



**Issue Date: 01 April 2019**

BALCA CASE NO.: 2019-TLN-00061

ETA CASE NO: H-400-18361-098814

*In the Matter of:*

**HIGHWAY 19 CONSTRUCTION,  
LLC,**

*Employer*

### **DECISION AND ORDER OF REMAND**

This matter arises under the labor certification process for temporary non-agricultural employment in the United States under the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor (“DOL”) at 20 C.F.R. Part 655, Subpart A. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). Employers wishing to hire foreign workers under this program must apply for a “labor certification”. 8 C.F.R. §214.2 (h)(6)(iii). A Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews the employer’s application. 20 C.F.R. § 655.50.

On February 20, 2019, a CO denied the H-2B Application for Temporary Employment Certification (“Application”) of Highway 19 Construction, LLC (“Employer”). Employer timely requested administrative review on February 28, 2019, and the Appeal File (“AF”) was provided on March 11, 2019. On March 13, 2019, I remanded the matter to the OFLC because the appeal file was incomplete.<sup>1</sup> I received the correct and complete Appeal File on March 19, 2019, and issued a Notice of Receipt. Neither party filed a brief within the time allowed under 20 C.F.R. section 655.61, subsection (c).

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<sup>1</sup> The provided Appeal File did not include an index or page numbers, and certain documents were missing.

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”), and by designation of the Chief ALJ, I am BALCA for purposes of this appeal. 20 C.F.R. § 655.61(d); 20 C.F.R. § 655.61(a).

## I. STANDARD OF REVIEW

When an employer requests review of the denial of its application BALCA’s scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination. 20 C.F.R. § 655.61(a)(5). I must review the CO’s determination based solely only on the Appeal File, the request for review, and any legal briefs submitted. 20 C.F.R. § 655.61(e). I must either affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

Neither the Act nor the applicable regulations specify a standard of review. When the CO’s determination turns on a long-established, policy-based interpretation of a regulation, I likely owe considerable deference to the CO. *See Zeta World-force, Inc.*, 2018-TLN-00015, slip op. at 4 (Dec. 15, 2017). But absent a long-standing, policy-based interpretation of a regulation, it would appear I am to review the CO’s denial de novo. *Sands Drywall, Inc.*, 2018-TLN-00007, slip op. at 3. (Nov. 28, 2017).

## II. BACKGROUND

Employer is located in Texas, and is in the business of providing “concrete culverts, headwalls, concrete culvert pipe... [and] varied other concrete parts for use along roadways.” (AF, p. 4.) The workers “set forms for concrete, dig trenches, finish concrete surfaces, operate hand/power tools, remove forms from finished slab, [and] clean up sites.” (AF, p. 6.) The work hours vary between 7:00 A.M. and 4:00 P.M. (AF, p. 8.) Employer has approximately 10 permanent construction laborers, and has previously supplemented its workforce with temporary laborers. (AF, p. 33.) Employer authorized Action International, Inc., to act as its representative for the purpose of labor certification requests. (AF, p. 161.)

### The Application

On January 7, 2019, Employer filed an application seeking 40 temporary workers from April 1, 2019, through November 20, 2019, based on a peakload need.<sup>2</sup> The application includes Employer’s below statement of temporary need:

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<sup>2</sup> Significantly, Employer filed the “exact same petition and payroll summary” in December, 2018, seeking certification for 40 workers for the period of February, 2019 through November, 2019. The prior application was reviewed by a CO and accepted for processing and recruitment. (AF, p. 12-17) Due to the “first half CAP” for fiscal year 2018, Employer withdrew its first application and had to reapply with a new application for an April 1, 2019, start date. (AF, p. 100.)

Our orders slow down at the end of November because most of our clients cease their non-emergency work during December due to heavy holiday traffic and increased risk of accidents along the roadways. TxDot (Texas Department of Transportation) closes projects around the middle of November and does not open them again until January. Even though projects open in January conditions to work do not improve enough to allow full out production until mid to late February in our area. Any time from end of November through mid to end of February is our seasonal rains and this prevents our on-site work because rain affects the quality of our product, thus we mainly focus on our pre-cast business end of November through end of February. This causes our slow season to continue throughout December, January and February. During this slowdown, our year round, full time Concrete Workers can handle our workload. Around the last part of February each year we are able to re-commence our “formed on site” services as well as our pre-cast products. It is then that our busy season commences again and we need our peakload workers as we have in previous years. Though our domestic concrete workers can handle the work to the end of February, we need the additional laborers in order to stay on schedule for road work from 2/28 to 11/20. Please see the attached payroll summary to help understand our labor needs. Please note we were caught in the first half CAP for fiscal year 2018, so we had to reapply for workers for a 4/1 start state.

(AF, p. 10.)

The Application also listed the schedule of operations, with pre-cast work from December through February, and both pre-cast and on site concrete work from the end of February to end of November. (AF, p. 10.) The Employer stated that it was “unable to find a sufficient number of available, hardworking, dependable laborers” and the temporary labor “is crucial, in fact – without this temporary labor the negative impact will not allow us to continue in business.” (AF, p. 34.) The Employer attached its payroll records from January, 2016 to July, 2018 as an addendum to the application. (AF, p. 79.)

#### The Notice of Deficiency

On February 1, 2019, the CO issued a Notice of Deficiency (“NOD”) finding Employer’s application failed to establish the temporary nature of the job opportunity and the need for the number of workers requested, and did not include all potential worksites. (AF, p. 18)

The CO found a failure to establish the peakload temporary nature of the job. Specifically, the CO criticized the Employer’s failure to include the entire payroll record for 2018, with July being the last month provided. The CO required additional submission of:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period;
3. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses.

(AF, p. 22-23.)

The CO also found Employer failed to establish that the number of workers requested represented bona fide job opportunities. The CO asserted the Employer did not justify the increased in the number of workers requested, from 28 in 2018 to 40 in 2019. (AF, p. 23.) She required additional submission of:

1. A statement indicating the total number of workers the employer is requesting for this occupation and worksite;
2. An explanation with supporting documentation of why the employer is requesting 40 Concrete Worker/Laborers for Sulphur Springs, Texas during the dates of need requested. The explanation must include supporting documentation concerning why the employer is requesting an additional 12 workers for the same worksite;
3. If applicable, documentation supporting the employer's need for 40 Concrete Worker/Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
4. Summarized monthly payroll reports for a minimum of one previous calendar year that identify...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
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF, p. 23-24.)

It appeared to the CO "the employer may have additional worksites which are outside of a single area of intended employment." (AF, p. 24.) She requested additional information regarding the areas of employment.

## Employer's Reply to Notice of Deficiency

On February 8, 2019, Employer sent a Reply to Notice of Deficiency on H-2B Petition ("Reply.")

The Employer stressed it had previously filed an identical application with a start date in February, 2019, instead of April, 2019, which had been accepted by a CO. It argued that since the OFLC had "deemed the evidence sufficient to prove need it should still be sufficient enough to prove the employers *[sic]* need." (AF, p. 26.) Employer also asserted "BALCA has consistently approved this sort of peakload need for construction contracting, specifically concrete construction in the State of Texas." (AF, p. 27.) It contends "Highway 19's application is virtually identical to twin cases in which BALCA ordered certification in 2018." Specifically, to support its argument the Employer referenced *In the Matter of Jose Uribe Concrete Construction*, 2018-TLN-00040, 2018-TLN-00044 (Feb. 2, 2018). (AF, p. 27, 37.) The employer in those cases, a concrete construction business in Texas, sought a total of 24 temporary workers for a peakload season from February, 2018, through November, 2018, when general contractors scheduled work, with a holiday slowdown in December and January. (AF, p. 27.) In both cases the Administrative Law Judge reversed a CO's denial.

Further, the Employer maintained it had already provided much of the CO's requested additional information in the initial application. (AF, p. 27.) In its Reply it repeated its prior statement of temporary need, and asserted its peak work schedule "is consistent every year," and is a reflection of the period in which contractors offer more work. (AF, p. 28.) It stated its peakload is the "consistent period of roadwork in Texas," and that the general contractors "have their own reasons for when they will execute their contracts with the State, and Highway 19's work follows that need." (AF, p. 28.) Employer also included a table of all of its projects for 2017 to 2018, listing an estimate of the number of workers per project.<sup>3</sup> (AF, p. 35.) Employer asserts that in 2018 "both [its] permanent and temporary laborers worked additional hours to make up for the late start and shortage in labor," and "[a]ny work that could not be covered by working extra hours had to be postponed until [its] temporary laborers arrived." (AF, p.33.)

### The Denial

On February 20, 2019, the CO issued a Non-Acceptance Denial ("Denial.") The CO concluded Employer had failed to establish a peakload need and failed to establish the need for the number of workers requested.

The CO argues Employer failed to provide adequate documentation to establish a peakload need. First, the CO argues a decrease in daylight hours during the

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<sup>3</sup> The table is based on the start and end date of the project, and does not precisely reflect when the work was performed. (AF, p. 28.)

winter should not impact the Employer's 7-hour work day during the alleged non-peak period because the shortest amount of daylight is 9 hours and 57 minutes. (AF, p. 72.) Further, the CO asserts the Employer provided no documentation to support its statement that the Department of Transportation closes road projects around the middle of November and reopens them in January. (AF, p. 72.) The CO also argues Employer failed to provide any documentation supporting an increase in work from general contractors and a "holiday slowdown." (AF, p. 72.) Additionally, the CO took issue with Employer's submitted project summary list, contending that because the dates do not reflect when the work was actually performed it "did not make clear that the majority of the employer's projects happen during its stated peak period." (AF, p. 72.) Finally, the CO maintains the payroll records from 2017 and 2018 show the permanent workers' hours decreased when the temporary workers arrived, suggesting the temporary workers are *replacing*, not *supplementing*, the Employer's permanent workforce. (AF, p. 72.)

The CO reiterates similar concerns in finding the Employer failed to establish a need for the number of workers requested. Specifically, the CO again asserts the payroll records fail to demonstrate a workforce supplementation and that the project summary does not support the need for 40 temporary workers. (AF, p. 75.)

The Employer's Request for Review ("Request") followed the denial.

### III. ANALYSIS

First, I address Employer's argument that the application should have been accepted because the CO accepted its previously-filed identical application, with the only difference in the new application being a later start date. (AF, p. 26.) Prior approval of an application is not a guarantee of prospective approval, and each application must succeed on its own merits. But the approval of an identical application in the same year, for a start date a mere two months earlier, is a significant factor in this case. Thus, I find the CO's failure to address the prior approval, or offer any explanation for the reversal in decision, concerning.

#### 1. Temporary Need

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; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show its need for workers is temporary in that it is a one-time occurrence, seasonal, peakload, or intermittent need.<sup>4</sup> 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

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<sup>4</sup> The definition of "temporary need" derives from DHS regulations, 8 C.F.R. § 214.2(h)(6)(ii), and the DOL must exclusively utilize the DHS regulatory definition of "temporary need." *See* Consolidated Appropriations Act of 2017, P.L.115-31, Division H.

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 CO found the Employer failed to establish a peakload need because it did not provide adequate documentation, and because prior payroll records demonstrate a decrease in the hours worked by permanent laborers upon the arrival of the temporary workforce. On appeal, Employer asserts it is not required to prove the cause of its slowdown, but rather must simply show "demand for employer's services and, thus, the employer's need for additional workers decreases during that time period, for whatever reason." (AF, p. 2.) The CO acknowledges Employer's proffered reasons for its downturn in work during the non-peak season, but refuses to accept them because of lack of documentation. For example, the CO rejects Employer's assertion that the Texas Department of Transportation closes projects in the winter-months or that its general contractors request less work during that period. I find the CO's insistence that Employer provide extensive documentation of the underlying causes of its slow-down improper. Employer has the burden of proving the existence of a peakload season—not the exact cause of such a season. *See In the Matter of Power House Plastering, Inc.*, 2018-TLN-00119 (May 16, 2018.) Employer did not provide documentation of the Texas DOT policies or general contracts, but it substantiated its assertion of a peakload season through its payroll records which demonstrate an increase in work from late February through November. "While a CO could properly reject an employer's unsubstantiated and questionable explanation of an alleged peakload season when no evidence of that peakload season otherwise exists, a CO may not require an employer to prove the cause....of a properly substantiated peakload season." *In the Matter of Power House Plastering, Inc.*, 2018-TLN-00119, slip op. at 6, (May 16, 2018.) I find Employer's proffered payroll records substantiate its peak load need, and it therefore need not provide additional documentation regarding the reasons for such a peak load.

The more convincing basis for the CO's denial is that the payroll records show a significant decrease in hours worked by permanent employees accompanied by a sharp increase in hours worked by temporary employees. *See ETA v. Jamaican Me Clean*, 2014-TLN-00008 (Feb. 5, 2014.) To establish a peakload season the employer must show the temporary workers will *supplement* its permanent workforce. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B)(emphasis added). The CO offers as an example a comparison of March 2018, where permanent workers worked 1,884 hours, and April 2018, once temporary workers had arrived, and permanent workers only worked 1,457 hours. In response to the CO's accusation that it improperly reduced the working hours of its permanent workforce, the Employer explains that "the year-round U.S. workers are forced to work overtime and far more than a full-time schedule between February and when 'the cavalry arrives' in the form of the urgently need H-2B workers." (AF, p. 2.) Employer argues that "the reduced hours for the U.S. workers denote a return to a normal work schedule." (AF, p. 2.)

Where permanent workers are replaced by temporary workers an employer is not supplementing its permanent staff. *See In The Matter of Unlimited Drywall and Painting, LLC*, 2018-TLN-00060 (March 16, 2018)(finding the employer was replacing, not supplementing, its permanent workforce when it reduced its permanent workforce by the same number of workers it brought on temporarily.) The CO correctly asserts that temporary workers must supplement the permanent workers, but her analysis and description of the hours worked misrepresents the payroll records. The records show that permanent workers' hours dropped overall in certain months during the peak season to levels below certain months in the non-peak season, while the hours for temporary workers increased. But the payroll records as a whole do not support the conclusion that the Employer significantly reduced the hours of its permanent workforce during the peak season.

Isolating certain months and comparing hours worked could lead to a conclusion that the permanent workers hours decrease during the peak season. But this method of comparison is misleading. On average in 2018 during the non-peak months, from December to March, if the hours are divided evenly, each permanent employee worked 152 hours per month. During the peak months, when temporary employees were brought in, each permanent employee worked an average of 173 hours per month.<sup>5</sup> That the permanent workers were able to roughly maintain, or increase, their hours per month even while the Employer hired an additional 25-29 workers demonstrates that these additional temporary workers were supplementing, not replacing, the permanent workforce. The CO's focus on a drop in hours during several isolated months distorts the pay information. Further, the temporary workers' hours increased precisely because the Employer's workload increased overall. Employer's permanent employees were able to handle the workload during the winter months, but the pay records show they could not have handled Employer's workload alone during the peak months. Thus, I reverse the CO and find Employer satisfactorily established that the job opportunity reflects a temporary peak-load need.

## 2. Number of Workers Requested

An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. § 655.11(e)(3)-(4). The regulations do not specify how to quantify an employer's labor needs, nor what quantum of need justifies a request for each additional worker. *See In the Matter of Power House Plastering, Inc.*, 2018-TLN-00119, slip op. at 6, (May 16, 2018). But the regulations require the job opportunity be for a "full-time temporary position," which is defined as 35 hours or more per week. *Id.* The CO asserts Employer failed to establish the need for 40 workers, which would be an additional 12 workers from the 28 requested in

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<sup>5</sup> These averages are affected by the number of permanent employees working in each month. But I find no significant drop in permanent workers, and thus the averages are instructive comparisons.

2018. Employer counters it “showed that the hours of work performed in 2018 exceeded the 35-hour/week level for full-time employment,” and that the payroll data supports the need for up to 17.5 additional positions. (AF, p. 3.) Employer made this argument in its Response to the NOD, but the CO did not address it in her denial. Instead the CO provided the same arguments as she did in the section on temporary need. I considered and rejected those arguments above, and find no well-reasoned explanation for how the payroll records fail to establish the Employer’s need for the number of workers requested.<sup>6</sup> I reverse the CO’s denial and find the payroll records support Employer’s request for 40 workers.

#### **IV. ORDER**

Based on the above reasons the CO’s denial is **REVERSED** and **REMANDED** for further proceedings consistent with the above findings of fact and conclusions of law.

SO ORDERED.

For the Board:

CHRISTOPHER LARSEN  
Administrative Law Judge

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<sup>6</sup> The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week period. 20 C.F.R. § 655.20(f). This “disincentivizes employers from requesting more labor than needed,” and thus it is unlikely Employer would request more temporary workers than its work demands. *See Power House Plastering, Inc.*, 2018-TLN-00119, slip op. at 7.