

**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: 03 December 2018**

**BALCA Case No.: 2019-TLN-00012**  
ETA Case No.: H-400-18209-465241

*In the Matter of:*

**RAMON CORONEL REFORESTATION, INC.**  
*Employer.*

Appearances: Ramon Coronel  
*Pro se*

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

Before: Scott R. Morris  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Ramon Coronel Reforestation, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B non-immigrant program. 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

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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). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<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

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* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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).

## BACKGROUND

On July 23, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 90.<sup>3</sup> Employer requested certification of 12 “Forest and Conservation Workers,” for an alleged period of seasonal need from October 15, 2018 to July 15, 2019. AF 97.

On August 7, 2018, the CO issued a Notice of Deficiency, finding three grounds for denial of Employer’s application. AF 71-77. First, the CO concluded that Employer failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a)-(b). The CO noted that Employer had submitted a request for 12 workers in the previous year, alleging a seasonal peakload of January 2, 2018 through September 30, 2018. The CO stated that it was unclear why Employer’s dates of need had changes, and instructed Employer to submit a schedule of its operations throughout the year, an explanation for its changed dates of need, and its monthly payroll reports for the past year. AF 74-75. Second, the CO concluded that Employer had failed to establish a need for the number of workers requested as required by 20 C.F.R. § 655.11(e)(3)-(4). The CO instructed Employer to submit evidence and documentation to establish that the number of workers requested for certification represented bona fide job opportunities. AF 75-76. Third, the CO found that Employer failed to submit adequate documentation of its certifications as a Farm Labor Contractor, and directed Employer to submit appropriate certificates. AF 76-77.

On August 8, 2018, Employer responded to the CO’s Notice of Deficiency. AF 40-70. Employer attached a cover letter to this submission, which it alleged had been submitted with its application. AF 39. In pertinent part, this letter explained Employer’s new seasonal peakload:

. . . This coming season the company is scheduled to start the work October 15, 2018 and must have the work contracted for completed by July 15, 2019. Last season, a Labor Certification was granted (H-400-17284-988480) for work that was to begin on 1/02/2018 with a completion date of 09/30/18, for 12 H-2B workers. The NOA was issued on 11/08/2017 and the company went through the hiring process and submitted the Recruitment Report in a timely fashion. The company did not receive the Labor Certification which was approved for 12 H-2Bs. The mailing which contained the approved Labor Certification was apparently lost during a wind storm. Efforts were made by the company to the

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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> References to the Appeal File will be abbreviated with an “AF” followed by the page number.

USDOL to reissue the Labor Certification. The USDOL stated that they could not reissue but to submit the 1-129 Petition to the USCIS and make a request for the USCIS to enquire and make that request directly with the USDOL. The USCIS refused to honor such request. Consequently, the company lost much of the work contracted for the period of time between January 2, 2018 and September 30, 2018. The work that was not terminated has and is being worked by our local workforce, which number between 10 - 15 depending on how many show up for work.

The company has acquired new contracts/agreements which are located in the same counties but at different elevations. These new areas are able to be worked during the winter months, October through December. Beginning January 2019, the company will be able to work in the areas that were previously secured by contract through July 15, 2019. The additional work secured, October through December, is work that has very little return to the company. But, it does allow the company to continue employment opportunities for our local workers during the 2 1/2 month period before our normal season begins. By all appearances, the company has lost the potential to work the areas that have been previously contracted for that mandates that the work be done during the months of July through September. This is an unintentional shift, but necessary for the company to continue.

Although for the past number years, our Peak Load season has been January 2nd, through September 30th each year. But because the company was not able to fulfill our obligations to the land owner to complete the work contracted for beginning July through September, those contracts are now not available to the company. The only work that has come available is the work to be completed between October and the end of December 2018. The company will struggle financially with this newly acquired work between October and December, but worth the effort to keep our local employees employed.

AF 63-64.

Employer also explained that different elevations have different planting seasons because of the different climates they experience. In higher elevations, snowfall prevented planting trees during the months of October to December. However, lands at lower elevations had a planting season of October 15, 2018 to July 15, 2019 because they are generally closed to vehicle traffic and combustible engines (such as chainsaws) from July to October due to the threat of forest fires. In addition, planting trees at this elevation during this season is futile; the high temperatures and low humidity dries out the roots of any newly-planted seedlings. Accordingly, Employer maintained that the seasonal need for its current contracts is now October 15, 2018 to July 15, 2019. AF 40-42.

Employer next explained its calculation of its need for 12 H-2B workers. A landowner would generally only dictate a minimum contractor crew size to ensure that all the scheduled planting could be accomplished. Nevertheless, the final decision for the number of workers is

made by the owner of Employer, Ramon Coronel, who has the years of experience necessary to estimate labor needs based on the terrain, weather conditions, and elevation at each job. Employer asserted that 12 workers was a minimum but accurate estimate of the number of supplemental workers it needed to complete its current contracts. Employer further maintained that it would not request more workers than reasonably needed, as it incurred additional travel expenses and visa fees for each temporary worker hired. AF 42-43, 65.

To substantiate its seasonal need, Employer included a letter of intent to hire from Rayonier Forest Resources, which stated that it had hired Employer in the past. This letter stated that Rayonier would provide “an opportunity for [Employer] to bid on a portion of approximately 4,000 acres of pre-commercial thinning in the upcoming months, as well as planting for the 2019 season.” AF 69. This letter also asserted that Rayonier evaluated contractors such as Employer “on the basis of price, past performance, quality of work, and timely availability of crews to perform this work.” AF 69.

In Employer’s response to the CO, Employer maintained that Rayonier refused to grant the contracts to Employer until Employer could show that it possessed the labor force necessary to perform the job. Based on Employer’s past relationship with this landowner, Employer asserted that it could “project that it will receive the work that will be presented by the landowner if the additional 12 H-2Bs are approved.” AF 43. In response to the CO’s direction, Employer submitted payroll reports for its employees from 2017 and 2018. AF 45-57.

Employer also submitted the Farm Labor Contractor certificates that the CO requested, which were set to expire on September 19, 2018. Employer asserted that it had submitted the appropriate renewal requests for these permits. AF 44.

On September 27, 2018, the CO issued a Non-Acceptance Denial, finding that two deficiencies remained with Employer’s application despite its submissions. AF 21-26. First, the CO again concluded that Employer had failed to substantiate a peakload need under 20 C.F.R. § 655.6(a)-(b). The CO stated that the fact that Employer had secured new contracts with different dates of need did not justify a change in Employer’s dates of need. In particular, the CO noted that Employer’s two applications showed that Employer had obtained contracts and requested workers for a 19-month continuous period from January 2, 2018 to July 15, 2019. Accordingly, the CO concluded that Employer had established a need for year-round workers, not a seasonal peakload need. AF 23-25.

Second, the CO again found that Employer had failed to establish a temporary need for 12 Forest and Conservation Workers under 20 C.F.R. § 655.11(e)(3)-(4). AF 25-26. The CO stated that none of Employer’s submitted documentation showed that Employer required 12 additional H-2B workers to complete its contracts. The CO also noted that Employer’s payroll data for 2017 was not in the requested format and did not clearly establish Employer’s need for the requested workers.<sup>4</sup> AF 26.

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<sup>4</sup> The CO did not reiterate the previously-identified deficiency of failure to submit adequate certification as a Farm Labor Contractor.

On October 4, 2018, Employer appealed the CO's denial. In this appeal, Employer repeated the arguments it made before the CO and submitted additional evidence (discussed below). This Tribunal issued a Notice of Assignment and Expedited Briefing Schedule on November 8, 2018. The undersigned received the appeal file on November 19, 2018. The CO has not filed a brief.

## STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." 20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action. *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

In this case, Employer has submitted additional evidence with its appeal that were not submitted to the CO: a letter dated October 2, 2018 from Merrill & Ring, Inc., a letter dated October 3, 2018 from Forest Management Solutions LLC, a letter dated October 5, 2018 from Hancock Forest Management, and additional payroll data. AF 9-10, 15-17. However, a request for review "[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application." 20 C.F.R. § 655.33(a)(5). Moreover, the Board has held that it will not take official notice of any evidence that would undermine the regulation's clear restrictions on the Board's scope of review. *See Albert Einstein Medical Center*, 2009-PER379, slip op. at 9-13 (Nov. 21, 2011) (en banc). As the evidence that the Employer submitted with its appeal is neither a part of the record upon which the CO based his denial nor an appropriate subject of official notice, this Tribunal cannot consider it on appeal.

## DISCUSSION

### A. Legal Standard

An employer 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; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng'g*, 2013-TLN-3, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need.<sup>5</sup> Temporary service or labor "refers to any job in which

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<sup>5</sup> Since the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A). An employer establishes a "peakload need" if it shows it "regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

To qualify as a seasonal need, the employer "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); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer only made unsupported assertions about how weather conditions and contract patterns cause job openings to fluctuate); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *Nature's Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012); *Caballero Contracting & Consulting*, 2009-TLN-00015 (Apr. 9, 2009); *Marco, LLC*, 2009-TLN-0043 (Apr. 9, 2009); *KBR*, 2016-TLN-00026 (Apr. 6, 2016).

An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. § 655.11(e)(3), (4); *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 or period of need); *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).

## B. Analysis

As explained above, the CO's ultimate denial rested on two findings: (1) that Employer failed to substantiate its alleged peakload season from October 15, 2018 to July 15, 2019, and (2) that Employer failed to establish a need for 12 Forest and Conservation Workers. Upon review of the Appeal File and Employer's request for review, this Tribunal determines that the CO's denial of Employer's application was not arbitrary and capricious. Though the Tribunal disagrees with the CO's analysis of whether Employer has demonstrated the existence of temporary seasonal need, it finds the CO properly concluded that the Employer failed to establish its need for the number of requested workers. For the reasons that follow, the Tribunal affirms the CO's denial.

### 1. Temporary Need

The CO's denial rested first upon a conclusion that Employer did not demonstrate the existence of a seasonal—rather than year-round—need for workers. In particular, the CO noted that through the Employer's two applications, it had established a continuous need for workers during the 19-month period from January 2, 2018 to July 15, 2019.

The undersigned finds this conclusion to be at odds with Employer's credible assertions regarding the changed seasonal needs of its business. As well-explained in Employer's submissions, in 2017, Employer requested and received authorization to hire H-2B workers for work on its seasonal contracts from January 2, 2018 to September 30, 2018. This season was determined by the specific elevation of land for which Employer had been contracted to perform tree planting. However, due to its Labor Certification being lost in the mail, Employer never hired these temporary workers and subsequently lost these contracts when it was unable to perform the work.

In an adjustment to the loss of these contracts—which Employer believed it would not regain—Employer bid on less desirable jobs at higher elevations that had different climates and planting seasons. Accordingly, it submitted a new application for H-2B workers that reflected its altered business relations and changed dates of temporary seasonal need.

The CO did not reject Employer's assertions regarding the seasonal planting season of these new contracts, but found that, viewed together, Employer's two applications demonstrated a year-round need for temporary labor. The undersigned finds this analysis wanting. The regulations require only that an Employer 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2). Employer credibly explained that the new properties on which it will now work have different seasonal planting needs, requiring a different seasonal allocation of temporary labor. Such assertions satisfy the regulatory requirement and establish a seasonal need.

Only by ignoring the fact that Employer's business had fundamentally changed could the CO conclude that Employer had a year-round need for supplemental labor. Employer's submissions reveal that because Employer will *not* be working its previous contracts, its new seasonal work has changed—likely on a permanent basis. Thus, it was incorrect to conclude that Employer had demonstrated a need for year-round supplemental labor.

It appears that the CO may have been concerned that Employer would jump from one contract to another, thereby always being able to assert a current “temporary need” for H-2B workers. *See Mauel Huerta Trucking*, 2016-TLN-00069 (Oct. 19, 2016) (overlapping applications totaling 16 months suggests permanent employment). But here, nothing in the record indicates that Employer is playing these games. Rather, Employer has sought new, less desirable, seasonal work after losing contracts due to unforeseen circumstances. And nothing in the regulations requires a business—especially a small business—to remain static in the face of changed circumstances. Nor should such a business be penalized for seeking new seasonal contracts in an effort to keep its permanent workers employed after old contracts have been lost.

Accordingly, the undersigned finds that the CO's analysis of temporary need under 20 C.F.R. § 655.6(a)-(b) to be arbitrary and capricious. Nevertheless, for the reasons explained below, the CO's denial was ultimately proper because Employer has not demonstrated a need for the number of workers requested.

## 2. 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).

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, § 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." The undersigned finds 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": 35 hours per week, per worker.

Here, Employer has submitted no evidence from which the CO could conclude that its request for 12 Forest and Conservation Workers was justified under this standard.<sup>6</sup> In essence, Employer asserts that the judgment of its owner, Ramon Coronel, is trustworthy and accurate based on his years of experience, which it contends necessary to assess Employer's labor needs in light of the terrain, weather conditions, and elevation of the land to be worked under Employer's contracts. Employer also maintains that it is requesting only the minimum number of necessary temporary workers because it incurs additional travel expenses and visa fees for each temporary worker hired. AF 4, 42-43, 65.

Employer's bare assertions are insufficient to demonstrate a need for 12 temporary laborers. Even crediting Employer's statement that experience in forestry is necessary to accurately gauge its labor needs, Employer fails to explain how the land conditions it anticipates this coming season relate to its request for 12 H-2B workers. In large part, Employer's argument asks the CO—and now this Tribunal—to simply trust its owner's considered judgment. The regulations require more. While the undersigned is mindful that Employer's current situation may be similar to that of a startup, in which certain kinds of employment data pertaining to the new contracts are unavailable, Employer has not attempted to quantify its labor needs with any

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<sup>6</sup> As explained above, the additional payroll data and letters from potential clients that Employer submitted with its appeal may not be considered by this Tribunal, as they were not submitted before the CO. *See* 20 C.F.R. § 655.33(a)(5).

kind of data. *Cf. Midwest Poured Foundations, Inc.*, 2013-TLN-00053 (June 18, 2013) (reversing a CO's denial of certification where the start-up employer submitted all available data, including invoices, to demonstrate a need for 50 temporary construction laborers). For these reasons, Employer has failed to establish that its request for 12 Forest and Conservation Workers was justified.<sup>7</sup>

## **CONCLUSION AND ORDER**

For the reasons explained above, the Tribunal finds that the CO did not err in denying the Employer's application. The CO's denial is hereby **AFFIRMED**.

**SO ORDERED.**

For the Board:

**SCOTT R. MORRIS**  
Administrative Law Judge

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<sup>7</sup> The Tribunal also takes note of the conundrum in which Employer finds itself: landowners will not sign contracts until an employer has sufficient number of workers to perform the job, yet the DOL requires proof of signed contracts prior to granting certification for the necessary temporary labor to perform these contracts. Such situations need not be an absolute bar for an employer to obtain H-2B certification. *See Power House Plastering, Inc.*, 2018-TLN-00119 (May 16, 2018) (directing grant of certification where an employer could only estimate its labor needs due to the industry practice of not signing contracts months in advance). Here, however, Employer has offered no data whatsoever from which a CO could conclude that its request for 12 temporary workers was justified.