



Issue Date: 17 July 2018

BALCA Case No.: 2018-TLN-00101
ETA Case No.: H-400-17341-207137

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 utilize this program must apply for

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).

and 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 engaged in the building materials and construction business. (AF 132).⁴ On January 1, 2018, Employer filed its Form 9142 seeking 10 full-time, peakload Assembler/Material Handlers⁵ (“Assemblers”) for the period of April 1, 2018 to December 14, 2018. (AF 92). Employer’s Statement of Temporary Need stated, in part:

Our company 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 14th, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas 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 peakload 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 14th to April 1st, because the cold and wet weather is not conducive to construction work. . . . [O]ur 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 companies do not purchase as much product during the winter months when they are not building as much.

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—Production Workers” SOC code 51-9198. (AF 92).

(AF 132).

On January 8, 2018, the CO issued a Notice of Deficiency (“NOD”), citing two deficiencies in Employer’s application. (AF 86-91). First, the CO determined that Employer did not provide sufficient information “to establish its requested standard of need or period of intended employment,” and cited 20 C.F.R. § 655.6(a)-(b). (AF 89). The CO wrote:

The employer explains that its peakload need is based on the construction industry 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 Texas, 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 unclear if the employer experiences a true peak in its business during its requested dates of need and if the employer experiences a lull in business during its nonpeak dates, December 15 through March 31. Further explanation and documentation is needed to support its peakload need.

(AF 89).

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

1. A statement describing the employer’s 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 *Assembler/Material Handlers*, 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.

(AF 90).

The CO also cited a second deficiency, finding that Employer failed to establish temporary need for the 10 Assemblers it requested on its application. *Id.* The CO cited the applicable regulations at 20 C.F.R. § 655.11(e)(3)-(4). To correct this deficiency, the CO directed Employer to submit the following:

1. An explanation with supporting documentation of why the employer is requesting 10 Assembler/Material Handlers for its worksite in Texas during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 10 Assembler/Material Handlers, 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 (Assembler/Material Handlers), 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.

(AF 91).

On January 19, 2018, Employer submitted its response to the NOD. (AF 31-85). Employer submitted documentation, including a letter of explanation, letters of intent, a 2016 and 2017 sales report, 2017 overtime payroll report, articles on real estate trends, tax returns, and letters from the Delaware Secretary of State.

On February 26, 2018, the CO issued a Non-Acceptance Denial denying Employer's application for temporary labor certification for Employer's failure to establish the job opportunity as temporary in nature and failure to establish temporary need for the number of workers requested. (AF 15-30). First, the CO determined that Employer did not submit sufficient information "to establish its requested standard of need or period of intended employment." (AF 17).

The CO wrote:

The employer states that its temporary need is based on projections and its customers [sic] build cycle, 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 construction 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 the claim.

The employer indicated 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 1st to December 14th with a decrease in demand from December 15th to March 31st due to colder weather and other weather-related building constraints. However, the employer did not provide any documentation to support its claim. Based on the Department's research, the weather in the area 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 56 and 69 degrees. Therefore, it remains unclear how weather in the employer's area of intended employment affects the construction market.

...

The employer explained that its peakload need cannot occur without the necessary workers to produce the trusses and building products and that its included reports are more of a reflection of available labor and not a true reflection of customer demand. The employer's statements point to a permanent need for its workers and that production could increase anytime of the year given the proper staffing. 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 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).

On March 9, 2018, Employer requested administrative review of the CO's Final Determination/Non-Acceptance Denial. (AF 2). 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* (hereinafter "Employer's Brief" or "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.

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. § 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).

In this case, 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 projections and build schedules provided by customers, general industry projections, and the lack of available labor. (AF 31). In its appeal brief, Employer argues that: (1) the CO's failure to follow Department of Labor guidance; (2) her failure to understand and review certain documents; and (3) her misplaced reliance on weather patterns, all warrant overturning the denial. E. Br. at 1-2. I address these arguments in turn.

I. Department of Labor Guidance

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 addresses 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.

While the Guidance may have been intended to serve as a stopgap until changes to the OFLC registration process were promulgated, it is 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). Moreover, 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 the 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, this 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 1-147). 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 nonetheless be affirmed based on my findings below.

II. Evaluation of Employer’s Supporting Documents

To support its requested peakload need period of April 1, 2018 to December 14, 2018, Employer provided documentation, including a letter of explanation, letters of intent, 2016 and 2017 sales reports, 2017 overtime payroll report, articles on real estate trends, and tax returns. (AF 31-85).

*a. Letters Submitted as Supporting Documents*⁶

Employer provided a letter with an updated explanation of its temporary need. (AF 31-37). Employer’s letter suggests that its increased production in 2016 and 2017 at its Austin location proves that a peakload need exists in the nearby region. *See* (AF 34). Employer asserts that the Frisco “sales summaries do not demonstrate our peak-season” because the “peak load cannot occur without the necessary workers to produce the [products].” *Id.* The CO concluded that Employer’s explanation “point to a permanent need for [increasing] its workers and that production could increase anytime of the year given the proper staffing.” (AF 9). Further, I note that Employer conceded that its Frisco sales reports “are more a reflection of available labor and are not a true reflection of customer demand.” (AF 34). Accordingly, I agree with the CO’s conclusion and I find that Employer’s explanatory letter fails to support a finding of temporary peakload need, as asserted by Employer.

In lieu of submitting contracts, Employer submitted three letters of intent to support its

⁶ I do not address the contents of the letters from the Delaware Secretary of State because they show that “BMC West LLC” was previously organized as “BMC West Corporation,” rather than supporting Employer’s application on the merits. *See* (AF 82-85).

peakload need period of April 1, 2018 to December, 2018. (AF 43-45). Each letter contains similar language regarding peakload, which states: “[m]ost of our need for trusses will be for homes built during the peak building months of April 1st, 2018 through December 14th, 2018.” *See, e.g.*, (AF 43). The letters do not explain the reason for the asserted peakload need.⁷ *Id.* Thus, the letters of intent fail to clarify whether the “peak in service is tied directly to the availability of the workers or an actual peakload need for the employer’s services.” (AF 10). Accordingly, I find that the letters of intent do not help Employer establish its temporary peakload need or a need for the number of workers requested.

b. Sales Reports

The Employer submitted sales reports, showing the monthly sales for BMC West LLC during 2016 and 2017. (AF 38-41). As an initial matter, I note that the sales reports do not specify whether the data is specific to the Frisco location, or based on a wider geographic area covered by BMC West LLC. The 2016 sales chart shows that the nonpeak months of February and March reported the highest sales of 2016. (AF 40-41). The 2017 sales chart shows that the nonpeak months of January and March reported higher sales than the peakload months of November and December. (AF 38-39). Moreover, the CO 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.” (AF 10). Accordingly, I find that the sales charts do not include enough information to support Employer’s asserted dates of temporary need or a need for the number of workers requested.⁸

c. Payroll Report

Employer submitted an overtime payroll report of the overtime hours worked during 2017. (AF 42). As with the sales reports, I note that the payroll report does not specify whether the report is specific to the Frisco location, or based on a wider geographic area included within BMC West LLC. The overtime payroll reports also does not specify which category of workers were included in the report, nor does it distinguish between temporary and permanent workers. Accordingly, I find that the overtime payroll report does not include sufficient information to support Employer’s asserted dates of temporary need or a need for the number of workers requested.

d. Articles on Real Estate Trends

Employer submitted articles on real estate trends. (AF 46-57). The CO found that the articles “do not point to a peakload in new home construction or in the employer’s business in its area of intended employment.” (AF 10). Instead, the CO found that “the articles point to an overall labor shortage” in the expanding home building market. *Id.* The presence of a labor

⁷ The letter from Newport Classic Homes (N-3 Luxury Living) stated that due to “unpredictable circumstances,” some projects originally planned for 2017 will be completed in 2018 instead, but the letter did not explain reasons for the asserted peakseason of April 1st through December 14th. (AF 45)

⁸ Even if the sales reports included sufficient information on which to make a finding, I would find that the monthly fluctuation in sales numbers fail to establish a peakload need.

shortage, however, does not support a finding that Employer's need is temporary in nature. Rather, Employer bears the burden to establish that it "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). Accordingly, I find that the articles on real estate trends and the housing market do not help establish Employer's peakload need.

e. Tax Returns

Employer included tax returns from 2015 and 2016. (AF 58-81). 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 support of Employer's application in this case. Accordingly, I give no weight to the tax records.

f. Employer's Supporting Documents Fail to Establish Temporary Need

For the reasons explained above, I find that Employer has failed to provide sufficient information to establish peakload need. The evidence submitted by Employer does not support Employer's attestation that due to seasonal winter weather conditions its peakload need spans the period of April 1 through December 14, 2018. Moreover, Employer's evidence does not explain or support its alleged need for 10 Assemblers. Accordingly, I find the CO's grounds for denial were properly supported by the record.

III. Statements Regarding the Weather

In Employer's Brief, 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 the cold and wet weather is not conducive to construction work." (AF 9). The CO explained that "the monthly average low temperatures during its nonpeak period do not fall below freezing and the highs in the nonpeak period are between 56 and 69 degrees." *Id.*

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 employer's services." E. Br. At 10 (*quoting* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3)).

Employer's assertion that its application was improperly denied solely due to weather issues is contradicted by the record. As explained above, Employer's evidence failed to establish that the job opportunity is temporary in nature. Accordingly, the CO's statement regarding the weather is moot – Employer's application was flawed for numerous evidentiary 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 9). 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 and, here, Employer failed to do so.

CONCLUSION

For the reasons discussed above, I find that the Employer has not met its burden of showing that its employment need is temporary in nature based on peakload need or that it needs the number of workers requested. Further, I find the CO's determination was neither arbitrary nor capricious. Accordingly, I find that the denial of Employer's H-2B certification is affirmed.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of the Employer's *Application for Temporary Employment Certification* is **AFFIRMED**.

For the Board:

LARRY S. MERCK
Administrative Law Judge