2018). AF 111-34.

The CO issued its Final Determination denying Employer’s application. The CO found that Employer failed to establish the job opportunity as temporary in nature under

20 C.F.R. § 655.6. The CO noted Employer's prior application, which, when combined with the present application, represented a year-round need. Furthermore, the CO stated:

The employer is basing its temporary need on specific contracts it has entered into with its customers. It explained in its original temporary need statement that its peakload need is from January 1, 2018 to August 31, 2018 due to most construction deliveries have been made by December's end and that, as a result, it is in need of supplemental workers starting January 1. However, based on the renegotiation of contracts, that schedule appears to be fluid and not tied to any weather pattern or any other reason(s) during a certain time of year.

The CO furthermore noted that the payroll records demonstrated "inconsistent hours" throughout two years "with no consistent and definable peak." Therefore, the CO concluded that Employer's payroll does not support a temporary need from January 1 through August 31. AF 94-110.

Employer requested administrative review on December 19, 2017. Employer explained, "The wording on the intents to hire is the usual wording used by employer, which was provided to each of the hiring companies and signed by that company's representative." Furthermore, Employer comprehended from the Final Determination that the sole reason for the denial was the "CO's issue with the validity of the intents to hire." Employer asserted that it fully established the job opportunity and its need as temporary in nature through its responses to the two Notices of Deficiency. AF 1-93.

This matter was assigned to me on December 21, 2017. I issued the Notice of Docketing on December 29, 2017, ordering briefs to be submitted by the seventh business day after receipt of the administrative file. On January 9, 2018, the CO submitted her Notice that she would not be filing a brief and asked the Court to affirm denial for the reasons set out in the CO's Final Determination. Employer has not filed a brief. The decision that follows is based upon the entire record and the applicable law.

DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. See 8 U.S.C. §1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. An appropriation rider currently in place requires the Department of Labor to utilize the Department of Homeland Security's regulatory definition of temporary need. See 20 C.F.R. § 656.6(b) and (c); Consolidated Appropriations Act of 2017, P.L.115-31, Division H. The DHS definition is located at 8 C.F.R. § 214.2(h)(6)(ii)(B) and states that, generally, a period of temporary need will be limited to one year or less, but in the case of a "one-time event," could last up to 3 years.

Temporary service or labor "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). Employment is of a

temporary nature when the employer needs a worker for a limited period of time. An employer must establish that its need for temporary services or labor “will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer must demonstrate a bona fide need for the number of workers requested. *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017); *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).

The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (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); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient); *accord, BMC West*, 2016-TLN-00039 (May 18, 2016). While temporary need is generally established through payroll data and similar historic information, start-ups can still establish a temporary need. *Midwest Poured Foundations*, 2013-TLN-00053 (Jun. 18, 2013); *Los Altos Mexican Restaurant*, 2016-TLN-00067 (Oct. 28, 2016) (*Midwest* distinguished on the facts); *accord, The Garage Tavern*, 2016-TLN-00074 (Oct. 28, 2016). Furthermore, “the determination of temporary need rests on the nature of the underlying need for the duties of the position” and not “the nature of the job duties.” 80 Fed. Reg. 24042, 24005.

Here, Employer requested certification for 18 construction laborers, alleging that 01/01/2018 to 08/31/2018 is its “[peak load] period for construction laborers.” AF 192-221. To qualify as a peak load need, the employer must establish (1) “that it regularly employs permanent workers to perform the services or labor at the place of employment”; (2) “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; (3) “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); *Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peak load, temporary need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer’s documentation revealed that the employer’s alleged “peak load” need spanned at least a 19-month period); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer’s payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need); *Paul Johnson Drywall*, 2013-TLN-00061 (Sep. 30, 2013); *Kiewit Offshore Services*, 2012-TLC-00031, -32, -33 (May 14, 2012); *Tarrasco Steel Company*, 2012-TLN-00025 (Apr. 2, 2012); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *DialogueDirect, Inc.*, 2011-TLN-00038, -39 (Sep. 26, 2011); *Top Flight*

Entertainment, Ltd., 2011-TLN-00037 (Sep. 22, 2011); *Workplace Solutions LLC*, 2009-TLN-00049 (Apr. 22, 2009) (finding that the employer’s payroll documentation supported a claim for peak load need because, notwithstanding a calculation error, it was evident that the employer had a permanent staff that is supplemented by temporary workers); *Hutco, Inc.*, 2009-TLN-00070 (Jul. 2, 2009); *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009) (finding that the Employer’s submission of agreement letters, which were not legally binding, did not provide adequate evidence of the Employer’s need to supplement its permanent workforce with temporary workers during the stated time period); *Deober Brothers Landscaping, Inc.*, 2009-TLN-00018 (Apr. 3, 2009) (suggesting peak load need can recur if it lasts no longer than 10 months each year); *Magnum Builders*, 2016-TLN-00020 (March 29, 2016); *Erickson Framing Az*, 2016-TLN-00016 (Jan. 15, 2016) (remands to permit the CO to determine if a partial certification should be granted for a reduced period of peak load need); *accord, Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015) (remanded to permit certification for a shorter period of need); *BMC West*, 2016-TLN-00043 (May 16, 2016) (evidence of industry peak season need did not match employer’s need); *Empire Roofing*, 2016-TLN-00065 (Sep. 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.”); *Chippewa Retreat Spa*, 2016-TLN-00063 (Sep. 12, 2016); *Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016) (payroll records do support alleged period of need).

In this case, the documentation submitted in response to the Notices of Deficiency fails to establish any peak period. Specifically, the monthly summaries reveal that Employer has consistently needed 18 workers each month from September 2016 through December 2017. Added with the dates of need requested herein (January through August 2018), this accounts for a period of two full years. Notwithstanding the apparently consistent need for 18 workers monthly, Employer has retained an inconstant staff of permanent workers, ranging from one worker to as many as 36 workers each month. From July 2016 through December 2016 and again from July 2017 through November 2017, Employer has retained no more than two permanent workers, despite its apparent need (as reflected in the monthly summaries) of 18 workers during each of those months. Based on its payroll records, the only apparent peaks are during April and June, when Employer engaged 25 to 36 permanent workers. The Board has consistently affirmed denials of certification applications where an employer’s own records belie its claimed peak load periods of need. *See, e.g., Erickson Construction*, 2016-TLN-0050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011).

The CO’s decision was not a mere “rubber-stamped denial.” *See* Employer’s Request for Administrative Review of Denial, AF 2. Rather, the CO issued two Notices of Deficiency and considered a plethora of documentation (including that summarized above) before reaching the Final Determination that Employer’s records contradict its claimed peak load need. Employer’s records indicate that it consistently has needed at least 18 workers per month for a full two-year period (September 2016 through August 2018). Employer has not demonstrated that its employment future will not mimic its past or that this full two-year period of need is an anomaly.

The Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. As discussed above, the Employer failed to sufficiently explain how its request for temporary labor certification meets the regulatory criteria for a peak load, temporary need.

Therefore, after reviewing the record in this matter, I find that the CO's denial of certification was not arbitrary and capricious and should not be disturbed.

ORDER

In light of the foregoing, the Certifying Officer's Final Determination denying the Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge

Covington, LA