



Issue Date: 02 February 2018

BALCA Case No.: 2018-TLN-00044
ETA Case No.: H-400-17313-361411

In the Matter of:

JOSE URIBE CONCRETE CONSTRUCTION,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Sam Haddad, Esq.
Austin, Texas
For the Employer

Jeffrey L. Nesvet, Esq.
Wei (Katherine) Zhao, 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 DIRECTING GRANT OF CERTIFICATION

This case arises from Jose Uribe Concrete Construction’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);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. 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 November 9, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 16 construction laborers for the period of January 23, 2018 to November 23, 2018. AF 172-267.³ 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:

Despite efforts to hire U.S. workers through advertising in local newspapers and local job bank postings, our Company has not been able to attract U.S. workers during our peak load seasonal period during the year. Employment is peak load and temporary, for a specific period, and there are not sufficient U.S. workers ready, willing, and able for the job, as demonstrated through the SWA recruitment. Our need for additional workers is peak load, because the seasonal nature of our business results in a peak in our workload portions of the year... Since our business functions within the project plans and schedules of our customer’s construction needs, our peak load is tied to the seasonal nature of the other construction businesses. We are submitting support documents that support our recurrent/seasonal peak load need. Due to a natural seasonal slowdown of work given to us by our customers, there is a regular reduction in our workload, and therefore a reduction in our workforce. However, each year when the workload demands from our customers increases, we experience a peak load period of need, directly tied to customer and market demands. Therefore, we need additional workers for this peak –seasonal period... Due to the natural climate changes, weather conditions, and the customer needs for our services, our needs are peak load and seasonal. But this peak load seasonal period is recurrent each year, based on the Company’s past history of customer demand and work load... We have permanent employees and we only need additional workers during the peak load portion of the year, and it is difficult to obtain these peak and temporary workers when we need them ...

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that 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.

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

(AF 172, 178).

Employer also attached to its application certain documents which it listed as letters of intent, statement of temporary peak load need, client list, sample contracts, and sample invoices. payroll records for its permanent workforce for the years 2014 – 2016. (AF 187-245).

The CO issued a notice of deficiency on November 20, 2017, in the current case, listing two deficiencies in the Employer's application. (AF 164- 171). The CO noted the first deficiency as the Employer's "[f]ailure to establish the job opportunity as temporary in nature" and the second deficiency as "[f]ailure to establish temporary need for the number of workers requested."

The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement 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 167),

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 peakload need; or 4) an intermittent need as defined by DHS regulations. The CO determined that the Employer in this case had not submitted sufficient information to establish its requested standard of need or period of intended employment. *Id.*

The CO noted that the employer explained "its peakload need is a result of their customers' needs, weather conditions, and outstanding bids and proposals" but the CO determined, "it is not clear if the employer experiences a true peak in its business during its requested dates of need, and if the employer experiences a slowdown in business during its nonpeak dates." The CO further stated that the submitted documentation did not support the dates of need requested, noting that the letter of intent employer provided from Carothers Homes, LLC indicated that employer was "selected to provide contractor services during the dated of need requested" specifically, "100 projects in 2018 from January 23, 2018 through November 23, 2018." The CO determined that this letter did not demonstrate a peakload need in employer's business operations. The CO further determined that other information submitted, including contracts employer had entered into, did not have signatures and that such documentation only shows a partial year of invoices and does not show the annual operations of the employer. The CO also noted that although employer had noted its peak is a result of climate changes, "employer's work is done in Texas which is relatively favorable to year-round outside work." (AF 167 – 168).

The CO requested further documentation which included summarized monthly payroll reports for 2015, 2016 and 2017, a summary of monthly projects for 2016 through 2017, signed contracts for each project and "documentation specifically indicating that the employer's type of work cannot be performed during the entire time from November 24 to January 22 due to weather conditions." (AF 168-169).

In regard to the second 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 determined that

employer had not adequately justified its need for seven concrete finishers during the period of January 23, 2018 through November 23, 2018. Again the CO requested specific documentation including summarized monthly payroll reports for 2015 through 2017 specifying “concrete finishers,” signed contracts and other information justifying the employer’s need for seven concrete finishers. (AF 169-172).

On December 4, 2017 Employer filed a response to the Notice of Deficiency providing additional explanation of its business operations, as well as documentation which it asserted showed that it had been previously certified under the H- 2 B program for the same number of workers and similar dates of need for the four previous years although it had requested a nine month period of need in 2016 and 2017 and a ten month period of need in 2014 and 2015. Employer also submitted documentation which included copies of additional letters of intent, purchase orders, signed contracts and quarterly tax summary charts for 2016 and 2017 which showed the number of workers employed on a monthly basis. It also provided a webpage printout of economic forecast report for the applicable region of central Texas. Employer also provided further information as to why it was requesting a change in its seasonal start date from mid-February to January on the basis of its contract with Guyco to complete concrete work for barracks to be built at Ft. hood and on the basis that the general contractor had moved up the start date to January 2018. (AF 47-163).

Other documentation provided by the Employer to support its peakload need of January 23, 2018 to November 23, 2018, included an October 17, 2017, signed statement from builder, Matt Desjardin, vice president of D.R. Horton Builders who indicated that the services of Jose Uribe Concrete Construction during 2018 would be in the peak months of January, 2018 through November 2018 and that it intended to use Employer’s services to construct foundations on 200-300 homes in 2018. (AF 78). Employer also supplied a signed letter of intent, dated October 3, 2017, from the bookkeeper of Carothers Homes, LLC stating that Jose Uribe Concrete Construction is a subcontractor that their company has employed for the last 15 years and that their “need for Jose Uribe Concrete Construction is peak load seasonal and starts mid-January and ends mid-November.” It also stated that it expected to complete about 100 projects in 2018 but as it had not entered the 2018 season yet, its projections could change or increase as they approached the start of the “2018 peak load season.” (AF 79).

On December 20, 2017 Employer submitted an email requesting that it be allowed to amend its dates of need. (AF 44). As it appears this request was never processed or addressed by the Chicago Certifying Office it will not be addressed in this decision.

On December 25, 2017, the CO issued a Non Acceptance Denial to the Employer for essentially the same reasons stated in the prior Notice of Deficiency. In regard to the additional documentation submitted by the Employer the CO determined it did not contain sufficient detail to adequately establish the employer’s newly requested date of need. The CO determined that the Employer’s submitted documentation to support its statement was insufficient although it noted that some staffing and payroll documentation was submitted. The CO also noted that the Guyco contract did not specify the date that concrete work would begin. (The contract stated that the subcontractor (Jose Uribe Concrete Construction) would begin promptly when he is “notified that the ground is clear or the structure far enough advanced to allow the beginning of

that portion included hereunder” (AF 98)). The CO also additionally stated that no specific payroll or staffing records for concrete workers were submitted. (AF 24- 43).

Employer timely requested 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. On January 24, 2018, Attorney Wei (Katherine) Zhao, of the U.S. Department of Labor Regional Solicitor’s office (“Solicitor”), gave notice that she would not be filing a brief on behalf of the CO in this matter.

Employer filed a timely brief on January 24, 2018, in which it consolidated its argument in this case with the related case 2018-TLN- 00040. Both cases involve the same employer and originally requested the same period of need. 2018-TLN-00040 requests certification for 7 concrete finishers for the period of need of January 23, 2018 to November 23, 2018 while 2018 TLN00044 requests 16 construction laborers for the same period of temporary need.

In its brief Employer argues that the CO made factual errors, failed to consider all relevant evidence submitted, failed to follow applicable regulations and failed to consider its request to amend its dates of peakload need from January 23, 2018 through November 23, 2008, to a modified period of February 6, 2018 through November 9, 2018. It should be noted that only the appeal file for 2018-TLN-00044 contains this request for modification which was emailed by Employer’s counsel to the Certifying Officer on December 20, 2017. As stated previously, as Employer’s request to amend the application was not processed or addressed by the CO it will not be addressed in this determination.

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 standard⁴ 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).

ISSUES

Whether the Certifying Officer properly denied the Employer's H-2B application due to:

- 1) Employer's failure to establish that its request for 16 construction laborers for the period of January 23, 2018 to November 23, 2018, was based upon a "temporary" employment need, according to the Employer's stated standard of "peakload" need; and
- 2) Whether the employer had established the temporary need for the number of workers requested?

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).⁵ 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)).

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)).

⁴Similarly, 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).

⁵ 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 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 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 8 C.F.R. § 214.2(h)(6)(ii) which is the definition of temporary need as defined in the DHS regulation. 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).

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 Employer applied for temporary labor certification for 16 construction laborers in the current case (2018-TLN-00044) and for 7 concrete finishers in the related case 2018-TLN-00040, on a “peakload” basis. In regard to peakload 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.”

In response to the Notice of Deficiency Employer provided documentation to support that it has a permanent workforce which it wishes to supplement for the period January 23, 2018 to November 23, 2018. Specifically Employer supplied documentation which included a bar graph which summarized the number of workers it employed in 2016 which showed 8 workers in November and December, 15 workers in January and between 20 and 32 in the months of February through October. (AF 141). This document notes that the numbers reflect DOL Certification (presumably H-2B) between February 8 through November 8, 2016.⁶ This document is further supported by copies of the quarterly reports issued by the Texas Workforce Commission's Unemployment Tax Services reflecting the number of workers and the wage reports for all months in 2016, reported on a quarterly basis. These records which are broken down by month, coincide and support the bar graph submitted by the Employer.

The Employer submitted a similar bar graph for 2017 which included information for January through September, 2017, along with the quarterly reports issued by the Texas Workforce agency. The 2017 bar graph noted that the last quarter information was not available nor had it been filed by, the date the current H 2B application was filed in November of 2017. The 2017 bar graph notes 8 workers in January and February, with 25 or 26 workers noted in months March through September of 2017. Employer's bar graph also notes that “DOL certification [presumably H-2B] was received for February 15, 2017 through November 15, 2017, however, USCIS and Consular Processing delayed getting workers until March 2017.”⁷ Additional supporting documentation was also submitted by the Employer in the form of Employer's IRS Form 941 showing Wages paid for each quarter in 2016 along with a bar graph broken down on a quarterly basis and corresponding to the number of workers indicated above in 2016. This graph supports a peak in the amount of wages paid in the second and third quarters of the year (April through September) with a significant drop in the first and fourth quarters equating to about a 30 percent drop. A similar bar graph was submitted for 2017 with the available information. Although this information is compiled on a quarterly basis it is consistent with the information stated above concerning the number of workers employed on a monthly basis.

Employer pointed out in its response to the Notice of Deficiency that it had been approved in the four previous years, 2014, 2015, 2016 and 2017 for a similar period and a similar number of workers. Employer has noted that its need varied slightly each year based on contracts and market conditions but generally fell between nine months and ten months during the previous four years. Employer also asserted that its request for two additional construction laborers for 2018 was justified by the number of contracts it anticipated.

Employer's previous certifications are summarized in the charts below:

⁶ Information in the record reflects that Employer received H-2B certification during the period of 2/8/16 to 11/8/16 for 7 concrete finishers and 9 construction laborers.

⁷ Information in the record reflects that Employer received H-2B certification during the period of 2/15/17 to 11/15/17 for 7 concrete finishers and 14 construction laborers.

Case Number	Case Status	Start Date of Need	End Date of Need	Notes/Comments
H-400-14013- 792260	DOL Certification Issued	1/28/2014	11/14/2014	(7) Concrete Finishers
H-400-14306-691208	DOL Certification Issued	1/20/2015	11/20/2015	(7) Concrete Finishers
H-400-15323-704969	DOL Certification Issued	2/8/2016	11/8/2016	(7) Concrete Finishers
H-400-16331-409699	DOL Certification Issued	2/15/2017	11/15/2017	(7) Concrete Finishers
H-400-17308-957755	ETA9142 <i>Pending</i>	1/23/2018	11/23/2018	(7) Concrete Finishers

(AF 47 (2018-TLN-00040)).

Case Number	Case Status	Start Date of Need	End Date of Need	Notes/Comments
H-400-14013.(i82569	DOL Certification Issued	1/27/2014	11/14/2014	(5) Construction Laborers
H-400-14307-605398	DOL Certification Issued	1/20/2015	11/20/2015	(7) Construction Laborers
H-400-15323-139766	DOL Certification Issued	2/8/2016	11/8/2016	(9) Construction Laborers
H-400-16331-970163	DOL Certification Issued	2/15/2017	11/15/2017	(14) Construction Laborers
H-400-17313-361411	ETA9142 <i>Pending</i>	1/23/2018	11/23/2018	(16) Construction Laborers

(AF 54 (2018-TLN-00044)).

Other documentation provided by the Employer to support its peakload need of January 23, 2018 to November 23, 2018, included an October 17, 2017, signed statement from builder, Matt Desjardin, vice president of D.R. Horton Builders who indicated that the services of Jose Uribe Concrete Construction during 2018 would be in the peak months of January, 2018 through November 2018 and that it intended to use Employer’s services to construct foundations on 200-300 homes in 2018. (AF 78). Employer also supplied a signed letter of intent, dated October 3, 2017, from the bookkeeper of Carothers Homes, LLC, stating that Jose Uribe Concrete Construction is a subcontractor that their company has employed for the last 15 years and that their “need for Jose Uribe Concrete Construction is peak load seasonal and starts mid-January and ends mid-November.” (AF 79). It also stated that it expected to complete about 100 projects in 2018 but as it had not entered the 2018 season yet, its projections could change or increase as they approached the start of the “2018 peak load season.”

In support of its temporary labor certification application, Employer asserts that it has a peakload need for the 7 concrete finishers and 16 construction workers to perform concrete work in its concrete construction business between January 23, 2018 and November 23, 2018. Employer asserted in its application documentation that its peakload need in 2017 had been projected as mid-February through mid-November based on customer and market demands and pending bids and proposals with home builders and construction companies. However, in support of its position that its period of need was slightly longer (about 1 month) in 2018, Employer stated, “based on current customer and market demand that are evident through the signed contract and letters of support, we foresee a slight change to our peak load need, as compared to the previous year. This is not uncommon in any industry, especially in the construction market, which is subject to market fluctuations outside of simple analysis of customer demand.” Employer also asserted, in support of its slightly longer period of need that

the general contractor for one of its signed contracts to provide concrete construction services, Guyco, Inc. pertaining to its contract to provide concrete construction services for additional barracks to be built at Ft. Hood, had moved up Employer's start date to January 2018 and it was therefore essential that it have the adequate workforce to meet its construction obligations. (AF 52).

In Employer's brief, received on January 25, 2018, Employer argues that the CO failed to look at the totality of the evidence which it asserts supports that the Employer has established its peakload need and the requested dates of need. Employer alleges that the CO's determination contains factual errors concerning the documentation submitted and further asserts that the CO's request for certain types of specific documentation is not reasonable as the type of documentation requested is not produced in the normal course of business, and in light of the day to day operations of the construction business, may not be available prior to the construction season, which is affected by market and weather fluctuations. Employer also asserts that the CO appears to disregard the prior certifications which were approved on allegedly similar documentation. Finally employer asserts that the CO may be attempting to impose a nine month limit on the Employer's dates of need which has not been clearly established as the agency's policy, despite Employer's requests for clarification. Employer also points out that delays in the approval of its application are causing it to lose business as willing and available U.S. workers cannot be found to meet its labor demands.

Some of Employer's arguments have merit. Initially, and most importantly, the documentation provided by the Employer to the CO, on its face, supports the Employer's peakload and seasonal need between January and November 2018. The two letters of intent summarized above, from D.R. Horton Builders and Carothers Homes, LLC, are both signed by company representatives (a vice president and a bookkeeper), dated October of 2017, and clearly support that the peakload and seasonal need, for which each home building company is expecting to utilize Employer's concrete services, is between January and November of 2018. The letter from D.R. Horton Builders states that the need for the Employer's concrete services would be in the peak months of January 2018 through November 2018. The letter from Carothers Homes, LLC states the need for the Employer's services is "peak load seasonal and starts mid-January and ends mid- November.

These letters from two of the Employer's major clients clearly support its peakload and seasonal need as stated. Employer's statement in its Response to Notice of Deficiency also explains and supports the seasonality of its concrete construction business during the peak load period of mid- January to mid- November and also emphasizes the need for both timeliness in the execution of its work and the need to adapt to the other contractors who provide the other aspects of the construction projects. Employer states in its letter to the CO responding to the Notice of Deficiency:

Specifically, for 2018, in addition to pouring and finishing the concrete for the military barracks at Fort Hood, for whom we have included the signed contracts with Guyco, Inc., we have been contracted by DR Horton, the homebuilder, to pour slabs, sidewalks, and curbs for multiple subdivisions starting in January 2018, for homes [which] have been ordered by customers based on model homes

and floorplans offered by DR Horton, based on a home completion schedule agreed upon by the homebuilder and the customer. Therefore, the homebuilder relies on the subcontracting companies to perform their part of the construction process to get the homes built timely during their temporary peak load period.

Since our company prepares the land before we are able to pour the concrete, our role is one of the first jobs that gets done in a home construction project. Once we finish the pouring and finishing of concrete, then the other construction trades come in to do the plumbing installation, framing, roofing and sheetrock installation, which is followed by painting and appliance installation. It is very important that we have an adequate number of *construction laborers* to prepare excavate the land, and install the forms and pour the concrete, before the *concrete finishers* can smooth and finish the concrete, after which the concrete is cured and sealed. If we do not have a sufficient number of workers, then the project gets delayed and the homebuilders and other construction trades get behind the construction schedule and lose money on the project. The customer who ordered the home is put at a disadvantage when the home that they have purchased according to specifications and timelines offered by the homebuilder is not completed on time.

Our workload will pick up in *mid-January* and will continue to increase through the spring and summer until *mid-November*, when the demand for our services slow down due to reduced customer demand by home buyers, homebuilders and commercial construction companies, just before the holidays, due to customers' schedules and holiday plans, reduced daylight during the day and a slow-down of overall construction projects from about *mid-November through mid-January*, when our peak load season begins again.⁸

(AF 75).

Thus the Employer explains the seasonal nature of its work which involves the homebuilding industry, which is impacted by “reduced customer demand by home buyers, homebuilders and commercial construction companies, just before the holidays, due to customers’ schedules and holiday plans, reduced daylight during the day and a slow-down of overall construction projects from about *mid-November through mid-January*.” This statement supplements other statements made by the Employer in its statement of temporary need pointing to weather conditions which also impact the alleged seasonal slowdown in the months of mid-November to mid-January. I find the Employer’s explanation of the seasonal nature of its business which includes reduced demand in the homebuilding industry, as well as the supporting documents from its major clients, provide credible support for the seasonal nature of its peakload need.

⁸ Employer’s statement additionally states that it has a permanent workforce and only needs the additional workers to meet the increased demand during its peak season. Additionally Employer included the names of specific home subdivisions where DR Horton would be requiring its services in January of 2018. (AF 76).

In the CO's final denial she dismissed the Employer's explanation of seasonality in part on the grounds of climate considerations which she perceives cannot be substantiated in the state of Texas. In support of her Non-Acceptance Denial the CO states, "the employer explains that its peak is a result of climate changes. However, the employer's work is done in Texas, which is relatively favorable to year-round outside work." The dismissive nature of the CO's statement and her mischaracterization of the Employer's explanation of seasonal need, appears to reflect her failure to consider fully the Employer's explanation of the seasonal nature of the homebuilding industry which is driven by customer demands which cause a slowdown during the December holiday period and other considerations such as the shorter workdays due to daylight considerations. Although the two signed letters of intent from the homebuilding companies do not elaborate on the cause of the slow down between mid- November and mid-January they do support the Employer's statement of the seasonal nature of its slowdown during this period.

The CO stated in both the Notice of Deficiency and the Denial letter that,

[t]he employer is basing its temporary need on specific contracts it has entered into with its customers Guyco, Inc., Carothers Homes, LLC, and D.R. Horton. The contracts submitted do not provide any information to support the dates of need requested by the employer. Additionally, no signatures were included to validate the contracts' agreement. The employer also submitted invoices for work completed in its prior period of need; however, such documentation only shows a partial year of invoices and does not show the annual operations of the employer.

It should be noted that the nature of the employer's business is to secure contracts and provide services. Thus, it is unclear how two unsigned contracts and a letter of intent support the employer's temporary need.

(AF 28, 168).

The CO also noted in her denial letter that "[E]mployer did not provide adequate documentation to justify its shift in dates of need or for a peakload need overall," noting that employer's newly requested dates of need totaled an additional 32 days. She also stated again that employer did not provide sufficient documentation to supports its reasons for its peakload need which she characterized as: "Natural climate changes, weather conditions" in the employer's area of intended employment in several areas of central Texas and "customer needs for its services." (AF 31).⁹

These statements by the CO support the Employer's argument that the CO has made factual errors in her analysis which necessarily undermine her conclusions. The CO never recognized that Employer submitted a signed copy of the Guyco contract with its Response to

⁹ The CO also stated that the employer had charted its past certification with the program and stated that it hoped the chart established that employer's dates of need were for a "temporary period of only ten (10) months." The CO reasoned that employer was attempting to establish its peakload need based solely on past certification. She stated, "It is important to note that prior participation in the program alone does not establish the employer's temporary need for workers" (emphasis added). (AF 31).

the NOD (See AF 93, 116) in addition to two signed letters of intent from Carothers Homes, LLC and D.R. Horton Homebuilders. (AF 78, 79). Further the letters from the two major homebuilders which form the majority of the Employer's workload clearly support the peakload period of January 23, 2018 through November 23, 2018.

Due to these factual errors, mischaracterization of the Employer's position and somewhat dismissive nature of her review of the record, I find that the CO has abused her discretion and her determinations cannot be upheld even when viewed under an "arbitrary and capricious standard."

Further, to the extent that the CO could arguably be attempting to impose a 9 month limit on this temporary peakload application under the H-2B program, such a limit is not supported by the currently applicable regulation defining temporary need. As noted above, the controlling DHS definition of temporary need requires that generally, the period of temporary need will be limited to one year or less and does not impose a 9 month limit on a temporary period of need.

A review of previous BALCA cases reflect a longstanding policy of generally limiting a period of temporary need to ten months or less. *See Andres Patricio Candalario*, 2015-TLN-00017 (Feb. 10, 2015) ("Ten months is the usual cut-off for a 'temporary' need"); *See also Grand View Dairy Farm*, 2009-TLC-2, slip op at 6-7 (November 3, 2008) (upholding 10 months "as a threshold at which the [Certifying Officer] will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature."); *Triangle Maintenance Service, LLC*, 2009-TLN-97, slip op. at 6 (October 7, 2009) (Absent unusual circumstances, the Secretary will deny an application where the employer has a recurring seasonal or peakload need lasting more than 10 months, citing former regulation, 20 C.F.R. §655.6(c)(2009)); *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).

However, despite the shortcomings in the CO's findings, the burden is still on the Employer to supply sufficient documentation to support its H-2B application including its temporary need, which in this case is alleged to be a "peak load" need. As previously noted, to qualify as a peak load need, the employer "must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation).

The information supplied by the employer as noted above, which included bar graphs and monthly reports of the number of workers employed each month for the years 2016 and 2017, reflect that Employer has at least 8 employees which it employs year round and that it has supplemented this permanent workforce, at least partially through the H-2B program, in the four previous years with the number of temporary workers which are reflected in the charts above pertaining to the previous H-2B certifications.

Although certification from year to year is not guaranteed merely because a prior application was granted H-2B certification, and each application must stand on its own merits, it is still unreasonable to ignore the fact that the Employer had been granted certification in four previous years. The current application should reasonably be reviewed, within the context of the previous certifications, and the understanding that the certifying office had concluded that the basic requirements for certification had been met in the previous four years. When viewed in this context, I find the documentation submitted by the Employer is sufficient to establish that it has a permanent workforce consisting of approximately eight employees which it is supplementing with temporary workers through the H-2B program.

It should be noted that the Employer did fail to provide the specific payroll information that was requested by the CO in the requested format, i.e. broken into a designation of permanent and temporary workers. Ordinarily this is a requirement reasonably imposed on an Employer and Employer's failure to provide this information could reasonably support a denial of certification. However, in this case I find the information and documentation provided by the Employer pertaining to the number of workers employed each month for the two previous years is sufficiently specific to establish that it has a permanent workforce which it is supplementing through the H-2B program, especially in light of the fact that this is the fifth year that certification has been requested, with the four previous years resulting in grants of certification, for very similar periods of need.¹⁰ (The periods of stated peak load need varied slightly as noted in the charts above and reflected either a 9 or 10 month period in each of the four preceding years). I will therefore presume that the certifying office provided its usual thorough review of the four prior applications for the years 2014 through 2017, and reached a documented conclusion in those years that Employer did in fact have a permanent workforce which it was supplementing through the H-2B program.

Further, while noting that an Employer should in most cases provide the specific payroll information requested by the CO, in this case I find the submitted documentation should be deemed adequate rather than remanding for the Employer to be required to submit the more specific records which were requested. I make this determination with the recognition that this case has been affected by multiple delays in the processing of this application beginning with the initial Non-Acceptance Denial, as well as additional delays in obtaining the appeal file in this case (2018 TLN 00044), and a further delay in the briefing schedule caused by the partial government shutdown which occurred during the briefing period.

For the reasons discussed above, when looking at the totality of the documentation provided by the Employer I find the Employer has established its requested peakload period of January 23, 2018 through November 23, 2018. In particular, I find the letters of intent from the two homebuilders, H.R. Horton and Carothers Homes, provide credible support for the slightly longer period of need requested by the employer, as compared to the previous year, as well as support for the explanations of the employer pertaining to the peakload nature of its concrete

¹⁰ 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).

business, on a seasonal basis, that is affected by the seasonal and market demands affecting the home building industry.

Further, my review of the totality of the evidence, supports that Employer has also established its need for the number of workers requested. In the related case (2018-TLN-00040) the Employer is requesting 7 concrete finishers, the same number of concrete finishers it has requested in the four previous years. One must assume based on Employer's history of prior certifications, as well as information supplied reflecting its payroll in the two previous years that Employer has established its need for this number of concrete finishers. Employer has also justified, its need for these workers based on its continued relationship and ongoing business with both home builders (one of whom stating that it had contracted with the Employer for over ten years).

In the current case (2018-TLN-00044) Employer has requested only a marginal increase (2 additional workers) in the number of requested construction laborers; 16 in its current application, as compared to the 14 workers requested in its previous certification. As the documentation provided by the Employer has shown continued growth in its business and the increase need for two workers can only be shown through projections as opposed to past payroll information I find the nominal increase of 2 workers is justified by the Employer's statements regarding its business projections as well as its letters of intent from its major clients. Accordingly I find the Employer has established its requested need for the number of workers requested.

ORDER

For the reasons stated above, Employer has met its burden of showing that its employment need for 16 construction laborers between January 23, 2018 and November 23, 2018 is temporary based on Employer's stated "peakload" standard, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii). The CO's non-acceptance denial is determined to be unsupported by the record and therefore is reversed. This case is **REMANDED** to the CO for a **GRANT OF CERTIFICATION**, and any further necessary processing, in an expedited manner, to the extent possible.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

RICHARD A. MORGAN
Administrative Law Judge