



Issue Date: 12 April 2019

**BALCA Case No.: 2019-TLN-00097**

ETA Case No.: H-400-18351-284937

*In the Matter of:*

**R-STUCCO, LLC,**  
*Employer.*

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

**DECISION AND ORDER AFFIRMING 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 R-Stucco, LLC (Employer). For the following reasons, the Board affirms 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 40 helpers and attaching thereto, *inter alia*, its Statement of Temporary Need in which Employer identified April 1 through December 15 as the peakload season. Employer cited "a very difficult time finding workers to accommodate the increase demand for our services during our peakload time...." AF 48-81.<sup>1</sup>

On February 13, 2019, the CO issued a Notice of Deficiency, finding that Employer failed to establish the job and need for requested number of workers as temporary in nature.<sup>2</sup> The CO found that the Employer did not explain what events caused the temporary need and noted that a labor shortage does not constitute temporary need. Accordingly, the CO requested further explanation and documentation justifying the dates of need and the number of workers requested. AF 39-47, citing 20 C.F.R. §§ 655.6(a)-(b), 655.11(e)(3)-(4) in support of the noticed deficiencies.

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<sup>1</sup> AF refers to the Appeal File.

<sup>2</sup> The third cited deficiency is not at issue here.

Employer responded on March 1, 2019, and included a job itinerary report for 2019, summary of 2018 projects, and monthly payroll reports for 2017 and 2018. Since its inception as a business, Employer has employed the following permanent staff:

| <b>Month</b> | <b>2017</b> | <b>2018</b> |
|--------------|-------------|-------------|
| January      |             | 182         |
| February     |             | 192         |
| March        |             | 203         |
| April        |             | 173         |
| May          |             | 159         |
| June         |             | 158         |
| July         |             | 153         |
| August       |             | 135         |
| September    | 105         | 136         |
| October      | 109         | 137         |
| November     | 128         | 149         |
| December     | 171         | 135         |

Additionally, Employer reported having 2,777 projects scheduled for 2019. Extrapolating data from 2018, Employer estimated its needed workers as follows:

| <b>Month</b> | <b>Projects</b> | <b>Workers</b> |
|--------------|-----------------|----------------|
| January      | 137             | 149            |
| February     | 195             | 212            |
| March        | 200             | 218            |
| April        | 220             | 240            |
| May          | 250             | 272            |
| June         | 240             | 261            |
| July         | 245             | 264            |
| August       | 240             | 261            |
| September    | 250             | 272            |
| October      | 240             | 261            |
| November     | 260             | 283            |
| December     | 300             | 327            |

Employer stated that it cannot meet the demand for services during the peakload (April through December 15) with its current staff, further citing the recent turnover rates and the near impossibility “to find any helpers of plasterers during our peakload dates of need.” AF 30-38.<sup>3</sup>

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<sup>3</sup> Employer’s response to the Notice of Deficiency was due on the tenth business day after the Notice issued, or February 28. Employer submitted its response one day later. This short delay did not affect the CO’s determination.

The CO issued the Final Determination denying Employer's application on March 7, 2019, finding that two noticed deficiencies remained. The CO determined that Employer's payroll established "a recruitment and retention challenge," which is "not representative of a peakload need." Specifically, the CO noted:

The employer began its year in January with 182 workers, growing to 203 permanent Helpers of Plasterers in March, a stated nonpeak month. However, beginning in April, the employer's permanent workforce began diminishing. It was reduced to its lowest number of workers in August, with 135 workers, a stated peakload need month.

Further, the CO questioned whether Employer had been "scheduling its projects in anticipation of a temporary workforce." Thus, the CO concluded that (1) Employer failed to support the decrease in need during December and January or the increase in need for the requested dates and (2) Employer failed to support its request for the number of workers. AF 19-29.

Employer requested administrative review by post on March 19, 2019, which was received by BALCA on March 21, 2019. In its request, Employer argued that its need is not due to a labor shortage but to an increase in the demand for services and that its current staff is insufficient to accommodate the demand. AF 1-18, citing 8 C.F.R. § 214.2(h)(6).

This matter was assigned to me on March 25, 2019. I issued the Notice of Assignment and Expedited Briefing Schedule on March 26, 2019. On April 10, 2019, the CO filed her Brief. The decision that follows is based upon the entire record and the applicable law.

## II. 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. 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." 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 satisfy regulatory criteria for a peakload, temporary need); *Kiewit Offshore Services, Ltd.*, 2013-TLN-00020 (Jan. 15, 2013); *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); *Hutco, Inc*, 2009-TLN-00070 (Jul. 2, 2009); *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009); *Deober Brothers Landscaping, Inc.*, 2009-TLN-00018 (Apr. 3, 2009); *Magnum Builders*, 2016-TLN-00020 (March 29, 2016); *Erickson Framing Az*, 2016-TLN-00016 (Jan. 15, 2016); *accord, Rowley Plastering*, 2016-TLN-00017 (Jan. 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (Jun. 4, 2015); *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).

An employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. Employer has not met that burden here. Employer’s claimed period of peakload need (from April 1 through December 15) is not supported by the payroll records. Employer had fewer workers in its non-peak period in 2018 than during its asserted period of increased demand. The CO correctly determined that the records represent a labor shortage, which does not constitute temporary need. *T & D Concrete, Inc.*, 2018-TLN-00029, slip op. at 4 (Dec. 27, 2017) (shortage of workers “does not appear to be a temporary situation, and Employer does not explain how it supports its application.”). Similarly, the job itinerary report for 2019 does not establish a peakload period or a temporary need for 40 additional workers. 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). Employer has stated that it

has a “short-term” need for additional workers from April through December 15. But, other than pointing to a labor shortage, Employer has not explained what events cause the seasonal or short-term demand. The only documentation evidencing a peakload need is the employer’s own projection of projects, without supporting evidence about these projects. *See AB Controls & Tech., supra* (bare assertions without supporting evidence are insufficient); *Jim Connelly Masonry, Inc., supra* (submission of agreement letters did not provide adequate evidence of employer’s need to supplement its permanent workforce).

Even had Employer satisfied its burden of establishing a peakload period, Employer failed to justify its request for 40 temporary workers. According to its projections, Employer’s workforce would need to more than double from January (149 workers) to December (327 workers). Employer has claimed a need for 218 workers in March (non-peak). Assuming it was able to hire 218 permanent workers for the year, Employer would need an additional 22 temporary workers in April, 54 in May, 43 in June, August, and October, 46 in July, 54 in September, 65 in November, and 109 in December. Finally, although Employer’s claimed peakload period extends through only half of December, Employer has predicted a need of 327 workers for 300 projects, the highest of any month in the entire year. Thus, Employer’s records do not support its claimed temporary need. 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).

#### **IV. ORDER**

In light of the foregoing, the Certifying Officer’s Final Determination is **AFFIRMED**.

**So ORDERED.**

For the Board:

**LARRY W. PRICE**  
Administrative Law Judge