



Issue Date: 10 May 2018

**BALCA Case No.:** 2018-TLN-00115  
**ETA Case No.:** H-400-17354-199605

*In the Matter of:*

**GALLEGOS MASONRY, INC.,**

*Employer.*

**Certifying Officer:** Chicago National Processing Center

**Appearances:** Timothy R. Bakken, Esq.  
Denver, Colorado  
*For the Employer*

Jeffrey L. Nesvet, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

**Before:** Richard A. Morgan  
Administrative Law Judge

**DECISION AND ORDER REVERSING THE CERTIFYING OFFICER'S DENIAL OF  
TEMPORARY LABOR CERTIFICATION**

This case arises from Gallegos Masonry, Inc.'s ("Employer") request for review of the Certifying Officer's ("CO") decision to deny its applications 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 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

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<sup>1</sup> 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. Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (2018).

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 1, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 44 stone mason helpers for the period of April 1, 2018 to December 22, 2018. (AF 248-388).<sup>3</sup> Employer indicated that the nature of its temporary need was “peakload.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer stated:

Gallegos Masonry, Inc. is seeking 44 temporary, full-time Stonemason Helpers in the company's Colorado Mountain area (Jackson, Garfield, Eagle, Grand, Lake, Pitkin, Routt, and Summit counties) to supplement its permanent masonry staff on a temporary basis because of a peak load seasonal demand.

(AF 248).

In an attachment to its application, Employer elaborated on its temporary need stating:

The Gallegos Corporation needs to supplement its permanent masonry staff on a temporary basis because of a peak load seasonal demand. We work on construction projects throughout the Colorado Mountain area year-round. However, masonry work is controlled in large part by weather conditions. Setting stone, brick, and block for outdoor projects requires reasonably fair weather and cannot be consistently performed during the coldest winter months in the Colorado Mountain area. Over the course of our 47 years in operation, our annual business cycle has reliably shown that our peak load season begins in April and ends in December as demand for our services increases in conjunction with the fair weather months. Based on our currently contracted projects as well as our projections for the upcoming peak load season, we anticipate that we will experience increased demand that will outpace the ability of our permanent staff to provide the required labor...

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<sup>2</sup> 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 have 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.

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

We maintain a year-round staff of approximately 99 masonry professionals (masons, foremen, and stonemason helpers) in our Colorado Mountain region. We have provided our 2016-2017 payroll records for the company as a whole, as well as for our Colorado Mountain masonry staff to demonstrate that we regularly employ permanent masonry workers year-round, and supplement our work needs with temporary stonemason helpers during our peak load season. For ease of reference, the 2016-2017 payroll records are divided into three columns of workers: the first column, labeled "All Employees" reflects the number of total employees in our Colorado Mountain division for the given time frame. The second column, labeled "Designated Occupation" is all of the masonry staff in our Colorado Mountain division for the given timeframe. The third column, labeled "Temporary Employees," reflects the number of H-2B workers serving as stonemason helpers in our Colorado Mountain division during the given timeframe...

During our peak operations season, we anticipate that we will require 44 H-2B stonemason helpers to assist our permanent masonry staff. We are requesting a start date of April 1, 2018 and an end date of December 22, 2018. These dates are consistent with our 2017 H-2B application. However, we are requesting fewer H-2B workers than originally requested last year. This change in the number of workers is due mainly to two factors. The first factor is that we were originally approved by DOL for 60 H2B workers but did not receive them due to the seasonal H2B visa cap being met prior to the approval. This caused severe loss of business for us, and once the cap was extended, we only had a need for 20 workers for the remainder of the season. The second factor contributing to our reduction in requested number of workers is that our projected workload is lower in 2018 than it was in 2017... Due to other errors, our H-2B application submission was significantly delayed and the available visas were exhausted by the time our application was submitted... Our H-2B workers were not able to enter the U.S. and begin work until September 2017. This delay affected our business significantly ...

(AF 259-260).

Employer also supplied a list of fourteen projects for which it had been hired from April 2018 – December 2018 in its Colorado region. Employer stated that it also had \$31,000,000 in project bids for additional work that will occur during the 2018 season. It noted these bids were reflected in an attached Gantt chart which showed the 2018 project work schedule. Based on the needs of the contracted and bid projects Employer anticipated it would need an additional 173 stonemason helpers to assist its permanent staff. Based on its hiring experience in the past year it anticipated hiring 129 U.S. workers with an additional need for 44 H 2-B workers to fill the remainder of its stonemason helper positions.

Employer further explained the basis for its calculation of the number of temporary workers it requested in its application. Employer stated:

In order to determine the number of helpers needed during a season, we estimate the quantities of in-place work that needs to be completed and compare it to estimated production rates and the schedule demands of each project. For example, if we have 1,000 SF of masonry to install in a 4 week time-frame, we know that we need to install 250 SF of masonry per week. A standard production rate for a crew made up of a mason and helper is 25 SF per day. In this example, we would need 2 masons and 2 helpers (50 SF/day x 5 days per week) on the project in order to finish the work on time. Using this logic, we have combined the needs of our contracted and projected projects to determine the number of stonemason helpers needed to meet our labor needs.

(AF 260).

Employer also attached copies of contracts, letters of intent, its anticipated project schedule broken down by month, and “projected headcount needs by month to demonstrate its increased labor need during peak load season.” Documents provided include payroll records broken down by month for the total number of workers for 2016 and 2017, as well as payroll records broken down by month indicating the total number of permanent and temporary workers in the stonemason helper position for the years 2016 and 2017. The records for 2017 reflect, as explained by the Employer, that due to delays in the H-2B application and visa process, Employer was not able to utilize H-2B workers until September of 2017 and only was able to obtain visas for 19 workers although it had been certified for more. (AF 263 – 372).

The CO issued a notice of deficiency on February 1, 2018, in the current case, listing three deficiencies in the Employer’s application. (AF 161- 168). The CO noted the first deficiency as “[f]ailure to establish temporary need for the number of workers requested.” As the other two deficiencies were ultimately cured, they will not be addressed in this decision.

In regard to the remaining deficiency – Failure to establish temporary need for the number of workers requested, the CO cited 20 C.F.R. §655.11(e)(3) and (4). The CO noted that under these regulations Employer must establish that the number or worker positions and period of need are justified, and that the request represents a bona fide job opportunity. The CO determined that the documentation submitted by the Employer was not sufficient to establish that the Employer’s request for certification for 44 stonemason helpers from April 1, 2018 through December 22, 2018 was true and accurate and represents bona fide job opportunities. The CO stated:

The employer submitted a copy of its company-wide payroll report from 2016-2017; however, the submitted document was not specific enough to determine the number of Stonemason Helpers utilized in the past for the worksite location in Basalt, Colorado. Additionally, the employer did not indicate how it determined a need for 44 Stonemason Helpers during the requested period of need. Therefore, further explanation and documentation is required in order to establish a temporary need.

(AF 245).

The CO noted that the Employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing an explanation detailing how it determined a need for 44 workers during the requested period of need. The CO also requested other supporting documentation including “summarized worksite specific 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.” The CO also requested other evidence and documentation that similarly serves to justify the number of workers requested.

(AF 245-246).

On February 6, 2018 Employer filed a response to the Notice of Deficiency providing additional supporting information and further explanation of the submitted documentation. Employer pointed out that its ETA Form 9142 made specific reference to the Employer’s statement of need attached to its application. (This detailed statement of temporary need has been summarized above). Employer submitted a second copy of its detailed statement of temporary need. In regard to the CO’s request for worksite specific payroll information the Employer explained that its request for temporary H-2B workers relates to various and numerous worksites in the Employer’s “Colorado Mountain region,” covering the counties specified in the Form 9142 application. Employer also stated that it had submitted “reports, schedules, selected contracts and letters of intent justifying the number of temporary workers requested and establishing that the number of workers requested is true, accurate, and represents bona fide opportunities.”

On April 6, 2018 the CO issued a Non-Acceptance Denial to the Employer, stating that the noted deficiency regarding Employer’s failure to establish temporary need for the number of workers requested, still remained and therefore the application was denied. The CO pointed out that in its response to the NOD, the Employer did not submit worksite specific monthly payroll reports, but did submit letters of intent and subcontract agreements between employer and its clients. The CO stated that although the contracts highlighted items such as “scope of work to be completed, price for completing work and payment cycles between the employer and its client,” the documents did not demonstrate how Employer determined a need for 44 stonemason helpers. The CO stated that the Employer had not submitted worksite specific monthly payroll records and that the payroll report submitted represents numerous worksite locations and that the documents were not exclusive to the position of a stonemason helper and did not adequately support a request for 44 stonemason helpers. Therefore the CO determined that Employer did not overcome the deficiency. (AF 178-179).

On April 18, 2018, Employer made a timely request for administrative review of the CO’s determination. (AF 1). The CO and the Employer were given the opportunity to file briefs in support of their positions. The Employer’s brief in support of its position was filed at the time

it submitted its request for administrative review. No brief was filed by U.S. Department of Labor Solicitor's office ("Solicitor"), on behalf of the CO.

In its brief Employer argues that the CO applied the wrong regulatory standard and also failed to take into account all of the evidence submitted by the Employer and also failed to properly evaluate the evidence submitted.<sup>4</sup> Employer asserts that it provided sufficient evidence to establish that the number of workers requested and period of need are justified, and that the request represents a bona fide job opportunity.

Employer's arguments will be discussed more fully below.

### **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; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

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 standard<sup>5</sup> 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, fn. 1 (Mar 4, 2016).

In its brief, Employer argues that in this case, "BALCA should review the CO's determination *de novo* as the CO's determination is not based upon the Employment and Training Administration's long-established policy-based interpretation of a regulation and is therefore due no deference. Employer cites the case *In the matter of Zeta World force, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) where the ALJ (on behalf of BALCA) determined that significant deference would be owed to the CO, if BALCA's review of the CO's determination involved review of a long established policy-based interpretation of a regulation by OFLC, but in the absence of such an interpretation, he would review the CO's finding *de novo*. I find

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<sup>4</sup> Employer's Counsel is commended in filing an erudite brief which addresses the relevant issues in a factually accurate and legally persuasive manner.

<sup>5</sup>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).

Employer's argument has merit and the approach taken by BALCA in *Zeta Worldforce Inc.* is consistent with BALCA's discussion of the proper standard of review in *Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016). In *Brook Ledge Inc.* which involved the definition of a "worksites" where no clear definition of the term had been articulated by the Office of Foreign Labor Certification ("OFLC") or the CO, the three judge BALCA panel determined the CO's finding in that regard was not entitled to deference. BALCA noted, "The CO offers no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC. There is no legal support for such a contention." In *Brook Ledge, Inc.*, The BALCA panel, acknowledged that it reviewed the CO's decision under an arbitrary and capricious standard. However, in reference to the CO's assertion that BALCA must therefore uphold the CO's determination where the CO "has considered the relevant factors and articulated a rational connection between the facts found and the choice made," (quoting *Motor Vehicles Mfrs. Ass'n*, 463 U.S. 29, 43 (1983)), the BALCA panel stated, "Unfortunately, the CO has not provided the type of 'rational connection between the facts' and its determination as described by the Supreme Court and therefore deference is not warranted."

Similarly, in the current case and for the reasons discussed below, I find that the CO has not provided a rational connection between the pertinent facts and the CO's final determination and therefore deference to the CO's determination is not warranted.

### **ISSUES**

Whether the Certifying Officer properly denied the Employer's H-2B application due to: Employer's failure to establish its temporary need for the number of workers requested, that is, 44 stone mason helpers for the period of April 1, 2018 through December 22, 2018?

### **DISCUSSION**

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii).<sup>6</sup> This regulation states:

(A) Definition. 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)).

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<sup>6</sup> Pursuant 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).

The DHS regulation further states in regard to the nature of petitioner's need:

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. 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 peakload need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The DOL regulation addressing temporary need in H2-B cases also states:

The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.

(20 C.F.R. §655.6).

The 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, the CO did not find the Employer's application to be deficient in establishing its temporary need based upon the stated standard of "peakload" between April 1, 2018 – December 22, 2018. However, the CO determined that Employer's application was deficient, citing 20 C.F.R. §655.11(e)(3) and (4), in that the documentation provided did not establish a bona fide need for the number of workers requested, that is 44 stone mason helpers during the requested period of need. The CO determined that the documentation submitted by the Employer was not sufficient to establish that the Employer's request for certification for 44 stonemason helpers from April 1, 2018 through December 22, 2018 was true and accurate and represented bona fide job opportunities. The CO stated:

The employer submitted a copy of its company-wide payroll report from 2016-2017; however, the submitted document was not specific enough to determine the

number of Stonemason Helpers utilized in the past for the worksite location in Basalt, Colorado. Additionally, the employer did not indicate how it determined a need for 44 Stonemason Helpers during the requested period of need. Therefore, further explanation and documentation is required in order to establish a temporary need.

(AF 245).

In its brief the Employer points out that it had, in fact, provided the required documentation in its application, as well as in its response to the Notice of Deficiency. Employer's assertion is supported by the record.

In the final denial letter the CO determined the documents provided did not demonstrate how Employer determined a need for 44 stonemason helpers. The CO stated that the Employer had not submitted worksite specific monthly payroll records and that the payroll report submitted represented numerous worksite locations and that the documents were not exclusive to the position of a stonemason helper and did not adequately support a request for 44 stonemason helpers. Therefore the CO determined that Employer did not overcome the deficiency. (AF 178-179).

In this case the CO has not provided a reasoned explanation that is supported by the relevant facts.

The Employer points out accurately in its brief that it had provided payroll records specific to its Colorado Mountain Region which covers several counties. (Employer made separate applications for its Denver and Montana regions.) The Employer provided signed company-wide payroll reports for 2016-2017 as well as a 2016-2017 payroll report specific to the position of stonemason helper at the project worksites included in the Colorado Mountain Region. The Employer reasonably explained that payroll and personnel records subdivided by each project do not exist. Employer also asserts in its brief that the CO incorrectly stated that the Employer did not submit payroll reports exclusive to the position of a stonemason helper. Employer noted that the records provided are explicitly labeled as "Designated Occupation: Helpers - Brickmasons, Stonemasons, and Tile and Marble Setters," which is the precise job title listed in the Employer's prevailing wage determination and temporary labor certification application and which is also the job title which applies to the duties of the position as established by the Standard Occupational Classification ("SOC") system. Thus the records provided were exclusive to the relevant category of workers and had complied with the information requested by the CO.

The Employer had also provided the information for both 2016 and 2017 even though the CO had only required one previous year. The records and the Employer's provided explanation support the Employer's request for 44 stonemason helpers for its peakload period of April 1, 2018 through December 22, 2018. These records are also consistent with Employer's explanation regarding the fact that in the prior year, 2017, due to delays in the temporary labor application process, and the visa cap having been met prior to the approval of its application, it was not able to obtain its H-2B workers until September of 2017 and at that time, only 19

workers could obtain visas, despite the fact that certification had been obtained for sixty H-2B workers. Employer also provided documentation regarding contracts, letters of intent and specific project bids broken down in chart form, showing the 2018 project schedule which reflected each specific projects and the projected beginning and ending dates. Employer further explained the specific calculation used in determining the number of temporary workers requested for the stonemason helper position. Employer stated:

In order to determine the number of helpers needed during a season, we estimate the quantities of in-place work that needs to be completed and compare it to estimated production rates and the schedule demands of each project. For example, if we have 1,000 SF of masonry to install in a 4 week time-frame, we know that we need to install 250 SF of masonry per week. A standard production rate for a crew made up of a mason and helper is 25 SF per day. In this example, we would need 2 masons and 2 helpers (50 SF/day x 5 days per week) on the project in order to finish the work on time. Using this logic, we have combined the needs of our contracted and projected projects to determine the number of stonemason helpers needed to meet our labor needs.

(AF 260).

Although it is Employer's burden to establish the number of workers requested and that the request represents a bona fide job opportunity, a review of the record supports that the Employer has met this burden. Employer not only provided requested information, it also provided additional supporting documentation to support the number and type of workers requested. *See 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).

The CO does not provide a reasoned explanation, that is consistent with the record, for the CO's determination that the documentation provided "did not demonstrate how Employer determined a need for 44 stonemason helpers" and that the "documents were not exclusive to the position of a stonemason helper and did not adequately support a request for 44 stonemason helpers." (AF 178-179).

As the Employer provided very comprehensive information which was accompanied by thorough and specific explanations which supported its request for 44 stonemason helpers during its requested peakload need of April 1, 2018 through December 22, 2018, I find the CO erred in her analysis of the provided information, and in her determination that Employer had not met its burden in this regard.

### **ORDER**

For the reasons stated above, Employer has met its burden of showing its temporary employment need for 44 stonemason helpers between April 1, 2018 and December 22, 2018 and

has demonstrated a bona fide need for the number of workers and period of need requested pursuant to 20 C.F.R. § 655.11(e)(3) and (4).

The CO's non-acceptance denial is determined to be unsupported by the record and therefore is **REVERSED** and the case is **REMANDED** to the CO for further processing under the regulations.

**SO ORDERED.**

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN  
Administrative Law Judge