



Issue Date: 10 July 2018

BALCA Case No.: 2018-TLN-00097
ETA Case No.: H-400-18001-930927

In the Matter of:

BMC WEST LLC,
Employer.

Appearance: Robert Kershaw, Esquire
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For the Employer

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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 377).⁴ On December 15, 2017, Employer filed its Form 9142 seeking 24 full-time Plaster Helpers⁵ for the period of April 1, 2018 to December 15, 2018. *Id.* at 377, 383-386. 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 31st, 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 31st to April 1st, because the cold and wet weather is not conducive to helping carpenters construct, erect, install, and repair structures. Also, construction in general slows down and need for laborers is substantially reduced.

Id. at 377. 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.*

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 – Painters, Paperhangers, Plasterers, Stucco Masons,” SOC code 47-3014. (AF 385).

On January 8, 2018, the CO issued a Notice of Deficiency (“NOD”), citing two deficiencies in Employer’s application. (AF 362-367). 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 365. 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 *Plaster 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 365-66) (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.* at 366. 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 24 Plaster Helpers for its worksite in Las Vegas, Nevada during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 24 Plaster 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 (Plaster 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 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 367) (emphasis and numbering in original).

On January 19, 2018, Employer submitted its response to the NOD. (AF 30-361). 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 30-35. Employer also submitted letters of intent from home builders (including statements regarding peakload need⁶), copies of agreements between

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).

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 36-361.

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 15-23). The CO determined that Employer did not submit sufficient information "to establish its requested standard of need or period of intended employment." (*Id.* at 17).

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.

The employer submitted a bid report that displays a total of 50 bids for home builders with start dates between January 1 and November 16, 2017. The report shows that work was started in every month of the year including its nonpeak months of January through March as well as projects starting as late as November. Therefore it is unclear from the report how the employer determined that it has a peakload need from April 1 through December 31.

The Employer included 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. . . . It is unclear how the employer determined its peakload 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. In fact, the employer's 2017 payroll showed its requested peakload months of April, May, July, August, and October all had less hours worked than its nonpeak months of February and/or March. Therefore the payroll does not support a temporary need during the employer's requested period of need, April 1, 2018 through December 15, 2018.

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 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 explained that construction in general slows down from December 31 to April 1 and the need for workers is substantially reduced. The employer did not submit documentation to substantiate a construction schedule in its area of intended employment. 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 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 employer submitted bid proposals and Master Vendor Agreements for homebuilders William Lyon Homes, Inc., Warmington Residential Nevada, Inc., Fore Construction LLC, Pardee Homes of Nevada, and KB Home. Except for the Linea project with Pardee Homes that noted work was to start on October 30, 2017 and two other undated emails simply confirming the awarding of contracts, these agreements are generally not specific to a project and do not indicate when work is to be performed. Therefore, the documents did not lend support for the employer's requested peakload dates of need.

The employer also submitted letters of intent which generally state that the peak months when the homebuilders will need seasonal labor for stucco jobs are April 1, 2018 through December 15, 2018. However, the reason(s) for this peak in need is not indicated in the letters; and therefore, it is not clear if the peak in service is tied directly to the availability of the workers or an actual peakload need for the employer's services.

The employer also included copies of its 2015 and 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.

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

Furthermore, the employer explained that,

In our continued efforts to find qualified Plasters and Plaster Helpers locally, BMC has placed several radio, newspaper, and online advertisements. The candidates that do respond to the advertisement usually don't show up for an interview. The candidates that are offered a job, in most cases don't show up to work. Therefore, BMC needs the H-2B program. Without these peakload workers it's difficult or impossible to complete commitments that we have made with our customers.

The employer's ongoing recruitment efforts point to a permanent need for workers. The employer is reminded that 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 regarding the causes of its peakload need including weather constraints and a construction schedule in the employer's area of employment. Therefore, the employer did not overcome the deficiency.

(AF 19-21).

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, bid report for January 1 through November 16, 2017, payroll reports from 2016 and 2017 for Plasterer Helpers, 2015 and 2016 quarterly federal tax returns, 2014 through 2016 U.S. tax returns, contracts and work agreements, and letters of intent.

The employer submitted a bid report that displays a total of 50 bids for home builders with start dates between January 1 and November 16, 2017. The report did not show the number of workers needed for each project. Therefore, it is unclear from the report how the employer determined its need for 24 Plasterer helpers from April 1 through December 31 [sic].

The employer included its payroll reports from 2016 and 2017. The employer's 2017 payroll reflects the use of past 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. Specifically, the 2016 payroll reports show a range of 27 to 39 temporary workers employed during the dates outside of the requested period of need, while the employer's 2017 payroll reports reflect 37 to 43 temporary 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. In fact, the employer's 2017 payroll showed its requested peakload months of April, May, July, August and October had less hours worked than its nonpeak months of February and/or March. Therefore, the payroll does not support a need for temporary workers during the employer's requested period of need, April 1, 2018 through December 15, 2018.

The employer submitted bid proposals and Master Vendor Agreements for homebuilders William Lyon Homes, Inc., Warmington Residential Nevada, Inc., Fore Construction LLC, Pardee Homes of Nevada, and KB Home. The documentation did not indicate the number of workers needed for the projects. Therefore, the documents were not used to support for the employer's request for 24 Plasterer Helpers.

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 31, 2018. However, the letters of intent do not explain the employer's specific need for 24 Plasterer Helpers.

The employer also included copies of its 2015 and 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 P19 --- occupation in a specific area of intended employment. Also, tax returns represent the annual income of the employer and offer no support for a temporary need for 24 Plasterer Helpers.

The employer explained that it normally estimates a need for one plasterer and one plasterer helper for every \$50,000 in gross sales and based on an anticipated \$31 million in total contracts, it figured its need for at least 24 Plasterer Helpers. However, based on the above figures, the employer's need would be for 620 workers. Thus, it is not clear if the employer's numbers and calculations are correct.

Therefore, the employer did not overcome the deficiency.

(AF 22-23).

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 30). 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.

I. 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 1-390). 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.

II. Letters of Intent, Agreements, and Bid Reports

In support of its peakload need period of April 1, 2018 to December 31, 2018, Employer submitted five letters of intent from clients. (AF 37-40). 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 a summary of bid reports, (AF 43), and a series of Mastor Vendor Agreements and bids for various home-builders, *id.* 44-332. Employer stated it has 150 jobs during its peakload period of need. *Id.* at 33.

The letters of intent are of little help. While they show that Employer's customers will require its services during those periods, they are limited to each company writing the letter,⁷ and do not address whether Employer is contracted by other vendors during other times.

The bid summary is also unhelpful. The summary provided by Employer shows multiple jobs beginning prior to April, with jobs starting in January, February, March, and November. *See* (AF 43) (listing approximate start dates). These staggered and varied start dates undermine Employer's argument that its peakload need for Plasterer Helpers extends from April through December.

The Master Vendor Agreements are also of little help to Employer. The agreements showed varied starting periods for stucco work, which do not align to Employer's asserted peakload need period. *See* (AF 44-332). Of these vendor agreements, only one contains an explicit schedule of work (outlined in the "Spring Mountain Base Line Project Schedule"). *See*

⁷ The language in the letters limits their scope to "services . . . performed *for our company*" by Employer. *See, e.g.* (AF 35) (emphasis added). While the companies can provide support for their own peakload needs, they are not dispositive of the industry's peakload need period.

id. at 228-39. That schedule shows significant construction (framing and sidewalk work) being performed during the off period. *See id.* at 231, 234.

Accordingly, I find that these documents do not help Employer establish its peakload necessity. That schedule shows significant building projects (such as framing and sidewalk creation) being performed from December through March. *See AF (230-31)*. The schedule for stucco and lath work only covers a period of late May through early August, which also runs counter to Employer's assertion of peakload demand from April through December. *See id.* 235-38.

On the whole, these documents hinder more than they help. This evidence undermines Employer's asserted peakload need period.

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 \$50,000.00 in gross sales." AF 34. Employer's average sales by month for 2017 show at least \$2,000,000 in sales each month. *Id.* This would suggest, at minimum, a requirement of 40 Plasterer Helpers throughout the year. Employer also states that it included \$31,000,000.00 in total contracts with its response. *Id.* Employer does not explain how it reached that valuation, but if it is implying it received \$31,000,000 in contracts for plaster work, Employer would need at least 620 Plasterer Helpers by its metric. In any event, these values do not match with the 24 requested. As such, the record casts doubt on the validity of Employer's statement that it needs 24 Plasterer Helpers.

III. Industry Data

Employer included citations to industry data showing construction work over time in Nevada and the Las Vegas area. *See (AF 31-35)*. 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 30-31. Further, Employer provided data on net sales per subdivision, which showed a trend for higher home sales during the summer months than the winter months. *Id.* at 31-32. Data for new home permits also supports that trend. *Id.* at 33⁸ 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 31.

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 correlation is not supported by the record. Even

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 knowledge of the legal specifics of new home permits, and the record does not address home permits in any detail.

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 31-33). Not only that, but Employer’s sales per subdivision chart appears to show a massive jump in sales in January 2018, matching sales in July, August, June, April, March, and February, 2017. *Id.* 32.

Employer also provides a chart of its own sales of stucco by month in 2017. *Id.* at 32. This chart, however, shows that April, February, June, and July were the lowest selling months. *Id.* As Employer recorded higher sales in January and March than it did in April, I fail to see how this data supports Employer’s assertion that its peakload need extends from April to December.

Simply put, upon review all of the industry projections provided by Employer show at least March as a busier 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.

IV. Payroll Documents

Employer’s payroll reports include the total hours worked and earnings received by Plasterer Helpers from 2016-2017. (AF 41-42). 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	37	3,982	\$71,679.75
February	43	4,463	\$78,342.00
March	39	5,184	\$91,631.12
April	35	3,720	\$65,171.76
May	36	3,931	\$66,961.23
June	43	6,035	\$100,912.36
July	64	7,314	\$127,533.36
August	64	7,434	\$131,179.16
September	71	11,186	\$204,081.46
October	60	9,266	\$172,769.48
November	63	9,872	\$187,065.45
December	81	12,265	\$236,772.90

(AF 42).

The payroll records demonstrate that April was the month with the fewest workers and lowest earnings in 2017. February and March have substantially more work than January, April, or even July. These numbers do not support Employer’s assertion that its peakload need spans April 15 through December 31. Rather, these values suggest the off-peak season for Employer is April through May.

The 2016 numbers show a different trend:

Temporary Employment 2016			
Month	Total Workers	Total Hours	Total Earnings
January	27	1727	\$29,342.00
February	27	1669	\$28,349.00
March	39	2530	\$42,988.25
April	43	4873	\$82,795.34
May	36	4436	\$73,674.75
June	50	5649	\$97,680.00
July	49	7490	\$123,407.38
August	48	6158	\$102,777.25
September	51	7695	\$132,367.01
October	54	5881	\$103,167.84
November	56	7175	\$120,767.59
December	41	5660	\$93,297.30

(AF 41). These numbers show a substantial increase in work from March to April. It is unclear why the opposite occurs merely a year later.

The difference between the 2016 and 2017 work hours suggest either that there is no trend in workload throughout the year (undermining any assertion of predictable peakload need), or that the trends shift overtime. The numbers show high demand in late summer through fall, with variable demands from January through May. In any event, the payroll records do not support Employer’s assertion that April is the definitive start of the peakload period.

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 22). 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 34 (explaining that Employer’s continued efforts to find qualified Plasterer Helpers typically fail, and that “[w]ithout these peak-load workers it’s difficult or impossible to complete commitments made to [its] customers.”). The H-2B program covers only *temporary* need. It provides no relief to Employers who have problems staffing permanent workers.

Given this data, I find that Employer’s pay records do not support its statement of peakload need. The off-peak periods for both years vary too greatly to establish any predictable pattern.

V. Tax Records

Employer included tax returns for 2014-2016, and quarterly tax returns for 2015 to 2016. (AF 333-61). 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 333, 53. 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.⁹

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 9.¹⁰ 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.* at 19.

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)).

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 19); *see also id.* at 234 (scheduling framing work throughout the winter months). 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 for their 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

⁹ 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, *Compare* (AF 333, 336) *with id.* at 345, 348. This contradicts Employer’s assertion that the peakload need for its business begins in April.

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

support Employer's attestation that its peakload need spans the period of April 1 through December 15, 2018; on the contrary, the evidence undermines that assertion. Moreover, Employer's evidence does not adequately support the specific need for 24 Plasterer Helpers. 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