



Issue Date: 23 January 2019

BALCA Case No.: 2019-TLN-00022

ETA Case No.: H-400-18309-898307

In the Matter of:

HERDER PLUMBING, INC.,
Employer.

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

DECISION AND ORDER REVERSING THE FINAL DETERMINATION

This proceeding is before the Board of Alien Labor Certification Appeals (the Board) pursuant to Employer Herder Plumbing, Inc.'s request for administrative review of the Certifying Officer's (CO) denial of temporary labor certification under the H-2B program. For the following reasons, the Board reverses the CO's denial of certification.

I. BACKGROUND

Employer submitted its ETA Form 9142, H-2B Application for Temporary Employment Certification, on November 6, 2018, requesting certification for 25 pool laborer helpers and attaching thereto, *inter alia*, its Statement of Temporary Need in which Employer identified January 20 through October 20 as the peak of the swimming pool construction season. Employer further cited its previous certification (ETA Case No. H-400-17221-087673). AF 41-69.¹

On November 16, 2018, the CO issued a Notice of Deficiency, finding that Employer "did not sufficiently demonstrate the requested standard of temporary need," failed to establish the need for the number of workers requested, and did not identify its agent or recruiter for foreign workers. Accordingly, the CO requested further explanation and documentation justifying the dates of need and the number of workers requested, as well as agreements between Employer and agents for recruitment of foreign workers. The CO cited to 20 C.F.R. §§ 655.6(a)-(b), 655.11(e)(3)-(4), and 655.9(a)-(b) in support of the noticed deficiencies. AF 33-40. Employer responded on November 30, 2018, and provided (1) letters from two pool companies with whom it contracted, (2) an inventory listing contracted units per month for 2018 and 2019, (3) the number of helpers needed by month to complete the contracted

¹ AF refers to the Appeal File.

units, (3) summarized monthly payroll reports, and (4) documentation of its recruitment plans. AF 21-32.

The CO issued the Final Determination denying Employer's application on December 26, 2018, finding that Employer's explanation and documentation did not overcome the deficiency under 20 C.F.R. § 655.6(a)-(b).² Specifically, the CO concluded that (1) Employer failed to support the decrease in need during the winter months or the increase in need for the requested dates, (2) the documentation submitted demonstrated a peak from May to August in 2018 and a projected peak in 2019 from May to July (according to one pool contractor) or July to October (according to another pool contractor), and (3) the payroll reports:

... show the use of the employer's prior certifications. In 2017, the employer requested workers from April 11 through November 15, and in 2018 from January 20 through October 20. It appears when the employer is able to attain a temporary workforce, it is able to provide work for those workers.

AF 8-20.

Employer requested administrative review on January 7, 2019, stating it believed it responded to the Notice of Deficiency with the information needed to be certified. AF 1-7. This matter was assigned to me on January 11, 2019. I issued the Notice of Assignment and Expedited Briefing Schedule on January 14, 2019, and I received the Appeal File on January 15, 2019. Employer submitted its Brief on January 21, 2019, explaining that its dates of need had not changed from its prior certification. Employer noted that January's units, though not much higher than November, begin construction on and after the 20th. Employer also explained that it regularly employs permanent workers to complete the averaged 131 units per month during the non-peak months and needs temporary workers during the peakload months when the average units for completion increases to 212 per month. Finally, Employer summarized the information contained in its job report, payroll summary, and contractor letters, which it contended demonstrate the peakload need for the requested dates. The documentation upon which Employer relied and summarized in its Brief was submitted to the CO in response to the Notice of Deficiency.

The decision that follows is based upon the entire record and the applicable law.³

II. STANDARD OF REVIEW

Neither the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, nor the regulations applicable to H-2B temporary labor certifications, 20 C.F.R. Part 655, Subpart A, identify a

² The CO apparently determined that Employer's documentation sufficiently justified the number of workers requested and provided the necessary recruitment information. Thus, the only reason for the CO's denial is Employer's requested dates of need.

³ In the context of an employer's request for administrative review, the Board may consider only "the Appeal File, the request for review, and any legal briefs submitted" and only the evidence submitted to the CO prior to the issuance of the final determination. 20 C.F.R. § 655.61(a)(5), (e). Based thereon, the Board must either affirm, reverse or modify, or remand for further action. 20 C.F.R. § 655.61(e)(2).

specific standard of review for an employer’s appeal under 20 C.F.R. § 655.61(e). The Board has fairly often applied an arbitrary and capricious standard to its review of a CO’s determination in a labor certification case, while yet other decisions apply a quasi-hybrid deference standard or *de novo* standard.⁴ The arbitrary and capricious standard adopted by the Board no doubt stems from the Administrative Procedure Act. Judicial review under the Administrative Procedure Act provides that an agency’s actions, findings, and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. *Albert Einstein Medical Center, supra*; see also, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989).

Accordingly, in reviewing the CO’s decision in the case *sub judice*, I will determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient.⁵ I further note that the CO is entitled to no deference under *Brook Ledge* as no longstanding or clearly articulated interpretation of a regulation is at issue here.

III. DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. An appropriations rider, see 20 C.F.R. § 656.6(b)-(c), requires the Department of Labor to utilize the Department of Homeland Security’s regulatory definition of temporary need, which states, generally, a period of temporary need will be limited to one year or less, but in the case of a “one-time event,” could last up to 3 years. 8 C.F.R. § 214.2(h)(6)(ii)(B).

Temporary service or labor “refers to any job in which the petitioner’s need for the duties to be performed... is temporary, whether or not the underlying job can be described as... temporary.” 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer needs a worker for a limited period of time. An employer must establish that its need for temporary services or labor “will end in the near, definable future.”

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

⁵ In so doing, I adopt the standard of review as defined in *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) for the reasons stated by Administrative Law Judge William T. Barto.

8 C.F.R. § 214.2(h)(6)(ii)(B). The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: one-time occurrence; seasonal need; peakload need; or intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient); *accord, BMC West*, 2016-TLN-00039 (May 18, 2016). While temporary need is generally established through payroll data and similar historic information, start-ups can still establish a temporary need. *Midwest Poured Foundations*, 2013-TLN-00053 (Jun. 18, 2013); *Los Altos Mexican Restaurant*, 2016-TLN-00067 (Oct. 28, 2016) (*Midwest* distinguished on the facts); *accord, The Garage Tavern*, 2016-TLN-00074 (Oct. 28, 2016). Furthermore, “the determination of temporary need rests on the nature of the underlying need for the duties of the position” and not “the nature of the job duties.” 80 Fed. Reg. 24042, 24005.

To qualify as a peakload need, the employer must establish (1) “that it regularly employs permanent workers to perform the services or labor at the place of employment”; (2) “that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand”; and (3) “that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015) (employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload, temporary need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (employer’s documentation revealed that the employer’s alleged peakload need spanned at least a 19-month period); *Paul Johnson Drywall*, 2013-TLN-00061 (Sep. 30, 2013); *Kiewit Offshore Services*, 2012-TLC-00031, -32, -33 (May 14, 2012); *Tarrasco Steel Company*, 2012-TLN-00025 (Apr. 2, 2012); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *DialogueDirect, Inc.*, 2011-TLN-00038, -39 (Sep. 26, 2011); *Top Flight Entertainment, Ltd.*, 2011-TLN-00037 (Sep. 22, 2011); *Workplace Solutions LLC*, 2009-TLN-00049 (Apr. 22, 2009) (notwithstanding a calculation error, it was evident that the employer had a permanent staff that is supplemented by temporary workers); *Hutco, Inc.*, 2009-TLN-00070 (Jul. 2, 2009); *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009) (employer’s submission of agreement letters did not provide adequate evidence of employer’s need to supplement its permanent workforce); *Deober Brothers Landscaping, Inc.*, 2009-TLN-00018 (Apr. 3, 2009) (need can recur if it lasts no longer than 10 months each year); *Magnum Builders*, 2016-TLN-00020 (March 29, 2016); *Erickson Framing Az*, 2016-TLN-00016 (Jan. 15, 2016) (remands to determine if partial certification should be granted for a reduced period); *accord, Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015) (remanded to permit certification for a shorter period of need); *BMC West*, 2016-TLN-00043 (May 16, 2016) (evidence of industry peak season need did not match employer’s need); *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016) (“The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.”); *Chippewa Retreat Spa*, 2016-TLN-00063 (Sep. 12, 2016).

The CO determined that Employer’s documentation failed to demonstrate a peakload need. The documentation submitted by Employer in response to the Notice of Deficiency establishes the following:

For 2017,

| | Hours Worked | Number of Staff | |
|-----------|--------------|-----------------|-------|
| | | Perm. | Temp. |
| January | 1120 | 7 | 0 |
| February | 1280 | 8 | 0 |
| March | 1600 | 10 | 0 |
| April | 4320 | 11 | 16 |
| May | 5440 | 11 | 23 |
| June | 6560 | 18 | 23 |
| July | 6560 | 18 | 23 |
| August | 6240 | 16 | 23 |
| September | 6080 | 15 | 23 |
| October | 5920 | 14 | 23 |
| November | 5760 | 13 | 23 |
| December | 1760 | 11 | 0 |

AF 32.

For 2018,

| | Units Completed | Hours Worked | Number of Staff | |
|-----------|-----------------|--------------|-----------------|-------|
| | | | Perm. | Temp. |
| January | 138 | 1280 | 8 | 0 |
| February | 164 | 2560 | 11 | 5 |
| March | 188 | 5600 | 19 | 16 |
| April | 204 | 5280 | 17 | 16 |
| May | 270 | 5920 | 16 | 21 |
| June | 202 | 6400 | 19 | 21 |
| July | 212 | 6560 | 20 | 21 |
| August | 268 | 6720 | 21 | 21 |
| September | 176 | 6720 | 21 | 21 |
| October | 185 | 5920 | 16 | 21 |
| November | 125 | 2240 | 14 | 0 |
| December | 123 | 2240 | 14 | 0 |

AF 28, 32.

For 2019,

| | Units Contracted for 2019 | | |
|-----------|---------------------------|----------|----------|
| | Total | Client 1 | Client 2 |
| January | 146 | 64 | 41 |
| February | 173 | 71 | 52 |
| March | 198 | 85 | 59 |
| April | 215 | 83 | 68 |
| May | 285 | 129 | 56 |
| June | 213 | 101 | 60 |
| July | 224 | 123 | 77 |
| August | 283 | 75 | 75 |
| September | 186 | 63 | 76 |
| October | 195 | 51 | 76 |
| November | 132 | 24 | 53 |
| December | 130 | 25 | 40 |

AF 28-30.

Based on these tables, I find it facially apparent that Employer has an increased need for workers during the dates requested. The contracted units grow from January forward, through October. Employer explained its January need begins on the 20th, which coincides with a small increase from December's 130 to January's 146 and even larger increases thereafter through August. Employer then maintains a heightened workload, albeit slightly less than the late spring/early summer months, which bottoms out by November. AF 28-30, 32. The CO concluded that Employer failed to support the decreased need in winter months and increased need in the requested months. AF 8-20. I find these conclusions are not rationally supported by the evidence Employer submitted to the CO. Employer's records taken as a whole demonstrate an aggregate peakload need from the end of January through the end of October. That Employer shifted its dates of need from 2017 does not alter my decision here, as that shift is apparently permanent and persists through 2019.

An employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. As discussed above, Employer has met that burden. The Board has consistently affirmed denials of certification applications where an employer's own records belie its claimed peakload periods of need. *See, e.g., Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016); *Erickson Construction*, 2016-TLN-00050 (Jun. 20, 2016); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need). Based thereon, the inverse is equally true. Where, as here, an employer's records facially and clearly support its claimed peakload periods of need, certification is proper.

Therefore, after reviewing the record in this matter, the Board finds that the CO's basis for the denial of certification is factually and legally insufficient.

IV. ORDER

In light of the foregoing, the Certifying Officer's Final Determination denying the Employer's ETA Form 9142, H-2B Application for Temporary Employment Certification, is **REVERSED**. The Certifying Officer is hereby **ORDERED** to grant certification.

So ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge