



**Issue Date: 10 July 2018**

**BALCA Case No.:** 2018-TLN-00096  
**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 applications<sup>1</sup> 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);<sup>2</sup> 20 C.F.R. § 655.6(b).<sup>3</sup> Employers seeking to use this program must apply for and

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<sup>1</sup> 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.

<sup>2</sup> 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 235).<sup>4</sup> On January 1, 2018, Employer filed its Form 9142 seeking sixteen full-time Plasterers<sup>5</sup> for the period of April 1, 2018 to December 31, 2018. *Id.* at 235, 241-44. Employer’s Statement of Temporary Need stated:

Our Company currently requires the services of laborers to perform manual labor such as applying coats of plaster onto interior/exterior walls, ceilings, or partitions of buildings. . . . the Riverside County[, California,] location has a temporary peak load need for persons with these skills because its busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to December 31st, during which time we need to substantially supplement the number of workers for our labor force for these positions. Our 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 part of our labor workforce. Due to the nature of our work we are unable to engage in much business during the winter months, of approximately December 31st to April 1st, because the cold and wet weather is not conducive to construction work. . . . The Riverside County location is engaged in home construction business as well as suppl[y]ing 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.

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<sup>3</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

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

<sup>5</sup> The standard occupational classification title was listed as “Plasterers and Stucco Masons,” SOC code 47-2161. (AF 243).

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

*Id.* at 235. 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 substantially.” *Id.*

On January 8, 2018, the CO issued a Notice of Deficiency (“NOD”), citing three deficiencies in Employer’s application. (AF 219-25). 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 222. 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 Riverside County, California, 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, January 1 through March 31. Further explanation and documentation is needed to support its peakload need.

*Id.*

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 *Plasterers and Stucco Masons*, 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 223) (emphasis and numbering in original).

Second, the CO found that the Employer's application 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 16 Plasterers and Stucco Masons for its worksite in Riverside County, California during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 16 Plasterers and Stucco Masons, 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 224) (emphasis and numbering in original).

Finally, the CO found that Employer had failed to submit an acceptable job order as required by 20 C.F.R. §§ 655.16 and 655.18. *Id.* The CO explained that Employer had to submit its job order to the “SWA serving the area of intended employment at the same time it submits its [Application] and a copy of the job order to the [Chicago National Processing Center].” *Id.* The CO noted that, though the Employer had submitted a copy of its job order with its Application, the job order referred applicants to “Planet Youth” instead of the nearest office of the SWA in the State in which the advertisement appeared. *Id.*

The CO requested that Employer “instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.” (AF 225). The CO required Employer to include in its response correct language that remedied this deficiency or an already-amended job order containing the required language. *Id.*

On January 19, 2018, Employer submitted its response to the NOD. (AF 35-218). Employer submitted documentation including a statement, payroll documents, contracts and contract summaries, and tax records. *Id.* at 35-218. Employer also included a corrected job order. *Id.* at 192-94.

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).<sup>6</sup> 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 66 and 72 degrees.

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<sup>6</sup> The CO did not raise the SWA issue as a ground for denial.

Further, the employer noted that its monthly sales reports were submitted but the CNPC was unable to locate this document in the NOD response. The employer said that the sales and payroll would show its demand starting on April 1 and remain strong through December. However, the payroll does not reflect this as [the] hours and number of temporary employees fluctuates throughout the requested period of 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 31 . . . . 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 include its payroll reports from 2016 and 2017. The employer's 2017 payroll reflects the use of foreign workers during its requested dates of need as the employer's previous case was certified, as well as a robust temporary workforce year-round. The 2016 payroll reports show a range of 40 to 46 temporary workers employed during the dates outside of the requested period of need, while the employer's 2017 payroll report reflects 31 to 47 workers outside the requested dates. It is unclear how the employer determined its peak-load need, as there is not only a staggered number of workers throughout the requested dates of need, but also a large number of both temporary and permanent employees year-round. Therefore, the payroll does not support a temporary need.

The employer also submitted master vendor agreements for home-builders K. Hovnanian Companies, Pardee Homes, Pulte Group, and Woodside Homes of California. These documents are simply general contracts that establish a relationship between the employer and the contractor where from time to time the employer performs vari[ous] construction related labor and services. These agreements are not specific to a project; and therefore, do not support specific dates when work will be performed.

The employer included copies of its U.S. Corporate taxes and copies of its 2015 through 2016 income tax return and 2015 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.

Furthermore the employer explained that its peakload is due to a labor shortage and the lack of temporary workers needed to accommodate its

business operations. 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).

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 2016 to 2017 for Plasterers-Stucco, tax returns from 2015 and 2016, supporting letters from BMC's marketing Sales Manager, Master Vendor Agreements and a contract summary.

The employer explained that it had over \$17,700,000 in contracted business for the Riverside, CA area and estimated it needs on plaster[er] for every \$60,000 in contracted business. Based on this noted calculation, the employer would need 295 plaster[er]s. The employer is requesting 16 workers. Therefore, it is unclear how the employer's calculations figured into its need for 16 temporary workers.

The employer's 2017 payroll shows that 16,585 hours were worked in its highest hours worked month of June. This number would equate to 104 full-time workers. The employer shows that it employed 111 workers during its nonpeak month of March. Therefore, the payroll did not support a need for additional workers. The employer has not sufficiently demonstrated a peakload need for 16 plasterers to supplement its permanent workforce during the dates requested.

The submitted contracts are not specific to a particular project and therefore, provide no support for the requested[]16 workers during the requested dates of need.

The employer's quarterly payroll taxes were submitted; however, they were not favorable as they represent the employer's entire organization with over 4,000 employees and are not exclusive to the position of a Plasterer.

Therefore, the employer did not overcome the deficiency.

(AF 20).

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 35). 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](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 1-248). 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.

### **Contracts and Contract Summary**

Employer submitted Master Vendor Agreements and a contract summary for 2018. (AF 39). These documents are unhelpful for determining the peakload need for Plasterers. These documents only provide general information – they do not specify the schedule by which jobs are to be performed, or how many jobs are to be performed by the various types of workers Employer employs. On the contrary, the contracts suggest that the builder will provide schedules of work to Employer as needed. *See, e.g.*, (AF 61) (noting that the Vendor and Employer’s representative would determine, later, the exact work schedules). Simply put, without more information (particularly schedules of work and number of jobs to be performed), I cannot determine what work was required of Employer’s Plasterers.

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

The contract data also undermines the number of workers requested by Employer. Employer states in its response to the NOD that “[w]e normally estimate a need for 1 plasterer and 1 plasterer helper for every \$60,000.00 in gross sales.” (AF 36). Employer also stated that it included \$17,700,000.00 in total contracts with its response. *Id.* Using Employer’s own metric, it would require 295 Plasterers. Employer does not explain how it reached the 16 Plasterer value.

### **Payroll Documents**

Employer’s payroll reports include the total hours worked and earnings received by “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 2016			
Month	Total Workers	Total Hours	Total Earnings
January	40	2,957.49	\$55,764.16
February	40	3,421.43	\$64,518.60
March	46	3,190.55	\$60,158.63
April	51	4,384.00	\$82,696.60
May	45	3,389.25	\$63,961.96
June	37	3,112.80	\$58,717.51
July	23	1,969.50	\$30,906.42
August	30	3,911.90	\$55,166.07
September	35	4,640.50	\$62,012.07
October	33	4,190.70	\$58,198.09
November	30	3,990.50	\$60,616.04
December	38	3,486.0	\$57,277.03

(AF 41).

The payroll records demonstrate that, in 2016, Employer’s busiest months were September, October, and April. However, February, March, May, June, and December had roughly equivalent work requirements, with Employer’s lowest work months being July and January. These numbers do not support Employer’s assertion that the peakload months are April through December. Rather, they demonstrate varied work requirements, with significant workload in January, February, and March, and a significant slowdown in June and July. Moreover, the employed number of workers varies wildly – Employer even employed more temporary employees in January through February than it did from July through December. Put simply, Employer’s 2016 payroll does not establish a peakload need from April through December. It almost suggests, contrarily, a peakload need from August through April/May.

The 2017 numbers show a totally different trend:

Temporary Employment 2017			
Month	Total Workers	Total Hours	Total Earnings
January	41	2,026.65	\$36,023.75
February	31	1,376.88	\$23,781.00
March	47	2,499.25	\$44,055.25
April	52	3,284.70	\$58,998.13
May	56	4,638.00	\$78,120.75
June	68	5,561.75	\$102,626.88
July	61	5,497.45	\$102,551.36
August	65	5,604.40	\$101,259.82
September	65	5,604.40	\$101,259.82

October	92	8,060.00	\$154,169.46
November	93	8,090.50	\$156,086.75
December	18	1,966.55	\$37,443.17

(AF 41). These numbers show a changed trend from 2016, with March having more earnings than December, January, and February, but less earnings and workers than the months of April through November. These numbers actually suggest a peakload need starting potentially in March or April, and extending through November. December is a huge drop-off in need for both workers and hours, and it actually shows the lowest number of temporary workers all year long. It is unclear how the 2017 numbers could possibly support a peakload need season from April through December, given the precipitous drop in workers, hours, and total earnings reflected from November to December. If December required an increase in workers due to peakload need, so, too, would January, February, and March.

The 2016 and 2017 trends undermine the notion that the peakload need is predictable - the numbers show variable demands from year to year. July and June go from some of the lowest demand months to the highest demand months in the period of a year. In any event, the payroll records do not support Employer's assertion that April marks the start of the peakload period and December marks its end.

The payroll records are also perplexing because they show baseline temporary worker amounts throughout the year. As the CO noted, employer's payroll reports show "a robust temporary workforce year-round." (AF 18). This constant temporary workforce, as well as Employer's concerted efforts to find new employees, suggest that Employer's temporary recruitment is a stopgap measure to solve a permanent labor shortage. *See id.* at 36 (noting the growth in housing that has "translate[d] into a lack of available labor" to meet rising housing demands). The H-2B program covers only *temporary* need. It provides no relief to Employers who have problems staffing permanent workers. Employer's consistent yearly temporary plasterer workforce suggests that, at least in part, Employer's need is not temporary.

Given this data, I find that Employer's pay records support neither its statement of peakload need nor its requested number of temporary workers.

### **Tax Records**

Employer included tax returns for 2015-2016, and quarterly tax returns for 2015. (AF 195-218). 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 195, 215. 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.<sup>7</sup>

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<sup>7</sup> 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, Employer had roughly the same amount of earnings. *See* (AF 195-200). This contradicts Employer's assertion that the peakload need for its business begins in April.

## 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. 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 66 and 72 degrees [Fahrenheit].” *Id.*

Employer argues that the CO’s subjective views regarding the weather “properly play no part in determining whether . . . an applicator 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)).

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-IV, *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. *Id.* at 17. This request was 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. If Employer believed the CO was wrong, the Employer should have properly supported its statement in its response, rather than waiting to attack the CO’s statement after denial.

## 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 31, 2018. Moreover, Employer’s evidence does not explain or support its alleged specific need for 16 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