



**Issue Date: 09 May 2019**

**BALCA Case No.: 2019-TLN-00108**

ETA Case No.: H-400-18365-448325

*In the Matter of:*

**PERMANENT WORKERS, LLC,**  
*Employer.*

**DECISION AND ORDER REVERSING FINAL DETERMINATION**

This proceeding is before the Board of Alien Labor Certification Appeals (the Board) pursuant to the request for administrative review of the Certifying Officer's (CO) denial of temporary labor certification under the H-2B program filed by Employer Permanent Workers, LLC (Employer). 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 January 7, 2019, requesting certification for 95 construction laborers and attaching thereto, *inter alia*, its Statement of Temporary Need in which Employer identified April 1 to December 31 as the peakload season. Employer cited first-quarter weather conditions and increased demand during second, third, and fourth quarters of the year, which its labor force of approximately 280 workers cannot handle. Employer further stated that one of its client owns and operates three shipyards and needs an additional 31 to 32 laborers in each yard. AF 185-3837.<sup>1</sup>

On February 26, 2019, the CO issued a Notice of Deficiency, finding that Employer failed to establish the job as temporary in nature because it did not provide supporting documentation regarding its peakload need being caused by rain, cold temperatures, ice, and snow weather conditions.<sup>2</sup> The CO cited to weather data indicating average high temperatures in January and February in the 60s and rainfall in August above seven inches. The CO further noted that Employer's payroll reports were not summarized and failed show the total number of

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<sup>1</sup> AF refers to the Appeal File. Employer attached a significant number of documents to its application, including the proposed newspaper advertisement, summary of income by customer for 2016 and 2017, profit and loss statements for 2016, statements of assets, liability, equity, revenue, and expenses for 2017, 2018 profit and loss statements, contracts, website screenshots, letter of intent, IRS forms for 2017 and 2018, payroll for 2017 and 2018, and the prevailing wage determination.

<sup>2</sup> Two other noticed deficiencies were cured and are not at issue here.

workers employed, total hours worked, and total earnings received for each month of 2017 and 2018. The CO found that the profit and loss reports, customer summaries, and contracts did not support the claimed peakload dates. Accordingly, the CO requested further documentation from Employer to substantiate the dates of need. AF 175-84, citing 20 C.F.R. §§ 655.6(a)-(b).

Employer responded on March 8, 2019, attaching some of the same documents attached to its application as well as a detailed account of income by customer for 2017 and 2018, the steel structural welding code, job order, and weather data. AF 31-174. The CO issued the Final Determination denying Employer's application on March 20, 2019, finding that Employer's NOD response failed to establish its claimed peakload need. Specifically, the CO noted that the months within the requested period of need have similar weather conditions, i.e., humidity, moisture, temperature, and wind, to those Employer claims prevent it from conducting business in January through March. The CO further noted that Employer's payroll records demonstrate lower earnings in the second quarter of 2018 than in the first quarter. Although Employer claimed the 2018 payroll demonstrates an unusual circumstance, the CO found that claim questionable in light of Employer's statement that the second quarter increase "was due to normal expansion and growth..." Further, the CO determined that Employer's income reports do not illustrate the peakload temporary need because the documents are not exclusive to the requested position and demonstrate that work is being performed during the nonpeak period. The CO also questioned how one client's contract could support a peak in Employer's operations, noting, "One contract does not represent a seasonal or short-term demand for the employer." Thus, the CO determined that Employer failed to support the decrease in need during January through March or the increase in need for the requested dates. AF 20-30, citing 20 C.F.R. § 655.6(a)-(b).

Employer requested administrative review on March 27, 2019. In its request, Employer argued that the negative weather factors include cold temperatures, precipitation/moisture, wind, and fewer sunny days, not the high temperatures cited by the CO, and the combination of the negative factors—rather than each factor individually—restricts work during the nonpeak period. Employer further stated that it has not claimed March to be a slower work month and contended that it provided a reasonable explanation why December is included in the peakload dates of need. In December, Employer is able to fabricate parts indoors, which is not sustainable throughout January and February. Employer requested that, rather than denying its application altogether, the Board consider restricting the dates of need to exclude December. Employer also explained that several considerations in the H-2B program factor into its dates, such as the requirement to file 90 days before the first date of need and the inability to request a start date in March because doing so would require filing late in the fiscal year "guaranteeing 100% exclusion... due to the visa cap." Further, Employer stated that it experienced a labor shortage in the second quarter of 2018, which accounts for the decreased earnings as compared to the first quarter. Finally, Employer explained that its contracts work together with the other factors listed to "paint a larger picture" of need. AF 1-19.

This matter was assigned to me on April 25, 2019. I issued the Notice of Assignment and Expedited Briefing Schedule on April 26, 2019. The decision that follows is based upon the entire record and the applicable law.

## II. STANDARD OF REVIEW

Neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review for an employer's request for administrative review. 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.<sup>3</sup> The arbitrary and capricious standard adopted by the Board no doubt stems from the Administrative Procedure Act. Judicial review under the Administrative Procedure Act provides that an agency's actions, findings, and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. *Albert Einstein Med. Ctr.*, *supra*; *see also*, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989).

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

## III. DISCUSSION

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. 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); 20 C.F.R. § 656.6(b)-(c); *see also* 80 Fed. Reg. 24042, 24005 (determination rests on need for duties, not nature of job duties). Employment is of a temporary nature when the employer needs a worker for a limited period of time. An employer must establish that its need for temporary services or labor "will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: one-time occurrence; seasonal need; peakload need; or intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *BMC West*, 2016-TLN-00039 (May 18, 2016); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions

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<sup>3</sup> *Cf. Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (applying arbitrary and capricious standard but affording deference where decision involved longstanding or clearly articulated interpretation of regulation); *Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) (applying *de novo* standard where no such interpretation is at issue); *Albert Einstein Med. Ctr.*, 2009-PER-00379, -81, slip op. 31-32 (Nov. 21, 2011) (en banc) (citing 5 U.S.C. § 577(b) concluding that *de novo* review of CO decisions denying permanent labor certification is appropriate due to intra-agency nature of the adjudication).

without supporting evidence are insufficient); *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).

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); *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); *BMC West*, 2016-TLN-00043 (May 16, 2016); *Magnum Builders*, 2016-TLN-00020 (Mar. 29, 2016); *Erickson Framing AZ*, 2016-TLN-00016 (Jan. 15, 2016); *Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015); *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); *Paul Johnson Drywall*, 2013-TLN-00061 (Sep. 30, 2013); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013); *Kiewit Offshore Services, Ltd.*, 2013-TLN-00020 (Jan. 15, 2013).

The CO denied certification finding that Employer failed to support the decrease in need during January through March or the increase in need for the requested dates based on weather data, payroll records, and client contracts. I find that the CO erred by viewing each negative weather factor individually rather than as a whole. The table below demonstrates that only January, February, and March have a combination of all five negative weather factors that prevent Employer from performing a high volume of labor outdoors.

**NEGATIVE WEATHER FACTORS**

<b>Avg. Low</b>	<b>Rain In.</b>	<b>Humidity</b>	<b>Wind</b>	<b>Days/Rain</b>	<b>Month</b>
<b>43</b>	<b>5.12</b>	<b>62</b>	<b>10</b>	<b>14</b>	<b>January</b>
<b>46</b>	<b>4.29</b>	<b>59</b>	<b>10</b>	<b>13</b>	<b>February</b>
<b>52</b>	<b>4.02</b>	<b>57</b>	<b>10</b>	<b>13</b>	<b>March</b>
		X	X		April
	X	X			May
	X	X		X	June
	X	X		X	July
	X	X		X	August
	X	X		X	September
	X				October
	X	X			November
X	X	X		X	December

AF 172. Although December has four of the five factors, Employer explained that it reserves its smaller projects for work indoors during that month, which is not a sustainable practice.

An employer must establish that “it needs to supplement its permanent staff... 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). The CO reviewed Employer’s payroll records and saw no evidence of a peak in Employer’s operations. Employer’s payroll records for 2017 and 2018 show that it employed construction laborers as follows:

	Month	CLs	Hours Worked	Average Hours		CLs	Hours Worked	Average Hours
<b>2017</b>	<b>Jan</b>	182	27,027.16	33,570.30	<b>2018</b>	274	41,318.46	49,753.31
	<b>Feb</b>	189	31,568.81			283	49,303.68	
	<b>Mar</b>	191	42,114.93			289	58,637.79	
	<b>Apr</b>	216	33,745.97	48,529.27		240	38,188.38	50,246.32
	<b>May</b>	259	41,659.78			257	44,550.55	
	<b>Jun</b>	264	54,564.88			286	59,248.66	
	<b>Jul</b>	262	43,037.96			283	46,387.26	
	<b>Aug</b>	280	47,563.89			297	59,301.13	
	<b>Sep</b>	284	60,276.22			281	47,995.63	
	<b>Oct</b>	271	50,785.00			257	47,407.08	
	<b>Nov</b>	280	50,028.16			269	54,852.92	
	<b>Dec</b>	295	55,101.54			265	54,285.26	

AF 159-60. Certainly, these records show an increase in hours worked from the first quarter of each year to the remainder of the year. Employer explained that its business had grown from 2017 to 2018 and that it experienced a temporary labor shortage during the second quarter of 2018. Even despite this shortage, Employer’s records nonetheless establish increased demand for services and increased labor requirements for the rest of the year. These records demonstrate a growth of business followed by a temporary labor shortage during a peakload period of need.

The CO essentially determined that the sole support for Employer’s dates of increased need is the client letter requesting 95 workers for its three shipyards in April through December. From that letter, the CO concluded,

One contract does not represent a seasonal or short-term demand for the employer. Further, it is not clear from the letter of intent if the employer’s need begins on April 1 or if the availability of a temporary workforce is the determining factor in the employer’s stated period of need.

AF 29. Employer maintains labor contracts with seven total clients and an average workforce of up to 280 construction laborers. AF 26, 196. In its submission, Employer contended that its contract represents a short-term demand for services that repeats every year. The client letter

specifically requested 95 workers from April through December. Employer further contended that this demand, together with the overall work demand in the months of more favorable weather conditions, creates the peakload, seasonal need. I agree with Employer.

The CO's inquiry into the factual issues before her was not searching and careful. Rather than considering Employer's evidence as a whole, the CO treated Employer's supporting documentation piecemeal. While Employer works year-round, the totality of the record supports Employer's claim of increased demand after the first quarter of the year. Thus, Employer has met its burden of demonstrating eligibility for the H-2B program. Therefore, after reviewing the record in this matter, the Board finds that the CO's basis for the denial of certification are factually and legally insufficient and reverses the denial.

#### **IV. ORDER**

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

**So ORDERED.**

For the Board:

**LARRY W. PRICE**  
Administrative Law Judge