



Issue Date: 04 April 2018

BALCA Case No.: 2018-TLN-00076

ETA Case No.: H-400-17352-414422

*In the Matter of:*

**PRESTIGE GUNITE OF SOUTH TEXAS,  
LTD.,**

*Employer.*

**AMENDED DECISION AND ORDER  
AFTER RECONSIDERATION**

The court issued a Decision and Order Directing Grant of Certification in this matter on March 27, 2018. The Certifying Officer moves for reconsideration of that Decision and Order, and Employer opposes the Motion. The court, having carefully considered the arguments of the parties, now grants the Certifying Officer's Motion for Reconsideration, vacates the Decision and Order issued March 27, 2018, and issues in its place this Amended Decision and Order After Reconsideration.

Prestige Gunitite of South Texas, Ltd. ("Employer") requests review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the 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 program must

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

<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,

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 (“ETA”) reviews applications for temporary labor certification.

The CO (acting for the Secretary of Labor, *see* 20 C.F.R. §655.2(a)) can issue the labor certification only after determining (1) there are not sufficient qualified U.S. workers available to perform the work in question and (2) employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* 20 C.F.R. §655.1(a). The burden of proof is on the employer to show it is entitled to the labor certification. *See* 8 U.S.C. §1361.

If the CO denies the application under 20 C.F.R. § 655.53, the employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). *See* 20 C.F.R. § 655.61(a). By designation of the Chief ALJ, I am BALCA for purposes of this appeal. *See* 20 C.F.R. §655.61(d).

### **Standard of Review**

The regulations do not specify the extent to which BALCA should defer to the CO’s determination. When the CO’s determination turns on ETA’s long-established, policy-based interpretation of a regulation, BALCA likely owes considerable deference to ETA. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (granting deference to administrative agencies’ statutory interpretations). In such cases, BALCA likely should not overturn a CO’s policy-based determination unless arbitrary, capricious, or inconsistent with ETA’s established policy interpretation. But absent ETA’s long-standing, policy-based interpretation of a regulation, it appears BALCA should review the CO’s denial *de novo*.

### **BACKGROUND**

On January 1, 2018, ETA received an application for temporary labor certification from Employer, who sought to employ ten foreign gunite finishers from April 1, 2018, to November 1, 2018. (AF, at 193.)<sup>3</sup> These ten employees, to be based in Katy, Texas, would work in various locations in different areas identified within the Texas. (AF, at 196, 201).<sup>4</sup> After considerable back-and-forth, the CO denied the

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2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

<sup>3</sup> I abbreviate references to the appeal file as “AF” followed by the page number.

<sup>4</sup> At or about the same time, Employer filed another application seeking to hire ten gunite finishers to work in or around Lockhart, Texas. On appeal, BALCA affirmed the CO’s denial of that

application because Employer had failed to establish the job opportunity as temporary in nature. (AF, at 118-20.)

## DISCUSSION

### Temporary Nature of Need

Under 8 C.F.R. § 214.2(h)(6)(ii)(B):

(B) 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. . . . The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

(3) Peakload need. The 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.

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application because Employer did not justify the number of foreign employees it wished to hire. *See* BALCA Case No. 2018-TLN-00069.

(4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

After reviewing the application, the CO observed:

The employer did not submit sufficient information in its Application for Temporary Employment Certification to establish its requested standard of need or period of intended employment.

...

The employer is basing its peakload need on temperatures in the employer's area of intended employment in the Katy, Texas area and on customer demand. However, a search for average temperatures finds that during the employer's nonpeak period of November through mid-February, the average monthly temperature is from 55 to 62 degrees. Furthermore, precipitation is at its highest during the employer's peak period.

Therefore, it is unclear how weather affects the annual work operations for this employer. Further explanation and documentation is required in order to establish the employer's peakload need for 10 Gunitite Finishers during the requested dates.

(AF, at 118-19.)

The CO allowed Employer to respond but was not convinced:

In response to the NOD, the employer submitted: an overview of the business and its scope of operation in the opening letter; geographical area wide weather forecast documents; two years of Quarterly Federal Tax documents; and two years of Prestige Gunitite of South Texas, Ltd. Payroll Summaries with accompanying bar graphs.

In its response, the employer explained that its temporary need is based on weather conditions and on customer demand. The employer stated that it cannot place quality gunitite in inclement weather. Specifically, it cannot shoot gunitite unless the temperature is at least 38 degrees and rising during the

day, getting above 50 degrees before going down. As support that weather in its area of intended employer [sic] from December through middle of February is not favorable to the work outlined in its application, the employer submitted weather history for its worksite area along with newspaper articles describing icy cold weather four days in December and January. The submitted chart for weather from November 2, 2017 to January 23, 2018 showed an average mean temperature of

57 degrees, an average minimum temperature of 46 degrees, and an average maximum temperature of 68 degrees.

Another submitted chart for weather from November 2, 2016 to February 1, 2017 showed an average mean temperature of 60 degrees, an average minimum temperature of 50 degrees, and an average maximum temperature of 70 degrees. The average temperatures do not fall below the threshold of 38 degrees as described by the employer.

The employer stated that “homeowners think about building a pool more as the temperatures rise and they seek an escape from the high temperatures, and they also desire to be able to use their new purchase immediately.” However, it failed to provide any documentation to support a peak in need based on customer demand.

The employer submitted two years of Quarterly Tax Contributions. However, tax documents represent the employer’s entire organization and is not specific to the worksites included in this application nor to the requested occupation.

The employer explained that its temporary need starts in February and ends on November 1. However, the employer’s 2017 payroll shows more hours worked in the employer’s nonpeak months of November and December than in their peak months of February and March. This is not consistent with a peakload period.

The employer did not provide documentation to support the reasons it attributed to its temporary need, weather conditions and customer demand. Therefore, the employer did not overcome the deficiency.

(AF, at 120.)

I find the CO's analysis of weather conditions misguided. She concludes Employer has not shown a peakload need because the average monthly temperatures during the "nonpeak period of November through mid-February" fluctuate between 55 and 62 degrees and because "precipitation is at its highest during the employer's peak period."<sup>5</sup> But she does not say where she obtained this information or to what locality it applies. Based on this data, she concludes, "it is unclear how weather affects the annual work operations for this employer." She then abruptly changes the subject to announce "[f]urther explanation and documentation is required in order to establish the employer's peakload need for 10 Gunitite Finishers during the requested dates" – an issue which was the second basis for her denial.

Employer responded with additional information on local weather conditions and a more detailed explanation of how the weather affects its business, alleging it can shoot gunitite only on days when the temperature is at least 38 degrees and rises to over 50 degrees before going down again. (AF, at 134-36.) But the CO discounts this response because weather data from November 2, 2017, to January 23, 2018, shows "an average mean temperature of 57 degrees, an average minimum temperature of 46 degrees, and an average maximum temperature of 68 degrees," and these temperatures do not fall below Employer's threshold of 38 degrees. (AF, at 10-11.) The CO's rejection of Employer's submission is unreasonable because the rejection is based solely on average temperatures. But specific daily ranges determine Employer's ability to work, not averages incorporating months of data. I find the information Employer submitted appears generally consistent with its allegations and sufficient to establish the job opportunity is temporary in nature.

The CO also concludes the 2017 payroll summaries disprove a peakload need because they show "more hours worked in the employer's nonpeak months of November and December than in their peak months of February and March." (AF, at 11.) But she does not respond to Employer's aggregate data showing payroll hours increased for gunitite finishers by 57% during its period of need in 2016 and by 62% during its period of need in 2017. (AF, at 15.) The CO also does not comment on the drops in payroll between October and December, when the peak period ends, by 41% in 2016 and 31% in 2017. (AF, at 15.) Neither does the CO respond to Employer's assertion it has been unable to recruit domestic temporary workers in recent years. (AF, at 15.)

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<sup>5</sup> The CO's concern for precipitation is curious because Employer never asserted precipitation contributed in any way to his alleged need.

Accordingly, the court reverses the Certifying Officer's determination and directs the Certifying Officer to accept Employer's application under 20 C.F.R. § 655.32, subsection (b).

**SO ORDERED.**

For the Board:

Christopher Larsen  
Administrative Law Judge