



**Issue Date: 26 October 2017**

BALCA CASE NO.: 2018-TLN-00002

ETA CASE NO.: H-400-17199-454698

*In the Matter of:*

DESERT RUNNER TRANSPORTATION, INC.,  
Employer.

### **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This matter arises under the labor certification process for temporary non-agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart A.<sup>1</sup> 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 Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

On September 14, 2017, the Certifying Officer (“CO”) for the Office of Foreign Labor Certification denied the H-2B Application for Temporary Employment Certification of Desert Runner Transportation Inc. (“Employer”) because Employer failed to establish that the job opportunity was temporary in nature in violation of 20 C.F.R. § 655.6(a) and (b), and failed to establish temporary need for the number of workers requested per 20 C.F.R. § 655.11(e)(3) and (4). On September 27, 2017, Employer timely requested administrative review of the CO’s denial of certification. The Appeal File (“AF”) was provided on October 12, 2017, and the CO and Employer were given 7 business days to submit appellate briefs. *See* 20 C.F.R. § 655.61(c). On October 12, 2017, the U.S. Department of Labor, Office of the Solicitor, on behalf of the CO, filed a notice stating that it would not file a brief in this matter but requested that the denial be affirmed for the reasons set out in the CO’s final determination letter dated September 14, 2017. Employer timely filed a brief on October 23, 2017 (“Employer’s Brief”).

This proceeding is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to § 655.61(a).<sup>2</sup> As explained below, this Decision and Order affirms the denial of certification and denies Employer’s request for relief.

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<sup>1</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule amending the regulations at 20 C.F.R. Part 655, Subpart A. *See* 80 Fed. Reg. 24042, 24109 (Apr. 29, 2015) (“2015 IFR”). The H-2B program currently operates under the 2015 IFR.

<sup>2</sup> The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61(d).

## Background

Employer is a trucking company located in Santa Cruz County, Arizona, that employs truckers year round and transports produce grown in Mexico into Santa Cruz County. AF at 230, 240. On July 18, 2017, Employer filed an H-2B Application for Temporary Employment Certification (“Application”) seeking certification to hire 15 Truck Drivers from October 2, 2017, through July 2, 2018. AF at 230-272. In the Application, Employer stated it has an increased need for drivers to deliver produce during this time and listed the seasons for various produce:

[T]he season for cucumbers and peppers generally grow [sic] from October through June; eggplants and melons generally grow from October through July; grapes generally grow from April through July; limes generally grow from December through May; avocados and tomatoes generally grow from December through June.

AF at 230. Employer supported this statement with a chart showing an increase of produce for the months of October through June and a decrease in produce for the months July through September, as well as a report from the Fresh Produce Association of the Americas entitled “Four Seasons of Mexican Produce.” AF at 248-259. Employer also noted that according to the U.S. Department of Transportation, truck crossings from Mexico to Nogales, Arizona increase between October and June in comparison to the months of July through September. AF at 240. Employer stated:

The truck crossings seen in these statistics include all trucks, moving both perishable and non-perishable goods. Although many goods are transported year around, due to the produce, or fruits and vegetable season, having peak and non-peak seasons in Santa Cruz County, AZ and Nogales, AZ in particular, the Petitioning Company, which specializes in moving produce from Mexico, has an increase of need for truckers during the October through June peak season every year.

AF at 241. Employer contended that due to this “peak need,” it needs more drivers from the beginning of October through the beginning of July, and provided an affidavit signed by its Vice President that it had a “seasonal increase of need for truckers to deliver produce” during the requested period.<sup>3</sup> AF at 230, 242. Therefore, Employer requested certification of its Application “based on its geographic location, nature of its business, and documentary evidence....” AF at 241.

On July 26, 2017, the CO sent Employer a Notice of Deficiency (“NOD”), indicating that Employer had: 1) failed to establish the job opportunity as temporary in nature in violation of 20 C.F.R. § 655.6(a) and (b); 2) failed to establish that its need for 15 workers was justified in violation of 20 C.F.R. § 655.11(e)(3) and (4); 3) failed to submit an acceptable job order; and 4) failed to submit a complete and accurate Application. AF at 220-229. Only the first two deficiencies are at issue on appeal.

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<sup>3</sup> In Section B.8 of the Application, Employer also checked “peakload” as the nature of the temporary need, and in the statement of temporary need, Employer’s attorney explicitly stated Employer was attempting to establish a peakload need. AF at 230, 241.

Regarding the first deficiency, the CO noted that although Employer detailed which produce is in season during the requested dates of need, it “did not explain nor document how that translates to there being a peakload need for the employer.” AF at 223. The CO stated that the documentation provided by Employer “show[ed] that a lot of produce is being harvested outside of employer’s peak season and that the industry has striven to and continues to strive to extend growing seasons” which, according to the CO, “calls into question whether the employer has a true peakload period, as it appears the employer has plenty of opportunity for work during the rest of the year and has not shown a measurable slowdown outside of the season.” AF at 223-224. The CO also noted that Employer’s documentation showing an increase in truck crossings from Mexico to Nogales, Arizona during October through June represented all trucks industry-wide, not data specific to Employer. AF at 224. Because the information was “industry-wide in the area of intended employment,” the CO could not determine “as to whether the employer *itself* has a temporary peak load need during the dates of need requested.” *Id.* (emphasis added).

The CO requested that Employer submit additional information. Specifically, the CO stated that Employer must submit an updated temporary need statement containing the following:

1. A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year, that is specific to the employer;
2. An explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need, including a detailed description of the produce being transported and an explanation and documentation to demonstrate that there is an increased need for truck drivers to transport such produce during the dates of need requested; and
3. An explanation and documentation to demonstrate how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need. The employer has stated that it has a peakload need; therefore, documentation is needed to demonstrate that it has a decreased need for workers during the months not requested in its dates of need.

...

AND

The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer’s response must include, but is not limited to, the following:

1. 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 Truck Drivers, 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
2. The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer's response must include, but is not limited to, any contracts signed with the Petitioning Company and a summarized report from the Petitioning Company, that supports the temporary need that occurs between October 2 and July 2 as part of the Mexican Fruit peak season; and
  3. A summarized monthly list of the previous calendar year and up-to date of current year that indicates the number of truck loads that leave the main worksite for deliveries to other locations for the peak need, or increase of need, for Truck Drivers in Santa Cruz County in Arizona, and Nogales, Arizona, where the Petitioning Company is headquartered.

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 at 225 (emphasis in original).

Regarding the second deficiency, the CO found that Employer did not sufficiently demonstrate that the number of workers requested was true, accurate, and represented bona fide job opportunities. AF at 226. The CO found that Employer did not include adequate attestations to justify the need for 15 Truck Drivers from October 2, 2017, through July 2, 2018, and that it was "unclear how the employer determined the need for 15 Truck Drivers." *Id.* The CO requested additional information, stating:

The employer must include in the application attestations regarding temporary need in the appropriate sections. This must include a detailed statement of temporary need containing an explanation as to the need for 15 workers.

AND

...

1. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in Heavy and Tractor-Trailer Truck Drivers, 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;
2. Detailed explanation of how the employer calculated the need for 15 Truckers to deliver various fruit during the Mexican Fruit peak season in the Santa Cruz, Arizona MSA; and

3. Other evidence and documentation that similarly serves to justify the need for 15 Heavy and Tractor-Trailer Truck Drivers.

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 at 226.

Employer responded to the NOD on August 9, 2017, and provided various documents including: a revised statement of temporary need; payroll reports from January 2014 to the present<sup>4</sup>; its 2015 and 2016 tax returns; and trailer registration documents. AF at 29-210. Edy Lopez, President of the company, provided an affidavit in which he stated that there is an increased demand for truck drivers carrying produce in Nogales every year from early October through early July, and it is clear that an agricultural harvest is seasonal (“to suggest that an agricultural harvest is not seasonal is mindboggling”). AF at 204-210.<sup>5</sup> He noted that “another company” obtained H-2B visas based on seasonal need in the fall of 2015. AF at 207. Mr. Lopez also stated that he owns 22 semi-trucks and 37 trailers, but employed only 3 drivers for the months of February, March, May, June and July of 2017, and only 4 drivers for January and April of 2017. AF at 206. Mr. Lopez stated that “due to the lack of visas and manpower, I can’t use most of these trucks with employees.” *Id.* He asserted that the rest of the trucks are driven by contractors, and that he also uses Mexican nationals to drop loads off in Nogales, but the Mexican workers are not allowed to move loads to other warehouses without an H-2B visa. AF at 206-207. Mr. Lopez argued that “it’s impossible to prove that I need more workers from early October through early July unless I obtain these workers.” AF at 209. He stated, “I cannot say that at present my drivers’ activities in America increase more from early October through early July because I can’t say I have much drivers [sic] at all. I have three full-time drivers and 22 trucks.” *Id.* Regarding the need for 15 workers, Mr. Lopez argued that it is evident 15 workers were needed since he owns 22 trucks and 37 trailers, and that the CO “should not have a problem certifying 15 Workers as it has certified 15 Workers for [Employer previously] in case H-400-15328-271351.” AF at 210.

The CO issued a Non Acceptance Denial Letter on September 14, 2017, based on Employer’s failure to overcome the first two deficiencies. AF at 11-25. The CO noted that the payroll reports that Employer submitted were not summarized as requested, and that while the records showed the individual workers’ names and gross pay figures, they did not make clear how many hours Employer’s truck drivers worked each month. AF at 16. The CO therefore asserted that the payroll records could not be used to support the supposed peakload need. *Id.* The CO stated that overall finances of a company from year to year as shown by Employer’s federal tax records do not support a temporary need for workers. *Id.* Additionally, the signed affidavit by Edy Lopez<sup>6</sup> did not demonstrate that there was a peakload need because he once again pointed to the

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<sup>4</sup> Employer submitted monthly payroll records for 2015, 2016, and 2017, and a yearly total for 2014.

<sup>5</sup> Employer’s attorney submitted two versions of this affidavit, asking in an email to the CO that the second version be considered as there were some “minor changes.” AF at 200. The only change appears to be the addition of a paragraph about the “peak season” getting longer. *Compare* AF at 35 *with* AF at 210. The CO did acknowledge this request. I have considered the later version; however, the additional paragraph had no effect on my determination.

<sup>6</sup> The CO described Edy Lopez’s position in the company as “unknown.” AF at 16. However, at the beginning of his affidavit, he states that he is the President of the company. AF at 29.

seasonal need based on the agricultural harvest and a general increase in trucks crossing the border, but did not explicitly tie an increase in trucks to the agricultural harvest or Employer specifically. *Id.* Finally, Employer did not provide the requested summarized monthly list for the previous year and current data of Employer's truckloads that crossed the border and contracts specific to Employer to demonstrate an increased rate of business during the period requested. *Id.* Therefore, the CO could not determine if there was a true peakload need.

The CO also found that Employer did not overcome the second deficiency of failing to establish the temporary need for 15 truck drivers. AF at 16. The CO noted that Employer's statements did not provide support for 15 temporary workers, and that ownership of vehicles does not support the need for 15 workers. AF at 17-18. The CO found that "without summarized monthly payroll reports in the manner requested by the employer, a detailed explanation of how the employer calculated the need for 15 workers, or the submittal of other evidence and documentation, it is not possible to determine that the employer has a need for 15 workers." AF at 18.

### Contentions of the Parties

On appeal, the CO relies on the reasons set out in the final determination letter dated September 14, 2017, as described above.

In its brief, Employer repeats many of the arguments it made in its response to the NOD. Employer states that produce grows according to seasons and that it is a company that distributes specific produce, thus demonstrating that there is a seasonal need. Employer's Brief at 1. Employer describes the CO's "remaining concern" as regarding how the seasonal need "translates to there being a peakload need for the employer," and Employer asserts again that it is "impossible for [Employer] to have the amount of truck drivers it needs during the Fall Harvest without being granted H2B Visas." *Id.* Employer again cites Department of Transportation data showing that there is an increase in trucks from Mexico into Nogales, Arizona during the alleged peak load period. *Id.* at 1-2. Finally, Employer notes that the "Fall Harvest increases the demand for the transportation of produce in the Nogales Area year after year, and that this increase in need is expanding," and asserts that "the seasonal need for truck drivers distributing produce in the Nogales/Santa Cruz County Area in Arizona from early October through early July of every year has been recognized by the Department itself as the reality of the laws of nature." *Id.*

### Legal Standard

The standard of review in the H-2B program is limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board may consider only "the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The evidence is reviewed de novo, and the Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

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 and 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). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need.<sup>7</sup> 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). An employer establishes a “peakload need” if it shows 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).

The employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3) and (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); *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); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017).

Applications are properly denied where the employer did not supply requested information in response to a Notice of Deficiency. 20 C.F.R. § 655.32(a) (“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.”); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017).

### Analysis

After reviewing the record, I find that the CO properly denied the Application because Employer failed to establish a peakload need and failed to justify a need for 15 truck drivers.

Contrary to Employer’s argument, the CO did not deny that a seasonal need for truck drivers in general exists. *See* Employer’s Brief at 1 (“Fruit and vegetable grow according to seasons. That is common sense. It should not be a subject of any legal appeal.”). Instead, the CO denied Employer’s Application due to Employer’s failure to link the apparent seasonal need to Employer’s specific business needs. Showing that there is a general industry need for trucks to transport produce does not establish that Employer itself had such a need. In *Erickson Construction d/b/a/ Erickson Framing AZ LLC*, 2016-TLN-00060 (Aug. 19, 2016), the employer cited to U.S. Census data that revealed an increase in building permits during the employer’s period of need in support its assertion of a peakload need. Slip op. at 3. The CO denied the employer’s application for

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<sup>7</sup> Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

temporary labor certification because while the U.S. Census data demonstrated an industry-wide building permits increase, the documentation “fell short of specifically demonstrating [the] employer’s [peakload] need for temporary workers.” *Id.* at 5; *see also 9th Parallel Healthcare, Inc.*, 2017-TLN-00062, slip op. at 4 (Oct. 4, 2017) (newspaper article about increase in population in Palm Beach, Florida during the winter months does not specifically demonstrate employer’s need for temporary workers).

The situation here is similar to that in *Erickson*. While Employer may have demonstrated that there is a seasonal need based on the agricultural harvest and a general increase in trucks crossing the border, it did not tie the increase in trucks to the agricultural harvest or to Employer’s business specifically. Rather than citing to Department of Transportation statistics showing an increase in truck crossings from Mexico, Employer should have provided some documentation about its specific contractual obligations or how many of its own trucks crossed the border during the seasonal harvest, as requested by the CO. *See Munoz Enterprises*, 2017-TLN-00016, slip op. at 7 (Jan. 19, 2017) (finding that a peakload need “depends on the amount of work the employer is contractually obligated to perform, when such work must be performed, whether the employer’s contractual obligations overlap, and how many permanent workers are employed by the employer.”). Employer’s statement that it has an increase in demand for truck drivers from early October through early July, AF at 207, is not, on its own, sufficient to meet its burden of proof. The Board has held that bare assertions without supporting evidence are insufficient. *BMC West Corporation*, 2016-TLN-00039, slip op. at 5 (May 18, 2016). Additionally, the fact that the CO may have approved applications for temporary employment for another similar company is not ground for reversal of the CO’s denial. *Rollings Sprinkler & Landscape*, 2017-TLN-00020, slip op. at 5 (Feb. 23, 2017).

Further, the CO specifically requested specific documentation to demonstrate Employer’s peakload need in response to the NOD, but Employer failed to provide it. *See* AF at 16 (“The Department requested a summarized monthly list for the previous year and up-to date of current year of the employer’s truckloads that crossed the border and contracts specific to the employer to demonstrate an increased rate of business during the period requested. However, the employer did not provide the requested documentation.”). Employer did not address the failure to provide this documentation in its response to the NOD or its appellate brief. The failure to provide the requested documentation alone is grounds for finding the CO’s denial of certification was proper. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053, slip op. at 5-6 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016, slip op. at 6 (Jan. 19, 2017); *Carolina Contracting and Management, LLC*, 2017-TLN-00026, slip op. at 6-7 (Apr. 4, 2017).

Additionally, the payroll records provided by Employer did not establish a peakload need. The records are difficult to interpret, and were not summarized as requested by the CO. As the CO correctly observed, it is not clear from the payroll records how many hours Employer’s truck drivers worked each month. *See* AF 82-129. Without such information, it was not possible for the CO to determine how Employer’s needs during the alleged peakload period compared the months not requested in its dates of need. Employer argued that the payroll records may not reflect his need because he needs to hire temporary drivers to meet his need. AF at 209. However, the CO stated in the NOD that Employer’s response was not limited to the requested documents. AF at 225. Employer could have provided any other documentation to demonstrate its specific need, but it failed to do so. *See Baranko Brothers, Inc.*, 2009-TLN-00051, slip op. at 6 (Apr. 16, 2009) (where payroll records were of poor evidentiary quality, the employer should have chosen to present other types of supporting documentation).

The payroll records similarly do not demonstrate a need for 15 truck drivers, but the CO also similarly allowed for Employer to submit “[o]ther evidence and documentation that...serves to justify the need for 15 Heavy and Tractor-Trailer Truck Drivers” in response to the NOD, which Employer failed to do. The documentation asserting ownership of 22 trucks and 37 trailers does not demonstrate a need for 15 truck drivers, which appears to be an arbitrary number. Employer argued that the CO should approve the request for 15 truck drivers since it had in the past, but prior decisions of the CO to grant certification are not binding in future cases. *Baranko Brothers, Inc.*, 2009-TLN-00051, slip op. at 7 (Apr. 16, 2009). Employer did not present sufficient documentation to support the need for 15 truck drivers, and the CO’s denial of certification on this ground was not arbitrary or capricious.

It is not clear what Employer was attempting to show with its tax returns for 2015 and 2016, and Employer offers little insight.<sup>8</sup> These documents only reflect financial totals for the relevant year, not any monthly breakdown demonstrating a peakload need or the number of permanent and temporary employees by month. Therefore, these documents do not demonstrate the nature of the temporary need or the need for 15 truck drivers.

Based on the evidence of record, I find that Employer has failed to demonstrate that it has an actual seasonal peakload need for 15 truck drivers. Employer had the burden of establishing the nature of the temporary need and that the request for 15 workers was justified, and it failed to meet this burden. Therefore, the CO’s denial of Employer’s Application is affirmed.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge

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<sup>8</sup> In his revised statement of temporary need, Mr. Lopez only stated that the tax returns showed the company was “ready to expand” but could not because of the lack of workers. AF at 209.