



Issue Date: 07 March 2019

BALCA Case No.: 2019-TLN-00039
ETA Case No.: H-400-18365-114965

In the Matter of:

SAN FELIPE STONE INC.,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus, Esq.
Fisher Broyles, LLP
Austin, TX
For the Employer

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

Before: J. ALICK HENDERSON
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary non-agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A.¹ 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,² or intermittent basis, as defined by the Department of Homeland Security. *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).³

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). *Consolidated Appropriations Act*, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

² I note that 20 C.F.R. refers to “peakload,” while 8 C.F.R. refers to “peak load.”

³ 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

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to San Felipe Stone, Incorporated’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of the temporary labor certification under the H-2B non-immigrant program. For the following reasons, on behalf of the Board, I affirm the CO’s denial of certification.

BACKGROUND

On January 7, 2019, Employer applied for temporary labor certification through the H-2B program to fill 40 full-time laborer “rock splitter” positions. AF, p. 217. In support of its request, Employer attached a Statement of Temporary Need asserting that the 40 new-hire positions are to satisfy a temporary peakload need for workers from April 1, 2019 through November 1, 2019.⁴ AF, pp. 227-228. It explained as follows:

. . . . Our company is engaged in the stone quarry business in the Haskell County, TX area. Our services include production and movement at a stone quarry. The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is April 1st, 2019 to November 1st, 2019. Our company has been engaged in business since 2005 and has gross revenues of \$6,599,688.34 for the last fiscal year.

Our company currently requires the services of laborers to perform manual labor associated with a stone quarry such as split, cut, carry, stack, load and unload rock and stone. Lift up to 30lbs. No education or experience required. Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately February 1st , 2019 to October 1st, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the winter months, of approximately November 1st to April 1st, because the cold and wet weather is not conducive to splitting, cutting, carrying, and stacking rock and stone. Also, construction and landscaping in general slows down, and since our stone is used for construction and landscaping projects, our

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.

⁴ In this decision, AF is an abbreviation for “Appeal File.”

peak load need is directly tied to those industries, and therefore the need for laborers is substantially reduced.

Our dates and number of workers have not changed substantially from last year's application. Last year we applied for April 1st through November 15th dates. This year we are applying for April 1st through November 1st dates since construction is increasing and orders are coming in earlier. Last year we applied for 40 workers, and this year we are applying for the same. Since our dates have not changed more than two weeks, and since the number of workers has not changed, we are not submitting additional supporting documentation in accordance with the September 1, 2016 Department of Labor announcement that additional information may not be required in such cases.

The additional information that was submitted in support of previous applications, such as payroll summaries, tax returns, and Letters of Intent, should support the dates and number of workers we are requesting this year.

Our company has extensively recruited U.S. workers to fill these positions without success. Specifically, our company has engaged in newspaper ad campaigns and word of mouth recruitment without receiving any adequate response or being able to hire sufficient numbers of U.S. workers to meet our demand for this number of workers as quickly as they are needed once the weather changes. We have found the local labor market to be completely inadequate and unable to meet our need for these peak load workers during our busiest seasons. Most of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for the H-2B workers we are asking for in 2019, but cannot anticipate, at this time, that we will need H-2B workers in 2020 due to fluctuations in the economy.

We are not hiring a recruiter to help us recruit H2B workers this year since all of our new H2B workers are being recruited from our existing workforce so there is no contract with a recruiter attached.

AF, pp. 226 – 227.

On January 16, 2019, the CO issued a Notice of Deficiency (“NOD”) to the Employer identifying two deficiencies in its application. The first deficiency explained that the Employer failed to establish that the job opportunity was temporary in nature. *Id.*, p. 212 (citing 20 C.F.R. § 655.6(a)-(b)). The second deficiency explained that the Employer failed to establish how it determined a need for 40 temporary workers. *Id.*, p. 213 (citing § 655.11(e)(3)-(4)). The Notice of Deficiency provided the Employer with an opportunity to submit additional evidence and documentation to support its application.

As to the first deficiency, the CO specifically requested that the Employer provide the following documentation:

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 duties the employer's permanent workers in this same occupation perform during the stated non-peak period;
3. An explanation and supporting documents that substantiate the employer's statement that weather effects its production during its state nonpeak period. This documentation can include supportive letters from industry specific organizations in the employer's area of intended employment;
4. 2017 and 2018 monthly production data for its Lueders, Texas worksite;
5. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Rock Splitters, Quarry (Laborer), 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
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. . . .

Id., pp. 212-213 (emphasis in original).

As to the second deficiency, the CO specifically requested that the Employer provide the following documents:

1. An explanation with supporting documentation of why the employer is requesting 40 Laborers for its worksite in Lueders, Texas during the dates of need requested;
2. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Rock Splitters, Quarry (Laborer), 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
3. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

Id., p. 213 (emphasis in original). The CO also notified the Employer that, if the submitted documents and its relationship to the Employer's need was not clear to the lay person, then the Employer must submit an explanation of exactly how the documents supported its request. *Id.*, p. 213.

On January 28, 2019, the Employer responded as follows:

We understand that the U.S. DOL and U.S. DHS must give its previous decisions deference with adjudicating new matters. To the extent that San Felipe Stone, Inc. met its burden in previous years on the identical issue, we again request the same, favorable discretion this year without the need to fully respond to a formal Request for Evidence regarding the peak-load nature of the quarry business, which is well documented and universally acknowledged. Our dates and number of workers have not changed from our last year's application. As such, we are not submitting additional supporting documentation in accordance with the September 1, 2016 Department of Labor announcement that additional information would not be required with the application in such cases.

....

Also, our use of the H2B program since 2007 (10 years) shows a strong precedent that we qualify as a peak-load/temporary business. Though this, by itself is not probative that we qualify as temporary/peak-load, it creates a strong presumption of meeting our burden of proof by a preponderance of the evidence, or more likely than not. The peak-load nature of our business has not changed in all of these years – back to the regulations in force in 2007, the new H2B regulations in 2009, and the newest H2B regulations since 2015.

....

The difficulty in finding peak-season U.S. Workers has been worsened recently by an improved U.S. economy in which the unemployment rate is at historic lows . . . higher paying disaster relief jobs in Houston and the gulf coast, and higher paying oilfield jobs returning to central and west Texas. . . . At present, we have a temporary need for these peak-season laborers, but cannot anticipate needing them in the future when the economy changes. As such, these workers are not a part of our regular operations. . . .

Because San Felipe has benefitted from the H-2B program in the past, it does not use foreign worker recruitment—it generally brings in the same set of workers year-after-year.

....

San Felipe has been growing on average over 10% per year since 2015. We expect to grow about 10% in 2019 over 2018). [sic] This is largely due to the improved economy and growth we are experiencing in Texas We estimate we need one quarry laborer for every \$100,000 in gross sales. With over \$6,000,000.00 in gross sales per year, we have more than enough work for 40 peak-season H2B workers.

Id., pp. 31–32 (emphasis removed).

Employer also submitted twelve Letters of Intent from Employer’s clients indicating that they intended to use Employer’s services as a natural stone supplier for various construction projects throughout Texas during 2019 (AF, pp. 34-45); an online article from Hunker.com titled *Cons to Building a House in the Winter* (AF, pp. 46-48); and an online article from KXAN News in Austin, Texas titled *Wintry weather highlights potential delays in TxDOT projects* (AF, pp. 49-50). Employer also submitted sales data for 2018, including its sales invoices for January through December 2018 (AF, pp. 51-79); detailed sales reports showing the quantity, sales price, amounts and balance of each order for the same time period (AF, pp. 80-155); its monthly sales by customer summaries for each month of 2018 (AF, pp. 156-167). It also provided its U.S. Corporation Income Tax Returns for 2016 and 2017 (AF, pp. 168-182) and its quarterly federal tax returns for 2017 and 2018 (AF, pp. 183-206).

On February 4, 2019, after examining the additional information provided by Employer, the CO issued a Final Determination denying Employer’s application. AF, pp. 14-23. On February 8, 2019, Employer submitted a request for administrative review to BALCA appealing the CO’s Final Determination. AF, p. 1. In its request for review, Employer asserted that “[I]t’s clear from a review of the Final Decision that there was a mistake (a scrivener’s error BY THEIR ACCOUNTANT) on the 3rd quarter FY 2017 941 which has now been corrected. As such, remand may be proper instead of appeal so that the Honorable Certifying Officer may properly consider the actual evidence of need.” *Id.*

On February 15, 2019, BALCA docketed the appeal and issued a Notice of Docketing. The parties were given an expedited briefing due date of seven days (excluding federal holidays) after their receipt of the brief file, in accordance with 20 C.F.R. § 655.33. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services (“the Solicitor”) in accordance with 20 C.F.R. § 655.33(b) on February 19, 2019.

On February 28, 2019, Employer submitted a brief styled “Motion to Remand.” In it, the Employer requested that the case be remanded to the CO for consideration of a corrected tax return for the 3rd quarter FY 2017, reportedly amended to reflect the correct number of workers employed during that quarter. On March 1, 2019, the Solicitor objected via email, arguing that 20 C.F.R. 655.61(a)(5) limits requests for review to legal argument and such evidence that was actually submitted to the CO below.

DISCUSSION

The H-2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”).

8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012) (“[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application.”) (citing 20 C.F.R. § 655.33(a), (e)).

After considering evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; or (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e). BALCA may overturn a CO’s decision if it finds the decision is arbitrary or capricious. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

Employer Did Not Establish a Temporary, PeakLoad Need

Pursuant to DHS regulations, temporary services or labor under the H-2B classification 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 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). 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. *Id.*

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peak-load, or intermittent. *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). To establish a peak-load need, an 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).

In the instant case, the Employer attempted to establish a peak-load need for rock-splitter labor from April 1, 2019 through November 1, 2019. I find that the CO’s decision to deny the application was neither arbitrary nor capricious.

In its analysis, the CO noted that the Employer failed to submit the summarized monthly payroll reports that it requested. AF, p. 18. I note that the Employer failed to submit other requested documentation, including the 2017 and 2018 monthly production data for its Lueders, Texas worksite and a detailed explanation as to the duties the employer’s permanent workers in this same occupation perform during the stated non-peak period. BALCA has upheld a CO’s denial of an application where the employer does not supply information requested by a CO. *Saigon Restaurant*, 2016-TLN-0053 (Jul. 8, 2016); *Munoz Enterprises*, 2017-TLN-00016, slip op. (Jan. 19, 2017). While it does not appear that the CO relied exclusively on the Employer’s failure to produce the requested documentation, the Employer’s omission is conspicuous in light of the other documentation provided, discussed below.

As the CO determined, the Employer’s 2018 sales data is not consistent with a peakload need of April 1st to November 1st. AF, p. 19. The CO compiled the below chart summarizing the Employer’s monthly sales data in support of its finding:

Months of 2018	Total Sales Per Month
January	481,116.33
February	409,294.83
March	510,392.82
April	487,353.90
May	481,809.28
June	550,717.30
July	438,606.70
August	430,827.58
September	344,411.54
October	340,393.15
November	359,731.11
December	152,164.77

Id. This data evidences consistent sales from January through August of 2018, with a slight drop from August through November, and only one slow month—December. Notably, the second highest sales period occurred in March 2018 and the fifth highest sales period occurred in January 2018. Neither of these months fall within the alleged period of need. Thus, the monthly sales data is actually inconsistent with the alleged peakload. While it is possible that rock-quarry production could slow down during the winter months, the Employer did not provide such data despite the CO’s request.

I also concur with the CO that the Employer’s tax documents fail to support the application. First, the yearly returns do not contain production data. Further, its quarterly tax returns do not discern between its rock-quarry production and its other operations. *Id.*, p. 20. Nonetheless, the quarterly returns did report numbers of total workers and compensation paid, and the CO compiled the following chart:

2017-Quarter	Number of Workers	Compensation	2018-Quarter	Number of Workers	Compensation
1	73	456,217	1	45	385,371
2	81	638,812	2	46	410,873
3	0	653,385	3	48	453,129
4	87	582,904	4	48	464,056

Id. The CO correctly pointed out that, inconsistent with a peakload need, the quarterly tax returns showed a “relatively consistent” number of workers throughout 2018. Further, the compensation paid in the fourth quarter of 2018, which would be after the alleged period of need, was actually the highest amount of compensation paid in that year. *Id.* The CO noted that the Employer’s quarterly tax return for the third quarter of 2017, which reported “0” workers, was likely incorrect because it also reported having paid compensation that quarter. AF, pp. 20, 189. It is logical to assume, based on the amount of the compensation paid, that the number of workers employed for the 3rd quarter was roughly the same as the quarters before and after. Regardless, the CO found the tax data provided by Employer did not support Employer’s dates of need, and I concur. *Id.*

Likewise, the CO reasoned that the letters of intent were of little value in establishing the claimed peakload need because they were not clear as to whether and to what extent orders would be made outside of the alleged peakload months. AF, p. 212. I also note that the twelve letters of intent appear to be based on a template, as they contain nearly identical language and state that “the peak months that services are performed for [their] company [by Employer] are April 1st through November 1st, 2019” and a statement reading, “To perform the required services will require a substantial number of workers, and it is difficult, if not impossible, to find U.S. workers ready, willing and able to perform this work.” AF, pp. 34-45. It is unclear how these customers would have first-hand knowledge of the Employer’s quarry production and worker recruitment efforts.

At best, these letters could imply that these customers’ had a greater demand for the Employer’s products between April 1st and November 1st, but they do not show Employer has an increased need during this period or a lesser need during this period for rock-splitter workers. However, even this implication is contradicted by the monthly sales data provided by the Employer. For example, one of the letters of intent was written by Apex Stone. However, the Employer’s sales data summary for each month shows the following sales data for 2018: (1) \$21,668.20—January; (2) \$7,969.70—February; (3) \$19,838.30—March; (4) \$14,381.45—April; (5) \$15,085.80—May; (6) \$1,911.80—June; (7) \$8,998.54—July; (8) \$5,634.60—August; (9) \$4,165.55—September; (10) \$10,854.70—October; (11) \$4,080.10—November; (12) \$1,816.80—December. AF, pp. 156-167. Thus, the Apex Stone sales data is inconsistent with the alleged peakload need of April through November. Similarly, the monthly sales data for the other companies is inconsistent with the statements in their letters of intent. Therefore, I concur with the CO’s conclusion that the letters of intent do not support a peakload need.

The CO did not find the two online articles pertaining to weather in Texas to be probative because they did not address peakload needs for quarry and stone suppliers. *Id.* I agree that Employer’s online articles are not relevant to show Employer’s peakload need. The article about

the Texas Department of Transportation has little relevancy to Employer's business activities and offered little information about how winter weather affects anything other than construction on major roadways in Texas. The other article pertaining to residential construction appears to be written for consumers, not businesses, and shows only that residential construction during the winter months may be more costly to the consumer. Neither article discussed rock splitting and quarry businesses. For these reasons, I find that neither article supports Employer's peakload need.

Finally, I note that this case appears to be similar to *In re Apache Stone Quarry, LLC*, 2018-TLN-00039 (Jan. 17, 2018). The employer in that case also sought approval for a number of temporary rock-splitter laborers, alleging they were needed to satisfy a peakload need. The CO requested attested employment data detailing the monthly number of permanent and temporary rock splitter workers employed in previous years, as well as the number of hours worked by each category of worker. However, the employer declined to provide this documentation, relying instead on non-attested generic summaries of total number of workers and estimated production numbers. As a result, BALCA affirmed the CO's denial of the application. There, as here, the employer failed to provide the type of documentation that would have supported its application despite the CO's identification of and request for that documentation.

Overall, I find that none of the documentation and data submitted by Employer, taken together or alone, show a peakload period of demand in which Employer would need to supplement its permanent staff. Therefore, I find that Employer has failed to overcome the first deficiency.

Employer Did Not Establish a Temporary Need for the Number of Workers Requested

The second issue on appeal is whether Employer has established a temporary need for the 40 workers requested. To obtain certification under the H-2B program, Employer must establish that the number of worker positions is justified and the request represents a bona fide job opportunity. 20 C.F.R. §§ 655.11(e)(3)-(4); *BMC West LLC*, 2018-TLN-00099 (July 13, 2018) (affirming denial where the employer's uniform letters of intent, fluctuating sales reports, and other documentation failed to support a need for the number of workers requested); *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (reversing denial because the employer provided a comprehensive and specific explanation to support its request for 44 stonemason helpers).

In the present case, Employer estimated that it needed one quarry laborer for every \$100,000 in gross sales and that it has roughly \$6,000,000 in gross sales per year. Employer indicated that, based on its gross estimate, 40 temporary workers would be "more than sufficient" to meet its needs. However, the Employer failed to provide any substantiation for its estimation.

In *Gerardo Concrete, LLC*, 2018-TLN-00122 (May 16, 2018) the employer requested 40 construction laborers for a peakload, temporary need. *Id.* at 2. The CO issued a notice of deficiency, stating the employer had failed to establish a temporary need for the number of

workers requested. *Id.* at 4. In response, the employer submitted summarized sales reports for 2016 and 2017 and letters of intent, among other documents. *Id.* However, the CO determined the employer had failed to overcome the deficiency and denied the employer's application. *Id.* at 5. The CO noted "The employer's letters of intent only indicate that it has prospective contracts and projects for the year, but they do not demonstrate how employer quantitatively determined that it has a need for 40 temporary workers." *Id.* at 6. On appeal, BALCA agreed with the CO. *Id.* BALCA therefore has determined that letters of intent and summarized sales reports are insufficient information to establish a particularized need for production workers. *Id.* at 8-9.

Second, I find Employer's tax documentation is insufficient to support Employer's stated need for 40 temporary workers. The CO was correct in finding that Employer's Quarterly Tax Returns show it employed a "relatively consistent" number of workers throughout 2018. Employer employed 45 total workers in quarter one, 46 workers in quarter two, 48 workers in quarter three, and 48 workers in quarter 4. These numbers, at first glance, seem to support a need for 40 workers generally. However, according to the Quarterly Tax Return form's prompt, these numbers are the total number of employees who are paid wages, tips, or other compensation. They do not break down the number of temporary and permanent employees or the types of employees (sales v. production). Employer reports that it is requesting the same number of temporary H-2B workers as last year. AF, p. 31. This implies that Employer's workforce primarily consists of temporary H-2B workers and that it employs only five to eight permanent employees. Indeed, the consistent number of employees reported for each quarter suggests a need for 40 permanent workers. Nonetheless, because of these ambiguities, I find Employer's tax documents are insufficient to support its requested need for 40 temporary workers.

In contrast, in *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018), the employer requested 44 stonemason helpers for a peakload temporary need. *Id.* at 2. The employer explained that the stonemason helpers would assist the permanent masonry staff and provided a list of fourteen projects for which it had been hired during its peakload period. *Id.* at 3. The employer also explained its year-round staff numbers and the jobs held by its baseline staff, supported by payroll records showing permanent staff, the number designated as masonry staff, and the number of temporary H-2B workers serving as stonemasons in a given timeframe. Based on the scheduling needs of the contracts, its past hiring practices, estimated production rates, and quantities of work that needed to be produced, the employer calculated it needed 44 stonemason helpers to complete its orders on time. *Id.* at 3-4. The employer also provided payroll records that broke down by month the total number of temporary workers in the stonemason helper position for 2016 and 2017. *Id.* at 4. Additionally, the employer described its process for quantifying the number of workers needed. It stated,

In order to determine the number of helpers needed during a season, we estimate the quantities of in-place work that needs to be completed and compare it to estimated production rates and the schedule demands of each project. For example, if we have 1,000 SF of masonry to install in a 4 week time-frame, we know that we need to install 250 SF of masonry per week. A standard production rate for a crew made up of a mason and helper is 25 SF per day. In this example, we would need 2 masons and 2 helpers (50 SF/day x 5 days per week) on the

project in order to finish the work on time. Using this logic, we have combined the needs of our contracted and projected projects to determine the number of stonemason helpers needed to meet our labor needs.

Id. However, the CO ultimately denied the employer's application for failing to establish a temporary need for the number of workers requested. *Id.* at 5. On appeal, BALCA found that the records and the employer's explanation supported the request for 44 stonemason helpers during its peakload need. *Id.* BALCA noted,

Employer not only provided requested information, it also provided additional supporting documentation to support the number and type of workers requested. . . . As the Employer provided very comprehensive information which was accompanied by thorough and specific explanations which support its request for 44 stonemason helpers during its requested peakload need of April 1, 2018 through December 22, 2018, I find the CO erred in her analysis of the provided information, and in her determination that Employer had not met its burden in this regard.

Id. at 10. Therefore, BALCA reversed the CO's denial and found the employer had met its burden of showing its temporary employment need. *Id.*

Similarly, in *3-G Constr. Co., Inc.*, 2018-TLN-00137 (June 21, 2018), the employer requested 15 carpenters for a peakload temporary need. *Id.* at 2. The CO issued a Notice of Deficiency, stating the employer had failed to establish a temporary need for the number of workers requested. *Id.* In response, the employer explained, with specificity,

[W]e have 1125 units to complete. At 2.56 per carpenters per month, it will take an average of 16 carpenters during the remainder of our peakload . . . to meet these numbers. We currently have 123 total field workers, 28 carpenters (25 permanent and 3 temporary) and 95 helpers of carpenter [sic]. We will need an average of 16 carpenters from May to November 9. This is how we calculated the need for 15 carpenters. We need these 15 temporary carpenters to supplement our staff during our peakload to meet our contractual obligations. Therefore, we are requesting a total of 15 carpenters.

Id. at 4. The CO ultimately denied the employer's application for failing to overcome this deficiency. *Id.* On appeal, BALCA noted the employer reviewed the number of projects completed per month in 2016 and 2017 to find that its carpenters could complete an average of 2.56 projects per month. *Id.* at 7. The employer then divided its number of projects that it needed to complete each month by 2.56 and found the number of workers needed per month. *Id.* After subtracting the number of workers it already employed, the employer determined it needed 15 temporary carpenters. *Id.* BALCA found this total consistent with the employer's calculations and therefore found the employer had justified the number of workers it had requested for June to October 2018, though it did not find its projects extended into May or November 2018, which were included in the employer's peakload period. *Id.* at 7-8. BALCA

therefore partially granted the employer's request for workers from June to October 2018. *Id.* at 8.

Finally, in *Jose Uribe Concrete Constr.*, 2018-TLN-000044, the employer requested 16 construction laborers for a peakload temporary need. *Id.* at 2. The CO issued a notice of deficiency, stating the employer had failed to establish a temporary need for the number of workers requested. *Id.* at 3. In response, the employer submitted purchase orders, contracts, and quarterly tax summary charts for 2016 and 2017 which showed the number of workers employed on a monthly basis. *Id.* at 4. In response to the NOD, the employer submitted documentation which showed it employed at least eight permanent workers in November and December, 15 workers in January, and 20 to 32 workers in February through October in 2016, and 8 workers in January to February, and 25 to 26 workers in March through September in 2017. *Id.* at 8. The employer also noted that its applications had been approved for the four previous years for a similar number of workers and a similar peakload period. *Id.* However, the CO ultimately denied the employer's application for failing to overcome this deficiency. *Id.* at 4. On appeal, BALCA, after reviewing the employer's application within the context of the previous applications, found that the submitted documentation was sufficient to establish that the employer had a permanent workforce of approximately eight employees which it was supplementing with temporary workers. *Id.* at 14. The employer also provided documentation which supported the marginal increase from fourteen workers requested in previous applications and the sixteen workers requested in the current case. *Id.* at 15. Therefore, BALCA found the employer established its requested need for sixteen workers and ordered the case be remanded to the CO for a grant of certification. *Id.*

The present case is distinct from both *Gallegos* and *3-G Construction*. In those cases, the employers thoroughly disclosed their methods of calculating their requested numbers of workers and presented additional documentation to support their requests. Here, Employer's data is insufficient standing alone to support a request for 40 workers, and Employer failed to provide a sufficient description of how its calculated number of workers is precise to its needs and supported by the data. Employer also failed to explain how its submitted documents support its request.

The present case is also not analogous to *Jose Uribe*. Though the employer in that case and the present Employer's applications were approved in previous years, the employer in *Jose Uribe* responded to the denial of its application by providing documentation to prove that it had at least eight permanent workers and only needed to supplement its existing workforce during its peakload need. In the present case, however, Employer failed to adequately prove it maintains a permanent workforce and only needs to supplement its permanent workers with the requested number of temporary workers during a peakload need period. Employer has not provided an explanation of the number of permanent workers it consistently employs, has not offered sufficient data to support the request for 40 workers, and has overall failed to establish a peakload need for 40 workers. For these reasons, I find Employer has failed to present sufficient evidence to overcome the second deficiency.

Employer's Brief

On February 28, 2019, Employer submitted a brief styled as a "Motion to Remand." In the motion, it represented that the "0" number of workers in its quarterly tax return for the third fiscal quarter of 2017 was the result of a scrivener's error by its accountant. It indicated that it has since amended the tax return to reflect the correct number of workers and requested that the matter be remanded to the CO for consideration of the amended document.

Regulations provide that a request for review may only contain legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. *See* 20 C.F.R. § 655.61(6)(5). Thus, the fact that the Employer submitted inaccurate documentation does not create a basis for remand so long as the CO properly considered that documentation. As noted above, the burden of proof lies with the Employer. In any event, as discussed above, the CO recognized the Employer's apparent error in its decision and noted that was not material. Accordingly, the motion is DENIED.

CONCLUSION

Based on the foregoing discussion, I find and conclude the CO properly denied the Employer's H-2B application. It is the Employer's burden to demonstrate eligibility for the H-2B program, but the Employer failed to demonstrate its temporary seasonal need for 40 "Rock Splitters, Quarry" workers for the period of April 1, 2019 through November 1, 2019. Thus, the denial of the Employer's H-2B certification must be **AFFIRMED**.

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

ORDERED this 7th day of March, 2019, at Covington, Louisiana.

For the Board:

J. ALICK HENDERSON
Administrative Law Judge