



Issue Date: 01 April 2019

BALCA Case No.: 2019-TLN-00079  
ETA Case No.: H-400-18353-078289

*In the Matter of:*

CEI ROOFING – TEXAS, A TECTA AMERICA COMPANY, LLC,  
*Employer.*

Appearance: Robert McCubbin, Esquire  
H2 Visa Consultants, LLC  
Garden Ridge, TX  
*For the Employer*

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

Before: Drew A. Swank  
Administrative Law Judge

**DECISION AND ORDER REVERSING CERTIFYING OFFICER IN PART AND  
REMANDING FOR FURTHER PROCESSING**

This case arises from CEI Roofing – Texas, A Tecta America Company, LLC’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

---

<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 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.

hire foreign workers under this 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 January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer for twenty roofing helpers for the period of April 1, 2019 to December 1, 2019. (AF 110-42).<sup>3</sup> Employer indicated that the nature of its temporary need was “peakload.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer stated:

CEI Roofing Texas, A Tecta America Company, LLC is a large-scale roofing specialist located in Dallas, Texas. Our greatest challenge each year is to secure a sufficient, dependable temporary workforce that will stay and work for our entire peak period. We have a peak-load need which starts in early April and then runs all the way through early December. Dallas, Texas is in a climate region that has four established and distinct seasons. The fluctuations of any four season climate, no matter how severe, always affects the business patterns of a roofing contractor. According to the National Centers for Environmental Information, through climate analysis, scientists have identified nine climatically consistent regions within the contiguous United States. These known regions are as follows: The Northwest, West, Southwest, Northern Rockies and Plains, Upper Midwest, Northeast, Ohio Valley, South and Southeast. CEI Roofing Texas, A Tecta America Company, LLC performs work in the Dallas, Texas area, which is located in the South U.S. Climate Region according to the National Centers for Environmental Information. The South Climate Region is different than for instance...

(AF 110).

In an attachment to its application, Employer compared the south climate region to other areas and stated that, although areas such as the northeast climate region has more severe seasons, the south climate region still experiences the four seasons, including cold temperatures and snow in the winter, which causes “most types of construction efforts to subside until the following spring.” (AF 116). Employer explained that “[m]ost roofing duties are too difficult or simply impossible to complete during the winter months” which then creates a “rush to complete as much roofing work as possible in the warmer weather months, when temperatures stay high enough to allow roofing materials to be successfully applied by roofing workers.” (AF 122).

---

<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

Specifically, Employer stated that roofing tools are directly affected by freezing temperatures, noting that air compressors on nail guns fail to work properly in freezing temperatures and that the “end result of these circumstances often leads to the nail being under-driven into the roofing material, which is often directly responsible for a shingle blowing off later on, requiring the roof to need to be repaired.” *Id.* Employer stated that in Dallas, Texas, the area of intended employment, the average low in January is 37°F and the average high is 57°F, and the average snowfall is 0.5 inches in January and 0.6 inches in February, which prevents roof work from being successfully completed. Employer further explained that cold temperatures also affect roofing adhesives, and stated that “most roofing adhesives require the temperatures to be 40 degrees Fahrenheit or higher for a considerable period of time for the roofing material to be able to properly stick to the surface of the roof” and that a lack of proper adhesion leads to leaks, which require touch-up and repair. *Id.*

Employer stated that it operates year-round and has permanent workers. However, Employer stated that most of the roofing projects done during the non-peakload winter months “consist of inspections, quotes, patching, and emergency repairs.” (AF 123). Employer further stated that approximately 75 percent of its workload is performed between April 1<sup>st</sup> and December 1<sup>st</sup> each year, which creates a peakload. Employer explained that, based on its 2017 revenue reports, 79.84 percent of its total annual revenue was conducted between April 1, 2017 and November 30, 2017. Employer stated that each year it seeks to employ a minimum of 20 temporary roofing helpers, but struggles to secure that number. *Id.*

Employer submitted a letter from Reid Ribble, the Chief Executive Officer (“CEO”) of the National Roofing Contractors Association, dated December 27, 2018. Mr. Ribble states that cold weather makes it difficult to perform roofing work during the winter months because “[i]ce on a roof makes it extremely dangerous to even attempt to perform roofing work.” (AF 132). He further stated that the “materials used in roofing, such as sealants and adhesives, require the temperature to be 40 degrees or higher in order for the roofing materials to be applied properly and seal” and that the average low temperature in Dallas, Texas is 36°F in January, and that temperatures regularly dip below freezing during the nighttime. *Id.* He further stated that the “ideal conditions for roofing work are when the temperatures are warm and even excessively hot” because this allows the “adhesives and sealants to quickly weather-proof a roof, causing for less risk to the building owner.” (AF 133). He explained that, due to these factors, “all roofing contractors in the state of Texas without question operate on a peak-demand basis, needing to hire additional temporary workers during the warm weather months annually” and that, if they fail to do so, it “vastly lower[s] their profit margins.” *Id.* Mr. Ribble concluded that all roofing contractors in Texas experience a peak-demand need from April 1<sup>st</sup> and December 1<sup>st</sup> of each calendar year. *Id.*

The CO issued a Notice of Deficiency (“NOD”) on February 1, 2019, listing two deficiencies in Employer’s application. (AF 101-09). First, the CO found that Employer failed to “establish the job opportunity as temporary in nature.” 20 C.F.R. §§ 656.6(a) and (b). The CO explained that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” (AF 106). The CO noted that an employer’s need is considered temporary if it is justified to the CO as one of the following: (1) a one-time occurrence; (2) a seasonal need; (3) a peak load need; or (4) an

intermittent need as defined by DHS regulations. The CO determined that Employer failed to submit sufficient information to establish its requested standard of need or period of intended employment. *Id.* The CO stated that, although Employer contends that weather is a determining factor in its peakload need, “the weather in Texas appears to be favorable to outdoor work all year-round” and noted that “[e]ven winter days in Dallas often reach an average of 70 degrees; and for only six times a year on average does the highest temperature of the day in Dallas stay below 40 degrees.” (AF 107). The CO further noted Employer’s contention that it is unable to hire sufficient employees due to a labor shortage, but stated that a “labor shortage, no matter how severe, does not justify a temporary need.” *Id.*

The CO concluded that further explanation and documentation was necessary. Specific documentation requested included the following:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. Weather documentation concerning the weather in the area of intended employment in Texas that will demonstrate the routine presence of weather conditions which the employer has stated is a cause for its peakload need;
3. Summarized 2018 Gross Revenue chart that specifies the revenue is related to the occupation of Roofing Helpers, with details regarding the total number of staff, and total hours worked by its staff;
4. A summary listing of all the employers Roofing projects in Dallas, Texas for 2017 and 2018 calendar years. The list should include start and end dates, and the worksite addresses for each project;
5. Roofing specification documents supporting its statement that weather effects the duties of the occupation of Roofing Helpers in Dallas, Texas;
6. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Roofing Helpers, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
7. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 108).

Second, the CO found that Employer failed to establish a temporary need for the number of workers requested. §§ 656.11(e)(3) and (4). The CO stated that Employer did not indicate how it determined that it needed twenty roof helpers during the requested period of need, stating that additional explanation and documentation were required. Specific documentation requested included the following:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. Documentation concerning the weather in the area of intended employment that will demonstrate the routine presence of weather conditions which the employer has stated is a cause for its peakload need;
3. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
4. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Helper-Roofers, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 109).

On February 14, 2019, Employer filed a response to the NOD and provided additional information and further explanation of the submitted documents, which it asserted supported its temporary need for twenty roofing helpers. (AF 76-100).

Employer re-iterated its prior statements and attested that it experiences a peakload need from April to December due to the effects of colder weather. Employer disagreed with the CO's finding that "[e]ven winter days in Dallas often reach an average of 70 degrees" and re-iterated that the average low in January is 37°F, the average high is 57°F, and the record low is -23°F. Employer continued, stating that roofing work "cannot be performed in even moderately cold weather conditions." (AF 78). Employer cited to several internet articles to support its position that cold weather prevents roofing and other construction work from being performed. Employer also submitted documents stating that some adhesives "require temperatures to be '40F and

rising' for proper application" while another adhesive can only be applied "when ambient temperatures are '50F and rising.'" (AF 79). Employer also submitted a two-page excerpt of a contract, which states that Employer cannot "start roof installation if rain is imminent, or ambient temperature is below 45 degrees F." *Id.*

Employer submitted revenue and payroll reports for 2017 and 2018. Employer states that the 2018 revenue chart shows that it "brought in the vast majority of its overall revenue during the warm weather season, evidencing a peak-load need during the dates of need requested." (AF 80). Employer stated that the payroll data from 2017 and 2018 shows that it employed "between 36 and 69 permanent year-round roofing helpers" and "up to 11 temporary roofing helpers during the peak period of April 1<sup>st</sup> through December 1<sup>st</sup> during the past two calendar years." *Id.* Employer further stated that these records would more accurately reflect Employer's peakload need, except that it has "deeply struggled to secure and retain temporary workers" and that any absence of temporary workers during the peak period of need "simply represents a lack of temporary workers available, and not a lack of work needed to be performed by the employer during those dates." (AF 80-81). Employer noted that this data shows "exceptionally high March figures" because March is a transitional month that is busy some years due to warmer temperatures and not as busy other years. Due to March's fluctuation, Employer states that it only requests temporary workers start in April as it is more consistent year to year. *Id.*

Employer also submitted a list of all projects completed in 2017 and in 2018, as well as a list of 2019 upcoming construction projects. Employer asserts that more weight should be given to the 2019 list of projects than the 2017 and 2018 payroll data because "a past need is really not proof of a future need." (AF 81). Employer acknowledged that the CO requested contracts, letters of intent, or any other supporting documentation that supports the number or workers and dates of need. However, Employer stated that contracts and letters of intent do not list the number of workers or dates of need and that these documents are "usually complicated, technical and extremely length in nature." *Id.* As a result, Employer asserts that the 2019 list of projects is simpler and easier to interpret, and "shows that the employer currently has 23 total construction projects currently lined up for the 2019 peak construction period." *Id.* Employer stated that this is an "extremely high level of work volume" that is "comparable to and even higher than the workload lined up in most past calendar years" that necessitates "an absolute minimum of 20 additional temporary roofing helpers." *Id.* Employer also noted that some of the scheduled work for 2019 is backlogged work that was originally scheduled in 2018, but was unable to be completed on time because Employer did not have a sufficient number of workers. (AF 82).

On February 25, 2019, the CO issued a Final Determination, finding that Employer failed to establish (1) the job opportunity as temporary in nature and (2) a temporary need for the number of workers requested. (AF 58-75). The CO determined that the information Employer submitted did not overcome the deficiencies regarding its failure to establish its temporary need and a bona fide need for the number of workers requested. The CO noted that Employer submitted additional documentation. However, the CO stated that the "documents submitted are not supportive documents or letters from building trade organizations in the employer's intended area of employment." (AF 66).

The CO found that the documents do not support a peakload need during the period stated. The CO included a weather chart from the National Weather Service notating the average temperature for each month from 2015 onward. The CO stated that the “almost every month of the year, including the Employer’s stated non-peak months . . . show an average temperature above 40 degrees Fahrenheit.” (AF 66). The CO further stated that the average low temperatures “occur in the middle of the night when workers are not performing their duties.” *Id.*

The CO also found that the two-page contract detailing the provision that Employer is not to perform roofing work if rain is imminent or the ambient temperature is below 45°F did not contain sufficient information to demonstrate that a contract was entered into between Employer and a client. Specifically, the CO noted that this contract excerpt “does not list the client’s name and/or address, worksite address where the work will be performed, begin and end date, or the employer and client signatures and date.” (AF 68).

The CO further found that the revenue reports do not support a peakload need. Specifically, the CO noted that March had the highest revenue in 2018. The CO further opined that the “revenue report does not show a steady pattern of increased operations from April to December” but instead shows that “business operations fluctuate throughout the entire period of need.” (AF 68).

Similarly, the CO found that the payroll data for 2017 and 2018 do not support a peakload need. Specifically, the CO noted that March 2017 had the second highest number of hours worked for permanent workers and that its permanent workers worked overtime in the non-peakload months of December and February. The CO further noted that temporary workers worked an average of 47 hours per week, with 7 hours of overtime, during the non-peakload month of December. Next, the CO noted that the 2018 payroll data showed that March had the third highest number of hours. The CO stated that, in December 2018, “temporary workers worked an average of 42 hours per week with two hours of overtime, which is significantly higher than the permanent workers’ hours worked in that same month.” (AF 69). The CO further noted that in April, July, September 2018, as well as non-peakload months of March and December 2018, permanent workers’ hours decreased as the employer hired temporary workers. Based on this calculation, the CO determined that “this situation does not represent a supplementation of permanent workers, but a situation where the permanent workers’ hours are taken away and those hours are worked by its temporary workers.” *Id.*

Further, the CO noted that the 2017 and 2018 list of construction projects included client names and the start and end dates of each contract, but that the list of 2019 construction projects does not list the construction worksite location or the start and end dates. The CO determined that “there is no information on the 2019 upcoming construction projects list that support an April 1, 2019 or later start date with any of the employer’s clients.” (AF 70).

The CO also found that the additional documentation submitted does not support a need for 20 roofing helpers, and re-iterated its prior findings on the evidence submitted. (AF 74-75). Specifically, the CO stated the revenue report “does not show a steady pattern of increase from April to December; instead it reflects a fluctuation throughout the entire period of need” and does not support the dates of need or number or workers requested. (AF 73-74).

By letter dated March 6, 2019, which was received on March 8, 2019, Employer submitted a request for administrative review to the Chief Administrative Law Judge regarding the CO's February 25, 2019 denial. (AF 1-57).

Employer stated that the CO is correct to note that the weather in Texas is sometimes favorable for winter work. However, Employer explained that this is why it has a "peakload" need and not a "seasonal" need for temporary workers. Employer further explained that moderate winter weather conditions are why Employer can operate, to a lesser degree, during the winter as the weather in the Dallas area prevents roofing work from being performed on and off throughout the cold weather period. Employer contends that, despite having a moderate winter, "the Dallas area regularly experiences ice, freezing rain, deep freezes and/or snow storms off and on at least a few times during the wintertime each year consistently . . . which impairs roofing work from being performed in any capacity" and, as such, creates a peakload need. (AF 3).

Employer disagreed with how the CO interpreted the documents it submitted regarding weather effects as it pertains to roofing, and stated that, although the CO noted that some adhesives "require ambient temperatures of 40 degrees Fahrenheit and rising," the CO neglected to address that other adhesives that Employer regularly uses require temperatures to be "50 degrees F and rising." (AF 5). Employer stated that the average temperature in Dallas remains below 50°F in January, and that, even though some days experience averages that are higher than 50°F, "part of the temperature range is also too low to perform roofing work." *Id.* Employer also stated that the CO's chart from the National Weather Service verifies its peakload need as it illustrates that the averages in January are 44.5°F or 45.8°F in various years, show averages as low as 45.7°F in February, and hovers around 49°F in December. Employer noted that the average temperatures listed are daytime temperatures, and that the temperatures fall lower at nighttime and in the early mornings, which prevents work from being done anytime the temperature could drop below the minimum within the span of several hours after installing a roof. Employer further stated that even on days when the temperatures are higher and its permanent employees can work, this is not consistent throughout the winter months. (AF 5-6).

Employer contended that it did not have to submit the exact items the CO requested, but rather that the regulations provide Employer with flexibility as to the types of documentation it can use to support its need and that employer used this flexibility. Specifically, Employer stated that letters of intent and contracts do not list start and end dates or the number of workers needed. Employer explained that contracts are lengthy and complicated and that producing "hundreds of pages of contracts that provide little useful information, don't list end dates and start dates of work because it is not industry standard... and generally don't list actual physical addresses" did not seem logical or practical. (AF 10). Rather, Employer stated that the contract excerpt was submitted to illustrate its contractual requirements pertaining to weather conditions when installing a roof and to "prove that weather impacts roofing in Dallas, which is what the [CO] asked for." (AF 7). Employer further stated that this is a generic section of a contract it uses with various clients. Further, Employer stated that the list of 2019 upcoming projects are all within the area of intended employment and that the document states "[a]ll Projects listed are scheduled to be performed during the 2019 peak period months of April 1<sup>st</sup> through December 1<sup>st</sup>," which Employer states contradicts the CO's conclusion that the 2019 project list provide

“no information on the upcoming 2019 construction projects list that support [an] April 1, 2019 or later start date.” (AF 10).

Regarding the month of March, Employer re-iterated its prior statement that March is a transitional month and that some years, when it is warmer, it is able to perform more roofing work than other years, when it is colder. Employer contends that a high March workload in prior years does not mean it lacks a peakload need during the requested dates, but shows that weather patterns vary from year to year. Employer further contends that the revenue data evidences a peakload need, noting that the records illustrate that business tapers off in December and that January and February also have lower revenues, while March through November shows higher revenues. (AF 8-9).

Employer also stated that the CO distorted its 2017 and 2018 payroll records, and explained that payroll reports do not account for factors such as high turnover rates; workers calling in sick; or workers going on vacation, which Employer said comes in cycles. (AF 11). Employer further explained that “[i]n many instances a worker will work for a week and be reported as a worker for a month on the payroll chart” even though he may “only have worked 15 total hours in that month” and stated that these occurrences make the type of calculations the CO did problematic. *Id.* Specifically, Employer stated that the CO “is taking the monthly hours from the report and dividing it by the number of workers listed that month on the report, and erroneously thinking it can know the number of hours and overtime hours worked by each specific worker on a month by month basis” and that such a process is inaccurate. *Id.* Rather than reading the payroll reports this way, Employer argues these records show that Employer has a peakload need, as demonstrated by its employment of between 36 and 69 permanent workers and up to 11 temporary workers, and that it struggles to obtain and retain workers for that need. (AF 12).

By Order dated March 20, 2019, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before March 27, 2019.

Employer submitted a brief on March 27, 2019 and expanded on two points made in its request for administrative review. First, Employer re-iterated that certain adhesives it regularly uses requires temperatures to range between 40 and 50 degrees Fahrenheit and rising for the roof installation to commence. Employer noted that the temperatures the CO quoted are average temperatures and therefore are “midway between extreme highs and extreme lows” and that some days are higher than the quoted average and other days are lower. (Employer’s brief). Employer continued, stating that “[o]n the days where the weather dips to the lower extreme in December through February, and sometimes in March, the employer is not able to work during those days, which decreases production and workloads during this time of the year.” *Id.* Employer re-iterated that it is not alleging a seasonal need, but a peakload. Employer contended that “[i]n a peakload need the employer doesn’t need to prove that it is impossible to perform work during the non-peak period” but that “an employer only needs to prove that the demand for its services and need for workers decreases during a certain period of the year.” *Id.* Employer stated that it achieved this by demonstrating that it requires a smaller workforce in the winter month due to weather conditions prohibiting “roofing work from being performed off and on

throughout the cold weather period, as these temperature averages cited by the [CO] in the Denial Notice conclusively evidence.” *Id.*

Second, Employer re-iterated that the CO misinterpreted the payroll records when it determined the average hours each permanent employee worked as compared to temporary workers. *Id.* Specifically, Employer stated that the CO’s calculation “doesn’t account for an array of industry-specific factors, not limited to but especially high turnover rates in the construction industry.” *Id.* Employer explained that “[w]hen an employer has to create a payroll report for the [CO] like the one submitted, they must list all hours and works in the column on the report, regardless of how long any worker stayed in a particular month.” *Id.* Rather, Employer stated that these records demonstrate a peakload need for temporary workers from March or April, depending on the year, through early December. *Id.*

### **SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; or (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action. (20 C.F.R. § 655.61(e)).

### **ISSUES**

The two issues on appeal from the CO are whether the Certifying Officer properly denied Employer’s H-2B application due to:

- 1) Employer’s failure to establish that its request for twenty roofing helpers for the period of April 1, 2019 to December 1, 2019 was based on a “temporary” employment need according to Employer’s stated standard of “peak load” need; and
- 2) Employer’s failure to establish a bona fide need for the number of workers requested.

### **DISCUSSION**

In order to obtain temporary labor certification for foreign workers under the H-2B program Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation as “any job in which 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). Per the DHS regulations, employment is “of a temporary nature” when:

[T]he employer needs a worker for a limited period of time. 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. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

8 C.F.R. §214.2(h)(6)(ii)(B).

The DOL regulation addressing temporary need in H2-B cases also states that “the employer’s need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.” (20 C.F.R. §655.6).

In the current case, Employer applied for twenty roofing helpers for the period of April 1, 2019 to December 1, 2019 on the basis of a “peakload” need. (AF 110). In regard to peakload need the DHS regulation states, “[t]he petitioner must establish that 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).

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-00003 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

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) and (4). *See Roadrunner Drywall*, 2017-TLN-00035, 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); *see also 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 and made good faith effort to provide alternative supporting documentation to the requested payroll records).

In this case, Employer submitted 2017 and 2018 payroll reports; 2017 and 2018 completed project lists; a list of 2019 upcoming projects scheduled to be performed between April 1, 2019 and December 1, 2019; a two-page contract excerpt specifying the minimum temperature required to install a Thermoplastic Roof System is an ambient temperature of 45°F or higher; instruction pages for several roofing adhesives showing required temperatures for successful application; and a letter from the CEO of the National Roofing Contractors Association. Employer stated that the months of April 1<sup>st</sup> to December 1<sup>st</sup> create a peakload need due to the effect winter weather as roofing work cannot be performed in snowy and icy

conditions or where the ambient temperature is not between 40°F and 50°F and rising, depending on the roofing adhesive used, for several hours after it is used.

In the final denial, the CO determined the documents Employer provided did not demonstrate a peakload need from April 1, 2019 to December 1, 2019, stating that employer did not provide contracts that list the client's name and/or address, worksite address where the work will be performed, begin and end date, or the employer and client signatures and date. (AF 68, 73). The CO further noted that Employer's list of 2019 upcoming projects does not include the worksite location for each project or the start and end dates for each project. (AF 70).

Employer contends that it is not required to submit the specific documents the CO requested, but rather that it has flexibility in submitting documentation to support its need. (AF 7-8). *See Midwest Poured Foundations*, 2013-TLN-00053 (ALJ June 2013) (the regulations provide an employer with flexibility as to the type of documentation it may use to support its purported temporary need).

Employer submitted articles pertaining to weather and roofing, a two-page contract excerpt specifying that a minimum ambient temperature of 45°F and higher is needed to perform roofing work, and a letter from the CEO of the National Roofing Contractors Association to support its argument that the weather in Dallas, Texas creates a peakload need. These documents purport that some roofing adhesives require that the temperature be 40°F and rising, while other adhesives require the temperature to be 50°F and rising. (AF 78-79, 132-33; Employer's brief).

The CO determined that the weather in Dallas, Texas is favorable to outdoor work year-round. The CO included a weather chart from the National Weather Service containing the monthly and annual average temperatures in Dallas, Texas, and stated that nearly every month of the year has average monthly temperatures above 40°F. (AF 66-67). This chart notes average temperatures ranging from 48.4°F to 53.7°F in December, 44.5°F to 51.2°F in January, 45.7°F to 60.6°F in February, and 56.1°F to 63.3°F in March. *Id.* As Employer stated, these temperatures represent the average daily temperature, and neither demonstrate what the average daily low temperatures are nor factors that there are days that have lower temperatures.

The CO also included a freeze data and cold season temperatures chart for Dallas, Texas for the years 2015 to 2019. This chart notes that the first occurrence of a temperature equal to or less than 32°F ranges from November 10<sup>th</sup> to December 8<sup>th</sup> and a first occurrence of a temperature equal to or less than 20°F varied from December 18<sup>th</sup> to January 1<sup>st</sup>. The chart also shows a last occurrence of temperatures equal to or less than 32°F ranges from January 8<sup>th</sup> to February 26<sup>th</sup> and temperatures equal to or less than 20°F ranges from January 8<sup>th</sup> to January 18<sup>th</sup>. (AF 67).

The Employer explained that, although the weather may reach a high enough temperature on days during the non-peakload period, “[o]n the days where the weather dips to the lower extreme in December through February, and sometimes in March, the employer is not able to work during those days, which decreases production and workloads during this time of the year.” (Employer's brief). As such, the undersigned finds that the documents pertaining to roofing and

weather support Employer’s statement that it experiences a peakload need during the months of early April to early December based on weather.

Employer also submitted revenue data, 2017 and 2018 payroll data, and a list of upcoming 2019 projects to support its peakload need. Employer submitted the following chart for its 2018 revenue, which shows:

<b>Month</b>	<b>Actual Revenue</b>
January	\$466,366
February	\$355,979
March	\$1,663,811
April	\$1,333,428
May	\$1,184,096
June	\$1,182,074
July	\$1,428,162
August	\$1,289,468
September	\$1,311,804
October	\$1,310,694
November	\$1,186,750
December	\$680,884

(AF 89). The CO determined that the 2018 revenue report does not support a peakload need because it “does not show a steady pattern of increased operations from April to December” but shows that “business operations fluctuate throughout the entire period of need.” (AF 68). However, the CO failed to consider that Employer’s 2018 revenue data demonstrates that, regardless of whether the peakload months of need fluctuate, the peakload months of April through November demonstrate a significantly higher revenue than the non-peakload months of December through February. Although the revenue for March 2018 exceeds the peakload months of need, Employer explained that a higher-revenue month of March does not represent a lack of peakload need from April to early December, but rather, that March fluctuates from year to year depending on the weather, and that it requested a peakload need beginning in April due to April being more consistent from year to year. (AF 80). As such, the undersigned finds that the revenue reports support Employer’s statement that it experiences a peakload need during the months of early April to early December.

Therefore, based on Employer’s revenue reports, weather data, and documentation pertaining to roofing and weather, the undersigned finds that Employer met its burden in establishing a peakload need from April 1, 2019 through December 1, 2019.

Next, Employer contends that it needs 20 temporary roofing helpers to meet its peakload need. Employer submitted a 2019 upcoming projects list as well as 2017 and 2018 payroll records to support its need.

The CO determined that Employer failed to establish a temporary need for 20 roofing helpers. The CO stated that Employer failed to submit contracts and letters of intent that list the

number of workers required and that the two-page contract excerpt, 2017 and 2018 revenue, and 2017 and 2018 payroll data all fail to support the number of workers requested. (AF 72-75).

Employer responded that contracts and letters of intent do not list the number of workers required, and that a more accurate way of determining the number of workers needed is to review the list of 2019 upcoming projects. Employer states that it has over \$12 million of work scheduled in 2019 and that this “is more than enough to employ the full number of 20 temporary roofing helpers requested.” (AF 10). Employer also stated that the 2017 and 2018 payroll records showing that Employer had up to eleven temporary workers does not adequately capture its need because it has struggled to secure and retain temporary workers during the past several calendar years. *Id.*

As the CO determined, Employer has not explained how it determined it needs 20 temporary roofing helpers or how these documents support the requested number of workers. Rather, Employer made a bare assertion that \$12 million of work justifies 20 temporary workers without explaining how it reached that figure. It is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word. Here, the Employer failed to provide evidence justifying that it has a greater need for workers in 2019 than it did in 2017 and in 2018. The CO was thus unable to determine whether the additional positions Employer requested represented bona fide job opportunities. Therefore, Employer did not establish a temporary need for the 20 roofing helpers it requested.

However, Employer’s payroll records for 2017 and 2018 indicate that, to the extent it was able to employ up to eleven temporary roofing helpers from April to December, it demonstrated its need for at least eleven temporary workers during these months. The CO analyzed the number of hours permanent employees worked in 2017 and 2018 as compared to the number of hours temporary employees worked and determined that Employer’s use of temporary workers “does not represent a supplementation of permanent workers, but a situation where the permanent workers’ hours are taken away and those hours are worked by its temporary workers.” (AF 69). Specifically, the CO divided the total number of hours worked by permanent employees by the total number of workers listed in a given month and compared it to the total number of hours worked by temporary employees divided by the number of temporary workers that month. As Employer stated, this type of calculation is problematic as it does not account for industry-specific factors, such as high turnover, workers turning work down, workers calling in sick, or workers taking vacations. As such, the undersigned finds that that the 2017 and 2018 payroll records support Employer’s peakload need for at least eleven temporary roofing helpers.

Although the CO denied Employer’s request in its entirety, this denial is inconsistent with the undersigned’s findings. As a result, the stated deficiency of “failure to establish the job opportunity is temporary in nature” pursuant to 20 C.F.R. §§ 655.6(a) and (b) does not exist with respect to April 1, 2019 through December 1, 2019 portion of Employer’s period of need.

Pursuant to 20 C.F.R. § 655.54, the CO has the discretion to issue a partial certification by reducing the requested period of need. *See Erickson Framing AZ LLC*, 2016-TLN-00016 (ALJ Jan. 5, 2016) (remands to permit the CO to determine if a partial certification should be

granted for a reduced period of peak load need); *accord, Rowley Plastering*, 2016-TLN-00017 (Jan 15, 2016); *Marimba Cocina Mexicana*, 2015-TLN-00048 (June 4, 2015) (remanded to permit certification for a shorter period of need).

Accordingly, the undersigned finds Employer has met its burden in establishing a peakload need for eleven roofing helpers from April 1, 2019 to December 1, 2019, but has failed to establish its need for twenty roofing helpers during the requested period of need of April 1, 2019 to December 1, 2019.

### **ORDER**

Accordingly, it is hereby ORDERED that: the Certifying Officer's denial of Employer's application for eight construction laborers is AFFIRMED in part, and REVERSED in part. This matter is remanded to the Certifying Officer for further processing. The Certifying Officer is directed to continue processing this application in regard to a partial certification for eleven roofing helpers for a period of need between April 1, 2019 and December 1, 2019.

**SO ORDERED.**

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK  
Administrative Law Judge