



Issue Date: 23 April 2019

**BALCA Case No.:** 2019-TLN-00110  
**ETA Case No.:** H-400-19009-064442

*In the Matter of:*

**DICKEY CONSTRUCTION, LLC**  
*Employer.*

**Certifying Officer:** Chicago National Processing Center

**Appearances:** Aaron Bernard, *Esq.*  
The Bernard Law Firm, P.L.C.  
Ames, Iowa  
*For the Employer*

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

**Before:** Larry A. Temin  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Dickey Construction’s LLC (“Employer”) request for review of the Certifying Officer’s (“CO”) Denial in the above-captioned H-2B temporary labor certification matter.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work

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<sup>1</sup> 20 C.F.R. § 655, Subpart A (codified April 1, 2016). On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). The IFR rules apply to this case.

within the United States on a one-time, seasonal, peakload or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).<sup>3</sup> A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.<sup>4</sup>

## STATEMENT OF THE CASE

The Employer is a construction company located in Bradgate, Iowa. (AF 69).<sup>5</sup> On January 9, 2019, the Employer filed an ETA Form 9142B, *Application for Temporary Employment Certification* (“Application”), signed appendix B, job order, DHS Form G-28, recruitment agreement, statement of temporary need, certificate of organization, other documentation, and a prevailing wage determination requesting certification for seven (7) carpenter helpers<sup>6</sup> from April 1, 2019, until December 15, 2019 based on a peakload need for temporary labor. (AF 68-180).

On February 28, 2019, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in the Employer’s Application. (AF 58-67). Specifically, the CO stated that the Employer (1) failed to establish that the job opportunity was temporary in nature; (2) failed to establish temporary need for the number of workers requested; and (3) failed to submit an acceptable job order. *Id.* As pertinent to this appeal, the CO determined that the Employer failed to establish that the job opportunity was temporary in nature. (AF 63-64). The CO requested the Employer provide documentation to establish a peakload need for additional workers. *Id.* The CO additionally stated that the Employer failed to establish a temporary need for the number of workers requested. (AF 64-65). The CO asked the Employer to provide documentation to explain its need for 7 workers. *Id.*

On March 13, 2019, the Employer submitted additional documents in response to the Notice of Deficiency, including invoices, summarized payroll documentation for 2017 and 2018, calculations of hours worked and earnings received by workers in 2017 and 2018, an employer accounting attestation and a revised job order. (AF 27-57). On March 20, 2019, the CO issued a Final Determination Denial (“Denial”) concluding that the Employer (1) failed to establish that the job opportunity was temporary in nature and (2) failed to establish temporary need for the number of workers requested. (AF 17-26). On April 2 2019, the Employer requested administrative review of the CO’s Non Acceptance Denial, as permitted by 20 C.F.R. § 655.61.<sup>7</sup> (AF 1-16).

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<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113) § 113 (Dec. 18, 2015).

<sup>3</sup> 8 C.F.R. § 214.2(h)(6)(iii).

<sup>4</sup> 20 C.F.R. § 655.61(a).

<sup>5</sup> In this Decision and Order, “AF” refers to the Appeal File.

<sup>6</sup> SOC (O\*Net/OES) occupation title “Helpers – Carpenters” and occupation code 47-3012 (AF 68).

<sup>7</sup> Pursuant to 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. Within seven (7) business days of receipt of an employer’s appeal, the CO will assemble and submit to BALCA an administrative Appeal File. 20 C.F.R. § 655.61(b). Within

On April 10, 2019, BALCA received the Appeal File from the CO. On April 18, 2019, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File.<sup>8</sup> No briefs from either party were received.

## DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. 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 a final determination.<sup>9</sup> 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.<sup>10</sup>

The Employer bears the burden of proving that it is entitled to temporary labor certification.<sup>11</sup> The CO may only grant the Employer’s Application to admit H-2B workers for temporary non-agricultural 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.<sup>12</sup>

### Failure to Establish a Temporary Need for Workers

To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent.<sup>13</sup> The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.”<sup>14</sup> Pursuant to § 113 of the 2018 Consolidated Appropriations Act, “for the purpose of regulating admission of temporary workers under the H-2B program, the definition of temporary need shall be that provided in 8 CFR 214.2(h)(6)(ii)(B).” Accordingly, 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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seven (7) business days of receipt of the Appeal File, counsel for the CO may submit a brief in support of the CO’s decision. 20 C.F.R. § 655.61(c). The Chief Administrative Law Judge may designate a single member or a three-member panel of BALCA to consider a case. 20 C.F.R. § 655.61(d). Pursuant to 20 C.F.R. § 655.61(f), BALCA should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery

<sup>8</sup> 20 C.F.R. § 655.61(c).

<sup>9</sup> 20 C.F.R. § 655.61.

<sup>10</sup> 20 C.F.R. § 655.61(e).

<sup>11</sup> 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

<sup>12</sup> 20 C.F.R. § 655.1(a).

<sup>13</sup> 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

<sup>14</sup> 20 C.F.R. § 655.6 (a).

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.

In this case, the Employer alleged a peakload need for 7 carpenter helpers from April 1, 2019, until December 15, 2019. In order to establish a peakload need for temporary workers, 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.”<sup>15</sup>

In its Application, under the Statement of Temporary Need, the Employer stated that it employs carpenters year-round to perform inside construction work but that there is an increased need for workers from April to December as the weather conditions allow for increased outdoor work. (AF 68). To support its show of need, the Employer summarized its payroll reports and summarized the hours worked and earnings made by its workers in 2017 and 2018. (AF 50-54). However, the documentation fails to show that the Employer has an increased need for workers lasting from April to December. The documents indicate that in 2017 and 2018 the Employer had 3 to 6 permanent employees and hired no temporary workers. *Id.* The number of workers employed from April to December of each year is typically the same as the number of workers employed in January, February and March. While the evidence shows an increase in work in July 2017, July 2018, December 2017 and December 2018, the remainder of the Employer’s work appears consistent. In 2018 workers actually worked more hours in March (450 hours) than they did in September (442.5 hours). Thus, there is no evidence of a substantial decrease in business during January, February and March compared to other months of the year. Overall the Employer’s past hiring and workload do not support its assertion that it has a peakload need for more workers from April to December.

The Employer has provided contracts for its 2019 projects. (AF 41-49). The number of concurrent projects the Employer plans to undertake each month is shown in the table below:

MONTH	NUMBER OF PROJECTS
April 2019	1
May 2019	2
June 2019	2

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<sup>15</sup> 8 C.F.R. 214.2(h)(6)(ii)(B)(3); *see also Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peakload 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 (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 peakload, temporary need).

July 2019	2
August 2019	4
September 2019	4
October 2019	4
November 2019	2
December 2019	2
January 2020	1
February 2020	1
March 2020	1

The documentation shows that the Employer will be working more concurrent projects in August, September and October. However, the documents fail to indicate how many workers will be needed for a particular contract or project. Thus, I am unable to determine if the Employer in fact has an increased need for workers from April to December. There is also no indication that these contracts represent an increase in contracts from previous years that would represent a short term need for additional workers.

There is also no indication of a seasonal demand for increased workers. The Employer argues that there is less work in the winter because it cannot work outside but provides no documentation to support this assertion. The Employer has submitted an article regarding the effects of cold weather on concrete. (AF 102-125). While the article outlines additional steps and precautions that may need to be taken when pouring and setting concrete in colder weather, the article does not state that cold weather would prohibit the Employer from pouring concrete and engaging in outside work. Further, the Employer has provided no evidence of the weather conditions in Iowa from January to March. Thus, while working outside in Iowa in the winter may be unpleasant or not preferable, there is nothing to show that the work is not possible. Accordingly, there is nothing in the record to support the Employer’s assertion that there is an increased demand for work during the peakload season of April to December it identified, only that the Employer has a preference for not working outside from January to March. I find that the Employer’s preference does not create a seasonal demand that gives rise to the need for temporary workers. After reviewing the record, I concur with the CO that the Employer has failed to establish a “peakload” need for H-2B workers from April 1, 2019 until December 15, 2019.

Failure to Justify a Need for 7 Workers

The other issue on appeal is whether the Employer has demonstrated that it has a need for 7 carpenter helpers and whether its request for those workers represents a bona fide job opportunity. The regulations provide that the CO will “review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors . . . (3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity.”<sup>16</sup> In the NOD and Denial, the CO

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<sup>16</sup> 20 C.F.R. § 655.11(e)(3)-(4).

concluded that the Employer failed to justify a need for 7 carpenter helpers and that it was unclear how the Employer determined the number of worker's requested. (AF 64-65, AF 24-26).

In its response to the NOD, the Employer outlined its anticipated contracts for 2019. (AF 41-49). The Employer stated it ideally needs four to six workers for each project and that due to a particularly rainy 2018 season many jobs originally scheduled for 2018 were postponed until 2019. Thus, the Employer stated it needs to double its work force in order to complete all its contracts. (AF 38-39). After reviewing the record, I find that the Employer has not explained how it determined it would need 7 workers. The Employer stated that it needs four to six workers for a project but there is nothing in the record to support this assertion. Further, there is no documentation to support the Employer's statement that its contracts for 2019 are in greater number or bigger in scope than its contracts for the previous years. The Employer has shown the number of workers and the hours worked in 2017 and 2018, but provided no information about the number of contracts it entered into and/or completed in those years. BALCA has held that "a bare assertion without supporting evidence is insufficient to carry the employer's burden."<sup>17</sup>

Thus, it is not clear from the record how the Employer calculated how many additional workers it would need from April 1, 2019 until December 15, 2019. Therefore, I find that the Employer has not established that the request for 7 carpenter helpers represents a bona fide job opportunity. Accordingly, I find that the CO properly determined that the Employer failed to meet the requirements of 20 C.F.R. § 655.11(e)(3)-(4).

### **ORDER**

In light of the foregoing, it is **ORDERED** that the Certifying Officer's decision denying certification be, and hereby is, **AFFIRMED**.

For the Board:

LARRY A. TEMIN  
Administrative Law Judge

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<sup>17</sup> *BMC West Corp.*, 2016-TLN-00039/40, slip op. at 5 (May 18, 2016)(citing to *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013)).