



Issue Date: 08 February 2018

BALCA Case No.: 2018-TLN-00053
ETA Case Nos.: H-400-17322-027273

In the Matter of:

CODY BUILDERS SUPPLY,

Employer.

Appearances: Kevin Lashus, Esquire
Fisher Broyles, LLP
Austin, Texas
For the Employer

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

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from Cody Builders Supply’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application 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 nonagricultural 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);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Division B (2018).

program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

In this case, the CO issued a Final Determination on December 25, 2017, denying Employer’s application for temporary alien labor certification. Employer timely filed a request for review on January 9, 2018.

BACKGROUND

On November 18, 2017, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 36-132.³ The application requested H-2B temporary labor certification for 15 Helpers – Production Workers. *Id.* The “Statement of Temporary Need” on Employer’s application stated:

Cody Builders Supply, headquartered in Austin, is a structural and miscellaneous metals fabricator established in 1994 by a team of veteran steel fabricators with an extensive scope of construction, management and production experience throughout the industry. Since its inception, Cody Builders Supply has expanded steadily, garnering additional expertise in a wide variety of infrastructure, water and waste-water, and transportation projects. We have a peak load need for temporary foreign workers beginning February 5, 2018 and culminating in a slow-down November 5, 2018 related to the slow down in manufacturing orders by our customers during the late fall early winter each year as evidenced by the attached payroll summaries for temporary production helpers.

AF 36.

The payroll summaries attached to the application showed the following:⁴

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

³ References to the appeal file will be abbreviated as “AF” followed by the page number.

⁴ The payroll summaries showed, for each month from January 2015 through June 2017, the number of workers, hours worked, and earnings received for permanent employees, and the number of workers, hours worked, and earnings received for temporary workers. AF 53-54. The total number of workers and total numbers of hours worked in the table reflect my own addition of the numbers for permanent and temporary workers. The “hours worked” are rounded to the nearest full hour.

Month & Year	Number of Permanent Workers	Hours Worked	Number of Temporary Workers	Hours Worked	Total Number of Workers	Total Number of Hours Worked
Jan. 2015	5	840	8	970	13	1810
Feb. 2015	5	840	9	1303	14	2143
Mar. 2015	5	840	9	1418	14	2258
Apr. 2015	5	1260	11	2551	16	3811
May 2015	5	840	11	1404	16	2244
June 2015	5	840	14	1583	19	2423
July 2015	5	840	9	367	14	1207
Aug. 2015	5	840	11	1254	16	2094
Sept. 2015	5	840	10	1436	15	2276
Oct. 2015	5	1260	18	3160	23	4420
Nov. 2015	5	840	18	2064	23	3104
Dec. 2015	5	840	13	1748	18	2588
Jan. 2016	7	1176	10	1434	17	2610
Feb. 2016	7	1176	12	1694	19	2870
Mar. 2016	7	1764	19	3356	26	5120
Apr. 2016	7	1176	15	2062	22	3238
May 2016	7	1176	14	1603	21	2779
June 2016	7	1176	19	2119	26	3295
July 2016	7	1176	16	1621	23	2797
Aug. 2016	7	1176	17	2262	24	3438

Sept. 2016	7	1764	19	3715	26	5479
Oct. 2016	7	1176	19	2771	26	3947
Nov. 2016	7	1176	16	2613	23	3789
Dec. 2016	7	1176	19	1962	26	3138
Jan. 2017	8	1344	17	2266	25	3610
Feb. 2017	8	1344	17	2642	25	3986
Mar. 2017	8	2016	14	2595	22	4611
Apr. 2017	8	1344	11	1467	19	2811
May 2017	8	1344	13	1791	21	3135
June 2017	8	1344	9	1068	17	2412

AF 53-54.

On November 29, 2017, the CO issued a Notice of Deficiency (“NOD”) informing Employer that its application failed to meet the criteria for acceptance. AF 28-35. The NOD provided the “specific reason(s) why the application cannot be accepted for consideration, with citations to the relevant regulatory standards, and the modifications required for acceptance of the application and/or job order.” AF 28. It detailed three deficiencies in Employer’s application: (1) Failure to establish the job opportunity as temporary in nature; (2) Failure to establish temporary need for the number of workers requested; and (3) Failure to submit an acceptable job order.⁵ AF 31-35.

For Deficiency 1, failure to establish the job opportunity as temporary in nature, the CO cited 20 C.F.R. 655.6(a) and (b) and stated that “[t]he employer did not sufficiently demonstrate the requested standard of temporary need.” AF 31. The CO pointed to Section B, Item 9 of the application, where Employer asserted it has “a peak load need for temporary foreign workers beginning February 5, 2018 and culminating in a slow-down November 5, 2018 related to the slow down in manufacturing orders by our customers during the late fall early winter each year as evidenced by the attached payroll summaries for temporary production helpers.” *Id.* The CO found that this explanation “did not sufficiently demonstrate how [Employer’s] need meets the regulatory standard” of peakload need. Specifically, Employer did not explain “what events cause the employer’s peak in production from February 5 to November 5, and the specific reasons why the employer will not need the services or labor from November 6 through February 4.” *Id.* The CO also stated: “Furthermore, the employer’s submitted payroll shows 10 to 19

⁵ In an apparent typographical error, both the second and third deficiencies are numbered as “Deficiency 2.”

temporary workers employed year-round. Therefore, it is not clear if the employer has a temporary or a permanent need for its workers.” *Id.*

To address Deficiency 1, the NOD directed Employer to submit an updated temporary need statement containing the following:

1. A description of the employer’s business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need. The employer must explain the causes of its peak in production and why the employer’s manufacturing orders by its customers slow down during its nonpeak period of November 6 through February 4; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

AF 32. The NOD stated: “The Statement of Temporary Need MUST begin in the space provided in Section B., Item 9. of the ETA Form 9142. If necessary, the employer may add an attachment to continue the description.” *Id.* The NOD further directed Employer to submit “supporting evidence and documentation that justifies the chosen standard of temporary need.” *Id.* The NOD stated that the supporting documentation “must include,” but was not limited to: “Monthly sales summaries for each month in 2015 and 2016,” and “Other evidence and documentation that similarly serves to justify the standard of need and dates of need being requested for certification.” *Id.*

For Deficiency 2, failure to establish temporary need for the number of workers requested, the CO cited 20 CFR 655.11(e)(3) and (4) and stated that “[t]he employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” AF 32. The CO found that Employer “did not include adequate attestations to justify the need for 15 Helpers – Production Workers during the period of February 5, 2018 through November 5, 2018.” *Id.* The CO further found: “The employer’s submitted payroll shows the employment of 10 to 19 temporary workers” every month of the year, making it “unclear if the employer has a true need for 15 workers from February 5, 2018 through November 5, 2018.” AF 33.

To address Deficiency 2, the CO required Employer to submit an application with “attestations regarding temporary need in the appropriate sections,” which “must include a detailed statement of temporary need containing an explanation as to how the employer determined the number of workers requested for certification.” *Id.* Further, Employer was directed to submit “supporting evidence and documentation that justifies the chosen standard of temporary need,” including “[m]onthly sales summaries for each month in 2015 and 2016” and “[o]ther evidence and documentation that similarly serves to justify the employer’s need for 15 Helpers – Production Workers.” *Id.*

For the third deficiency, failure to submit an acceptable job order, the CO stated that the “Texas SWA has confirmed that the employer has not placed a job order for the requested position,” and directed Employer to submit a job order with the required information to the appropriate SWA. AF 33-35.

Employer filed a timely response to the NOD on December 13, 2017. AF 23-27. Employer’s response included a transmittal email from Employer’s counsel; a two-page letter from Employer’s president; and the same draft job order submitted with the original application. The transmittal email from Employer’s counsel states that the company’s letter explains “why they see a significant slow-down of activity from Thanksgiving through the middle of January,” and that “Cody needs the workers to supplement the active workforce. It won’t need supplemental workers during November through January.” AF 23. The letter of explanation from Employer’s president, dated December 13, 2017, stated that Employer would “further explain the slow down in business and labor needs from late November through January.” AF 24. Employer explained that it exclusively services the public works industry, and it is common for its customers to be under-manned over the holiday season. *Id.* For that reason, Employer shuts down operations for the two weeks encompassing the Christmas and New Year’s holidays, and maintains a “skeleton crew” during this time. *Id.* Employer stated that this policy is popular with its employees and “corresponds with our slow periods.” *Id.* Employer also stated that there is a “natural reduction in the desirability of overtime” from Thanksgiving through the last week before the shutdown. *Id.* Employer explained that finding new hires in the fourth quarter is difficult, since the new employee would almost immediately have a two-week period of no wages due to the shutdown. *Id.* Employer also stated that after the two-week shutdown, the “ramp up of operations is generally slow,” as business in the prior months is more sporadic. *Id.* Employer also stated that some workers do not return after the break, especially production helpers, and “[r]e-hiring for this position in January is always a considerable challenge.” AF 24-25. “That is why we are seeking seasonal workers to arrive in January and supplement our permanent workforce through mid-November.” AF 25.

On December 25, 2017, the CO issued a Non Acceptance Denial (“Denial”) of Employer’s application. AF 10-22. The Denial was based on two deficiencies: (1) failure to establish the job opportunity as temporary in nature, and (2) failure to establish temporary need for the number of workers requested. AF 12-16. Deficiency 3, related to the job order, was not cited as a basis for the Denial, and will not be discussed further.

Regarding Deficiency 1, the CO found that Employer “did not sufficiently demonstrate the requested standard of temporary need.” AF 12. “The employer did not sufficiently demonstrate how its need meets the regulatory standard. The employer has not explained what events cause the peakload need and the specific period of time in which the employer will not need the services or labor.” AF 13. Regarding Employer’s response to the NOD, the CO found:

The employer indicated that its customers, project worksites, suppliers and subcontractors are understaffed during the holiday season, which complicates the employer’s operations. However, the employer did not explain how the indicated holiday season explains the three month period the employer indicates is its non-

peakload period. Further, the employer did not provide any documentation to support its statements.

AF 14. The CO further found:

Additionally, the employer indicated it shuts down for a two week period encompassing the Christmas and New Year holidays each year. However, the employer did not explain how the two week shutdown results in the determination that temporary workers are not needed during the three month non-peak period, November 5 to February 5.

Id. Regarding the documents and explanation requested in the NOD, the CO found:

The employer did not adequately explain its business history and activities (i.e. primary products or services) and schedule of operations through the year. Further, the employer did not submit the requested monthly sales summaries for each month in 2015 and 2016 or any other evidence and documentation.

Id. For these reasons, the CO found that Employer did not show that it “meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need,” and did not overcome Deficiency 1. *Id.*

Regarding Deficiency 2, the CO found that Employer had not established temporary need for the number of workers requested. AF 15. The CO stated: “The employer did not include adequate attestations to justify the need for 15 Helpers – Production Workers during the period of February 5, 2018 through November 5, 2018.” *Id.* Further, “[t]he employer’s submitted payroll shows the employment of 10 to 19 temporary workers used every month of the year; therefore, it is unclear if the employer has a true need for 15 workers from February 5, 2018 through November 5, 2018.” *Id.* Regarding the documents and explanation requested in the NOD, the CO found that Employer’s response letter “does not address this deficiency and did not explain how the employer determined its need for 15 Helpers – Production Workers.” *Id.* “Further, the employer did not submit the requested monthly sales summaries for each month in 2015 and 2016 or any other evidence and documentation.” *Id.* For these reasons, the CO found that Deficiency 2 was not overcome. AF 16.

Because Employer failed to provide an explanation and documentation sufficient to overcome the deficiencies, the application for temporary employment certification was denied. AF 16.

Employer timely filed an appeal of the CO’s Denial on January 9, 2018. AF 1. I granted the parties’ joint request for an extension of time in which to file briefs in this matter, and Employer timely filed its brief on February 5, 2018. Employer argued that its payroll data confirms that it “experience[s] strong peaks ... over the months requested,” and that the additional demand has forced it to supplement its “small permanent workforce” by “hiring substantial numbers of temporary helpers.” Employer asserted that its temporary and total workforce headcounts “bottom out” in the winter months and that the total hours worked “rise

sharply from February through October.” Thus, it argued that it demonstrated a peak load need. Employer argued it substantiated the number of workers requested through Employer’s attestations and its evidence “that Cody has regularly employed more than 15 temporary workers.” Also on February 5, 2018, the CO filed a Notice that it would not file a brief, and asked that the denial of certification be affirmed for the reasons set forth in the CO’s final determination.

LEGAL STANDARD

BALCA’s scope of review is limited to the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may only contain legal argument and such evidence actually submitted to the CO. 20 C.F.R. § 655.61. The employer bears the burden of proof concerning its entitlement to a certification. 8 U.S.C. § 1361; *Cajun Contractors*, 2011-TLN-00004 (Jan. 10, 2011); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017).

DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. *See* 8 U.S.C. §1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. Temporary service or labor “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.” 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer needs a worker for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer must establish that its need for temporary services or labor “will end in the near, definable future.” *Id.*

The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient).

To qualify as a peak load need, the employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (ALJ Feb. 5, 2014); *D & R Supply*, 2013-TLN-

00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peak load, temporary need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer's documentation revealed that the employer's alleged "peakload" need spanned at least a 19-month period); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need).

The employer must demonstrate a bona fide need for the number of workers requested. *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); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application).

Here, Employer requested certification for 15 temporary production helpers, alleging a peak load period from February 5, 2018, through November 5, 2018. The documentation submitted by Employer fails to establish this peak period. Employer did not submit the documentation requested by the CO in the Notice of Deficiency. The CO directed Employer to submit an updated Statement of Temporary Need (Section B, Item 9, of Form ETA-9142B) containing three specific items (one of which included a schedule of operations), as well as monthly sales summaries for each month in 2015 and 2016, and any other relevant documentation. Employer did not submit an amended Statement of Temporary Need, a schedule of operations, or the monthly sales summaries. It submitted only the short letter from its president, explaining the reduced requests for overtime starting around Thanksgiving, its two-week shutdown for the holidays at the end of December, and a slow "ramp up of operations" when it reopens in January. This slow-down in operations over the holidays does not establish that the rest of the year is a peak period. *See 3-G Construction Company, Inc.*, 2018-TLN-00048 (Jan. 31, 2018) (comparing the employer's three-month slow period to a school calendar and finding it does not establish a peak period).

Moreover, the payroll summaries submitted with Employer's application belie its claim that its need for labor is decreased in November, December, and January. The payroll summaries begin with January 2015. For each month of the 2015 holiday season (November 2015 through January 2016), the total numbers of hours worked by production helpers for Employer exceeded that of each month in May through September 2015. In fact, for all of 2015, only the months of April and October had a higher total number of hours worked than November 2015, December 2015, and January 2016.

Similarly, for the 2016 holiday season, the total numbers of hours worked by production helpers for Employer in November 2016 (3789 hours), December 2016 (3138 hours), and January 2017 (3610), was comparable to or exceeded the numbers of hours worked for six other months in 2016,⁶ with March, September, and October as the exceptions.⁷ Looking forward to

⁶ Specifically, production helpers worked a total of 2870 hours in February 2016; 3238 hours in April 2016; 2779 hours in May 2016; 3295 hours in June 2016; 2797 hours in July 2016; and 3438 hours in August 2016.

2017, the total numbers of hours worked by production helpers during the 2016 holiday season also exceeded the total numbers of hours worked in April through June, 2017.

Focusing on the total number of production helpers employed, rather than the total numbers of hours worked, yields a similar result. Employer employed a total of 23 helpers in November 2015, 18 in December 2015, and 17 in January 2016. With the exceptions of October and June 2015, it employed 16 or fewer production helpers the rest of the year. Likewise, the total number of production helpers employed in the 2016 holiday season (November 2016 – January 2017) was comparable to or exceeded the total number employed throughout 2016.

Thus, employer's payroll summaries do not demonstrate a peak period from February 5 through November 5. As noted above, Employer did not submit the additional documentation requested in the Notice of Deficiency. The Board has consistently affirmed denials of certification applications where an employer's own records belie its claimed peak load periods of need. *See, e.g., Erickson Construction*, 2016-TLN-0050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011). The record does not show that the CO's denial of certification for failure to show a temporary peak load need was improper.

Employer also did not demonstrate a true need for 15 temporary workers. Its payroll summaries show that it consistently employed at least 13 production helpers throughout 2015 (of which only 5 were permanent employees), at least 17 production helpers throughout 2016 (of which only 7 were permanent employees), and at least 17 production helpers in 2017 (of which only 8 were permanent employees). There were a minimum of 8-10 temporary production helpers employed at all times throughout 2015-2017, and there were more temporary production helpers than permanent production helpers for every month in the 30-month period covered by the payroll summaries. Thus, the records show that Employer consistently uses temporary workers year-round. Rather than show a temporary need for 15 additional workers, this indicates that Employer requires some number of additional permanent staff to account for its minimum need throughout the year. Employer cannot use a temporary peak load request to augment its staff up to its year-round baseline need.

Additionally, Employer did not explain, either in its initial application or in the response letter, how it determined its need for 15 workers. Employer did not submit any evidence explaining, based on its predicted workload or past experience, why the peak load period would require more or less workers than the periods represented on the payroll records (where the number of temporary workers varied).

Thus, the record does not show that the CO's denial of certification for failure to establish a temporary need for the number of workers requested was improper.

⁷ Employer's payroll records appear to show peak periods in March-April and September-October, but those distinct periods are far shorter than the nine-month period Employer has claimed in its application.

The employer bears the burden of demonstrating eligibility for the H-2B program. As discussed above, Employer failed to sufficiently demonstrate how its request for temporary labor certification meets the regulatory criteria for a peak load, temporary need for 15 Helpers – Production Workers. Therefore, after reviewing the record in this matter, I find that the CO’s denial of certification should not be disturbed.

For these reasons, the CO’s denial of labor certification is AFFIRMED.

SO ORDERED.

For the Board:

MONICA MARKLEY
Administrative Law Judge

MM/MS/jcb
Newport News, VA