



Issue Date: 10 October 2018

BALCA Case No.: 2018-TLN-00169  
ETA Case No.: H-400-18184-249783

*In the Matter of:*

**RBM SERVICES, INC.,**

*Employer.*

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus  
Austin, TX  
*For the Employer*

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

Before: Drew A. Swank  
Administrative Law Judge

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

This case arises from RBM Services, Inc. (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its 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 (DHS). *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

<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).

<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

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 July 4, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 100 laborers for the period of October 1, 2018 to February 1, 2019. (AF 94-117).<sup>3</sup> Employer indicated that the nature of its temporary need was “seasonal.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer attached a statement in support of the temporary labor certification application for RBM Services, Inc. and its subsidiary, Illuminations Design, LLC, for 100 aliens. Employer noted the following:

Our company is engaged in the illumination (holiday- light installation) business in the Salt Lake, UT area. Our services include holiday- light installation and maintenance. The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is October 1, 2018 to February 1, 2019.

Our company currently requires the services of laborers to perform manual labor associated with light installation such loading and unloading materials, climbing roofs, affixing lights, and ensuring illumination. Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the fall and winter months, from approximately October 1st to February 1st, during which time we need to substantially supplement the number of workers for our labor force for these positions. Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the spring and summer months, of approximately February 1st to August 30th because no one requires holiday illumination during those times...

(AF 102-103).

The CO issued a notice of deficiency on July 12, 2018, listing two deficiencies in the Employer’s application. (AF 88-93). The CO noted the first deficiency as the Employer’s

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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.

“[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 91).

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 did not sufficiently demonstrate the requested standard of temporary need, noting that the employer was requesting 100 laborers from October 1, 2018 to February 1, 2019 based on a seasonal need. *Id.*

The CO noted that in order to establish a seasonal need, the petitioner must show that the service or labor for which it seeks workers is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The CO stated employment is not seasonal if the period during which the service or labor is needed is unpredictable, subject to change or considered a vacation period for the employer’s permanent employees. *Id.*

The CO determined that employer had not explained what events cause the seasonal need and the specific period of time in which the employer will not need the services or labor. Therefore the CO requested further explanation regarding the employer’s business operations and how the request for certification of temporary workers meets one of the regulatory standards of a one-time occurrence, seasonal, peak load or intermittent need. (AF 91-92).

Employer was instructed to provide supporting evidence and documentation justifying its chosen standard of need including monthly invoices from the previous calendar year, 2017, showing that work will be performed each month during the requested period of need, signed service contracts from customers for the previous calendar year and summarized monthly payroll reports from a minimum of one previous calendar year identifying for each month and separately for full time permanent and temporary employment in the requested occupation, including total number of workers, total hours worked and total earning received. Such documentation must be signed by employer attesting that information was compiled from employers’ actual accounting records. (AF 92).

In regard to Deficiency 2, “failure to establish the job opportunity as temporary in nature,” the CO stated that the employer had not established that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity. The CO stated that the employer had not indicated how it determined that it needs 100 laborers during the requested period of need of October 1, 2018 through February 1, 2019 and further explanation and documentation is required to establish the employer’s need for 100 laborers. (AF 92-93).

The CO directed the employer to submit further documentation including an explanation with supporting documentation of why the employer is requesting 100 laborers during the

requested dates of need, including contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year identifying full time permanent and temporary workers in the requested occupation for each month, as well as any other relevant evidence which serves to justify the number of workers requested. (AF 93).

On July 26, 2018, Employer filed a response to the Notice of Deficiency providing additional supporting information and further explanation of the submitted documentation. (AF 18-87). This information included Employer's letter from its CFO, Jon Erickson, explaining its seasonal need as the "Holiday Season" and noting that it installs and maintains lighting for Halloween, Thanksgiving, Christmas, New Year's (including Chinese New Year's) and Valentine's Day. Employer's letter also noted that it had a long history of performing this seasonal work which started in October and continued until approximately February. In order to help with the additional workload during this peak time it was requesting 100 H2B workers for the months of October through January. (AF 25-26).

Employer submitted a letter of intent from CenterCal Properties, LLC, dated June 28, 2018, stating that this company intended to use Employer's holiday lighting services in the Davis County area and noting that "the required services will require a substantial number of workers." (AF 27).

Employer also submitted the monthly payroll totals for its permanent and temporary labor force in the position of lighting laborer for the months of October 2017 through January 2018. (AF 30-31). In addition, Employer submitted general payroll information and quarterly federal tax returns for the second and third quarters for 2015 and 2016. The quarterly tax return information for 2015 and 2016 included a list of the employees for these quarters which presumably represent the permanent workforce. It is not clear why the Employer did not submit similar information for the first and fourth quarters which are at issue here, or a list reflecting the number of temporary employees employed during the requested period of need.

On August 28, 2018 the CO issued a Non-Acceptance Denial to the Employer, stating that the noted deficiency regarding Employer's failure to establish the temporary need for the number of workers requested still remained and therefore the application was denied. (AF 7-17). Specifically the CO stated that the previous Notice of Deficiency requested that the Employer provide an explanation and supporting documentation to substantiate its request for 100 laborers for the requested dates of need, October 1, 2018 through February 1, 2019. The CO noted that the payroll chart provided by the Employer for its lighting labor did not indicate how many lighting laborers were staffed during any given month, nor were the amount of hours worked included, despite the fact that this information had been requested by the CO in the Notice of Deficiency. Accordingly the CO determined that the Employer's documentation did not contain enough information to support its need for 100 workers. (AF 10-11).

By letter received on September 10, 2018, Employer made a timely request for administrative review of the CO's determination. (AF 1-6).

By Order issued on September 27, 2018, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before October 5, 2018. Employer filed a timely brief with OALJ-filings on October 5, 2018. No brief was submitted by the Solicitor.

Employer argues in its brief that the CO erred in her factual determination as well as by making legally incorrect assessments about what RBM needed to show to satisfy its burden of proof. Employer argues specifically that it has met its burden of showing the number of temporary workers requested for its temporary peakload lighting business on the basis of the letter of intent which it submitted from CentreCAL at AF 27-28 and by its online advertisement for its holiday lighting business, as well as the statement in support of its temporary need for workers, filed by its CFO, Jon Erickson at AF 25-28. Employer also asserts that, “It’s not for the CO to determine whether there’s enough work to keep the temporary workforce actively employed,” and “it’s not the CO’s place to determine that the employer over-estimated the number of workers they may need for a future opportunity in order to justify denying the application.” (Employer’s brief at 4). Employer cites no cases in support of its argument. Employer’s argument is addressed below.<sup>4</sup>

### **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)).

### **STANDARD OF REVIEW**

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 in H-2B matters. BALCA has, fairly consistently, articulated an arbitrary and capricious standard 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). However, *see also Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) and *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (recognizing a

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<sup>4</sup> Employer also argues that the CO failed to address the Employer’s need as a peakload need and rather applied a seasonal standard. This argument is somewhat puzzling since the CO’s final denial was based only on whether the number of requested temporary workers was established and not on whether the temporary need or requested period was established. Accordingly this argument will not be addressed further.

distinction in BALCA’s review of the CO’s determination involving review of a long established policy-based interpretation of a regulation by the Office of Foreign Labor Certification (“OFLC”), in which case OFLC’s interpretation would be owed considerable deference; but in the absence of such an interpretation, the CO’s finding would be reviewed *de novo*.<sup>5</sup>

In the current case, which does not involve a longstanding policy-based interpretation of a regulation by the OFLC, the undersigned finds that deference need not be shown to the CO’s determination. However, for the reasons discussed below, I find the record supports the CO’s determination in this case, as Employer has failed to meet its burden of establishing a temporary need for the number of workers requested between October 1, 2018 and February 1, 2018.

### ISSUE

Whether the Employer has met its burden of establishing its temporary need for 100 laborers for the period of October 1, 2018 through February 1, 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.

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<sup>5</sup> The approach taken in *Zeta Worldforce, Inc.*, is consistent with BALCA’s discussion of the standard of review in *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). In *Brook Ledge*, a three-judge BALCA panel held that the CO’s definition of a “worksites” was not entitled to deference where the OFLC or the CO had articulated no clear definition of the term. BALCA noted that the CO offered “no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC,” adding that there is “no legal support for such a contention.” While the *Brook Ledge* panel acknowledged that it reviewed the CO’s decision under an arbitrary and capricious standard, the panel ultimately found that deference to the CO’s determination was unwarranted. The panel explained that where the review did not involve a longstanding or clearly articulated interpretation of a regulation, and the CO had not shown that he had considered the relevant factors and articulated a rational connection between the facts found and the choice made, BALCA need not defer to the OFLC’s or the CO’s interpretation. However, the BALCA panel stated, “We take no issue with the assertion that BALCA should defer to OFLC’s rational and reasonable interpretation of an ambiguous regulatory term.” *Cf. Best Solutions USA, LLC*, 2018-TLN-00117 at footnote 2 (May 22, 2018) (BALCA judge declining to apply “the so-called ‘arbitrary and capricious’ standard of review ... and will instead simply determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient in light of the written record provided”).

<sup>6</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).

(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)).

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).

In this case the Employer is alleging that it has a temporary need for 100 laborers due to a seasonal/peakload need from October 1, 2018 to February 1, 2019 for the Employer's holiday lighting business. (AF 94).<sup>7</sup> To establish a seasonal need according to the DHS regulation,

[t]he 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 service 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)).

In this case the CO's final denial is based on Employer's failure to establish the temporary need for the number of workers requested. An Employer must 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).

In the final denial letter the CO noted that the payroll chart provided by the Employer for its lighting labor did not indicate how many lighting laborers were staffed during any given

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<sup>7</sup> Although the original application at AF 12, 94, requests certification on the basis of a "seasonal need" Employer at times refers to its need as peakload need. As the CO did not determine that the chosen standard of need was not established in the Final Denial, this point is moot.

month, nor were the amount of hours worked included, despite the fact that this information had been requested by the CO in the Notice of Deficiency. (AF 9-10).

Employer argues in its brief that it supplied sufficient support for its request for 100 laborers in the letter of intent from CenterCal Properties, LLC (AF 27-28), its online marketing campaign (AF 25), and clarification of its temporary need by its CFO, Jon Erickson (AF 25-26). However none of these statements, nor any other information in the record, refer to the number of lighting workers used in the past, or the number which were expected to be needed in the future. Nor does any of the supplied information provide any reasonable basis to calculate whether the number of workers requested is based on “bona fide” job opportunities.

Although the total amount of wages paid to the temporary lighting laborers during the months of October 2017 through January 2018 was supplied and was broken down by month, the Employer did not specify how the total wages equated to a specific number of workers. (AF 30-31). Employer also failed to provide any explanation as to how it calculated its need for the specific number of temporary lighting workers, either in the previous year, or in the upcoming requested period of need, October 1, 2018 through February 1, 2018.

Employer provided payroll information regarding the second and third quarter wages paid in 2015 and 2016, as well as a list of the permanent workers employed in those quarters but failed to provide the same information for the first and fourth quarters, which are the quarters at issue here, nor did it provide a list of the temporary workers employed, nor did it specify the number of temporary workers staffed in any of the months in question, i.e., October through January, in previous years. (AF 32-84).

Employer supplied one letter of intent from CenterCal Properties, LLC, dated June 28, 2018, stating that this company intended to use Employer’s holiday lighting services in the Davis County area and noting that “the required services will require a substantial number of workers.” (AF 27). However, this letter provides no specific information regarding what “a substantial number of workers” equates to, nor does it include any information which specifically supports the need for 100 temporary lighting laborers.

Employer failed to provide any of the requested documentation which would have allowed the CO to reasonably determine whether the request for 100 temporary lighting laborers represented a “bona fide job opportunity” as required by 20 C.F.R. § 655.11(e) (3) and (4). *See Roadrunner Drywall Corp.* 2017-TLN-00035 (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 North Country Wreaths*, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it 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”). Accordingly, the CO’s denial of the Employer’s application for failure to establish its temporary need for the number of workers requested is supported by the record.

For the reasons stated above, Employer failed to meet its burden of establishing a bona fide need for 100 temporary lighting laborers for the period of need requested.

**CONCLUSION**

Employer has failed to meet its burden of establishing its temporary need for 100 temporary lighting laborers for the requested period of October 1, 2018 through February 1, 2018. Accordingly, the CO's denial of Employer's application for temporary labor certification is **AFFIRMED**.

**SO ORDERED.**

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK  
Administrative Law Judge