



Issue Date: 05 July 2018

BALCA Case No.: 2018-TLN-00094
ETA Case No.: H-400-18001-930927

In the Matter of:

BMC WEST LLC,
Employer.

Appearance: Robert Kershaw, Esquire
The Kershaw Law Firm, PC
Austin, Texas
For the Employer

Nora Carroll, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Larry S. Merck
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from BMC West, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny twelve applications¹ 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 non-agricultural 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);² 20 C.F.R. § 655.6(b).³ Employers seeking to use this program must apply for and

¹ Employer received twelve denied applications. In Employer’s Brief, Employer noted it was not aware of any consolidation of the matters and “would have opposed consolidation as the facts in each case are quite different AND the issuance of one decision may prejudice individual applications.” E. Br. at 1, fn. 1. I have reviewed each of Employer’s applications that are on appeal before me, and determined each involves different locations across the United States, different occupations, and different responsive documentation to the CO’s Notices of Deficiency. Therefore, I will render a decision in each case.

² The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

Background

Employer is a building materials and construction services business. (AF 291).⁴ On January 1, 2018, Employer filed its Form 9142 seeking fifty-four full-time Carpenter Helpers⁵ for the period of April 1, 2018 to December 15, 2018. *Id.* at 291, 297-303. Employer’s Statement of Temporary Need stated:

Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 15th, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Nevada winters (during which time our business slows significantly 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 and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year round workers). 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 winter months, of approximately December 15th to April 1st, because the cold and wet weather is not conducive to construction work. As mentioned above, the Clark County location supplies home builders and construction companies with building materials and pre-fabricated trusses in addition to other products. Therefore our business is directly tied to the construction industry. Since construction in general slows down during the winter months due to the cold and wet weather and the holidays, the need for laborers is substantially reduced since, in our experience, the home builders and construction

³ 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.

⁴ Citations to the Appeal File are abbreviated as “AF” followed by the page number.

⁵ The standard occupational classification title was listed as “Helpers-Carpenters,” SOC code 47-03012. (AF 299).

companies do not purchase as much product during the winter months when they are not building as much.

Id. at 291. Employer stated further that it was “not submitting additional supporting documentation” because its dates of need had “not changed and . . . the number of workers ha[d] not changed more than 20%.” *Id.*

On January 8, 2018, the CO issued a Notice of Deficiency (“NOD”), citing two deficiencies in Employer’s application. (AF 276-281). First, the CO determined that Employer “did not submit sufficient information . . . to establish its requested standard of need or period of intended employment.” *Id.* at 279. Citing 20 C.F.R. § 655.6(a)-(b), the CO wrote:

The employer explains that its peakload need is based on an increase in projects that will slow during the winter months. The employer indicates that during the winter months, it is unable to engage in much business, because the cold and wet weather is not conducive to construction work. However, the employer’s work is done in Las Vegas, Nevada, which is relatively favorable to year-round outside work.

The employer’s explanation of its temporary need points to an overall increase in its work projects which has resulted in its need for additional workers. However, it is not clear if the employer experiences a true peak in its business during its requested dates of need or if the employer experiences a lull in business during its requested dates of need and if the employer experiences a lull in business during its nonpeak dates, December 16 through March 31. Further explanation and documentation is needed to support its peakload need.

Id. at 279.

To correct this deficiency, the CO directed Employer to submit the following additional documentation:

1. A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation and supporting documents that substantiate the employer’s statement that it is unable to engage in much business, because the cold and wet weather is not conducive to construction work. This documentation can include supportive letters from building trade organizations in the employer’s area of intended employment;
3. Summarized monthly payroll reports for a minimum of two previous calendar year[s] that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Carpenter Helpers*, 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 employer’s actual accounting records or system; and

4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

Note: if the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF 280) (emphasis and numbering in original).

The CO also cited a second deficiency, finding that Employer failed to establish temporary need for the number of workers requested on its application. *Id.* The CO cited the applicable regulations at 20 C.F.R. § 655.11(e)(3)-(4) as grounds for the deficiency. *Id.* The CO directed Employer to submit the following:

1. An explanation with supporting documentation of why the employer is requesting 54 Carpenter Helpers for its worksite in Las Vegas, Nevada during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 54 Carpenter Helpers, such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, 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 employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

Note: if the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF 281) (emphasis and numbering in original).

On January 19, 2018, Employer submitted its response to the NOD. (AF 28-275). Employer submitted documentation, including a statement, a graph of monthly new home closing trends for the Las Vegas area, a graph of weekly traffic and net sales per subdivision, a

graph of its truss sales by month for 2017, a graph of monthly new home permits since 2015, and a chart of its contracts for 2018. *Id.* at 28 – 34. Employer also submitted letters of intent from home builders (including statements regarding peakload need⁶), copies of agreements between Employer and other home builders, payroll summaries for permanent and temporary employees for years 2014-2017, and several quarterly federal tax returns with wages and tax liability. *Id.* at 35-275.

On February 28, 2018, the CO issued a Non-Acceptance Denial denying Employer's application for temporary labor certification because Employer failed to establish the job opportunity as temporary in nature and failed to establish temporary need for the number of workers requested. (AF 14-21). The CO determined that Employer did not submit sufficient information "to establish its requested standard of need or period of intended employment." (*Id.* at 16).

The CO wrote:

The employer states that its temporary need is based on projections and building schedules provided by its customers, general industry projections, and lack of available labor. The employer also stated that its business is tied directly to that of the builders' fiscal year and labor. The employer was specifically asked to submit an explanation as well as supporting documents that substantiate the employer's statement that it is unable to engage in much business because the cold and wet weather is not conducive to work. This document would provide support for the employer's statement that "harsh winter weather conditions" cause the employer to not engage in much business. However, this document was not included in the employer's NOD response, thus failing to support their claim. The weather in the areas of intended employment shows that the monthly average low temperatures during its nonpeak period do not fall below freezing and the highs in the nonpeak period are between 58 and 69 degrees.

As support for its peakload need, the employer equated their need with the growing home builder market but robust home sales shows a healthy housing market and does not point to a temporary need. The employer included a chart showing home closings per month and explains that buyers tend to move in the summer months. The employer notes that home buyers don't tend to move during the colder months due to the weather and the holidays. However, it is not clear how home sales patterns support a temporary need for the building of the homes.

The employer also included a monthly new home permits chart. The source of the data or the locale that the data represents was not shown. It

⁶ The peakload need statements are identical on each letter of intent. These statements each read: "The peak months that services are performed for our company by BMC West LLC are April 1, 2018 through December 15, 2018." *See, e.g.* (AF 35).

should be noted that building permits are valid for work to begin anytime within six months; and therefore, building permit data is not a useful tool in supporting specific dates of need.

The employer stated that sales and payroll would show its demand starting on April 1 and rema[ing] strong through December. The employer included its payroll reports from 2016 to 2017. The employer's payroll reflects a robust temporary workforce year-round. For instance, the 2016 payroll reports show a range of 45 to 134 temporary workers employed during the dates outside of the requested period of need and the employer's 2017 payroll reports reflect 116 to 131 temporary workers outside the requested dates. Furthermore, the employer's 2017 payroll shows more hours worked in the nonpeak month of March (32159) than its requested peakload month of April (26853). Therefore, the payroll does not support a demand starting on April 1.

The employer's sales report also does not show a peak in sales beginning in April. In 2017, March showed sales of \$4,153,416 that exceeded its requested peak month of April (\$3,786,482). It should be noted that it is not clear at which point a sale is recorded – when the sale is made, when the work is completed, or when the money is received. Therefore, the sales data does not include enough information to be a useful tool in determining a peakload need.

The employer again explained that its customers conduct the majority of their building during the warmer months which means demand for homebuilding follows a peak-load season from April 1 to December 15 with a decrease in demand from December 16 to March 31 due to colder weather and other western-related building constraints. The employer did not submit documentation to substantiate its stated reasons for the peakload need. The NOD suggested the employer could submit letters of support from building trade organizations in its area of intended employment; however, the employer did not provide any documentation to support its claims.

The employer included copies of its U.S. Corporate taxes and copies of its 2015 through 2016 quarterly federal tax returns; however, quarterly taxes represent the employer's entire organization including over 4000 employees and do not represent a particular occupation in a specific area of intended employment. Also, tax returns represent the annual income of the employer and offer no support for temporary need.

The employer submitted a list of its contracts and bid confirmations; however, the work locations and beginning and ending dates of need of the specific projects that would support its date of need were not

identified. The employer's contracts did not support specific dates detailing when the projects would begin or end.

The employer also attributed its peakload to a labor shortage caused by the 2008 recession where the employer's area of intended employment saw a huge loss in construction workers. However, a labor shortage, no matter how severe, does not alone justify that an employer's underlying need for workers is temporary and not permanent.

The employer's response did not include documentation to substantiate its statements as to the cause of its peakload need including its statement regarding a construction schedule in the employer's area of employment. Therefore, the employer did not overcome the deficiency.

(AF 18-19) (emphasis in original).

The CO also determined that Employer failed to establish temporary need for the number of workers requested. *Id.* at 19-21. The CO wrote:

In response to the NOD, the employer submitted a letter of explanation, payroll reports from 2014 to 2017 for Carpenters/Carpenter Helpers, 2015 and 2016 quarterly federal tax returns, 2014 through 2016 tax returns, contracts and work agreements, and letters of intent.

The employer was requested to, but did not[,] provide monthly summarized payroll reports from 2017 specific to the requested occupation. Instead, the employer submitted 2015 and 2016 payroll for both Carpenters and Carpenter Helpers. These documents do not provide an explanation . . . supporting the employer's specific need for 54 workers.

Therefore, the employer has not sufficiently demonstrated a peakload need for 54 Carpenter Helpers to supplement its permanent workforce during the dates requested.

The letters of intent generally stated that the peak months when the homebuilders will need seasonal labor to produce trusses are April 1, 2018 through December 15, 2018. However, the letters of intent do not explain the employer's specific need for 54 Carpenter Helpers. It is not clear how the employer determined a specific need for the 54 workers during the requested dates of need.

The employer's quarterly payroll taxes were not reviewed as they represent the employer's entire organization with over 4,000 employees and are not exclusive to the position of Carpenter Helper.

Therefore, the employer did not overcome the deficiency.

(AF 20-21).

On March 9, 2018, Employer requested administrative review of the CO's Final Determination/Non-Acceptance Denial. (AF 4). The case was docketed by the Board of Alien Labor Certification Appeals ("BALCA"), and I issued a *Notice of Docketing and Order Establishing Briefing Schedule* on March 20, 2018.

On March 29, 2018, Employer filed *Applicant's Brief on Appeal* ("E. Br."). Employer argues that "the CO failed to follow recent departmental guidance regarding the processing of renewal applications," and "the CO erred in her determination of the merits in virtually every critical respect." E. Br. at 1-2, 6-9. Employer also asserted that the evidence provided plainly established peakload need, and the CO's determination to the contrary was flawed. *Id.* at 9-14.

Standard of Review

BALCA's standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy & Ed. Inc.*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

Discussion

Employer is required to establish that its need for the workers requested is "temporary." Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

- (A) Definition. Temporary services or labor under the H-2B classifications 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.

(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. 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 peak load need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).

The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & 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). Need is considered temporary if justified as “a one-time occurrence[,] a seasonal need[,] a peakload need[,] or an intermittent need.” 20 C.F.R. § 655.6(b); *see also* 8 U.S.C. § 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Employer applied for temporary labor certification on a “peakload” basis. An employer establishes a “peakload need” if it shows it “regularly employs permanent workers to perform the services 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). Employer asserted that its peakload need is based on three factors: 1) projections and build schedules provided by customers; 2) general industry projections; and 3) the lack of available labor. (AF 28). Employer contends that the CO's failure to understand and review those documents, her misplaced reliance on weather patterns, and her failure to follow Department of Labor guidance all warrant overturning her denial. E. Br. at 1-2. I address these arguments in turn.

Department of Labor Guidance

In its appeal brief, Employer argues that the CO's decision is “starkly at odds with the Department of Labor's 2016 guidance regarding subsequent determinations of an employer's previously certified temporary need and the evidence necessary to support such a subsequent determination.” E. Br. at 4. Employer bases this argument on *ETA's Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating “Temporary Need”* (Sept. 1, 2016), available at https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf (last visited June 28, 2018) (“Guidance”). The Guidance provides:

To reduce paperwork and streamline the adjudication of temporary need, effectively [sic] immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B “Temporary Need Information,” Field 9 “Statement of Temporary Need” of the Form ETA-9142B. . . . Other documentation or evidence demonstrating temporary need is not required to be filed with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.

Employer argues that its application should have been certified based on the Guidance because it has a history of previously approved certifications, and has recurring peakload staffing needs. E. Br. at 7. Further, Employer argues that its application “explicitly noted that it was seeking ‘recertification’ to utilize ‘returning workers’” and its prior applications adequately explained its business and peakload need. *Id.* at 8. Employer argues that the CO’s failure to consider its history of applications, contrary to the Guidance, was arbitrary and capricious. *Id.*

The Guidance is a scion of 20 C.F.R. § 655.11(j), which reads:

In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the FEDERAL REGISTER a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.

(emphasis in original). While the Guidance may have been intended to serve as a stopgap until changes to the OFLC registration process were promulgated, it is clearly not a regulation. *See also Gordon Stone Co., LLC*, 2018-TLN-00083, slip op. at 5 (Apr. 16, 2018) (noting the Guidance’s non-regulatory status). Employer’s strict interpretation of the Guidance belies the Guidance’s non-regulatory nature.

Neither the Guidance nor the current regulations prohibit the CO from requesting additional information. On the contrary, the Guidance specifically provides:

If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued. The factors used by the CO to determine whether the employer’s need is temporary in nature are the requirements in 20 C.F.R. [§§] 655.6 and 655.11(d) and (e).

It is the quality, consistency, and probative value of the information provided on the Form ETA-9142B itself that will be determinative in the CO’s assessment of temporary need. The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer’s current need is temporary in nature. Likewise, inconsistencies between the employer’s

written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.

Once the CO issued the NOD in this case, the burden was on the Employer to produce responsive documentation. “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.” 20 C.F.R. § 655.32(a); *Saigon Rest.*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016).

Moreover, though applications should reasonably be reviewed within the context of previous certifications where the CO concluded that the basic requirements for certification were met in previous years, the Guidance and regulations do not allow a non-meritorious application to survive simply based on previous years’ approvals. *See Jose Uribe Concrete Constr.*, 2018-TLN-00044, slip op. at 14 (Feb. 2, 2018); *see also H & H Tile & Plaster of Austin, Ltd.*, 2018-TLN-00049 (Feb. 16, 2018). Thus, though the success of previous applications should be considered, that metric is not dispositive.

In reviewing this application and the appeal file, I find that no prior applications (or data therefrom) have been included in the record. *See generally* (AF 1-304). Employer provided a list of 2017 application numbers in its brief, but it did not provide any copies or specific information regarding those applications. Accordingly, I cannot make any determinations based on the previously filed applications. Even if I were able to consider Employer’s previously filed applications, the CO’s denial of certification would still be affirmed based on my findings below.

Letters, Projections, and Build Schedules of Customers

In support of its peakload need period of April 1, 2018 to December 15, 2018, Employer submitted five letters of intent from clients. (AF 35-39). Each letter contains identical language regarding peakload, which reads: “[t]he peak months that services are performed for our company by BMC West LLC are April 1, 2018 through December 15, 2018.” *E.g. id.* at 35. The letters also explain the nature of the work for which Employer will be contracted. *E.g. id.*

In addition to these letters, Employer submitted summaries of contracts for 2018 that it expected to provide nearly 550,000 hours of work for its clients in 2018. (AF 34). Employer stated it has 150 jobs within 48 projects every month during its peakload period of need. *Id.* at 28. Employer also provided a number of subcontractor pricing agreements, outlining the amount of work to be performed at numerous jobsites in Nevada. *Id.* at 44 – 217.

These additional documents are unhelpful for determining the peakload need for Carpenter Helpers. The pricing agreements and status of work at jobsites does not qualify what amount of Carpentry Helper work was performed (or was still to be performed). These documents showed only a general overview of work. From those documents, I cannot determine what work was required of Employer’s carpentry helpers, when. The agreements also lack firm ending dates (and most lack information on starting dates) for the work to be performed.⁷ At the

⁷ For example, Employer includes a number of change orders that are part of a larger Master Trade Contractor Agreement (“MTCA”) that became effective July 29, 2014. (AF 92). I do not understand how change orders made

very least, the agreements and work progress sheets already provided do not allow a lay person to divine the start and stop period for those contracts.

Accordingly, I find that these documents do not help Employer establish its peakload necessity.

Industry Data

Employer included citations to industry data showing construction work over time in Nevada and the Las Vegas area. *See* (AF 29-33). Employer stated in its response that the Las Vegas residential housing market has increased by 14% year to year, and in 2017, there was an increase of 1,000 homes compared to 2016. *Id.* at 28-29. Further, Employer provided data on net sales per subdivision, which shows there is a trend for higher home sales during the summer months than the winter months. *Id.* at 30-31. Data for new home permits also supports that trend. *Id.* at 31.⁸ Employer stated:

People tend to move during the summer months. Buyers like to be moved in before the new school year starts and before the holidays. Home buyers don't tend to move during the colder months due to the weather and the holidays.

Id. at 29.

Though these records clearly support the assertion that housing sales rise in the summer, they are unhelpful to Employer. As an initial matter, Employer relies on the sales of houses as a predictor of house construction demand. This is not made clear by the record. Even were housing sales a good predictor of demand, the exhibits in the record clearly establish that March is a critical month. In each example of home sales/subdivision traffic provided by Employer, March contains equal or higher values than April. *See* (AF 29-31).

Not only that, but Employer's sales per subdivision chart appears to show a massive jump in sales in January 2018, matching sales in February, March, April, June, July, and August 2017. *Id.* 30. This further implies that the period of April through December does not accurately represent a peakload period.

Simply put, upon review of all of the industry projections provided by Employer show March as a larger season than April. Employer does not explain this discrepancy in its brief or its response to the NOD. Accordingly, I find this evidence does not help Employer establish its peakload necessity.

Payroll Documents

Employer's payroll reports include the total hours worked and earnings received by

in April 2017 provide any input as to when Employer's work began or ended that year. On the contrary, the still effective MTCA suggests that Employer's work has been continuous and ongoing since July 29, 2014.

⁸ The CO noted that home permits may be valid for a significant period of time, and that they are not good indicators for when work began. AF 9. I lack sufficient information to determine the validity of this assertion.

“Carpenters/Carpenter Helpers” from 2016-2017. (AF 40-41). Those amounts are separated based on permanent workers and temporary workers. *Id.* I reproduce the temporary worker values below:

Temporary Employment 2017			
Month	Total Workers	Total Hours	Total Earnings
January	121	10,779.00	\$193,692.00
February	131	10,522.00	\$181,567.00
March	116	12,181.00	\$210,457.00
April	113	10,833.00	\$197,507.00
May	142	14,873.00	\$289,334.00
June	174	21,393.00	\$425,139.70
July	163	19,578.00	\$375,324.00
August	180	20,451.00	\$392,352.00
September	197	29,109.00	\$586,316.00
October	193	24,437.00	\$488,943.04
November	178	22,804.00	\$448,332.80
December	175	22,239.00	\$444,421.00

(AF 41).

The payroll records demonstrate that, in 2017, the busiest months for Employer were August through December, with a sharp drop in January. April is actually the month with the fewest workers and one of the lowest earnings. March, while having the second fewest workers, had significantly more hours and earnings than April, January, or February. These numbers suggest that Employer’s peakload season begins in May, and, at the very least, that March is a busier month for Employer than April.

The 2016 numbers are somewhat similar:

Temporary Employment 2016			
Month	Total Workers	Total Hours	Total Earnings
January	45	3,567.36	\$54,546.00
February	103	8,743.40	\$131,238.50
March	134	12,698.93	\$190,611.00
April	131	17,050.40	\$255,926.50
May	116	13,868.15	\$208,161.00
June	137	16,324.98	\$245,037.90
July	129	16,955.50	\$293,396.84
August	150	14,364.00	\$250,582.40
September	197	26,006.62	\$474,247.75
October	181	21,015.00	\$372,748.35
November	152	18,482.00	\$331,009.67
December	132	19,014.00	\$340,788.00

(AF 40). These numbers show a changed trend, with March being roughly equivalent to May in terms of total hours worked and total earnings gained (but with a number of workers equivalent to December, July, June, and April). March had more workers than either April or May.

The 2016 and 2017 trends actually undermine the notion that April is the start of the peakload need period. The numbers show a trend of high demand in late summer through fall, with variable demands from March through May. The payroll records are additionally flawed because they do not address Carpenter Helpers alone – it is unclear whether the additional temporary workers are Carpenter Helpers. This further muddies the water in regards to when peakload need for Carpenter Helpers actually occurs.⁹

Given the information contained in the payroll records, I find that they do not support Employer’s assertion of peakload need.

Moreover, the payment records fail to establish the need for the number of workers requested by Employer. Simply put, I cannot divorce the number of needed Carpenter Helpers from the number of Carpenters requested by Employer.

Tax Records

Employer included tax returns for 2014-2016, and quarterly tax returns for 2015 to 2016. (AF 218 – 275). The tax records demonstrate that the company as a whole has employed anywhere from approximately 4,400 to 6,500 employees during that time period. *Id.* at 252, 272. These tax records are for Employer’s entire national operations; they are not limited to the area at issue in this application. As the tax records focus solely on the national earnings of Employer, they provide no specific information that can be applied in this case. Accordingly, I give no weight to the tax records.¹⁰

Statements Regarding Weather

Employer asserts that “the CO’s rationale for rejecting BMC West’s applications rested on her evaluation of a single phrase: the favorable weather condition in the location of intended work.” E. Br. at 9.¹¹ The CO noted in her Non-Acceptance Denial that Employer had been asked to submit “an explanation as well as supporting documents” to substantiate its claim that it is “unable to engage in much business because of the cold climate.” (AF 18). The CO explained that “[t]he weather in the areas of intended employment shows that the monthly average low temperatures during its nonpeak period do not fall below freezing and the highs . . . are between 58 and 69 degrees [Fahrenheit].” *Id.*

⁹ Employer’s pay statements also suggest that in 2016 it had a baseline of 45 total temporary Carpenter/Carpenter Helpers and in 2017 it had a baseline of 113 temporary Carpenter/Carpenter Helpers. *Compare* AF 40 *with* AF 41.

¹⁰ In fact, were I to give weight to the tax records, they actually harm Employer. The tax records show that for quarters 1 and quarters 2 of 2015 and 2016, Employer had roughly the same amount of earnings, *See* (AF 220–75). This contradicts Employer’s assertion that the peakload need for its business begins in April.

¹¹ Employer’s argument seems to be focused on a separate application for workers in California. *See* E. Br. at 10.

Employer argues that the CO's subjective views regarding the weather "properly play no part in determining whether . . . an applicant has demonstrated the requisite "seasonal or short-term demand" for the Employer's services. E. Br. at 10 (*quoting* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3)). Employer makes a mountain out of a molehill.

As an initial matter, Employer's assertion that its application was denied solely due to weather issues is contradicted by the record. As I explain above, there are multiple, serious issues with Employer's evidence regarding its peakload need. *See* Discussion Parts I-V, *supra*. Accordingly, the CO's statement regarding the weather is moot – Employer's application was flawed for numerous, far more serious reasons, and the CO focuses on those issues in her denial.

Moreover, I fail to see how the CO's statement is improper. The CO noted, based on weather data, that the average temperature and weather conditions in the off peakload season did not appear uncondusive to construction. (AF 18). The CO asked for additional evidence to establish that the weather was a factor in determining the peakload season. This request is not unreasonable or improper. Employer raised the weather as a factor limiting the peakload need period; the CO may properly ask Employer to support that statement.

CONCLUSION

Upon review of the information in the record, I find that Employer has failed to provide sufficient information to establish peakload need. The evidence provided by Employer does not support Employer's attestation that its peakload need spans the period of April 1 through December 15, 2018. Moreover, Employer's evidence does not explain or support its alleged specific need for 54 workers. Accordingly, I find the CO's grounds for denial valid.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

For the Board:

LARRY S. MERCK
Administrative Law Judge