



Issue Date: 03 April 2019

BALCA Case Nos.: 2019-TLN-00085
ETA Case Nos.: H-400-18362-266868

In the Matter of:

SOUTHERN SPECIALTY CONTRACTORS,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Jose Carlos Garza
Southern Specialty Contractors
Brownsville, TX
For the Employer

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

Before: J. ALICK HENDERSON
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the H-2B temporary non-agricultural labor provisions of the *Immigration and Nationality Act*, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and its implementing regulations at 20 C.F.R. Part 655, Subpart A.¹ The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *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).²

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). *Consolidated Appropriations Act*, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (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 certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24042 *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 decision and order are to the IFR.

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Southern Specialty Contractors’ (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) denial of its application for temporary labor certification under the H-2B non-immigrant program. For the following reasons, the Board affirms the CO’s denial of certification.

BACKGROUND

On January 7, 2019, Employer submitted an application for H-2B visa temporary workers. In its application, Employer requested certification to fill 45 temporary “Painters – Coating, Painting, and Spraying Machine Setters, Operators, and Tenders” positions during its peakload period from April 1, 2019 through July 31, 2019. AF at 43.³ Employer described the job duties as “Set[ting] up, operat[ing], or tend[ing] machines to coat or paint any of a wide variety of products, including glassware, cloth, ceramics, metal, plastic, paper, or wood, with lacquer, silver, copper, rubber, varnish, glaze, enamel, oil, or rustproofing materials. Lifting required up to 50lbs.” *Id.* at 45, 57.

Employer also submitted a Statement of Temporary Need in which it indicated it employs full-time, permanent workers to perform painting duties but needs to supplement its permanent staff during its peakload season. *Id.* at 49. Employer attributed its peakload need to the “extreme heat index” in Cameron County, Texas, which “forces [Employer] and others to slow operations dramatically.” *Id.* Additionally, Employer noted that rain in September further restricts its operations. *Id.* Employer stated that its usual peakload season begins in October and runs through July. *Id.*

On January 29, 2019, the CO issued a Notice of Deficiency (NOD) identifying two issues with the Employer’s application. *Id.* at 37. First, the CO found Employer’s application was deficient because it failed to substantiate that the job opportunity as temporary in nature pursuant to 20 CFR 655.6 (a)-(b). *Id.* at 40. Second, the CO found Employer failed to justify a temporary need for the number of workers requested under 20 CFR 655.11(e)(3)-(4). *Id.* at 41. The CO therefore requested that Employer provide additional documentation and information to substantiate a peakload need from April 1, 2019 through July 31, 2019, as well as its need for 45 workers to meet that peakload need.

On February 12, 2019, Employer responded to the CO’s Notice of Deficiency. *Id.* at 25. Diverging from its application dates, Employer asserted that its peakload period occurs from October to July and that the temporary workers were necessary to meet its contractual obligations and perform at full production. *Id.* at 25. Employer explained that, “[d]uring the hot season, . . . [it] shift[s] focus to finishing touches, quality control, and inspecting previous work with far less volume than when [it is] at full production. This work is easily accomplished with [its] permanent U.S. workforce.” *Id.* Employer also stated that its permanent U.S. workers duties are modified during the hot season to include only “performing finishing touches, quality control, and inspecting previous work.” *Id.* at 26. Employer attached several online articles showing the historic heat index in Brownsville, Texas, OSHA heat index data, and precipitation and thunder storm data. *Id.* at 30-33. Finally, Employer represented that in 2017 and 2018, it had

³ “AF” refers to the appeal file.

one project from January 1, 2017 to September 30, 2017, and another project from October 1, 2017, to December 30, 2018. *Id.* at 27.

With regard to the number of workers, Employer responded as follows:

Part of the basis for our request is our own business judgment and experience. We know our business and what is necessary to survive and prosper, and we are backing up our claim by incurring substantial expense applying for, transporting, and employing [temporary workers]. . . . To our knowledge, there is no evidence by which to impugn our considered judgment and substantial skin in the game.

Id. at 28. Employer also submitted payroll summaries for 2017 and 2018 and a letter of intent from a client, Texas CPS, Inc. *Id.* at 34-25.

On February 25, 2019, the CO issued a Final Determination denying Employer's application. *Id.* at 15. First, the CO found Employer did not overcome its deficiency in establishing the job opportunity as temporary in nature. *Id.* at 19. The CO noted the Employer's explanation that its temporary need was due to severely restricted climate changes in August and September, but concluded that the Employer's statements indicated its permanent workers did not perform painting duties during those months. *Id.* at 19-20. Further, the CO found the 30-year climate trend chart submitted by Employer showed the average temperature in September, a non-peak month, was the same as in July, the end of Employer's peak season. *Id.* at 20. Finally, the CO determined that Employer's payroll showed it employed temporary workers year-round and that its lowest work hours actually occurred in June and July in 2017 and August and October in 2018, which is inconsistent with Employer's stated peakload period. *Id.* at 22.

Second, the CO found Employer did not overcome its deficiency in supporting the requested number of workers. *Id.* at 24. The CO noted Employer submitted a letter of intent signed by both the Employer and Texas CPS stating a need for 45 workers and a reduced need for 30 workers in August and September. *Id.* However, the CO found the letter of intent unclear on how climate effects some of its workers and not others under the same contract. *Id.* Further, the CO found the payroll reports showed a year-round use of temporary workers which pointed to a permanent need for additional workers. *Id.* Finally, the CO found that, because Employer did not establish a peakload need in its operations, it did not establish a need for temporary workers. *Id.*

On March 12, 2019, Employer submitted a request for administrative review to BALCA appealing the CO's Final Determination. *Id.* at 1. The CO assembled the appeal file and transmitted it to BALCA, the Employer, and the Associate Solicitor for Employment and Training Legal Services ("the Solicitor") in accordance with 20 C.F.R. § 655.33(b) on March 20, 2019. On March 25, 2019, BALCA docketed the appeal and issued a Notice of Docketing. The parties were given an expedited briefing due date of seven days (excluding federal holidays) after their receipt of the brief file, in accordance with 20 C.F.R. § 655.33. Neither party submitted a brief.

DISCUSSION

The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an *Application for Temporary Employment Certification* (“ETA Form 9142”) with ETA’s Chicago National Processing Center. 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. *See Clay Lowry Forestry*, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); *Hampton Inn*, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); *Earthworks, Inc.*, 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012) (citing 20 C.F.R. § 655.33(a), (e)). After considering evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. 20 C.F.R. § 655.61(e).

BALCA may overturn a CO’s decision if it finds the decision is arbitrary or capricious. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016). Under the “arbitrary and capricious” standard, a decision is reviewed to determine if it has “articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *See generally Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted).

Employer Failed to Establish a Temporary, Peakload Need

In the instant case, the Employer attempted to establish a peakload need from April 1, 2019 through July 31, 2019. For the reasons discussed below, I find that the CO’s decision to deny the application was neither arbitrary nor capricious.

Pursuant to DHS regulations, temporary services or labor under the H-2B classification 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 permanent or 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. 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. *Id.*

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies under one of the four temporary need 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). To establish a peakload need, an employer must establish the following: (1) it regularly employs permanent workers to perform the services or labor at the place of employment; (2) 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) 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).

At the outset, I note that the Employer’s application cites a peakload of four months, from April 1, 2019 through July 31, 2019. However, its responses to the NOD focus primarily on weather conditions in August and September. *Id.* at 25-28, 30-33. Employer explained that its peakload need runs from October through July, but it was applying for workers for only a portion of this time period because a previous application that had to be withdrawn. *Id.* at 49.⁴ In any event, the documentation provided by employer fails to support a peakload need for either time period.

Employer’s documentation regarding heat and rain in August and September are of little value. Exhibit 1 is a climate trend chart showing the average monthly heat index in Brownsville, Texas, with outdated data collected between 1961 and 1990. *Id.* at 30. Exhibits 2 is general guidelines from OSHA for working in different levels of heat indexes. *Id.* at 31-32. And the charts in Exhibit 3 show that September contained the highest mean monthly value of days with thunder and precipitation between 1961 and 1990, but do not indicate the location where the data was collected. *Id.* at 33. The presupposition that Brownsville, Texas is hot in August and September would appear to be rather self-evidence. What is not explained, however, is why painters could not work in the early mornings or late evenings during these months.

More importantly, however, is the fact that the Employer’s other documentation is inconsistent with a peakload need. Employer provided payroll reports for 2017 and 2018, which reflect the following data:

2017 Payroll Report:

	Number of Permanent Painters	Total Hours Worked	Total Earnings Received	Number of Temporary Painters	Total Hours Worked	Total Earnings Received
January	4	640	440.00	40	6400	70,400.00
February	4	624	5304.00	30	4800	2800.00
March	4	624	5304.00	30	4800	52,800.00
April	4	800	6800.00	20	3200	35,200.00
May	4	608	168.00	25	4000	44,000.00
June	4	632	372.00	20	3200	35,200.00
July	4	788	6698.00	15	2400	26,400.00
August	6	952	8012.00	20	3200	35,200.00
September	6	1184	9965.00	20	3200	35,200.00

⁴ The employer explained that it had to withdraw its previous application because it was “capped out” for the first half of fiscal year 2019. *Id.* at 49.

October	6	958	10,103.50	43	6880	75,680.00
November	6	960	13150.40	43	6880	75,680.00
December	6	1200	17,676.00	43	6880	75,680.00

2018 Payroll Report:

	Number of Permanent Painters	Total Hours Worked	Total Earnings Painters	Number of Temporary Painters	Total Hours Worked	Total Earnings Received
January	6	960	8400.00	40	6400	76,800.00
February	6	960	8400.00	20	3200	38,400.00
March	6	1200	10,500.00	15	2400	28,800.00
April	6	960	8400.00	20	3200	38,400.00
May	6	960	8400.00	18	2880	34,560.00
June	6	1170	9945.00	15	2400	28,800.00
July	7	1060	9238.00	10	1600	19,200.00
August	7	1104	9624.00	5	800	9600.00
September	7	1425	12,412.00	6	960	11,520.00
October	7	1400	13,673.87	5	800	9600.00
November	7	1500	12,382.70	15	2400	28,800.00
December	7	1600	14,265.50	20	3200	38,400.00

This data does not support an increase in demand for temporary workers from April to July. In both years, the actual data shows a *decrease* in the number, hours, and earnings of its temporary workers beginning in January and February that continues on through July and August with only minor outlier increases in April, and May. It reflects a continued decrease, with the lowest totals in June, July, August, and October. Employer has applied for workers from April 1, 2019 to July 31, 2019, and the data does not support this requested period of need.

Additionally, Employer submitted the following list of its projects for 2017 and 2018:

1Jan-30Sep17 – Construction of a medical plaza (now known as Su Clinica) on Alton Gloor Boulevard, Brownsville

1Oct17-30Dec18 – Demolition of a warehouse on Alton Gloor Boulevard, Brownsville⁵

Id. at 27. Both projects ran through the requested peakload period of April to July and the non-peak period of August to September. These project dates indicate a year-round need for workers rather than a peakload need.

⁵ The CO mistakenly interpreted the time periods to indicate Employer's first project ended on September 17th, rather than the 30th, and the second project began on October 17th, rather than on the 1st. The CO therefore found a gap in the construction schedule that was partially outside of the stated non-peak period. Thus it appears that the CO incorrectly determined there was a gap in the construction schedule. The projects instead appear to have run back-to-back.

Employer also failed to establish that its temporary workers will not become part of its permanent staff. Originally, in its application, Employer represented as follows:

These temporary, supplemental H-2B workers will not become part of our regular operation because we have no year-round work for those positions. Only permanent staff are guaranteed year-round work. H-2B workers are not subject to rehiring, do not receive compensation once terminated, and are not guaranteed rehiring in the future.

Id. at 49. Thus, the Employer indicated that it has no guaranteed year round work for the temporary positions. Putting aside the notion of guaranteed work, the assertion that Employer has no year round work for these positions runs contrary to both the project list—which shows continuous work—and the payroll summaries—which show that the Employer in fact has been using temporary painters year round.

The Letter of Intent, if taken at face value, also reports that a large portion these “temporary workers” would be needed through October. As the definition of peakload requires an employer to establish that its temporary workers will not become part of its permanent staff, Employer’s application, evidence, and response should have addressed this issue.

The CO’s determination is also consistent with similar cases. For example, in *BMC West LLC*, the employer requested 24 H-2B workers to fill a temporary peakload need for the period of April 1st to December 15th. 2018-TLN-00095, at 2 (Jul. 5, 2018). To support its peakload need, Employer submitted payroll reports showing the total number of temporary workers, the total hours worked, and total earnings received for 2016 and 2017. *Id.* at 13. BALCA determined the reports demonstrated that, in 2016, there was a substantial increase in work from March to April, but in 2017, April was the month with the fewest workers and lowest earnings in 2017, and more work was performed in February and March than in April or July. *Id.* at 14. Therefore, BALCA determined the payroll records did not show April was the definitive start of a peakload period. *Id.* BALCA also determined, based on the reports, which showed baseline temporary worker amounts throughout the year, and Employer’s statement that “without these peakload workers [it would be] difficult or impossible to complete commitments made to its customers,” Employer sought temporary certification to solve a permanent labor shortage. *Id.* Therefore, BALCA found the payroll reports did not support Employer’s requested peakload need and ultimately affirmed the CO’s denial of certification. *Id.*

Similarly, Employer’s payroll reports also do not show an increased need beginning or continuing through April and ending in July, but instead show a decrease in workers, hours, and earnings that continues through April until July and August. The reports also show a year-round need for temporary workers. Additionally, in its H-2B visa application, Employer stated, “We regularly and continually recruit for U.S. workers but are regularly unable to fill these temporary positions. We have no reason to believe we will be any more successful this year that [sic] we have in prior years. No U.S. applicant has been or will be denied these positions for any reason other than lawful, job-related reasons.” AF, p. 43, 49. In its Response to the Statement of Need, Employer also stated, “We applied for H-2B visas because we are unable to recruit and, more importantly, retain a sufficient number of American workers for these positions for which so few

U.S. workers even apply. Despite this record of disinterest in these positions by U.S. workers, we will continue to attempt to recruit U.S. workers.” *Id.* at 25. These statements indicate that, like the employer in *BMC West*, Employer seeks to fill a permanent need, not a temporary need, for workers in 2019. These statements, combined with the statements discussed above which do not support that Employer has met the definition for a peakload need from April 1, 2019 to July 31, 2019.

While it may be that the Employer could show a peakload need, it has failed to substantiate that need in its application. “An employer cannot just toss . . . puzzle pieces—or . . . documents—on the table and expect a CO to see if he or she can fit them together. 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.” *Empire Roofing of Okla., Inc.*, 2016-TLN-00065, at 9-10 (Sept. 15, 2016). For these reasons, I agree with the CO’s determination that Employer has failed to establish the job opportunity is temporary in nature.

Employer Failed to Establish a Temporary Need for the Number of Workers Requested

The CO also found Employer failed to establish a need for 45 painters. In support of its requested number of workers, Employer provided the following statement in its application:

We have carefully analyzed our historical experience and the volume of work and contractual commitments we now have or are able to project. We know the productivity we may anticipate from our existing workforce, and the volume of work to be performed during our peakload. Under accepted practice, the number of workers that we have requested is necessary for us to fulfill our business obligations.

Id. at 49. In its Response to the Notice of Deficiency, the Employer was more direct:

Part of the basis for our request is our own business judgment and experience. We know our business and what is necessary to survive and prosper, and we are backing up our claim by incurring substantial expense applying for, transporting, and employing [temporary workers]. Our small company does not heedlessly commit in this way without the conviction of any other responsible business owners that this is necessary to succeed. To our knowledge, there is no evidence by which to impugn our considered judgment and substantial skin in the game.

Id. at 28.

To obtain certification under the H-2B program, Employer must establish that the number of worker positions is justified and the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4); *BMC West LLC*, 2018-TLN-00099 (July 13, 2018) (affirming denial where the employer’s uniform letters of intent, fluctuating sales reports, and other documentation failed to support a need for the number of workers requested); *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (reversing denial because the employer provided a comprehensive and specific explanation to support its request for 44 stonemason helpers).

Employer's payroll reports, as discussed above, show Employer employed 20, 25, 20, and 15 temporary workers in April, May, June, and July, respectively, in 2017, and 20, 18, 15, and 10 temporary workers in April, May, June, and July, respectively, in 2018. Neither year's data supports a historic need for 45 workers in 2019.

Employer's letter of intent is also not sufficient to support Employer's need for 45 workers. The letter of intent indicates the client expects Employer to provide 45 workers and states that during August and September, the client's proposed contracted work can be performed by 30 workers. *Id.* at 34. Importantly, the letter is conclusory and does not quantify or explain why Employer requires exactly 45 temporary workers from April 1, 2019 to July 31, 2019.

Employer has stated that its knowledge and experience support its requested number of workers and that the CO, and now BALCA, should take its considered judgment as proof of its need for exactly 45 workers. Further, citing *Ramon Coronel*, Employer contended that there is no accepted criteria for establishing proof of need for a requested number of worker. *See Ramon Coronel Reforestation, Inc.*, 2019-TLN-00012, at 8 (Dec. 3, 2018).

Employer's reliance of *Ramon Coronel* is misplaced. In that case, the employer requested 12 workers from October 15th to July 15th to fill a temporary seasonal need. *Id.* at p. 2. The employer provided payroll reports for its employees in 2017 and 2018 and a letter of intent from a client, and explained that it had calculated its need for 12 workers based on the owner's "years of experience necessary to estimate labor needs based on the terrain, weather conditions, and elevation at each job" and, "[b]ased on [the employer]'s past relationship with this [client], [the employer] could project that it [would] receive the work that will be presented by the [client] if the additional 12 H-2Bs are approved." *Id.* at 3-4. On appeal, BALCA stated,

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. . . . 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. In essence, Employer asserts that the judgement 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.

. . . Employer's bare assertions are insufficient to demonstrate a need for 12 temporary laborers. . . . 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.

Id. at 8.

Employer also asks the undersigned essentially to trust that it has a need for 45 workers. But, as *Ramon Coronel* holds, the regulations require more than an Employer's unsubstantiated word. As discussed above, the payroll summaries are inconsistent with the Employer's application because they reflect that Employer has historically employed far fewer than 45 temporary painters in the months of April through July. The letter of intent is also far too vague and conclusory to support a future need for the requested number of workers. For these reasons, I agree with the CO's findings and determine Employer has failed to establish a temporary need for the number of workers requested.

CONCLUSION

Based on the foregoing discussion, and a review of the entire record, I find and conclude the CO properly denied the Employer's H-2B application. It is the Employer's burden to demonstrate eligibility for the H-2B program, but the Employer failed to demonstrate its temporary peakload need for 45 "Painters" from April 1, 2019 through July 31, 2019. Thus, the denial of the Employer's H-2B certification must be **AFFIRMED**.

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

J. ALICK HENDERSON
Administrative Law Judge
Covington, LA