



Issue Date: 18 March 2019

BALCA Case No.: 2019-TLN-00050

ETA Case No.: H-400-18355-216539

In the Matter of:

PETE CHAVEZ D/B/A YES INDEED CONCRETE,
Employer.

BEFORE: **LARRY W. PRICE**
Administrative Law Judge

**DECISION AND ORDER REVERSING THE FINAL DETERMINATION AND
REMANDING FOR FURTHER PROCESSING**

This proceeding is before the Board of Alien Labor Certification Appeals (the Board) pursuant to the request for administrative review of the Certifying Officer's (CO) denial of temporary labor certification under the H-2B program filed by Employer Pete Chavez d/b/a Yes Indeed Concrete (Employer). For the following reasons, the Board reverses the CO's denial of certification and remands this matter for processing in accordance with the regulations and this Decision and Order.

I. BACKGROUND

Employer submitted its ETA Form 9142, H-2B Application for Temporary Employment Certification, on January 7, 2019, requesting certification for 20 laborers and attaching thereto, *inter alia*, its Statement of Temporary Need in which Employer identified February 1 through December 1 as the peakload season for pouring concrete. Employer requested workers for a period of need beginning on April 1 rather than February 1, "due to timing considerations and complications in the process...." Employer further cited its previous certification (ETA Case No. H-400-18304-746337), which had been granted but not used. AF 100-25.¹

On January 17, 2019, the CO issued a Notice of Deficiency, finding that Employer failed to establish the job and need for requested number of workers as temporary in nature. While Employer stated weather is a determining factor, the CO found the weather favorable to work year-round. Accordingly, the CO requested further explanation and documentation justifying the dates of need and the number of workers requested. AF 92-99, citing 20 C.F.R. §§ 655.6(a)-(b), 655.11(e)(3)-(4) in support of the noticed deficiencies.

¹ AF refers to the Appeal File.

Employer responded on January 28, 2019, and stated:

Our temporary, peak load, need for workers is directly related to the weather in West Texas. We perform our work outdoors. When the weather is wet or cold, and especially if we are experiencing freezing temperatures, we cannot do our jobs. In order for poured concrete to set properly, the outside air temperature should be 40° and rising. For this reason, we schedule the vast majority of our jobs between February 1st and December 1st. Although we do perform work outside of this need period, it is at a much lower volume therefore eliminating the need for additional staff.

Employer submitted a letter from the general manager of its client, Betenbough Homes, which attached several sales and weather demographics with sources cited and indicated that home builders “practically” take a sabbatical during December and January because of fewer home sales, unfavorable weather, and other factors. Employer also anticipated need based on the number of workers previously certified “and the similar demand for our services for the upcoming season,” attaching the following summary tables of its payroll for 2017 and 2018 supporting its need for 20 laborers:

Month	2017		2018	
	Permanent	Temporary	Permanent	Temporary
January	3	0	1	4
February	3	23	1	9
March	1	22	2	9
April	2	22	1	19
May	3	22	1	18
June	4	20	1	14
July	3	17	1	19
August	4	16	1	15
September	2	16	1	16
October	3	15	1	15
November	3	15	2	13
December	3	0	2	0

AF 80-91.

The CO issued the Final Determination denying Employer’s application on February 7, 2019, finding that the two noticed deficiencies remained. The CO found that the Betenbough Homes letter was not “an independent source” because the contractor “will directly benefit from the employer’s use of foreign labor....” Further, the CO rejected the rationale in the letter, stating that the letter “does not explain how the timeframe for building homes in an area of employment conducive to year-round work is effected by the peak period in home sales.” The CO also rejected Employer’s weather and climate data, finding that “average lows... occur in the middle of the night when workers are not performing their duties.” Additionally, Employer failed

to provide the requested summary listing of all projects for the previous calendar year. Finally, the CO determined that Employer failed to support the number of workers requested. Employer had apparently based its need on the number of workers it had over the last two years and the similar demand for services for the upcoming season. But, Employer failed to “submit an explanation with supporting documentation” for the request for 20 laborers. The CO further concluded, “[T]he employer’s payroll clearly shows that work is being performed during the winter months” and questioned whether the peak shown in those records “is a result of the arrival of its temporary workforce or if the employer experiences a true peak in its operations.” Thus, the CO concluded that (1) Employer failed to support the decrease in need during December and January or the increase in need for the requested dates and (2) Employer failed to support its request for the number of workers. AF 70-79.

Employer requested administrative review by letter dated February 19, 2019, attaching Notices of Acceptance (ETA Case Nos. H-400-17229-108140 and H-400-18304-746337) and Notices of Certification (ETA Case Nos. H-400-17354-473476 and H-400-18304-746337) relating to applications for 20 laborers nearly identical to the underlying matter.²

In its request, Employer argued that the CO “offered no evidence or citation to substantiate the allegation that the weather is favorable to outdoor work year-round” contrary to Employer’s “experience operating a concrete construction company over the last decade.” Employer also argued that the CO failed to explain why Employer’s temporary need statement is flawed, particularly as the same statement had been accepted in the previously certified applications. Employer pointed to the regulations requiring a notice of deficiency to be based on incompleteness, inaccuracies, or errors, and stated that such insufficiencies are “obvious,” “clear,” and “blatant,” “based on fact and evidence, and not on a vague presupposition.” Employer also protested the CO’s dismissal of its contractor’s letter and the sources cited therein, which demonstrated that average temperatures in December and January do not exceed the minimum necessary for concrete curing. Employer objected to the CO’s interpretation of its payroll showing work performed during winter months, noting that the regulations require only a peakload, not that no work is done outside of the claimed peakload period. While Employer conceded that it did not submit a summary listing, it argued that the information request offered an alternative to such a submission—that is, “other evidence and documentation that similarly serves to justify the dates of need being requested for certification,” which it submitted together with exhibits, letters, and payroll data to support the requested dates of need. Employer also takes issue with the CO’s contention that Employer did not substantiate its claim that December and January contain fewer daylight hours on average, with the CO’s interpretation of its client’s letter, and with the CO’s conclusion that Employer’s payroll records and tax returns failed to support a need of 20 temporary laborers as had been historically employed. AF 1-69, citing 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), 20 C.F.R. § 655.31.

² Employer also attached a printout of past weather for January 2019. This printout cannot be considered here as it was not submitted to the CO. In the context of an employer’s request for administrative review, the Board may consider only “the Appeal File, the request for review, and any legal briefs submitted” and only the evidence submitted to the CO prior to the issuance of the final determination. 20 C.F.R. § 655.61(a)(5), (e).

This matter was assigned to me on February 25, 2019. I issued the Notice of Assignment and Expedited Briefing Schedule on February 27, 2019, and I received the Appeal File on March 1, 2019. The CO did not file a brief. The decision that follows is based upon the entire record and the applicable law.³

II. STANDARD OF REVIEW

Neither the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, nor the regulations applicable to H-2B temporary labor certifications, 20 C.F.R. Part 655, Subpart A, identify a specific standard of review for an employer's appeal under 20 C.F.R. § 655.61(e). The Board has fairly often applied an arbitrary and capricious standard to its review of a CO's determination in a labor certification case, while yet other decisions apply a quasi-hybrid deference standard or *de novo* standard.⁴ The arbitrary and capricious standard adopted by the Board no doubt stems from the Administrative Procedure Act. Judicial review under the Administrative Procedure Act provides that an agency's actions, findings, and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. *Albert Einstein Med. Ctr.*, *supra*; *see also*, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989).

Accordingly, in reviewing the CO's decision in the case *sub judice*, I will determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient. In so doing, I adopt the standard of review as defined in *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) for the reasons therein.

III. 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. An appropriations rider, *see* 20 C.F.R. § 656.6(b)-(c), requires the Department of Labor to utilize the Department of Homeland Security's regulatory definition of temporary need, which states, generally, a period

³ The Board must either affirm, reverse or modify, or remand for further action. 20 C.F.R. § 655.61(e)(2).

⁴ *Cf. Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (applying arbitrary and capricious standard but affording deference where Office of Foreign Labor Certification's or CO's interpretation involved longstanding or clearly articulated interpretation of regulation); *Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) (applying *de novo* standard where no such interpretation is at issue); *Albert Einstein Med. Ctr.*, 2009-PER-00379, -81, slip op. at 31-32 (Nov. 21, 2011) (en banc) (citing 5 U.S.C. § 577(b) rather than § 706(2)(A) and concluding that *de novo* review of CO decisions denying permanent labor certification is appropriate due to intra-agency nature of the adjudication).

of temporary need will be limited to one year or less, but in the case of a “one-time event,” could last up to 3 years. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Temporary service or labor “refers to any job in which the petitioner’s need for the duties to be performed... is temporary, whether or not the underlying job can be described as... 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. An employer must establish that its need for temporary services or labor “will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: one-time occurrence; seasonal need; peakload need; or intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (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); *accord, BMC West*, 2016-TLN-00039 (May 18, 2016). While temporary need is generally established through payroll data and similar historic information, start-ups can still establish a temporary need. *Midwest Poured Foundations*, 2013-TLN-00053 (Jun. 18, 2013); *Los Altos Mexican Restaurant*, 2016-TLN-00067 (Oct. 28, 2016) (*Midwest* distinguished on the facts); *accord, The Garage Tavern*, 2016-TLN-00074 (Oct. 28, 2016). Furthermore, “the determination of temporary need rests on the nature of the underlying need for the duties of the position” and not “the nature of the job duties.” 80 Fed. Reg. 24042, 24005.

To qualify as a peakload need, the employer must establish (1) “that it regularly employs permanent workers to perform the services or labor at the place of employment”; (2) “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 (3) “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 (Apr. 2, 2015) (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) (employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload, temporary need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (employer’s documentation revealed that the employer’s alleged peakload need spanned at least a 19-month period); *Paul Johnson Drywall*, 2013-TLN-00061 (Sep. 30, 2013); *Kiewit Offshore Services*, 2012-TLC-00031, -32, -33 (May 14, 2012); *Tarrasco Steel Company*, 2012-TLN-00025 (Apr. 2, 2012); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *DialogueDirect, Inc.*, 2011-TLN-00038, -39 (Sep. 26, 2011); *Top Flight Entertainment, Ltd.*, 2011-TLN-00037 (Sep. 22, 2011); *Workplace Solutions LLC*, 2009-TLN-00049 (Apr. 22, 2009) (notwithstanding a calculation error, it was evident that the employer had a permanent staff that is supplemented by temporary workers); *Hutco, Inc.*, 2009-TLN-00070 (Jul. 2, 2009); *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009) (employer’s submission of agreement letters did not provide adequate evidence of employer’s need to supplement its permanent workforce); *Deober Brothers Landscaping, Inc.*, 2009-TLN-00018 (Apr. 3, 2009) (need can recur if it lasts no longer than 10 months each year); *Magnum Builders*, 2016-TLN-00020 (March 29, 2016); *Erickson Framing Az.*, 2016-TLN-00016

(Jan. 15, 2016) (remands to determine if partial certification should be granted for a reduced period); *accord, Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015) (remanded to permit certification for a shorter period of need); *BMC West*, 2016-TLN-00043 (May 16, 2016) (evidence of industry peak season need did not match employer's need); *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016) ("The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers."); *Chippewa Retreat Spa*, 2016-TLN-00063 (Sep. 12, 2016).

The CO determined that Employer's documentation failed to demonstrate a peakload need created by the increase in home sales and builds. The CO largely based her decision on her supposition that the area of employment, Lubbock, Texas, is "conducive to year-round work..." and on Employer's payroll records, which "clearly shows that work is being performed during the winter months." AF 76. The record contains no support for the CO's subjective assessment of Lubbock's winter climate or its suitability for residential construction year-round. Employer submitted its own statement as well as the statement of its client/contractor, which contained graphs and sources of weather information. The graphs showed that December and January had 23 and more days of weather below freezing, average temperatures approximating to 40 degrees, and fewer daylight hours than any other months. The CO almost entirely disregarded the client letter, finding it not an independent source despite the client's inclusion of graphs and outside sources supporting the statements contained in the letter.⁵ Further, Employer did not represent to the CO that work stopped in December and January but that the increased home sales led to a peakload need for builders. Employer attached a table of projects by month and a map indicating the locations of the several builds.⁶ Employer's client explained that increased labor is necessary to manage the sales and builds of new homes during the peakload period. Thus, I find Employer's application and the documents submitted in response to the Notice of Deficiency establish a peakload period during which the demand for home builders significantly increases.

The CO also determined that Employer failed to establish the need for 20 temporary laborers. Employer provided prior payroll reports demonstrating that its permanent workforce remained steady while the temporary labor need hovered around 20 employees. Indeed, as the CO noted, these records reflect the use of temporary workers. While Employer offered no additional documentation, prior certifications approved 24 laborers, and Employer explained that it anticipated similar need (but for 20 laborers) for the upcoming peakload period. The Department of Labor issued guidance on September 1, 2016, regarding the processing of H-2B applications under the current regulations. *See* Employment & Training Admin., U.S. Department of Labor, Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need."

⁵ The CO did not explain why this particular client/contractor's statement is incredible other than noting the client would directly benefit from Employer's use of foreign labor. The client's letter was detailed, well-explained, and supported by cited sources.

⁶ The CO instructed Employer to submit a summary listing of all projects in the area of intended employment with start and end dates and worksite addresses. Employer's table shows the dates the homes were sold by month. Employer explained that it does not maintain documents in the form requested and reiterated that the nature of the build projects does not lend itself to such a summary listing.

(Sep. 1, 2016) (“9/16 Guidance”). While prior certifications are not a safe harbor, the payroll records, invoices, and contracts commonly submitted to establish a temporary need for labor are often “substantially similar from year-to-year for the same employer or a particular industry” and so “creates an unnecessary burden for employers” and COs alike to resubmit and analyze these documents year after year. The 9/16 Guidance grants COs the discretion and indeed encourages COs to rely upon prior certifications in adjudicating temporary labor certifications. The record established by Employer through its prior applications, having been sufficient to justify certification, and the record underlying this review adequately explained the peakload need that arises in Employer’s business during the 10-month period between February and the end of November.

In light of the foregoing, the CO’s inquiry into the factual issues before her was not searching and careful. The totality of the evidence supports Employer’s request for temporary labor and increased need for workers during the peakload period. While Employer works year-round, the weather and number of home builds limits the demand for business in December and January. An employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. Employer has met that burden here. The Board has consistently affirmed denials of certification applications where an employer’s own records belie its claimed peakload periods of need. *See, e.g., Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016); *Erickson Construction*, 2016-TLN-00050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (employer’s payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need). By logical extension, the inverse is equally true.

Therefore, after reviewing the record in this matter, the Board finds that the CO’s bases for the denial of certification are factually and legally insufficient.

IV. ORDER

In light of the foregoing, the Certifying Officer’s Final Determination is **REVERSED**, and this matter is **REMANDED** for processing in accordance with the regulations and this Decision and Order.

So ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge

