



Issue Date: 11 October 2018

BALCA CASE NO.: 2018-TLN-00170

ETA CASE NO.: H-400-18193-984570

In the Matter of:

ALPINE CLEANING AND RESTORATION SPECIALISTS, INC.,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B).²

On August 28, 2018, the Certifying Officer (“CO”) for the Office of Foreign Labor Certification denied the H-2B Application for Temporary Employment Certification (“Application”) of Alpine Cleaning and Restoration Specialists, Inc. (“Employer”) because the Application failed to establish the job opportunity as temporary in nature and failed to establish a temporary need for the number of workers requested. *See* 20 C.F.R. § 655.6(a) and (b); 20 C.F.R. § 655.11(c)(3) and (4). Employer timely requested administrative review on September 7, 2018, and the Appeal File (“AF”) was provided on September 26, 2018. On October 5, 2018, Employer filed a brief on appeal. The CO did not file an appellate brief.

This proceeding is before the Board of Alien Labor Certification Appeals (“the Board”)

¹ On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

² The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018). Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 IFR decisions on this issue remain relevant.

pursuant to § 655.61(a).³ As explained below, this Decision and Order affirms the denial of certification and denies Employer's request for relief.

Background

Employer provides "disaster mitigation and reconstruction services in the event of hurricanes, floods, wild fires, tornadic wind and mold damage" in the Salt Lake County, Utah area. AF at 33, 60. On July 16, 2018, it filed its Application for 25 Labor Helpers based on an asserted temporary seasonal need from October 1, 2018, to July 1, 2019. AF at 51. The Labor Helpers would assist in residential and commercial cleaning and restoration of properties after fire, flood, water, or mold damage.⁴ AF at 53. Although Employer checked the box for "seasonal" as the nature of its temporary need in Section B.8 of the Application, *see* AF at 51, the statement of need referred to a "temporary peak load" need in the "winter, spring, and summer months," since this is when "most of [its] business activity occurs." AF at 60. Employer stated that "Utah winters (during which time our business significantly increases each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest part of the season will be." *Id.* Employer also stated:

Our company has extensively recruited U.S. workers to fill these positions without success. Specifically, our company has engaged in posted flyers on trucks and online ads without receiving any adequate response or being able to hire sufficient numbers of U.S. workers to meet our demand for this number of workers as quickly as they are needed once the weather changes. We have found the local labor market to be completely inadequate and unable to meet our need for these peak load workers during our busiest seasons. Most of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for the H- 2B workers we are asking for in 2018, but cannot anticipate, at this time, that we will need H- 2B workers in 2019 due to fluctuations in the economy.

Id.

Included with the Application were a summarized monthly payroll report for 2015 through 2017 and quarterly tax summaries and returns for 2015 and 2016, among other documentation. AF at 51-193. The summarized monthly payroll report showed the monthly total amount paid to permanent and temporary employees. AF 64. The table showed relatively consistent total payments to the permanent workforce for each year, with a gradual increase in total payments over time. For the temporary workforce, the table showed a decrease in the amount paid each summer in July, August, and September. In addition, Employer included three letters of intent that appeared to be unrelated to its services. The three letters of intent were addressed to "Illuminations Designs, LLC," and from a company that intended to use Illuminations Designs' services from October 2018 through February 2019 on holiday lighting supply, installation, and removal, in three different counties. AF at 61-63.

³ The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d).

⁴ Later in its statement of need, Employer contended the workers were needed as "landscape laborers." AF at 60. This appears to be an error, as there is no other reference to landscape work in the record.

On July 19, 2018, the CO issued a Notice of Deficiency (“NOD”) which identified five deficiencies in Employer’s Application, only the first two of which are at issue on appeal.⁵ AF at 42-50. The first two deficiencies identified by the CO were that Employer had: 1) failed to establish the job opportunity as temporary in nature in violation of 20 C.F.R. § 655.6(a) and (b); and 2) failed to justify its need for 25 workers in violation of 20 C.F.R. § 655.11(e)(3) and (4). AF at 45-46.

Regarding the first deficiency, the CO noted that Employer requested workers “for a period of nine months covering several seasons” and concluded that “it is not clear how the need for the requested workers is traditionally tied to a season of the year by an event or pattern.” AF at 45. The CO determined that the quarterly tax returns were not “exclusive to the need for the requested occupation” and could therefore not be used to support the Employer’s specific asserted need. AF at 45. The CO noted that the letters of intent were for the wrong services and only referred to October through February, and therefore also did not support the requested dates of need. AF at 45-46. Finally, the CO concluded that the payroll summaries showed that temporary workers were used year round and did not include the number of workers employed. AF at 46. The CO conceded that the summaries showed a decrease in amounts paid during July, August, and September, but stated that it was unclear what duties the workers were performing during this time. *Id.* The CO requested further information, including an explanation of Employer’s annual operations per month and the duties of the requested position, and an explanation of how the need fits the definition of seasonal need. AF at 46. The CO also required further supporting evidence, including summarized monthly payroll reports for two previous calendar years identifying permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received; and any other evidence that justified the dates of need. *Id.*

Regarding the second deficiency of failing to demonstrate that the number of workers requested accurately represented bona fide job opportunities, the CO stated that Employer did not indicate how it determined that it needs 25 Labor Helpers and requested further information and documentation. AF at 47. The CO requested a statement indicating the total number of workers requested; an explanation with supporting documentation of why Employer requested 25 workers; if applicable, documentation supporting the need for 25 workers such as contracts or letters of intent; summarized monthly payroll reports for one previous calendar year identifying permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received; and any other evidence justifying the number of workers requested. *Id.*

On August 2, 2018, Employer responded to the NOD. AF at 23-41. Employer submitted a letter signed by its CFO Jon Erickson that stated, in part:

Although primarily based in the Washach [*sic*] mountains, our teams can mobilize and have been asked to mobilize throughout the United States and Canada. Obviously, the majority of the flood damage we remediate is caused by “typical” local disasters, i.e. broken residential plumbing which typically occurs during the colder months of the year. The majority of residential fires also occur during the colder months as well as they are typically caused by space heaters, and or electrical

⁵ In the Non-Acceptance Denial, the CO cited only the first two deficiencies as grounds for the denial.

fires. We have agreements with multiple insurance companies as well as several third-party administrators, namely Alacrity Services, and Contractor Connection which provide us with job assignments in the event of a disaster. We obviously can't predict when a disaster will happen, but we can predict when disasters are more likely to happen based upon weather and temperature. As a result, we have a definite seasonality to our business as witness [sic] by our monthly revenue shown below for the past 2 years.

AF at 33. Employer then provided a table⁶ demonstrating that in 2017 and 2016 it had a drop in revenue in July, August, and September:

	2017	2016
January	\$1,243,672	\$1,187,429
February	\$1,361,891	\$1,193,072
March	\$1,327,539	\$1,202,089
April	\$1,298,385	\$1,198,471
May	\$1,196,952	\$1,056,138
June	\$1,076,426	\$1,021,848
July	\$798,086	\$756,275
August	\$815,862	\$763,951
September	\$823,972	\$781,511
October	\$1,123,841	\$984,629
November	\$1,276,163	\$1,027,739
December	\$1,782,634	\$1,172,498
Total	\$14,125,423	\$12,345,650

AF at 34. Mr. Erickson explained that by the summer months, Employer has “completed a significant amount of the jobs from the winter disasters...and [has] a lull until the disasters increase in the fall.” AF at 34-35. Mr. Erickson asserted Employer did not have contracts for future work because it is not contracted until the disaster happens, but stated Employer has “a long history of seasonal work starting in October and going until approximately June.” AF at 35. Finally, Mr. Erickson stated that when nation-wide disasters occur, it will mobilize only its existing permanent workforce, not its temporary H-2B workers. *Id.*

On August 28, 2018, the CO issued a Non Acceptance Denial Letter (“Denial”) because Employer did not sufficiently address the first two deficiencies identified in the NOD. AF at 9-22. First, the CO determined that in response to the NOD, Employer “did not specifically provide information to support its contention that the area of intended employment...has an increase in disasters during the requested dates of need.” AF at 13. The CO also stated that Employer’s “operations are primarily performed in the period from October through July. The employer’s employment opportunity, then, does not represent a seasonal or short-term demand, but is the employer’s regular operations.” *Id.* Additionally, the CO noted Employer did not provide previous two years’ of payroll summaries as directed, and thus the number of permanent and temporary

⁶ Employer included an additional table that showed a corresponding pattern of reduced numerical values in the months of July, August, and September; however, this table was not labeled and it is unclear what the numbers represent. *See* AF at 34.

workers and the monthly hours worked was unknown. AF at 14. Therefore, Employer failed to establish the job opportunity as temporary in nature. *Id.* Second, the CO noted that without the previous year's payroll summaries, as requested in the NOD, it was not possible to evaluate the number of workers needed during the requested dates of need. AF at 15. Therefore Employer failed to establish the temporary need for the number of workers requested. *Id.*

On appeal, Employer argues that the CO failed to properly evaluate the evidence and reached factually incorrect conclusions on the merits. Employer's Brief ("Emp. Br.") at 2.

Scope and Standard of Review

The scope of the Board's review in the H-2B program is limited. When an employer requests a review by the Board under section 655.61(a), the Board may consider only "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).

Neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review of the CO's denial of certification, but the Board has fairly consistently applied the arbitrary and capricious standard in reviewing the CO's determinations. *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016)⁷; *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

Discussion

An employer seeking certification under the H-2B program must show that it has a temporary need for workers. 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); 20 C.F.R. § 655.6(a). 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." 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer's need is temporary if it qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as

⁷ A three-judge panel of the Board adopted the "arbitrary and capricious" standard in *Brook Ledge* after referencing *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015), a case reviewing the denial of labor certification under the H-2A program. *Brook Ledge Inc.*, slip op. at 5-6. After noting that the CO argued that the Board should defer to the OFLC's interpretation of a regulation unless it is arbitrary, capricious, an abuse of discretion or not in accordance with law, the panel stated, "Generally speaking we do not disagree with the CO's characterization of its role vis a vis OFLC. We have previously acknowledged that BALCA reviews decisions under an arbitrary and capricious standard. *See J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015). We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term." *Id.* at 5. However, some opinions have not discussed a standard of review, and others issued by the Board have suggested that the CO's determinations should be reviewed, at least at times, *de novo*. *See, e.g., Roadrunner Drywall Corp.*, 2017-TLN-00035, slip op. at 3, n.11 (May 4, 2017) (citing *Albert Einstein Medical Center*, 2009-PER-00379 (Nov. 21, 2011) (*en banc*)); *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017), *Zeta Worldforce, Inc.*, 2018-TLN-00015, slip op. at 4 (Dec. 15, 2017) (suggesting a hybrid approach where a CO's policy-based determinations would not be overturned unless arbitrary, capricious, or inconsistent with the established policy interpretation, but absent such an established policy-based interpretation of the regulations, reviewing the CO's denials *de novo*). In this case I would affirm the CO's decision whether I afforded it deference or not.

defined by DHS. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b). The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3) and (4).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. *Alter and Son Gen. Eng'g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Bare assertions without supporting evidence are insufficient to carry the employer's burden of proof. *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013). In addition, 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. *Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016). Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) ("The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification."); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017). However, where an employer explains why it cannot produce the requested documentation and provides alternative evidence, it is an abuse of discretion for the CO to deny certification without considering whether such alternative evidence is sufficient to carry the employer's burden. *Int'l Plant Servs., LLC*, 2013-TLN-00014, slip op. at 6 (Dec. 21, 2012).

Number of Workers Requested

Employer did not sufficiently justify its need for 25 workers. The employer must demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3) and (4). "[I]t is the Employer's burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the employer at its word." *North Country Wreaths*, 2012-TLN00043 (Aug. 9, 2012); *see also Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046, slip op. at 6-7 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application even though it did not provide the precise information requested by the CO).

Employer failed to provide any information about the number of workers, permanent or temporary, that it employs. Employer provided only the amount of the monthly total payroll for the previous three years, not the number of each type of worker or the number of hours worked as requested by the CO.⁸ Employer argues that "[i]t's not for the CO to determine whether there's enough work to keep the temporary workforce actively employed," and that Employer "must use its best judgement in projecting the needs of its customers. The employer knows its customers far better than the CO." Emp. Br. at 4. While Employer certainly knows its business needs and that of its customers better than the CO, Employer bears the burden of demonstrating that it has a bona

⁸ Employer argues on appeal that it provided two years of payroll summaries and that the CO improperly failed to "accept" the summaries, but Employer does not address the fact that it failed to detail the number of hours worked and the number of each type of employee, as requested by the CO. Employer's failure to provide the requested information, along with its failure to explain any reason why it could not produce the requested documentation, is an independent ground for affirming the CO's denial of certification. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

fide need for the requested number of workers and must provide some information to the CO to support the number of workers requested. The only statement that touched on the number of needed temporary workers was Mr. Erickson's statement that Employer is requesting 25 workers to help with its additional workload. AF at 35. Employer cannot simply request a seemingly random number of temporary non-immigrant workers and expect the CO to grant the request on blind faith. Further, while there is some flexibility in the kinds of documentation it may use to support its requested need, *see Sur-Loc Flooring Systems, LLC*, at 6-7, Employer did not provide any information that would establish the need for 25 temporary workers.

Therefore, the CO's denial of certification is affirmed because Employer failed to demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3) and (4). In the alternative, I also find that the CO properly denied certification due to Employer's failure to establish a temporary need within the meaning of the regulations.

Temporary Need

To qualify for a temporary seasonal need, the employer "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." 8 C.F.R. § 214.2(h)(6)(ii)(B)(2); *Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012); *Nature's Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012).

The CO did not err in denying certification based on a failure to show a seasonal need because Employer's documentation was insufficient to demonstrate a temporary seasonal need for the laborers requested. While the table showing the monthly revenue for 2017 and 2016 and the table showing that Employer hires more temporary workers between October and June suggests that there this is a busy time for Employer, this data does not provide information specific to the requested temporary positions. Further, Employer provided only Mr. Erickson's assertions that winter weather results in flooding caused by broken pipes and fires caused by heaters or electrical problems, which in turn results in a demand for Employer's services. While this may be an accurate statement, Employer provided no supporting evidence demonstrating this is the case. Employer argues on appeal that there are no forward-looking contracts for future services that could have been submitted. Emp. Br. at 3. Accepting this argument as true, Employer still could have conceivably submitted other information, such as evidence of past contracts that indicated a temporary need that was based on "seasonal disasters" in the area of employment. As Employer noted in its brief, it is the CO's role to determine whether a need exists and whether such a need is seasonal (or peak load) in nature. Emp. Br. at 4. It is Employer's burden to provide evidence to enable the CO to make this determination, and bare assertions without supporting evidence are insufficient to carry the employer's burden of proof. *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013). Employer failed to carry its burden in providing sufficient evidence to support a seasonal need, and the CO therefore did not err in denying certification based on Employer's failure

to provide specific information to support its contention that the area of intended employment has an increase in disasters during the requested dates of need.⁹ AF at 13.

Employer argued on appeal that it provided letters of intent from four of its largest customers in a particular window of time as evidence of its “peak demand for its services” and that “this alone is sufficient to establish both the peak and its anticipated beginning and end dates.” Emp. Br. at 4. However, only three letters of intent are part of the record, and, as the CO noted, these letters are entirely unpersuasive as they appear to relate to a different employer providing different services for different dates of need. *See* AF at 61-63.

Employer also argues that the CO evaluated the Application under the incorrect standard, namely the seasonal standard versus the peak load need standard. Emp. Br. at 5. However, Employer failed to address the fact that it selected “seasonal” as the nature of the temporary need in Section B.8 of the Application. *See* AF at 51. While Employer’s attached statement of need referenced a peak load need, the CO did not err by analyzing the Application according to Employer’s indicated nature of temporary need, i.e., the “seasonal” category. Further, in its response to the NOD, Employer did not allege that the CO erred in applying the seasonal need standard. To the contrary, Employer argued that there was a “seasonality” to its business. AF at 33. On appeal, the Board may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). Whether or not Employer’s mention of a peak load need in its statement of need would allow me to consider this argument, Employer did not meet its burden of demonstrating a peak load need for similar reasons that it failed to establish a seasonal need.

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); *see also Munoz Enterprises*, 2017-TLNL-00016, slip op. at 7 (Jan. 19, 2017) (finding that a peakload need “depends on the amount of work the employer is contractually obligated to perform, when such work must be performed, whether the employer’s contractual obligations overlap, and how many permanent workers are employed by the employer.”).

The evidence Employer submitted to the CO is lacking. While the revenue tables and monthly payroll reports appear to show that Employer does more business between October and June, the information provided by Employer to the CO did not sufficiently establish a peak load temporary need. As noted above, the payroll report submitted by Employer showed only the monthly total amount paid to permanent and temporary workers; it did not provide the total number of workers employed or the total number of hours worked. The reports also lacked detail about the types of jobs performed by different kinds of employees. While Employer may actually have a seasonal or peak load need for temporary workers, the burden of proof rests squarely on

⁹ As observed by the CO, the quarterly tax returns for 2015 and 2016 also do not provide any specific information about the number of permanent and temporary workers or what role each worker fulfills for Employer, and are therefore unhelpful in determining Employer’s temporary need for the requested workers.

Employer and after a review of the record, I find it failed to meet that burden. Therefore, the CO could not establish that Employer has a temporary need, and the certification was properly denied.

For the forgoing reasons, the CO's denial of Employer's Application is affirmed.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

RICHARD M. CLARK
Administrative Law Judge