



Issue Date: 07 March 2019

BALCA Case No.: 2019-TLN-00036
ETA Case No.: H-400-18331-035051

In the Matter of:

SNYDER'S GATEWAY, INC.,
Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearances: Evelyn Wright
Phoenix Labor Consultants
Amherst, Virginia
For the Employer

Micole Allekote, Esq., Attorney-Advisor
U.S. Department of Labor, Office of the Solicitor
200 Constitution Ave., N.W., N-2101
Washington, D.C. 20210
Attorney for the Certifying Officer

Before: **JONATHAN C. CALIANOS**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification. 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, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).²

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. *See* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).

² 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

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matters is affirmed.

STATEMENT OF THE CASE

On January 1, 2019, the Employer filed an Application seeking to hire thirty (30) full-time “Housekeepers” (SOC Occupation Title: Cooks, Short Order) from April 1, 2019, to December 31, 2019. (AF at P33-P65).³ The Employer’s Application identified one worksite in Breezewood, Pennsylvania and indicated it had a “peak load need.” (AF at P33, P35, P51).

On January 8, 2019, the CO issued a Notice of Deficiency (“NOD”), identifying three deficiencies – two of which are relevant to this appeal. (AF at P27-P32). First, citing 20 C.F.R. § 655.6(a) & (b), the CO found “the [E]mployer did not sufficiently demonstrate the requested standard of temporary need.” (AF at P31-32). The CO explained that the Employer did not submit supporting documentation to establish its need for temporary workers results from increased business between April 1 and December 31, 2019. (AF at P31). To correct this deficiency, the CO directed Employer to provide:

1. A statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer’s workers in this same occupation during the stated non-peak period;
3. Monthly occupancy rates for the past two years at the employer’s worksite location(s);
4. Summarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, *Housekeeper*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. . . .

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.

³ References to the Appeal File appear as “(AF at P[#]).”

(AF at P31-32).

Second, citing to 20 C.F.R. § 655.11(e)(3) and (4), the CO also determined Employer failed to sufficiently demonstrate “that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” (AF at P32). The CO explained that the Employer did not indicate how it determined that it needs thirty Housekeepers during the requested period of need. (AF at P32). To correct this deficiency, the CO directed Employer to submit, *inter alia*:

1. An explanation with supporting documentation of why the employer is requesting 30 Housekeepers for Breezewood, Pennsylvania during the dates of need requested; [and]
2. If applicable, documentation supporting the employer’s need for 30 Housekeepers such as contracts, letters of intent, etc. that specify the number of workers and dates of need. . . .

(AF at P8, P32).

On January 16, 2019, the Employer responded to the deficiencies outlined by the CO. (AF at P18-26). In its response, Employer provided a narrative describing its temporary need and number of requested workers, payroll summaries for the occupations of Maids and Cooks, occupancy rates, and a chart depicting the monthly number of staff for the occupations of Maids and Cooks. (AF at P18, P21, P23-26).

On January 18, 2019, the CO issued a Final Determination denying the Application pursuant to 20 C.F.R. § 655.6(a) & (b) and § 655.11(e)(3) & (4). (AF at P2-9). Thereafter, Employer timely requested administrative review of the denial of the Application before the Board. (AF at P1). On February 14, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule allowing the parties to file briefs within seven business days. Only the Employer filed an appellate brief.⁴

DISCUSSION

The 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. 20 C.F.R. § 655.61(a), (e). The two issues in this appeal are whether the Employer has adequately documented a temporary need based on peakload, and whether Employer established a need for thirty housekeepers. Each will be discussed in turn.

1. Employer Did Not Establish a Temporary Need for Workers

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four 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). Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(B). To qualify for peakload need, an

⁴ References to the Employer’s appellate brief appear as “(Er. Br. at [#]).”

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.

Id.; see, e.g., *Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014). Additionally, in reviewing an employer's application, one of the factors the CO considers in making a determination of temporary need is that "[t]he number of worker positions and period of need are justified." 20 C.F.R. § 655.11(d)(3).

The CO did not err in denying certification based on a failure to show peakload need because Employer's documentation was insufficient to demonstrate a temporary peakload need for the laborers requested. Here, Employer's purported period of need is April 1, 2019 through December 31, 2019. (AF at P33). In response to the CO's NOD, the Employer referenced its statement of temporary need provided as part of its original application, where Employer claimed its peakload period of need is based on the increase in business during the "peak tourist season" and indicated the "pattern of increased demand is predictable and recurring." (AF at P18-19, P51). Employer also provided the CO with a chart depicting the number of "Recreation Visits" to Gettysburg National Park, a chart of its own occupancy records for 2017 and 2018, and updated payroll summaries from 2017 and 2018 demonstrating the number of workers and total hours worked in each month of each year. (AF at P23-P24, P52-P57).

In its brief, Employer first asserts the CO denied the Application "based primarily on the fact the employer did not staff temporary housekeepers during the identified dates of need in either year." (Er. Br. at 1). Having reviewed the CO's Final Determination, it appears Employer's assertion arise from the following explanation provided by the CO, which appears in both the NOD and the Final Determination:

The employer states that it requires temporary workers during its requested peakload dates of need from between April 1 and December 31, 2019 as a result of increased business during this period. However, the payroll documents submitted by the employer from calendar year 2017 through September, 2018 do not indicate that it staffed temporary Housekeepers during the identified dates of need in either year. Further, the employer states that its request for temporary workers is based on past and forecasted business volume. However, the employer did not submit supporting documentation establishing such an increase in business. As a result, the employer did not sufficiently demonstrate the requested standard of temporary need.

(AF at P14, P31).

Employer's argument rests upon its misunderstanding of the CO's provided reasoning for denying certification. While it is true that the CO acknowledged the payroll summaries from 2017 and 2018 show Employer did not staff temporary workers during the peakload periods in either year, there is no indication that the CO denied certification "primarily" because of this fact. (See AF at P5-9, P14-16). Rather, the fact that Employer has not staffed any temporary

workers during the peakload periods of the previous two calendar years is evidence that undermines Employer’s alleged need for temporary workers in the current year, as Employer has been able to support its own staffing needs without the need for additional temporary workers. (AF at P23-26, P53-56). Thus, it was reasonable for the CO to take into consideration the previous employment trends of Employer in determining whether Employer established the job opportunity as temporary in nature. *See* 20 C.F.R. § 656.6(a), (b).

Employer also takes issue with the CO’s determination that Employer’s 2018 payroll summary “shows an increase in hours worked during a *portion* of the requested dates of need.” (Er. Br. at 2; *see* AF at P15).⁵ In support of this finding, the CO provided the following chart to summarize the total number of hours worked by Cooks and Maids in each month of calendar year 2018:

2018	Maids Hours	Cooks Hours	Total Hours Worked
January	1998.37	962.43	2960.80
February	1037.73	625.26	1662.99
March	1443.84	586.85	2030.69
April	1595.24	459.16	2054.40
May	1825.98	453.08	2279.06
June	1847.85	561.37	2409.22
July	2622.30	2111.46	4733.76
August	1886.53	1819.39	3706.45
September	1743.01	1809.39	3552.40
October	1976.05	1711.15	3687.20
November	1609.38	1779.83	3389.21
December	1499.84	1790.48	3290.32

(AF at P6-7, P15-16).

Employer contends that this chart shows its peakload period begins in April, as evidenced by the “increase of almost 500 hours from February to April,” which Employer claims is “a significant increase.” (*See* Er. Br. at 2). Notably, however, the increase in total hours worked from February, 2018 to April, 2018 is not almost 500 hours—it is less than a 400 hour increase. (AF at P6-7, P15-16). Furthermore, the 2018 payroll chart shows the number of total hours worked in July increased by over 2,300 hours from June, and over 3,000 hours from February. (AF at P6-P7, P15-16). It also shows that the average number of total hours worked in the peakload months of April, May, and June was 2,247, which is only 30 hours more than the average number of total hours worked in the non-peakload months of January, February, and

⁵ As explained by the CO, pursuant to 20 C.F.R. § 655.15(b), the Employer’s application could not be partially accepted for a reduced number of workers beginning in July because it was filed more than 90 calendar days before the Employer’s date of need. (AF at P9).

March (2,217 hours). (AF at P6-7, P15-16). Therefore, the CO reasonably concluded that the 2018 payroll information shows Employer's peakload period begins in July rather than April, as Employer claims.

Moreover, although not specifically addressed by the CO in the Final Determination, the CO's primary reason for denying certification appears to be based on the overall lack of documentation to support Employer's claimed peakload period of need. (See AF at P5-7, P14-16). For example, although Employer claims it employs a "core staff of permanent workers," it has submitted no evidence as to the number of permanent workers it has retained for calendar year 2019. (AF at P51); see *AB Controls & Technology, Inc.*, 2013-TLN-00022, PDF at *7 (Jan. 17, 2013) (stating "[a] bare assertion without supporting evidence is insufficient to carry the Employer's burden of proof.") (internal citations omitted). Consequently, Employer has failed to present sufficient evidence to establish it is in need of additional temporary workers to supplement its existing permanent staff at its place of employment on a temporary basis in 2019, as required by 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). Additionally, the 2017 payroll summary shows Employer, on average, had 31 total workers during each of the alleged peakload months (April to December), in 2017; whereas the 2018 payroll summary shows Employer, on average, had 26 total workers during these same peakload months. (See AF at P23-24, P55-56). Accordingly, while the payroll summaries show Employer has typically needed between 26 and 31 total workers during past peakload months, the inconsistent number of total workers previously employed by Employer indicates it does not have a predictable period of need.

Employer, further contends the CO erred in its determination by relying "solely on 2018 data submitted," and suggests the occupancy rates it submitted supports its claimed peakload period of need. (Er. Br. at 2). Employer again misunderstands the CO's reasoning for denying the Application. In the Final Determination, the CO specifically identified all of the evidence Employer submitted in support of its claim for its peakload period of need. (AF at P5-9, P14-16). For example, the CO explained it would rely on the payroll information instead of the occupancy numbers provided by Employer primarily because of Employer's own statement in its response to the NOD that "the employer is requesting housekeepers AND cooks. Occupancy numbers do not show the Department anything in relation to cooks." (AF at P19). Thus, because Employer requested additional temporary staff to support both its cooks and housekeepers, the CO rationally relied on the 2018 payroll information for both cooks and housekeepers as it more accurately reflects Employer's period of need than the occupancy rates it provided.

Similarly, Employer argues the CO's determination that the "tourist numbers for the area where this employer is located" does not demonstrate Employer's temporary need is "an extraordinary shift from the Department's position concerning applications located in 'HIGH TOURIST TRAFFIC' areas. . . ." (Er. Br. at 2). To support this position, Employer claims there are other cases in which the CO certified an application based mainly on tourist numbers. (Er. Br. at 2). However, the CO's decisions in other recent cases are irrelevant, as the scope of my review is limited to the evidence that was submitted to the CO in this case. 20 C.F.R. § 655.61(a), (e). While the "tourist numbers" provided by Employer represent the total number of recreation visits to Gettysburg National Park, there is no evidence demonstrating that there is a corresponding increase in Employer's business. (See AF at P7, P16, P20, P57). Indeed, this data tends to show there is an increase in the number of tourists who visit the Gettysburg area from April through October, but I find it is too broad to also accurately depict a corresponding

increase in Employer's business that sufficiently justifies its request for need. Moreover, the tourist data submitted by Employer shows the number of visitors in calendar year 2017, but the data submitted does not contain any information as to the number of visitors in the area during any month in calendar year 2018. (AF at P20, P57). Accordingly, the CO reasonably concluded the tourist data was not sufficient to establish Employer's purported peakload period of need.

The Appeal File does not support Employer's peakload period of need. In sum, the CO denied certification of the Application in this case because the documentary evidence did not support Employer's purported peakload period of need. Although the 2017 and 2018 payroll summaries show Employer has an inconsistent need for workers during its peakload months, Employer provided no information as to the number of permanent employees it currently staffs or will have on staff in any month of 2019. This makes it significantly difficult to determine whether Employer either actually needs additional temporary workers to supplement its permanent staff at its place of employment on a temporary basis, or whether Employer instead aims to replace its permanent workers with temporary workers through the H-2B program. Lastly, the CO provided adequate explanations in its Final Determination as to why the occupancy rates and Gettysburg tourist data were insufficient to establish Employer's peakload period of need.

For the reasons outlined above, I find the Employer failed to meet its burden of establishing a need for temporary workers based upon a peakload need.

2. Employer Failed to Establish Need for the Number of Workers Requested

As explained above, an employer must demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3), (4); *see also Roadrunner Drywall*, 2017-TLN-35, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

In the Final Determination, the CO explained that the chart reproduced above demonstrates that Employer has "approximately a 60 percent increase from its highest hours worked during its nonpeak period (January) to its highest number of hours worked month in the year (July)." (AF at P9). Although the CO found this increase translates into a corresponding increase in workers, the CO found this documentation demonstrates the employer needs only 12 workers, not 30. (AF at P9). Therefore, the CO found the Employer failed to provide sufficient documentation to support its claim of need for 30 temporary workers from April through December. (AF at P9).

In its brief, Employer asserts that "the Department relied solely on PAST 2018 payroll to support the request for workers," and alleges that "[t]he Department is treating this employer unfairly, and in my opinion viewing the payroll date incorrectly, to reach a determination." (Er. Br. at 3). Employer specifically questions "[h]ow can an analyst at the Department of Labor determine an employer needs only 12 workers based on past hours?" (Er. Br. at 3). Employer further contends that "[t]his analyst knows nothing about the employer's operations and its needs to arrive at that assumption based on payroll hours." (Er. Br. at 3). As discussed above, the CO

considered all documentary evidence submitted by Employer. (See AF at P5-9, P14-16). Therefore, I reject Employer’s claim that the CO relied “solely” on the 2018 payroll information.

Additionally, the regulations do not specify what quanta of need will justify a request for each additional worker. See 20 C.F.R. § 655.11(e)(3). However, 20 C.F.R. § 655.20(d) requires that an employer's job opportunity be for a "full-time temporary position," which § 655.5 defines as "35 or more hours of work per week." I find the Department's decision to set 35 hours per week as the lowest amount of work considered "full-time" employment an appropriate benchmark by which to adjudicate an employer's request for a number of workers. Accordingly, for Employer's documentation to support its requested number of workers, it must bear some relation to the Department's definition of "full-time" employment: 35 working hours per week, per worker, or 147 working hours per month, per worker.⁶ 20 C.F.R. § 655.5; see also 80 Fed. Reg. 24,054 (Apr. 29, 2015). Here, Employer has submitted no evidence from which the CO could conclude that its request for 30 Housekeepers from April 1 through December 31, was justified under this standard.

Using the 2017 and 2018 payroll information submitted by Employer, I have created the following chart to summarize the number of workers employed by Employer in each month, and the average number of monthly hours worked by each worker in 2017 and 2018:

Permanent Employees
(Monthly Hours Worked per Employee)

Month	2017	2018
January	27 (172.36)	21 (140.99)
February	28 (104.25)	18 (92.39)
March	28 (115.91)	19 (106.87)
April	30 (130.28)	26 (79.02)
May	34 (125.70)	20 (113.95)
June	35 (132.09)	19 (126.80)
July	35 (130.92)	30 (157.79)
August	34 (184.67)	29 (127.81)
September	29 (126.10)	30 (118.41)
October	29 (129.41)	28 (131.69)
November	26 (123.17)	27 (125.53)

⁶ This calculation assumes a month has 21 working days, or 4.2 weeks.

December	27 (107.22)	26 (126.55)
----------	-----------------------	-----------------------

(AF at P23-24, P26, P53-56).

This chart establishes that the total number of permanent workers employed by Employer changed from 2017 to 2018 as follows: January, 27 to 21; February, 28 to 18; March, 28 to 17; April, 30 to 26; May, 34 to 20; June, 35 to 19; July 35 to 30; August, 34 to 29; September, 29 to 30; October, 29 to 28; November, 26 to 27; and December, 27 to 26. Likewise, the chart also shows that the total number of monthly hours worked per employee changed from 2017 to 2018 as follows: January, 172.36 to 140.99; February, 104.25 to 92.36; March, 115.91 to 106.87; April, 130.28 to 79.02; May, 125.70 to 113.95; June, 132.09 to 126.80; July 130.92 to 157.79; August, 184.67 to 127.81; September, 126.10 to 118.41; October, 129.41 to 131.69; November, 123.17 to 125.53; and December, 107.22 to 126.55.

Except for during the months of September and November, the number of total workers employed by Employer in 2017 decreased during the same months in 2018. I find it significant that the number of monthly hours worked per employee did not generally increase from 2017 to 2018, even though the number of total workers employed each month generally decreased from 2017 to 2018. For example, in April of 2017, Employer staffed 30 permanent workers, and each worked about 130 total monthly hours, which is near, but still below, the minimum full-time employment standard. In April of 2018, however, Employer staffed 4 fewer permanent workers, but each of the 26 permanent workers worked only about 79 total monthly hours, which is well-below the minimum full-time employment standard. This trend continues when comparing the number of workers and monthly hours worked in May and June of 2017 with those in May and June of 2018. Therefore, it is difficult to ascertain how exactly Employer calculated it needed 30 additional workers for the upcoming months of April, May, and June of 2019, when the evidence submitted to the CO establishes that Employer's need for workers in these months significantly decreased from 2017 to 2018.

More specifically, the above chart also shows that during the 2017 peakload months of April to December, Employer's permanent full-time employees worked an average of 4,130.39 hours per month. In the remaining non-peakload months of 2017, Employer's permanent full-time employees worked an average of 3,505.05 hours per month. Thus, the average difference between peakload and non-peakload monthly hours worked by Employer's permanent full-time employees in 2017 is 625.34 hours. Additionally, it appears that August was Employer's busiest peakload month in 2017, with 6,278.64 hours worked, while January was Employer's busiest non-peakload month in 2017, with 4,653.67 hours worked. The difference between its busiest peakload and non-peakload months of August and January is 1,624.97 hours. Divided between 30 H-2B temporary workers, which is the number of additional workers requested by Employer, each worker would receive 54 hours of work in that month. This is well-below the Department's minimum full-time employment standard. Accordingly, Employer's 2017 payroll report does not support its request for 30 additional workers.

The 2018 payroll summary likewise does not support its request for 30 additional workers. For the 2018 peakload months of April to December, Employer's permanent full-time employees worked an average of 3,233.56 hours per month. In the remaining 2018 non-peakload months, Employer's permanent full-time employees worked an average of 2,218.16

hours per month. Thus, the average difference between peakload and non-peakload monthly hours worked by Employer's permanent full-time employees in 2018 is 1,015.43 hours. July was the busiest 2018 peakload month for Employer's workers, with 4,733.76 hours worked, while January was the busiest non-peakload month, with 2,960.80 hours worked. The difference between its busiest peakload and non-peakload months of July and January is 1,773.96 hours. Divided between 30 H-2B temporary workers, which is the number of additional workers requested by Employer, each worker would receive approximately 59 hours of work in that month. This is well-below the Department's minimum full-time employment level standard. Therefore, I find the CO correctly determined the 2018 payroll summary does not demonstrate Employer is in need of 30 additional temporary workers from April 1 through December 31 of 2019.

After review of the record in this matter, I find Employer has not met its burden of establishing it has a peakload period of need for 30 Housekeepers from April 1, to December 31, 2019.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts