

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 21 February 2019**

BALCA Case Nos.: 2019-TLN-00029  
2019-TLN-00030

ETA Case Nos.: H-400-18325-859068  
H-400-18320-579822

*In the Matter of:*

SIoux CITY BRICK AND TILE COMPANY,  
*Employer*

Certifying Officer: Chicago National Processing Center

Appearances: Joe Hanson  
General Counsel, Sioux City Brick and Tile Company  
Sioux City, Iowa  
*For the Employer*

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

Before: ANGELA F. DONALDSON  
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.<sup>1</sup> The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the

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<sup>1</sup> 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).

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).<sup>2</sup>

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Sioux City Brick and Tile Company, LLC’s (“the 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, the Board affirms the CO’s denial of certification.

## **BACKGROUND**

On November 21, 2018, Employer applied for temporary labor certification through the H-2B program to fill 20 full-time positions for new-hire “Productions Workers” for the period of February 15, 2019 through December 15, 2019, at its plants in Adel and Sergeant Bluff, Iowa.<sup>3</sup> (AF-1 93; AF-2, 101). Employer described duties involving the “movement of brick from the conveyor to a monorail where the brick[s] are packaged into cubes; the employee must inspect the brick and grade to specification provided by supervisors.” *Id.* Employer described brick handling requirements in terms of exertion, other physical requirements, and typical production levels. *Id.* Employer also noted that job duties included “blending, manufacturing & packaging brick” as well as “general clean up and maintenance of work space.” *Id.* Employer stated the nature of the temporary need for workers was “seasonal.” *Id.* To support its request, Employer referred to a Statement of Need. *Id.*

On November 28, 2018, and November 30, 2018, the CO issued Notices of Deficiency (“NOD”) citing five deficiencies regarding 20 C.F.R. §§ 655.6(a)-(b), 655.11(e)(3)-(4), 655.16, 655.18, 655.9(a)-(b), and 655.15(a). (AF-1, 70-78; AF-2, 81-89). Specifically, the CO first found the Employer failed to establish the job opportunity as temporary in nature. (AF-1, 72; AF-2, 84). The CO noted Employer requested 20 Production Workers from February 15, 2019 to December 15, 2019, based on a seasonal need, but Employer’s Statement of Need was not included with its application. *Id.* The CO requested Employer provide a description of its business history and schedule of operations throughout the year, as well as an explanation of why the nature of the job opportunity and number of foreign workers being requested reflected a temporary need. (AF-1, 73; AF-2, 84). The CO also requested a summarization of Employer’s monthly payroll reports for a minimum of two years that identified the total number of workers, hours worked, and total earnings received for each month. (AF-1, 73; AF-2, 84-85). Finally, the CO requested a summarization of Employer’s monthly production for two years showing the number of products being produced by workers at the location each month, as well as any other information which would support the dates of need. (AF-1, 73; AF-2, 85).

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<sup>2</sup> 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 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.

<sup>3</sup> In this decision, AF is an abbreviation for “Appeal File.” AF-1 refers to Case No. 2019-TLN-00029, which relates to the Adel, Iowa location and AF-2 refers to Case No. 2019-TLN-00030, which relates to the Sergeant Bluff, Iowa location. In each application, Employer requested 20 Production Workers.

Second, the CO indicated that Employer failed to establish a temporary need for the number of workers requested. (AF-1, 73-74; AF-2, 85). The CO noted that Employer requested 20 Production Workers from February 15, 2019 through December 15, 2019, but did not explain how it determined the number of workers needed. *Id.*

Third, the CO indicated that Employer failed to submit an acceptable job order because it did not give the total number of job openings to be filled and whether the job opportunity was temporary or full-time. (AF-1, 75; AF-2, 86). Employer's job order in its Adel plant application listed the wage as \$11.84 in the "Employment Terms" section of the job order and in the ETA Forms 9141 and 9142, but listed it as \$11.67 in the "Job Description" section of the job order. (AF-1, 75). In its Sergeant Bluff plant application, the job order listed the wage as \$11.67 in the "Employment Terms" section, but listed it as \$11.84 in the "Job Description" section of the job order and in the ETA Forms 9141 and 9142. (AF-2, 86). Employer also stated the work would not be performed in multiple worksites in its application for Sergeant Bluff. (AF-2, 86). However, in the job order, Employer stated, "Employees will travel to Omaha NE for the Sergeant Bluff Plant." *Id.* The CO requested Employer indicate whether the job opportunity was temporary or full-time, state the total number of job openings to be filled, and list the highest wage of \$11.84 consistently throughout the job order and application. (AF-1, 77; AF-2, 88). Additionally, the CO requested Employer indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants would likely have to reside to perform the services or labor. (AF-2, 88).

Fourth, the CO indicted that Employer failed to provide a copy of all agreements with any agent or recruiter it engages or plans to engage with in the recruitment of H-2B workers, and failed to provide the identity and location of all persons and entities hired by or working for the recruiter or agent to recruit prospective foreign workers for the job opportunities. (AF-1, 77; AF-2, 88). The CO requested Employer provide this information or notify the Department that it will not utilize any agent or recruiter for the recruitment of H-2B workers. (AF-1, 77-78; AF-2, 88-89).

Fifth and finally, the CO indicated that Employer failed to submit a complete and accurate ETA Form 9142. (AF-1, 78; AF-2, 89). Specifically, in Section B, Items 2 and 3 on both applications, Employer indicated an SOC code of 51-9099 and job title of "Production Worker, All Other," but in Section F, Items 3 and 3a, Employer indicated an SOC code of 51-9041 and a job title of "Extruding, Forming, Pressing, and Compacting Machine Setters." *Id.* Further, in Section F(b)(1) of its application for the Sergeant Bluff plant, Employer indicated "none" for minimum education required for the job opportunity, while on the job order for the application, Employer indicated a high school diploma would be required. (AF-2, 89). The CO requested Employer use consistent SOC codes and amend the ETA form to indicate the minimum education requirement for the job opportunity is a high school diploma. *Id.* In addition, in Section F(c) of the ETA Form 9142 in its Adel plant application, Employer correctly listed the address of the Adel plant; however, on the ETA Form 9141 in the same application, Employer incorrectly listed the address of the Sergeant Bluff plant. (AF-1, 78). The CO requested Employer consistently list the Adel plant's address on both forms. *Id.*

On December 9, 2018, the Employer responded to the NOD's with summarized monthly payroll; answers to the seventeen requirements for acceptable job orders; a statement indicating the corrected base wage for the Adel, Iowa plant was \$11.67 with an overtime wage of \$17.50; a statement indicating that the corrected base wage for the Sergeant Bluff, Iowa plant was \$11.84 with an overtime wage of \$17.76; a copy of Employer's contractual agreement with Work Abroad Network, LLC, its agent and recruiter in hiring H-2B workers; an amended application listing the proper SOC code; and a statement indicating the workers will be employed at the Adel location. (AF-1, 25-29; AF-2, 36-40). However, the responses submitted were only relevant to the NOD denying the application for the Adel plant. (AF-1, 25; AF-2, 36).

Additionally, Employer submitted a Letter of Need, dated December 6, 2018, as their Statement of Need in support of their temporary need for H-2B visa workers for both their Adel and Sergeant Bluff, Iowa plants. (AF-1, 30-32; AF-2, 41-43). In the letter, the Employer stated that it is a small brick manufacturing company and premier manufacturer of commercial brick sold nationwide. *Id.* at 30; *Id.* at 41. Employer stated that the Sioux City and the Des Moines, Iowa areas are experiencing very low unemployment rates and a severe labor shortage, which has at times rendered the plant unable to hire sufficient workers to operate various departments in its plants. *Id.* Employer explained that the brick manufacturing industry is seasonal with maximum sales occurring when construction work is at its maximum from the spring to late fall when weather is most conducive for construction work. *Id.* Thus, Employer argued its seasonal need occurs each summer and fall. *Id.*

Employer also noted that the "key area" of the plant where additional employees are needed during the peak construction season is the re-blending area, where there is no permanent staff, and that additional workers are also needed in the packaging areas. *Id.* Additionally, Employer noted that newly-developed products like thin brick are growing in popularity, but Employer's plants as originally built were not designed to manufacture the new products. (AF-1, 31; AF-2, 42). Therefore, Employer's plant equipment has been modified to manufacture the products and the production is labor intensive. *Id.* For example, Employer explained that one new product must be hand set, as the original machine is unable to produce such products automatically. *Id.* The more intensive labor has subsequently created significant labor needs. *Id.* Finally, Employer also noted that it has received several commercial jobs, a large number of which are labor intensive, which must be filled in 2019. *Id.* To further support its temporary need, Employer attached graphs showing consolidated sales by month from 2015 to the first part of 2018 to demonstrate that Employer's sales are at their maximum in the late summer and early fall. *Id.*

Finally, Employer noted its application was for February 15 through December 15, 2019. (AF-1, 32; AF-2, 43). It also noted that over the last ten years, each of its plants had an average of one layoff per year from approximately December 15<sup>th</sup> to the middle or end of February when activity in the construction materials industry is impacted by winter weather. *Id.* It added that 35-40% of its workforce is laid off during this period. *Id.*

On January 9, 2018, after examining the additional information provided by Employer in response to the NOD, the CO issued a Final Determination denying Employer's applications. (AF-1, 6; AF-2, 15).

The CO found that Employer failed to overcome two of the five cited deficiencies regarding 20 C.F.R. §§ 655.6(a)-(b) (the temporary nature of the opportunity) and 655.11(e)(3)-(4) (the temporary need for the number of workers requested) for its Adel plant application. (AF-1, 6-13). Specifically, the CO first found that Employer failed to overcome its deficiency in establishing the job opportunity as temporary in nature. *Id.* at 9. Employer had stated that a severe labor shortage was affecting its ability to hire sufficient workers to operate all departments of its plant, its newly-introduced products were labor intensive, and its seasonal need was supported by its increase in sales from late summer to early fall each year. *Id.* at 10. However, the CO found that a labor shortage, no matter how severe, does not constitute a temporary need for workers, and the introduction of new products also does not create a need for temporary workers based on a seasonable standard. Employer had attached a chart of average sales by month from 2015-2017 that showed sales increased from March through June, but significantly decreased in July, which was included in the indicated seasonal period of need, and, based on Employer's description of its business operations and sales reports, the CO determined Employer solicited orders on a year-round basis, even if there were lulls in work production and/or employee hours. *Id.* The CO found that the historical sales reports did not support the indicated seasonal need, and, therefore, the CO found Employer did not overcome its first deficiency. *Id.*

Second, the CO found Employer failed to overcome its deficiency in establishing a temporary need for 20 requested workers. *Id.* at 12. The CO noted Employer submitted its 2017 packaging report for the Sergeant Bluff plant, among other documents. *Id.* The CO found the 2017 packaging report was not specific to the Adel plant, showed the hours worked fluctuated year round, and the temporary workers did not work full-time hours at any point through 2017, and thus did not support the request for twenty workers through the Employer's requested dates of need. *Id.* Additionally, as the Employer argued that a severe labor shortage was affecting its ability to hire sufficient workers to operate all departments of its plant, the CO again found that a labor shortage, no matter how severe, does not constitute a temporary need for workers. *Id.* Therefore, the CO found Employer did not adequately explain how it determined its need for 20 Production Workers during the seasonal period. *Id.* at 13. The CO found Employer did not overcome the deficiency and subsequently denied Employer's application. *Id.*

The CO also found Employer failed to overcome three of the five cited deficiencies regarding 20 C.F.R. §§ 655.6(a)-(b), 655.11(e)(3)-(4), and 655.15(a) (application filing requirements) in its Sergeant Bluff application. (AF-2, 15-24). Specifically, the CO found that Employer failed to overcome the same two deficiencies as in its Adel, Iowa application for the same reasons summarized above. *Id.* at 17-23. Additionally, the CO found Employer failed to overcome a third deficiency for failure to submit a complete and accurate ETA Form 9142. *Id.* at 23. The CO noted Employer submitted a statement requesting amendment to the ETA Form 9142; however, Employer did not amend the education requirement so that the high school diploma or higher requirement for the job opportunity was consistent between the ETA form and the job order. *Id.* at 24. Therefore, the CO found Employer did not overcome the deficiency and subsequently denied Employer's application. *Id.*

On January 16, 2019, Employer submitted a request for administrative review to BALCA appealing the CO's Final Determination in the above-captioned H-2B matter. (AF-1, 1-2; AF-2, 1-2). Employer argued that it justified its request for temporary employees on the basis that it had a seasonal need. *Id.* It further noted that it filed for and was granted H-2B visa authorization for the second half of 2018 for its Sergeant Bluff plant and that nothing had changed from 2018 to 2019. *Id.* Employer also added that its brick manufacturing plants in Adel and Sergeant Bluff, Iowa, are typically shut down from December to January due to the seasonal nature of the brick industry, and that, though the plants did not shut down in 2018, they will close for winter 2018-2019 and will open in February. *Id.*

Additionally, Employer argued that it did meet the definition of seasonal in its application materials, because the brick industry is tied to the construction materials industry and commercial and residential construction begins in the spring and peaks in the fall before the winter weather begins, especially in the northern United States and Canada. (AF-1, 1-2; AF-2, 1-2). Employer argued this creates a pattern that repeats each year. *Id.* Therefore, Employer argued its temporary need meets the definition of seasonal need. *Id.* Employer stipulated that monthly sales will vary from year to year due to the weather and its impact on the construction industry. *Id.* However, Employer argued the variation in sales noted by the CO does not alter the "seasonality" of the construction materials industry over the long term. *Id.* Rather, Employer argued the variation in sales numbers confirm that, although the brick industry is "fundamentally seasonal in nature as is the construction materials industry, sales can and will vary some year to year based on changes in weather patterns and related demand for residential and commercial projects. However, the reoccurring seasonal pattern is constant over time based on the impact of winter weather on construction activities." *Id.*

Further, Employer stated that its discussion of new products was provided only as general background information which was not intended to support or detract from Employer's seasonal need argument. (AF-1, 1-2; AF-2, 1-2). However, Employer argued that because the production of the new products is labor intensive and the products are manufactured on a seasonal basis, the new products do create "an additional need" for seasonal employees. *Id.* Additionally, Employer argued that its reference to the low employment rate in the Sioux City area where the Adel plant is located was not cited in support of its seasonal argument, but merely as a factual statement. *Id.* It noted, however that it received no applications through job listing it placed in the local newspaper and with Iowa Job Services pursuant to the H-2B rules, and that this supports why Employer must seek workers through the H-2B program. *Id.*

Employer also argued that the CO was incorrect in concluding its application did not meet the definition of "seasonal," asserting that the brick industry is indeed seasonal based on the construction industry, which starts in spring, peaks in fall, and falls off in winter. *Id.* Employer added that this is confirmed in its 2018 Application for fifteen workers at its Sergeant Bluff plant. *Id.* Employer noted that nothing had changed from 2018 to 2019 in regard to the seasonal nature of the construction materials industry. (AF-2, 2). It also noted that this was the first year Employer had requested production workers under the H-2B program for its Adel plant, but stated, "the employment needs at Employer's Adel Plant follow the same pattern as for the Sergeant Bluff Plant. Nothing has changed from 2018 to 2019 in regard to the 'seasonal' nature of the construction materials industry." (AF-1, 2).

Employer also noted that the CO appeared to be confused about Employer's use of temporary employees. (AF-1, 2; AF-2, 2). Employer noted these employees are not on Employer's payroll, but are full-time employees and are identified as employees at Employer's plants in the various reports submitted to support its applications. *Id.* Employer further added that all H-2B employees will also be full-time employees. *Id.*

Lastly, Employer noted that, in regard to the third deficiency in its Sergeant Bluff application, an inadvertent human error had occurred when its responses to the NOD were uploaded. (AF-2, 3). It found that the Adel plant's cover letter was attached, rather than the Sergeant Bluff cover letter and corrected ETA Form 9142. *Id.* Employer gave the DOL written permission to make any necessary corrections to Employer's application to correct the mistake and submitted the correct cover letter and amended job order with its appeal letter. *Id.*

Based on these arguments, Employer requested that the CO's Final Determination be reversed and its Application for Temporary Employment Certification be granted as submitted. (AF-1, 3; AF-2, 2).

On January 30, 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 appeal 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 6, 2019. Neither party submitted a brief.

## **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. 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. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *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).

To obtain certification under the H-2B program, an applicant 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. *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).

In the instant case, the Employer attempted to establish a seasonal need for the period of February 15, 2019 through December 15, 2019. To establish a seasonal need,

The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.

8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

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. 8 C.F.R. § 214.2(h)(6)(ii)(B). 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.

***Failure to Establish Job Opportunity as Temporary in Nature  
(Deficiency 1, Adel and Sergeant Bluff)***

The CO determined Employer failed to establish a seasonal need for workers at both plants because it failed to establish the job opportunity as temporary in nature. First, the CO found labor shortages, no matter how severe, are insufficient to constitute a temporary need for workers.

In response, Employer argues that its reference to the labor shortage in the Sioux City and Des Moines areas was provided as a supplemental, factual statement. However, Employer indicates that the labor shortage was a factor that contributed to its seasonal need for workers.

The CO was correct in stating that labor shortages generally cannot support seasonal need. On appeal, Employer somewhat minimizes the significance of its prior reference to the labor shortages when asserting that its reference to low unemployment rates was merely a factual statement. I note that in its December 9, 2018 Response to the Notices of Deficiency, Employer described the “very low unemployment rates” in its area as a “key challenge,” in the context of its seasonal need argument. Employer stated that when its seasonal need occurs “each summer and fall,” it has a “severe labor shortage for its plants.” Employer argued that, for this reason, it seeks H-2B visa workers to fully staff its plants during its seasonal need. However, I find that, taken in context, Employer established that its seasonal need, which is tied to the seasonal residential and commercial construction industry, exacerbates its existing, year-round inability to fully staff its plants. For this reason, although I agree with the CO’s statement that a labor shortage, no matter how severe, is insufficient support for seasonal need, I recognize that Employer’s reference to the labor shortage was offered as supplemental support for its other statements supporting seasonal need.

Second, the CO noted that the introduction of new products is an insufficient basis for a temporary need for workers.

Employer argues on appeal that its reference to the labor required to produce new products was only offered as supplemental information. Employer states that the new products are manufactured on a seasonal basis and thus create “an additional need” for seasonal employees.

I agree with the CO’s determination that the need created by production of new products is not sufficient to justify a seasonal need for workers. I find that Employer’s description of the labor-intensive process required for its new products does not justify or support seasonal need, which instead must be related to an event or pattern that occurs depending on seasons of the year and is of a recurring nature. See 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

Third, the CO determined that Employer’s charts of average sales by month from 2015 through 2017 showed a significant decrease in sales during July, which is during its indicated period of need. The CO also noted that Employer stated its operations peak in the late summer and early fall each year, which is inconsistent with its longer stated period of need from February 15<sup>th</sup> through December 15<sup>th</sup>. Further, the CO found Employer’s description of business activities and sales reports imply that it solicits business orders on a year-round basis, even if there are lulls in production.

On appeal, Employer argues that its monthly sales vary from year to year depending on weather patterns; Employer notes that warmer years may allow construction to continue into November and December and colder years can cause construction work to halt until late spring. It also notes that construction may sometimes decline in the summer before peaking again in the fall. However, Employer argues that none of this affects the seasonality of the construction materials industry over the long term.

I agree with Employer's position, which is consistent with its sales and production reports, that its sales customarily fluctuate and this fluctuation does not detract from the overall seasonality of its brick manufacturing activities. However, the sales reports alone are only marginally supportive of Employer's requests for seasonal production workers. The sales numbers, while generally trending upward in spring, summer, and fall months, are not accompanied by any explanation as to the typical relationship between the dates of sales and dates that production workers, like those sought here, would perform work related to those sales. There is also a baseline of sales activities year-round, whereas production reports show some weeks of zero activity in January and February, consistent with Employer's description of typical, yearly shutdowns of manufacturing and lay-offs.

On review of Employer's production and staffing reports, I find that Employer has adequately explained its seasonal need for production workers. In its original application, Employer submitted several documents to support its seasonal need. Among these documents were the following for the Adel Plant: 2016 - 2017 "Production Packaging and Blending," 2016 - 2017 "Staffing Hours," and 2016 - 2017 Packaging and Repackaging (showing number of "temps" and hours and earnings of temps). (AF-1, 83, 85-88). Though there are no labels or explanations accompanying the "Production Packaging and Blending" data, it appears to show that production began in earnest in early March of 2016 and 2017, and remained fairly consistent until about mid to late December of both years. (AF-1, 83). Both the 2016 and 2017 production reports reflect consistently higher production in the second, third, and fourth quarters of the years, and markedly lower production numbers in the first quarter (mainly parts of January and February).<sup>4</sup> This is generally consistent with Employer's asserted seasonal need for production workers.

The 2016 Staffing Hours numbers show that there were typically fewer workers and fewer hours worked from about the week ending January 24<sup>th</sup> to week ending March 6<sup>th</sup> in 2016 and from week ending January 15<sup>th</sup> to week ending February 26<sup>th</sup> in 2017, with consistently higher numbers of workers and hours worked during the rest of the year. (AF-1, 85-86). Although the Staffing Hours data does not identify the number of production workers, whether permanent or temporary, that Employer typically employed throughout the year, the Staffing Hours data generally supports the Employer's assertion of seasonal need for the requested period.

The 2016 Packaging and Repackaging ("Adel Temps") numbers show the most hours were devoted to packaging in 2016 from March to July, with a significant amount also occurring in January, and the most repackaging in 2016 taking place from January to November. (AF-1, 88). The 2017 Packaging and Repackaging ("Adel Temps") numbers reflect that the most hours were devoted to packaging from April to August in 2017, with no packaging taking place in July, and the most repackaging taking place from March to August. (AF-1, 87). Ideally, Employer would have explained the relationship between reports showing "Production Packaging and Blending" and those reflecting its use of temps for packaging/repackaging work in 2016 to 2017, and also how this use of temps is related to seasonal construction materials needs. Further, the

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<sup>4</sup> Per the reports, "blending" is occurring in the January, February and early March weeks where there are zeroes for production. Employer does not explain the significance of any of these numbers or otherwise describe the activities the numbers reflect.

packaging and repackaging information, while apparently showing a use of temporary workers all months of 2016 and mainly between March and September 2017, does not clearly show a recurring pattern of seasonal need for production workers from mid-February to mid-December. Rather, the use of temporary workers varies considerably in 2016 and 2017, including a peak in June of 2016 and declining numbers for the remaining 2016 months, and a peak in April 2017 and very little use of temps for most 2017 months. As such, Employer's production and staffing hours numbers were more supportive of its seasonal need than its packaging and repackaging reports.

Employer submitted similar data relevant to the Sergeant Bluff plant, which supported Employer's seasonality argument for that location. The 2016 Staffing Hours numbers for the Sergeant Bluff plant show the number of workers and hours worked dropped to zero between February 7, 2016 and March 13, 2016. (AF-2, 93). Similarly, in the same report for 2017, the number of workers and hours worked fluctuated between very low and zero between January 8, 2017 and January 22, 2017. (AF-2, 94). Packaging and Repackaging reports for the Sergeant Bluff plant (“#Temps, Hours, Total Earnings”) showed no temporary worker hours in February 2016, use of temporary workers year-round in 2017, and fluctuations in the use of temporary workers each month of both years, but peak months fell within the requested period. (AF-2, 95-96). Sergeant Bluff “Packaging Shipments” data from 2016 and 2017 reflected higher volume mainly from February/March through December; January each year had the lowest numbers (AF-2, 66-67). Overall, the staffing hours and packaging/shipments information are supportive of Employer's stated seasonal need.

The CO briefly mentioned, but failed to review or discuss the data contained in these documents in either its Notices of Deficiency or Final Determination. Rather, the CO primarily focused on matters of labor shortages, labor-intensive new products, and fluctuating sales data in finding Employer failed to establish a seasonal need. Based on the foregoing, the documents described above show an increase in production and staffing in the early spring to late fall/early winter, and a sharp decrease in production activity during January and early February, and thus a need for more production workers in the requested period of February 15th to December 15th.<sup>5</sup> For these reasons, I find Employer established a temporary, seasonal need and presented sufficient evidence to overcome this deficiency.

***Failure to Establish the Temporary Need for the Number of Workers  
(Deficiency 2, Adel and Sergeant Bluff)***

The CO found Employer failed to establish a temporary need for the number of workers it requested. First, the CO noted Employer's chart showing the total number of workers and total number of hours worked in the Sergeant Bluff plant's packaging department for 2017. The CO

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<sup>5</sup> The CO correctly noted certain discrepancies in the Employer's descriptions of its peak in activities, in that “employer indicated its operations peak in the late summer and early fall each year,” while seeking seasonal workers for a longer period from February 15th to December 15th. In its Letter of Need, Employer stated that residential and commercial construction peaks “spring to late fall each year,” that its own operations peak “each summer and fall,” and that sales “are at their maximum in late summer and early fall.” I have found herein that Employer's production and staffing data sufficiently establish a seasonal need for the requested period, even though the highest peaks in production appear to be in the Second, Third and Fourth Quarters.

found the document to show the total work hours fluctuated by month, and therefore did not support a seasonal need for 20 temporary workers.

For this and other reasons stated herein, I agree with the CO's determination. Though Employer's production and staffing reports tend to support its alleged period of seasonal need, the Employer failed to explain how it quantitatively determined the need for the specific number of workers sought (20 production workers). The number of workers, including temporary workers, listed for both 2016 and 2017 fluctuated monthly and never specifically support a need for 20 temporary workers. Rather, in 2017 at Sergeant Bluff, the number of temporary workers rose above 20 only twice in the packaging department and four times in the repackaging department. (AF-2, 96). In addition, the increases were significantly higher than 20 in some cases, with the number of temporary workers rising to 46 in October 2017 (in repackaging, whereas packaging temps dropped to 13) before dropping to 17 for November. *Id.* In addition, the reports show only 11 workers were needed in the repackaging department March and August 2017, and only 8 were needed in December 2017, within the stated period of need. *Id.* In 2016, the numbers were even less consistent, rising from 11 temporary workers in the July packaging department, to 44 in August, 57 in September, 9 in October, and 24 in November at Sergeant Bluff. (AF-2, 95). The 2016 repackaging department's data shows that every month in the seasonal need period had nearly 20 temporary workers or more, rising to 48 at the highest point, except for February, which had no workers, October, which had 10 workers, and December, which had 14 workers. *Id.* Packaging and repackaging temporary worker numbers for the Adel plant showed similar fluctuations, with no totals of temporary workers exceeding 20 in a particular month; if packaging and repackaging numbers are combined, the totals met or exceeded 20 only in May, June and July in 2016. (AF-1, 88). Adel's 2017 numbers were much lower. (AF-1, 87).

Importantly, Employer does not explain how the reports of temporary worker numbers in these years and only in these packaging and repackaging areas support the specific request for 20 production workers, who, according to the application, will have duties of sorting, handling, and packaging brick, as well as blending. Employer did not explain its baseline number of workers in any department or the relationship between the number of temporary workers and permanent employees in its packaging and repackaging departments to explain how Employer determined its need for 20 temporary production workers. Employer did not explain how it arrived at the specific number of 20 workers or how these reports support that number. As the CO determined, this Employer's data, without accompanying reasoning or explanation, does not on its face support Employer's assertion that it specifically requires 20 temporary production workers during its seasonal need. *See Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) ("An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of documents-on the table and expect a CO to see if he or she can fit them together. 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").

Employer's other data also does not support its request for 20 workers. Employer submitted H-2B Wage Information for the Sergeant Bluff plant for 2016 and 2017, which appears to show the plant consistently employed between 300 and 450 employees. (AF-1, 61-62). The reports do not indicate the number of permanent staff and the number of temporary workers. Adel's "Staffing Hours" contains a column for "# of Emp" (presumably the number of employees) that fluctuates each week/month, appears generally to increase between late February

and mid-December, but also does not indicate the number of permanent versus temporary workers. (AF-1, 85-86). Employer also submitted “Packaging Shipment” reports for both the Adel and Sergeant Bluff plants; however, Employer provided no explanation as to how this data fulfills Employer’s burden of proving it has a temporary seasonal need to supplement its existing workforce. Therefore, the documents alone do not support Employer’s request for 20 temporary workers. (AF-1, 65, 68).

In cases where employers have established a seasonal need for a specific number of temporary workers, employers have explained specifically how their seasonal work increases require a particular number of workers to supplemental their permanent staff. 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 numbers 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 issued a notice of deficiency, stating the employer had failed to establish a temporary need for the number of workers requested. *Id.* The CO ultimately denied the employer’s application for failing to overcome this deficiency. *Id.* at 5. On appeal, BALCA found the employer had provided information for both 2016 and 2017, even though the CO had only required it submit one previous year’s documentation. *Id.* at 9. Further, BALCA found the records and the employer’s explanation supported the request for 44 stonemason helpers during its peakload need. *Id.* BALCA noted,

Although it is Employer’s burden to establish the number of workers requested and that request represents a bona fide job opportunity, a review of the record supports that the Employer has met this burden. 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. Regardless of the above explanation, 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 to 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.

In *Jose Uribe Concrete Constr.*, 2018-TLN-000044 (Feb. 2, 2018), 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 8 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 8 employees which it was supplementing with the requested number of temporary workers. *Id.* at 14. The employer also provided documentation which supported the marginal increase from 14 workers requested in previous applications and the 16 workers requested in the case at issue. *Id.* at 15. Therefore, BALCA found the employer established its requested need for 16 workers and ordered the case be remanded to the CO for a grant of certification. *Id.*

In cases where employers submitted overly general assertions, descriptions of future projects and/or data without sufficient explanation for the number of workers sought, BALCA has affirmed the denial of certification. In *BMC West LLC*, 2018-TLN-00099 (July 13, 2018), the employer requested 8 assemblers 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 2016 and 2017 summarized payroll and 2016 to 2017 sales reports, among other documentation. *Id.* However, the CO determined the employer had failed to overcome the deficiency and denied the employer’s application. *Id.* at 4-5. On appeal, BALCA agreed with the CO. *Id.* at 10. BALCA stated,

Employer submitted summarized payroll reports of the overtime hours worked during 2015, 2016, and 2017. The overtime payroll reports are for “Assembler” workers and are separated based on permanent and temporary employees. The CO found that the overtime payroll reports show that the amount of hours worked fluctuates year-round, without an identifiable peak period. Employer asserts that, absent the labor shortage in the region, its “monthly sales and payroll reports would reflect seasonality.” It is the employer, however, who bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *Alter & Son Gen. Eng’g*, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). In this matter, the payroll reports do not establish why the job opportunity reflects a temporary need or Employer’s need for the number of workers requested.

*Id.* Similarly, BALCA found the sales reports to show “the 2016 net sales fluctuate[d] year-round, with the nonpeak month of January having net sales greater than any month identified by Employer as a peakload month.” *Id.* at 11. Therefore, BALCA found the sales reports did not support the employer’s need for the number of workers requested. *Id.* Finally, BALCA noted that the employer bears the burden of establishing “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).” *Id.* Because the employer’s supporting documentation failed to explain or support its alleged need for 8 workers, BALCA found the CO’s denial of the employer’s application was proper. *Id.* at 11-12.

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 to 2017, and letters of intent for prospective work, 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 (emphasis supplied). On appeal, BALCA agreed with the CO. *Id.* at 8. BALCA stated,

The CO found that the letters of intent only indicate prospective contracts for the year, and not how Employer quantitatively determined its need for 40 workers. Employer's gross income reports for 2016 and 2017 only show how much revenue is received for these years, and not how the Employer determined it needed 40 workers."

*Id.* BALCA, therefore, determined that the Employer had not presented sufficient information to establish its temporary need for the number of workers requested and subsequently affirmed the CO's denial of the employer's application. *Id.* at 8-9.

The present case is more analogous to *BMC West* and *Gerardo Concrete* than *Gallegos*, *3-G Construction*, and *Jose Uribe*. Unlike the employers in *Gallegos* and *3-G Construction*, Employer did not explain how it arrived at the number 20 when requesting that number of seasonal production workers for each of its plants, did not provide a breakdown of any calculations it might have used to reach the number of workers requested, and did not otherwise explain how it quantified the number of workers needed using some other data or method. As BALCA indicated in *Gerardo Concrete*, an employer should demonstrate how it quantitatively determined the need for the specific number of workers sought. The employers in *Gallegos*, *3-G Construction* and *Jose Uribe* did so by relating the number of workers sought to the number of baseline workers, the specific needs of seasonal work and particular future projects and how many workers the projects would require, and/or a history of using a specific number of temporary workers.

Here, the Employer's 2016-2017 charts and reports alone, and projected 2019 orders, do not on their face support the number of workers requested. In its initial application, Employer described production worker duties as mainly involving brick handling, including sorting and packaging, and briefly mentioned blending. (AF-1, 110-11; AF-2, 125-26). In its Letter of Need, Employer stated that the "key area" where workers are needed seasonally is the re-blending area, where products are blended into new products or re-blended and where there is no permanent staff; Employer also mentioned the need for "[a]dditional workers" in the packaging area, where bricks are packaged for storage. Blending and repackaging are not mentioned, even though some of the reports Employer submitted refer to these activities. (AF-1, 30; AF-2, 41). Whether any or all of these areas are considered areas for "production workers" is unclear. Employer has provided many reports giving numbers on "staffing hours," "production," "blending," "packaging," "repackaging," "temps," "packaging shipments," and "H2B wage information," and in some of the reports the numbers given are self-explanatory (such as "hours" and "earnings" or "wages") but in others, there is no explanation of whether production, blending and packaging and shipment numbers are weights of product, specific units of items, packages of said items, or some other unit of measurement. More importantly, Employer does explain how these numbers support its request for 20 production workers. As noted in *Empire Roofing*, *supra*, the various pieces of information Employer submitted are like puzzle pieces, and like the

employer in that case, Employer here did not meet its burden of identifying the right pieces and connecting them to establish the specific need it asserts.

In addition, unlike in *Jose Uribe*, Employer did not provide sufficient documentation to show that it maintains a certain level of permanent workers and only requires enough temporary workers to supplement the permanent staff. While Employer did submit its H-2B Wage Information for the Sergeant Bluff plant, and submitted “staffing hours” and information about packaging and repackaging “temps,” Employer nowhere explains its number of permanent and temporary workers or why it needs 20 workers to supplement its existing workforce. As *BMC West* reiterates, it is Employer’s burden to establish “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). Notably, in its Letter of Need, Employer also described seeking H-2B workers for the “key area” of re-blending and that this area of the plant has no permanent staff. (AF-1, 30; AF-2, 41).

As noted above, the present case is instead more analogous to *BMC West* and *Gerardo Concrete*. As in *BMC West*, Employer provided documentation that primarily showed fluctuations in the number of workers hired year-round. The data does not support a specific need for 20 workers during the seasonal period alone, and is not accompanied by an explanation of how the data supports the number of requested workers. In addition, as in *Gerardo Concrete*, Employer provided a list of upcoming orders, but did not give accompanying data like the units of bricks for each order, or the projected number of work hours involved, and thus never explained why 20 temporary workers were needed to supplement permanent staff to handle the upcoming work. How the 2019 orders will affect typical production and staffing levels at each plant is not explained, other than the general assertion that these “large commercial jobs ... will create manpower needs,” and “are labor intensive to provide,” thus requiring “additional seasonal employees to complete.” (AF-1, 30-32; AF-2, 41-43).

Overall, Employer’s documentation and evidence lacks an explanatory foundation to support the number of workers requested. While the various data the Employer provided generally shows higher production numbers and staffing hours during Employer’s stated period of need, thus demonstrating a seasonal need, the data does not support the specific request for 20 workers. Employer did not meet its burden of showing how it quantitatively determined the need for the specific number of workers sought. For these reasons, I find Employer has failed to present sufficient evidence to overcome this deficiency.

***Failure to Submit a Complete and Accurate ETA Form 9142  
(Deficiency 3, Sergeant Bluff)***

In regard to the Employer’s application for its Sergeant Bluff plant, the CO found Employer failed to amend the education requirement on the ETA Form 9142 to render it consistent with the job order. In response, Employer admitted the Adel cover letter was accidentally attached in the place of the cover letter for Sergeant Bluff. Employer submitted the corrected cover letter for Sergeant Bluff together with the previously submitted amended job order, and gave the DOL written permission to make any necessary corrections to Employer’s application. Accordingly, I find Employer’s amendment of its application for the Sergeant Bluff plant has overcome the deficiency.

**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 20 "Production Workers" for the period of February 15, 2019 through December 15, 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 21<sup>st</sup> day of February, 2019, at Covington, Louisiana.

For the Board:

**ANGELA F. DONALDSON**  
**Administrative Law Judge**