

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 March 2019**

**Case No.:** 2019-TLN-00066  
**ETA Case No.** H-400-18347-569922

*In the Matter of:*

**DFW FRAMING AND CONSTRUCTION, INC.,**  
*Employer.*

**Certifying Officer:** Leslie Abella  
Chicago National Processing Center

**Appearances:** Thomas P. Bortnyk, Esq.<sup>1</sup>  
Vice President and General Counsel  
MAS Labor  
Lovingsston, Virginia  
*For the Employer*

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United States Department of Labor  
Washington, DC  
*For the Certifying Officer*

**Before:** **TRACY A. DALY**  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

**1. Nature of Appeal.** This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b),

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<sup>1</sup> Employer's request for administrative review was submitted and signed by Mr. Thomas P. Bortnyk, who identifies himself as Vice President and General Counsel for MAS Labor H2B, LLC. However, Employer's request for administrative review states "MAS Labor H2B, LLC . . . is the employer's non-attorney agent-of-record for matters pertaining to their participation in the H-2B program, as permitted by 8 C.F.R. § 214(h)(2)(i)(F) and 20 C.F.R. § 655.8, and is filing this appeal of [Employer's] behalf." (AF 2-15)

1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)<sup>2</sup> and 20 C.F.R. Part 655 Subpart A. It involves Employer's Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for 30 temporary nonagricultural workers and an administrative review of the application's denial.<sup>3</sup>

## **2. Procedural History and Findings of Fact.**

a. On January 7, 2019, DFW Framing & Construction (Employer) filed an ETA Form 9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for 30 temporary "Helpers-Carpenters" to perform work from April 1, 2019 to December 15, 2019 based on Employer's claimed peakload need for temporary workers. Employer stated it is a construction contractor "whose primary activities are residential and multi-family framing services including erecting walls, laying sub-floors, and similar tasks." Employer further stated "construction work is highly weather-dependent and is generally performed from spring through the subsequent fall" and its "need for H-2B workers is directly tied to the regularly recurring annual business cycle customary to the housing construction industry in our locale." (AF 20, 68-77)<sup>4</sup>

b. On February 14, 2019, the CO issued a Notice of Deficiency (NOD) because Employer: 1) did not establish the job opportunity was temporary in nature; and 2) did not establish a temporary need for the number of workers requested. The CO instructed Employer to file a response to the NOD with additional supporting documentation to justify its application.

Concerning whether Employer established the job opportunity was temporary in nature, the CO noted in the NOD that Employer stated in its application the demand for framing and carpentry work decreases in the winter months due to shorter daylight hours and colder temperatures. The CO explained to Employer the average monthly temperature in the area of intended employment, Princeton, Texas, does not fall below 39°F and the area experiences at least eight hours of daylight during its stated non-peak period. Thus, the CO requested Employer submit the following additional documents and justification: 1) a statement describing Employer's business history, activities, and schedule of operations; 2) a detailed explanation as to the activities of Employer's permanent carpenters during the stated non-peak period; 3) an explanation regarding how daylight hours in the non-peak period affects its workers ability to perform its duties when its area of intended employment experiences at least eight hours of daylight during that time; 4) documentation confirming a building season in Princeton, Texas; 5) a summary listing of all projects in the area of intended employment for the previous two calendar years; 6) summarized monthly payroll reports for 2017 and 2018 calendar years; and 7) other evidence or documentation that similarly serves to justify the dates of need requested for

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<sup>2</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>3</sup> On April 29, 2015, the Department of Labor (DOL) and the Department of Homeland Security (DHS) jointly published an Interim Final Rule to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the "2008 Rule" found at 73 Fed. Reg. 78020. *See* 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

<sup>4</sup> References to the Appeal File are by the abbreviation AF and page numbers.

certification.

Concerning whether Employer established a temporary need for the number of workers requested, the CO stated in the NOD that Employer did not explain how it calculated the need for 30 Carpenter Helpers during the requested period of need. The CO requested Employer submit the following additional documents and justification: 1) an explanation with supporting documentation why it is requesting 30 Carpenter Helpers in Princeton, Texas during the dates of need requested; 2) documentation supporting Employer's need for 30 Carpenter Helpers, such as contracts and letters of intent; 3) summarized monthly payroll reports for 2017 and 2018 calendar years; and 4) other evidence and documentation that similarly serves to justify the number of workers requested. (AF 62-67)

c. On February 22, 2019, the CO received Employer's reply to the NOD. On February 27, 2019, the CO issued a Final Determination letter and denied certification.

First, the CO denied certification because Employer failed to establish the job opportunity was temporary in nature pursuant to 20 C.F.R. § 655.6(a)-(b). In its reply to the CO's NOD, Employer explained it experiences inconsistent weather patterns from January to March and it must wait "for the cement to dry in order of us to start the framing process." From January to March, Employer stated other companies must complete work such as land preparation and foundation work with concrete. Employer further noted it "is impossible to frame a home that has no foundation and concrete can only be poured in weather over freezing in order to cure." In response, the CO stated Employer did not submit any documentation of weather data to support its claim. Moreover, the CO explained Employer's supporting documentation did not demonstrate Employer's business operations slow down or are adversely affected by inconsistent weather patterns in the area of intended employment outside the requested period of need. In response to Employer's contention it is impossible to frame a home without foundation, the CO noted Employer did not submit any documentation or evidence that its business operations are unable to provide a foundation or pour concrete to frame homes outside its indicated peak season.

The CO further reviewed Employer's documentation labeled "Order Report" from January 2018 to February 2019. In acknowledging Employer's assertion it is impossible to frame a home without foundation, the CO stated Employer works on projects on a year-round basis. The CO further noted Employer's job report did not increase significantly during the peak months, nor did Employer experience an "extreme decrease during its non-peak season." The CO asserted Employer is providing services for its clients consistently and year-round based on the order report.

In its reply to the NOD, Employer stated the "fact that construction can, and notably does, occur year-round in Princeton, Texas is inconsequential" and "the fact that matters is that demand for construction services is highest from April to mid-December, consistent with traditional new home construction timeliness." Employer further explained this represents the peak period in which it needs to supplement its permanent workers with temporary Carpenter Helpers to meet the higher peak demand for its services. However, the CO explained Employer has tied its peakload need to market demands in its area of intended employment. The CO further

stated Employer did not provide any documentation or evidence “that defines what traditional new home construction timelines are, and how these timelines create a peakload period in its business operations.” The CO stated that market opportunities within a specific timeframe in a year does not determine if an employer is unable to perform its duties outside the dates of need requested.

In response to the CO’s NOD, regarding weather conditions and daylight hours, Employer stated the “reference to daylight hours merely reflects the ability to perform the workload,” which often exceeds eight hours per day. Because Employer’s workdays often exceed eight hours per day, Employer explained it has less time to complete projects on any given workday. Employer further stated weather implicates safety concerns, especially in severe winter weather conditions. In rejecting this argument, the CO stated, even on the shortest days of the year, daylight hours in Princeton, Texas are approximately 10 hours per day. The CO further noted, after reviewing Employer’s Order Report, the number of jobs completed increased each month until mid-December 2018 and the number of jobs completed did not decrease as the amount of daylight decreased; rather, the number of jobs completed by Employer increased each month. The CO concluded Employer’s ability to complete jobs was not affected by the loss of daylight based on the documentation submitted in response to the NOD.

The CO also reviewed a document styled “New Privately Owned Housing Units Started in the United States” that Employer submitted in response to the NOD. The CO noted this reflected market trends of homeownership in the United States, however, it did not establish Employer’s peakload need during the dates of need requested. The CO explained this documentation demonstrated Employer was seeking H-2B workers for business opportunities tied to homes being sold and developed year-round.

Finally, the CO reviewed three letters of intent from three of Employer’s clients. The CO remarked that two of the letters indicated the dates of need requested. However, none of the letters indicated how many workers are needed to complete the jobs, nor did they contain any information regarding why the clients must receive Employer’s services during the period of intended employment due to winter weather conditions.

Second, the CO denied certification because Employer failed to establish a temporary need for the number of workers requested pursuant to 20 C.F.R. § 655.11(e)(3)-(4). In response to the NOD, Employer submitted payroll records from 2017 and 2018 for Carpenter Helpers. The CO noted the payroll records detailed the number of hours worked and the total number of workers in comparison to its temporary employees. The number of temporary employees ranged from 22 to 25. The CO further stated the number of subcontractor workers ranges significantly from 42 to 62 during the indicated peak months. However, the payroll records did not detail the number of hours worked by Employer’s subcontractors. Thus, the CO was unable to determine the total number of hours worked by Employer’s staff and its corresponding business operations. The CO concluded the payroll records submitted in response to the NOD did not support Employer’s request for 30 workers during its claimed peakload need. (AF 20-27)

d. On March 4, 2019, Employer requested administrative review of the CO’s denial of certification pursuant to 20 C.F.R. § 655.61. First, Employer argues the CO incorruptly applied

the regulatory standard for peakload need. Specifically, Employer asserts the CO incorrectly applied the standard for a seasonal need in considering Employer's application. Additionally, Employer contends the CO made factual errors and omissions in its denial letter and failed to consider the totality of the evidence submitted. (AF 1-2)

e. On March 4, 2019 the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On March 11, 2019, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. The CO transmitted the Appeal File to BALCA on March 13, 2019. Neither party filed an appeal brief.

### **3. Applicable Law and Analysis.**

a. *H-2B Program.* The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 20 C.F.R. § 655.20.

b. *Standard of Review.* BALCA's standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the employer's request for administrative review, which may only contain legal arguments and evidence that was actually submitted to the CO in support of the employer's application. After considering the evidence of record, BALCA must: (1) affirm the CO's decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3). 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).

c. *Burden of Proof.* The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof'l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer's burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

d. *Temporary Peakload Need for Workers.* An employer seeking certification must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 C.F.R. § 655.6(a). 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 Department of Homeland Security (DHS) regulations. 20 C.F.R. § 655.6(b). An employer's need is temporary if the need is limited and will "end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B).

To qualify as a peakload need, the employer “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 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 (Sept. 12, 2016).

In its application, Employer seeks certification to hire 30 temporary workers to perform framing work from April 1, 2019 to December 15, 2019 based on a peakload need. In its statement of temporary need, Employer stated its work is “highly weather-dependent.” Employer argues the CO improperly applied the regulatory standard for seasonal need, rather than peakload need. Employer further argues the CO’s “challenge to weather claims is unreasonable on its face.” (AF 9) However, because Employer raised the issue of weather in the area of intended employment as a factor in the peakload period, the CO reasonably required Employer to submit additional documentation on this topic. *BMC West LLC*, 2018-TLN-00100, slip op. at 11 (July 17, 2018) (where the employer raises the issue of weather as a factor in determining peakload need, the CO may properly ask the employer to provide support for such statements). Although the CO spent part of the analysis in discussing weather conditions, the CO did not solely deny Employer’s application for this reason. Moreover, because the definition of peakload need encompasses the existence of a “*seasonal* or short-term demand,” the CO properly considered such seasonal evidence. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added).

In response to the NOD, Employer stated its demand for framing and carpentry work declines in the winter months because it experiences shorter daylight hours and colder temperatures. In response, the CO considered Employer’s “Order Report” submitted in response to the NOD. Employer correctly points out the CO stated Employer consistently performs services for its clients on a year-round basis. However, the CO explained the number of jobs Employer completed did not increase significantly during the asserted peak months, nor did they decrease significantly during the non-peak months in concluding Employer did not establish a peakload need during the asserted peak months. In reviewing this evidence, the CO reasonably concluded this evidence suggested Employer does not have a need to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand based on the evidence submitted by Employer.

The CO further reviewed a document submitted by Employer styled “New Privately Owned Housing Units Started in the United States.” The CO reasonably concluded this document did not assist Employer in establishing a peakload need during the dates of need requested because it details general housing trends in the United States rather than in Employer’s area of intended employment.

Additionally, the CO considered letters of intent from three of Employer’s clients. The letters from History Maker Homes and LGI Homes state “we expect you to provide us framing services from April 1, 2019 through December, 2019” subject to “reasonable outdoor working conditions.” The letter from Stepping Stones Church states they “have other projects in mind and

intend to use [Employer]” in the spring of 2019. However, these letters do not provide sufficient justification to establish a building season in the area of intended employment during the asserted peak season. Furthermore, because these letters contain the language “we expect,” there is insufficient evidence to establish they are legally binding. They therefore do not provide adequate evidence of Employer’s need to supplement its permanent workforce. *Jim Connelly Masonry, Inc.*, 2009-TLN-00052 (Apr. 23, 2009) (finding the employer’s submission of agreement letters, which were not legally binding, did not provide adequate evidence of the employer’s need to supplement its permanent workforce with temporary workers during the stated time period).

e. *Temporary Need for Number of Workers Requested.* The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based the following: the number of worker positions and period of need are justified and the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4). “[I]t is the [e]mployer’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.” *N. Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012).

In support of the 30 requested temporary workers, the CO requested Employer submit a statement explaining how it calculated the need for the specific number of workers requested and summarized monthly payroll reports for calendar years 2017 and 2018. In 2017 and 2018, Employer employed 22 to 25 temporary workers during the claimed peakload months. During the indicated months of peak need, Employer’s number of subcontractor workers ranged from 42 to 62. Although Employer submitted the total amount of hours worked by its temporary employees in 2017 and 2018, it failed to include the total number of hours worked by its subcontractor employees. Consequently, the CO was unable to review and assess the total number of hours worked by its entire staff during the previous two calendar years. In the NOD, the CO specifically required Employer to detail “the number of workers or staff employed” and the “total hours worked.” Therefore, the CO reasonably concluded Employer did not establish a need for 30 workers during its claimed peakload period.

Employer’s failure to provide the requested documentation alone is grounds to find the CO’s denial of certification was proper. Employer did not carry its burden to provide adequate documentation to the CO to support its request for 30 temporary workers. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017); *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017). Therefore, in the alternative, had Employer established a peakload need for workers, Employer’s application would still have been properly denied because it failed to fully comply with the CO’s NOD.

Finally, Employer argues the CO certified its applications in 2017 and 2018 for the same start and end dates of temporary need for 25 workers. Employer further asserts “the only substantive difference between the present application and the previous two years was the employer’s increase in the requested number of workers from 25 to 30.” However, the fact that the CO may have approved similar applications in the past is not ground for reversal of the denial. *Rollings Sprinkler & Landscape*, 2017-TLN-00020 (Feb. 23, 2017).

**4. Ruling.** Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO's denial of Employer's Application for Temporary Employment Certification is AFFIRMED.

**SO ORDERED.**

**TRACY A. DALY**  
**Administrative Law Judge**