

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 January 2018

BALCA Case No.: 2018-TLN-00039
ETA Case No.: H-400-17303-258346

In the Matter of:

APACHE STONE QUARRY, LLC,
Employer.

Appearance: Sam Haddad, Esq.
Sam Haddad, Attorney At Law
Austin, TX 78701
For the Employer

Wei (Katherine) Zhao, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Alan L. Bergstrom
Administrative Law Judge

DECISION AND ORDER - AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter. 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, “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” *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

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

hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”) using an ETA Form 9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 C.F.R. § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.53(b); 20 C.F.R. § 655.61(a). During the administrative review only the material contained within the appeal file (“AF”)³ upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case, 20 C.F.R. § 655.61(e). Accordingly, the documents attached to Employer’s filings after the December 18, 2017, denial determination are not considered.

STATEMENT OF THE CASE

On October 30, 2017,⁴ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Apache Stone Quarry, LLC for 30 “Rock Splitters” as a peakload need for employment from January 23, 2018 to November 23, 2018 (AF 112-122), with attachments in support of the application (AF 123-194). The position was listed by the Employer as O*Net Code 47-5051, “Rock Splitters, Quarry” in Section B.2 and B.3 of the filed ETA Form 9142B (AF 112) and is to be performed in Salado, Texas. (AF 115). No minimum educational, training or experience requirement is specified in Section F.b of the application, though the Employer listed special requirements under Section F.b Item 5 requiring

—
“Applicants must be able to work outdoors all day, stand & bend for prolonged periods of time & carry loads up to 60 lbs. Applicants must wear protective clothing & work in a variety of weather conditions, including very hot temperatures.”

(AF 115, 119). The Employer retained Sam Haddad, Esq., as its attorney in this matter. (AF 182).

On November 7, 2017 the CO issued a “Notice of Deficiency” (“NOD”) indicating the following deficiencies (AF 105-111):

“Deficiency 1: Failure to justify nature of temporary need.

subsequent appropriations legislation, including the current continuing resolution. Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, Division A, § 101 (2017).

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 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.

³ “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

⁴ Applications filed after April 29, 2015 with an employment start date of need after October 1, 2015 are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e)

... The employer did not submit sufficient information in its *H-2B Application for Temporary Employment Certification* to establish that the requested period of need is temporary in nature.

The employer has requested 30 Rock Splitters, Quarry from January 23, 2018 to November 23, 2018 a period of 10 months. However, the employer's history shows that it has requested temporary workers for 11 months out of the year, from January 23 through December 19. Therefore, the employer's need appears to be permanent. The employer must submit an explanation and documentation to support its temporary need for workers.

The employer's history is shown below.

Case Number	Case Status	Start Date of Need	End Date of Need
H-400-14050-846239	Determination Issued – Partial Certification Expired	3/26/2014	12/19/2014
H-400-14317-784705	Determination Issued – Partial Certification Expired	2/11/2015	12/11/2015
H-400-15328-981594	Determination Issued – Partial Certification Expired	2/22/2016	11/22/2016
H-400-16334-304250	Determination Issued – Certification	2/15/2017	11/15/2017
H-400-17303-258346	Pending Analyst Decision – Assigned	1/23/2018	11/23/2018

... The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing the following:

1. A description of the business history and activities (i.e. primary products or services) and schedules of operations through the year;
2. An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need.

The Statement of Temporary Need MUST begin in the space provided in Section B., Item 9. of the ETA Form 9142. If necessary, the employer may add an attachment to continue the description.

AND

The Employer must submit supporting documentation that justifies the dates of need requested for certification. The employer's response must include, but is not limited to the following:

1. Summarized monthly payroll reports for 2016 and up-to-date for 2017 that identify, for each month and separately for full-time permanent and temporary employment for Rock Splitters, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employers' actual accounting records or system;
2. Monthly summary of sales (January through December) in the employer's area of intended employment listing customer business name and amount of sale for each month. Each month's sales should be totaled;
3. Monthly production numbers for 2016 and up-to-date in 2017; and
4. Other evidence and documentation that similarly serves to justify the requested dates of need, if any.

“Deficiency 2: Failure to establish temporary need for the number of workers requested.

... The employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bone fide job opportunities.

The employer is requesting 30 Rock Splitters, Quarry under peakload need from January 23, 2018 to November 23, 2018. However, the employer did not include adequate attestations to justify the number of workers requested.

Further explanation and documentation is required in order to establish the employer’s need for a total of 30 workers.

... The Employer must submit supporting evidence and documentation that justifies the number of workers requested. The employer’s response must include, but is not limited to the following:

1. Summarized monthly payroll reports for 2016 and up-to-date for 2017 that identify, for each month and separately for full-time permanent and temporary employment for Rock Splitters, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employers’ actual accounting records or system;
2. Monthly summary of sales (January through December) in the employer’s area of intended employment listing customer business name and amount of sale for each month. Each month’s sales should be totaled;
3. Monthly production numbers for 2016 and up-to-date in 2017; and
4. Other evidence and documentation that similarly serves to justify the requested dates of need, if any.

On November 21, 2017, the Employer filed its response to the NOD (AF 48-104).

On December 18, 2017, the CO found the Employer’s response to the NOD unacceptable and denied the *Application for Temporary Employment Certification* for the 30 Quarry Rock Splitters requested by the Employer in accordance with Departmental regulations at 20 CFR §655.32(c). The CO set forth the following reason for the denial of the application (AF 20-35):

“Deficiency 1: Failure to justify nature of temporary need.

... The employer has requested 30 Rock Splitters, Quarry from January 23, 2018 to November 23, 2018 a period of 10 months. Additionally, the employer has a history of requesting temporary workers from March 26th through December 19th. (See Filing History Chart below). At issue is whether the nature of the employer’s underlying need for the duties of the position is temporary. ... Under DHS regulations, the employer must establish that the need for the employee will end in the near, definable future. ... Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time off due to a slow-down in work activity. Therefore, the employer did not submit sufficient information in its *H-2B Application for Temporary Employment Certification* to establish that the requested period of need is temporary in nature.

Case Number	Case Status	Start Date of Need	End Date of Need
H-400-14050-846239	Determination Issued – Partial Certification Expired	3/26/2014	12/19/2014
H-400-14317-784705	Determination Issued – Partial Certification Expired	2/11/2015	12/11/2015
H-400-15328-981594	Determination Issued – Partial Certification Expired	2/22/2016	11/22/2016
H-400-16334-304250	Determination Issued – Certification	2/15/2017	11/15/2017
H-400-17303-258346	Pending Analyst Decision – Assigned	1/23/2018	11/23/2018

... The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing the following:

3. A description of the business history and activities (i.e. primary products or services) and schedules of operations through the year;
4. An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need.

The Statement of Temporary Need MUST begin in the space provided in Section B., Item 9. of the ETA Form 9142. If necessary, the employer may add an attachment to continue the description.

AND

The Employer must submit supporting documentation that justifies the dates of need requested for certification. The employer's response must include, but is not limited to the following:

1. Summarized monthly payroll reports for 2016 and up-to-date for 2017 that identify, for each month and separately for full-time permanent and temporary employment for Rock Splitters, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employers' actual accounting records or system;
2. Monthly summary of sales (January through December) in the employer's area of intended employment listing customer business name and amount of sale for each month. Each month's sales should be totaled;
3. Monthly production numbers for 2016 and up-to-date in 2017; and
4. Other evidence and documentation that similarly serves to justify the requested dates of need, if any.

In response to the NOD, the employer submitted a summation letter addressing its deficiencies, an annual revenue bar chart for 2010-2017, bar chart for number of workers per month in 2017, quarterly tax documents, monthly production bar chart for 2017, and estimated production numbers bar chart for 2018, contractor letters of intent, sample client list, and various invoices and purchase orders. ... In case H-400-14050-846239, the employer requested a period of need ending on December 19 [2014]. Their current application is requesting a beginning need starting on January 23 [2018], which means the employer's history shows the employer has requested workers in the months of January through December. The employer's program history does not demonstrate a need "affected by the seasonal nature of the work", as described in the employer's temporary need statement.

Furthermore, ... the employer did not submit the payroll as requested. Instead it submitted its quarterly payroll, which represents the employer's entire organization, does not include total monthly hours worked in the requested position, and presents its data in a quarterly format. This data is not useful in determining if the employer truly experiences a peak in worker hours during its requested dates of need.

The employer provided five contractor letters in support ... However, it is unclear why the contractors have a seasonal peak load period, as it is not explained in the employer's response.

The production chart displays that the employer's full nonpeak month of December has production in excess of its current requested start month of January, and its production in December with 6800 tons is very close in production with its full requested peakload month of February with 6831 tons.

The employer also included Sales by Customer Summary for 2017. The list simply included a list of customer names and their total. The list did not contain sales dates. Therefore, this list was not used in supporting the employer's dates of need.

The employer also provided various (sic) documents including purchase orders and invoices. However, it is unclear how these documents support the employer's temporary need.

The employer's history, explanation, and submitted documents were not sufficient in overcoming the employer's temporary need deficiency.

“Deficiency 2: Failure to establish temporary need for the number of workers requested.”

... The employer did not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.

The employer is requesting 30 Rock Splitters, Quarry under seasonal⁵ need from January 23, 2018 to November 23, 2018. However, the employer did not include adequate attestations to justify the number of workers requested.

Further explanation and documentation is required in order to establish the employer's need for a total of 30 workers.

... The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing an explanation as to how the employer determined its need for 30 Rock Splitters, Quarry.

... The Employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need.⁶ The employer's response must include, but is not limited to the following:

1. Signed contracts with clients, detailing the number of workers needed for 2017 and 2018; and
2. Other evidence and documentation that similarly serves to justify the number of workers requested.

In response to the NOD, the employer submitted a summation letter addressing its deficiencies, an annual revenue bar chart for 2010-2017, bar charts for number of workers per month in 2017, quarterly tax documents, monthly production bar chart for 2017, and estimated production numbers bar chart for 2018, contractor letters of intent, sample client list, and various invoices and purchase orders.

... the employer did not submit the payroll as requested. Instead, it submitted its quarterly payroll, which represents the employer's entire organization, does not include total monthly hours worked in the requested position, and presents its data in a quarterly format. This data is not useful in determining the employer's need for 30 Rock Splitters.

The employer included a bar chart showing the total workers employed in 2017. The chart shows that the least amount of workers were employed in January with 44 workers and the highest thus far this year was in April with 69 workers. The bar chart does not provide the necessary data including the number of permanent workers, the number of temporary workers, and the number of hours worked. It is also not clear from the chart title if the data is exclusive to the requested

⁵ ETA Form 9142, Item B-8 indicates the “Nature of Temporary Need” is “Peakload.” The narrative in Item B-9 refers to “peakload need” and states “our peak load is tied to the seasonal nature of the landscape and construction related businesses. Therefore, for our Company, there are times during the year when there is much more work.”

⁶ In the context of the NOD, employer's response, and content of the denial determination, this refers to the “the number of temporary workers requested” and not “chosen standard of temporary need.”

position, Rock Splitter. Therefore the chart was not helpful in supporting the employer's request for a certain number of Rock Splitters.

The employer included a production chart. However, without documentation as to the number of permanent workers employed during the employer's stated nonpeak period, the Department is not able to use the production chart to assess the number of workers needed when its production increases.

The employer has not submitted sufficient documentation to assess its true number of workers needed. Therefore the employer did not overcome this deficiency.

... Based on the foregoing reason(s), the employer's application is denied."

On December 22, 2017, the Employer filed a timely formal request for administrative review of the denial determination with attachments that were duplicitous of those before the CO when the denial determination was made. (AF 1-19). In its "Expedited Administrative Review Request," the Employer's attorney argues that "the DOL Officer reviewing our Client's application presumed certain things that were clearly error on their face, since our Client had proffered and established in their application that the nature of their need for the workers was of a peak load and temporary nature. And, the documentation also supported the number of workers with financial records that clearly established the need." The Employer's attorney indicated it intended to "supplement this initial Notice of Appeal with a legal brief and evidence in support of our Client's case."

On January 3, 2018, BALCA issued a Notice of Assignment and Briefing Schedule directing the CO to assemble and transmit the AF to BALCA by Wednesday, January 10, 2018, and granting leave to the Employer and Solicitor to file briefs on the denial issues involved in this case by mail or facsimile transmission to the office of this BALCA Judge, or e-mail to the National Office, no later than 4:00 PM, Tuesday, January 16, 2018.⁷

On January 16, 2018, the Employer filed a brief in support of the position that certification should be granted for the application filed. The attachments filed with the Employer's appellate brief are attached to the appeal file but not considered as evidence in the appeal. The Solicitor filed notice that a closing brief would not be filed.

DISCUSSION

An employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The qualifications and requirements for the job "must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment," 20 CFR §655.20(e). Additionally, the employer "must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary ... The employer's need is considered

⁷ It is noted that the CO electronically filed the AF on January 3, 2018; the local office of this BALCA Judge was closed due to weather conditions January 4 and 5, 2018; and the National Office was closed from January 8, 2018. However, the National Office account for filing a response in this case was available to the Parties and was monitored by this BALCA Judge.

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 [the Department of Homeland Security] regulations.

These regulations provide that in order for an employer to establish a “peakload 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 [employer’s] regular operation.” 8 CFR §214.2(h)(6)(ii)(B)(3)

Where an employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues an Notice of Deficiency (NOD) to the employer setting forth the deficiency in the application and permitting the employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e). Accordingly, the specific documents which were attached to the request for review cannot be considered; however the same documents are considered as they previously appeared in the AF.

In the Employer’s November 18, 2017 response to the NOD, the Employer’s attorney submits that “our Client has never asserted a temporary peak load need in excess of ten (10) months ... [and] has a track record of four (4) years of DOL ‘Certifications’ of their ETA-9142 application based on previous DOL Analysts review and certifications.” He argues that the Employer’s peak load need has to be based on “the construction market and customer demand for limestone and sandstone products to be used in construction and landscaping design projects, including the construction of homes, walls, fireplaces, patios and outdoor living spaces ... [and] is directly tied to the seasonal nature of the construction and landscape market and peak load customer demand for such products.” The Employer submits that the change in the start date from February 15, 2017 in the 2016 application H-400-16334-304250 to January 23, 2018 in the current 2017 application H-400-17303-258346 “is only a change of approximately three (3) weeks, which is not a significant change in the big picture” and that the change from an end date of November 15, 2017 in the 2016 application H-400-16334-304250 to November 23, 2018 in the current 2017 application H-400-17303-258346 “is only a change of approximately one (1) week, which again is not significant in the big picture.” (AF 51053). The Employer submitted a statement that “we have adjusted our peak load period of need to meet our projected work load needs and are accommodating our labor needs accordingly to match our planned production schedules ... As a consequence ... we project that our peak load period will be from mid-January through mid-November, and we will expect a slow down after such time until our next peak load period commences.” (AF 61). Employer argues that because there has been a steady increase in product sales over the past few years there is a bona fide increase in the need for the additional temporary workers and that the number of workers is justified by the original submission and additionally submitted statements in response to the NOD. (AF 54).

In the January 16, 2018 written argument, the Employer's counsel asserts that "if the record was not sufficient" following the Employers response to the NOD, the CO "could have given our Client an opportunity to respond to a 'specific' request for records by issuing a subsequent NOD." However, as noted herein, the CO had requested 'specific' employment records in the NOD which the Employer failed to provide in its response. He argues that the Employer that the specific information requested "is not created and does not exist in the regular course of business ... so Apache Stone provided independently verifiable records ... which evidence which evidence their payroll, wages and taxes, including the month by month changes that show their temporary peak load need." He summarized the documents submitted and renews the arguments presented in his November 18, 2017 response to the NOD. He requested that the application for 2018 H-2B workers, which is an increase of 5 workers and 1 month over the 2017 application which was certified, be processed with a consistency shown in past applications. He argues the CO's decision "has created an impossible ultra vires threshold and burden, which is not supported by statute and regulations ... [and] that the Notice of Non-Acceptance Denial of our Client's application is in conflict with DOL's own precedent decisions." For reasons set forth herein, these arguments are rejected.

I. The Employer has failed to meet its burden to establish its need for 30 H-2B Quarry Rock Splitters is temporary in nature based on peakload need during the period of January 23, 2018 through November 23, 2018.

Where an employer has been granted certification for a specific classification of H-2B workers and subsequently submits an additional application for the same classification of H-2B workers at the same location of intended employment with the same work duties and requirements, consideration of the work periods involved in the prior certified application(s) is appropriate on the issue of "temporary need" for the H-2B workers because of the nature of dates of need and similarities in job requirements and duties. see *William Ashby Maltsberger d/b/d Maltsberger Ranch*, 2016-TLN-00078 (Sept. 28, 2016)

Here the actual work, production and employment histories of the Employer over time document a growing business involving the supply of limestone and sandstone to the construction and landscaping industries in Texas. The Employer argues it has a temporary need for Quarry Rock Splitters from January 23, 2018 through November 23, 2018; a period of 10 months.

Federal regulations require that the *Application for Temporary Labor Certification* under the H-2B program be denied where the employer has a "need" lasting more than nine months, unless the need is based on a "one time occurrence." 20 CFR §655.6(b); also, 80 Fed. Reg. 24055-24056 (Apr. 29, 2015). For the "one time occurrence" exclusion, the Employer "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." 8 CFR §214.2(h)(6)(ii)(B)(1). "The use of this [one time occurrence] category is limited to those circumstances where the employer has a non-recurring need which exceeds the 9 month limitation." 80 Fed Reg. 240056 (Apr. 29, 2015). In this case

the Employer has demonstrated a recurring need for H-2B foreign workers for Quarry Rock Splitters in 2014, 2015, 2016 and 2017. Accordingly, the current application cannot be considered a “one time occurrence.”

The Employer states “Our stone quarry production business ... is dependent on customer and market demand and we rely on a permanent workforce to help us meet our production obligations. However, during our seasonal peak load period of need, when our production requirements increase, we need to hire additional temporary workers to meet the higher demand for our product during the year.” (AF 60). “Our peak load period of need is not a static date that remains the same year after year, without some reasonable change ... based on our current projections for the 2018 season, we foresee that during the time period from mid-January through mid-November, our Company will experience its peak load need.” (AF 61).

The Employer submitted a chart indicating the total number of employees in 2017 were 44 in January; 46 in February; 59 in March; 69 in April; 63 in May; 64 in June; 63 in July; 63 in August and 57 in September. (AF 66). The submitted Texas Unemployment Insurance Contribution Report indicated that in 2017 the Employer paid 44 employees in January, 46 in February; 59 in March; 69 April; 63 in May; 64 in June; 63 in July; 63 in August; and 57 in September. (AF 67-69). No signed and attested documentation from the Employer’s actual accounting records or system was submitted separately setting forth the monthly number of full-time permanent and temporary employees working as Rock Splitters; their respective total hours worked each month; and their total earnings received each month, as requested by the CO in the initial NOD for the period from January 2016 through “up-to-date” 2017. (AF 110).

In the November 18, 2017 response, the Employer submitted a chart indicating “Monthly Stone & Quarry Production Numbers for 2017” which apparently includes a November 2017 production of 7,800 tons and a December 2017 production of 6,800 tons. (AF 74). These entries are questionable since the document had to be prepared prior to the November 18, 2017 submission. The Employer also submitted a chart for “Estimated Monthly Production Numbers for 2018” which identifies the individual bars by month. (AF 75). The estimated production for 2018 reflects an approximate 10% increase in the monthly production amounts charted as having occurred in each of the 12 months of 2017.

Without the requested attested employment documentation detailing the monthly number of Rock Splitters working as permanent employees and those working as temporary employees, as well as the number of hours worked by the Rock Splitters in each category, for the period from January 1, 2016 through the “up-to-date” 2017 period, it is not possible to determine the base-line production of permanent employee Rock Splitters on a full-time basis, which is needed to establish if there are periods of demand that cannot be met by the Employer’s permanent Rock Splitters. The Employer asserts a 10 month period of temporary need from January 23, 2018 through November 23, 2018 during which time its full-time Rock Splitters will not be a able to meet production. However, without the specifically requested employment data the Employer’s claim of an extended peakload period is unestablished speculation. The Employer’s argument that it does not maintain the requested information in the normal course of business was recognized by the CO in the NOD when the Employer was directed that “Such documentation must be signed by the employer attesting that the information being presented was compiled

from the employers' actual accounting records or system." (AF 110). Here the Employer failed to submit the specifically requested information as directed when it had the opportunity to make a timely submission.

When the credible evidence submitted to the CO prior to the December 18, 2017 denial determination is considered as a whole, Apache Stone Quarry, LLC has failed to meet its burden to establish that Apache Stone Quarry has a peakload based temporary need for Quarry Rock Splitters for the period January 23, 2018 through November 23, 2018.

II. The Employer has failed to meet its burden to establish that 30 foreign works are needed as H-2 Quarry Rock Splitters during the period from January 23, 2018 through November 23, 2018.

Past certification documents indicate the Employer was approved to hire up to 25 Rock Splitters for the period beginning on February 15, 2017 and ending on November 15, 2017 (AF 181, 195); hire up to 15 Rock Splitters for the period beginning on February 22, 2016 and ending on November 22, 2016 (AF 206); hire up to 15 Rock Splitters for the period beginning on February 11, 2015 and ending on December 11, 2015 (AF 216-218); and hire up to 5 Rock Splitters for the period beginning on March 26, 2014 and ending on December 19, 2014. (AF 227).

As noted above, the Employer did not submit signed and attested employment documentation compiled from the Employer's actual accounting records or system which separately set forth the respective monthly number of full-time permanent and temporary employees working as Rock Splitters; their respective total hours worked each month; and their total earnings received each month, as requested by the CO in the initial NOD for the period from January 2016 through "up-to-date" 2017. (AF 110).

Without the requested documentation detailing the monthly number of Rock Splitters working as permanent employees and those working as temporary employees, as well as the number of hours worked by the Rock Splitters in each category, for the period from January 1, 2016 through the "up-to-date" 2017 period, it is not possible to determine the need for augmentation of the permanent Rock Splitter work force with H-2B Rock Splitters; if there is a period of increased need for the requested number of H-2B Rock Splitters based on past monthly production; or if permanent full-time U.S. workers are being displaced by H-2B Rock Splitters.

When the credible evidence submitted to the CO prior to the December 18, 2017 denial determination is considered as a whole, Apache Stone Quarry, LLC has failed to meet its burden to establish a need for 30 H-2B Quarry Rock Splitters for the period January 23, 2018 through November 23, 2018.

After deliberation on the AF and argument of the Parties, this Administrative Law Judge finds that the CO properly denied the Employer's October 30, 2017, *Application for Temporary Employment Certification* for 30 Quarry Rock Splitters for the period of need from January 23, 2018 through November 23, 2018, in in Salado, Texas, pursuant to 20 C.F.R. §655.6(b) and 20 C.F.R. § 656.32(c).

ORDER

It is hereby ORDERED that the Certifying Officer's **DENIAL** of the Employer's October 30, 2017, *Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

For the Board:

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia