In the Matter of:

FALLS FRAMING, LLC,

Employer.

Appearances: Aaron Bernard, Esquire
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For the Employer

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

Before: JONATHAN C. CALIANOS
Administrative Law Judge

DECISION AND ORDER VACATING DENIAL OF CERTIFICATION
AND REMANDING TO THE CERTIFYING OFFICER FOR DETERMINATION
OF WHETHER PARTIAL CERTIFICATION SHOULD BE GRANTED


Employers who seek to 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 (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”) 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is vacated and remanded for further processing.

STATEMENT OF THE CASE

On July 24, 2019, the Employer filed an Application seeking to hire thirty full-time “Helpers-Carpenters” from October 7, 2019 to May 31, 2020, based on a temporary peakload need. (AF at 261). The Application identified the worksite as Hastings, Nebraska. (AF 264). In its Statement of Temporary Need, the Employer stated, in part:

Falls Framing LLC was formed to engage in framing and erecting buildings . . . . The majority of the framing work will be completed in the late fall, winter and spring months to meet project deadlines. Because fertilizer storage facilities are framed during the winter and spring months, there is little need for so many framers during the summer months of the year when there is less framing work . . . . This naturally creates a peakload need for framing construction by Falls Framing LLC from October through the Spring and not year-round . . . .

Because Falls Framing LLC will frame a fertilizer storage facility, their peakload need follows the construction project timeline for this type of facility. Framing projects are started after the concrete foundation has been completed. Concrete work in Nebraska for fertilizer storage facilities is done from April to December due to the weather conditions . . . . During the winter, freezing temperatures do not

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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. 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 have 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.

3 References to the appeal file will be abbreviated with an “AF” followed by the page number.
allow for excavation of concrete footings or proper concrete setting. . . . Concrete must be completed on time for the framing season to begin in October.

After the foundation is completed, Falls Framing LLC will begin its work. . . . With this project, the facility must be completed in May 2020. Therefore, this project with its dates of need from October to May, fits squarely into the peakload need for framers. . . . (AF 266, 271-72).

On August 1, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF at 252-59). The CO found that the Employer did not “sufficiently demonstrate the requested standard of temporary need,” as required by 20 C.F.R. § 655.6(a) & (b). 4 (AF 256). Specifically, the CO stated that the 2017 and 2018 payroll documentation provided with the Application “reflects a significant decrease in business in the months of December and January, which are included in the employer’s indicated period of need,” and it “is unclear why the employer is requesting workers during the months of December and January when it experiences a decrease in business during these months.” (AF 256). On August 13, 2019, the Employer responded to the NOD, providing additional documentation requested in the NOD, including summarized monthly payroll reports for 2018 and 2019, and a chart depicting the total number of workers by month for 2018 and 2019. (AF 103-251).

On August 22, 2019, the CO issued a Final Determination denying certification, based on a finding that the Employer did not establish a peakload need pursuant to 20 C.F.R. § 655.6(a) & (b). (AF at 95-102). The CO stated that the Employer did not address the concern raised in the NOD that the payroll documentation showed a significant decrease in business in December and January. (AF 100). The CO reviewed the additional payroll documentation provided in response to the NOD, and stated it also showed a decrease in business during a portion of the requested period of need. (AF 100-01). According to the CO, the 2018 payroll data showed that the months of November, December and January had lower total combined earnings than several of the months excluded from the Employer’s indicated period of need, including June, July and August. (AF 101). The CO concluded that based on the Employer’s payroll documentation and chart of total combined workers for 2018 and 2019, the Employer does not experience a true

4 The CO identified two additional deficiencies in the NOD. These additional deficiencies are not discussed herein as the CO did not rely on them in the Final Determination letter.
peak in business until February. (AF 101). The CO, therefore, determined that the Employer had not established a need for workers from October through January and denied certification on that basis. (AF 101-02).

On September 5, 2019, the Employer timely requested administrative review of the denial of the Application before the Board. (AF at 1-94). The Employer argued it submitted all the documentation requested by the CO and it was never required to provide an explanation of inconsistencies in the payroll data. (AF 10-11). The Employer provided several reasons for the deficiencies in the payroll data, which it asserted would have resolved any concerns if an explanation had been requested. (AF 11). Alternatively, the Employer argued that the CO’s denial was arbitrary and capricious because the Employer “has been certified for the same position using the same payroll data for not only this year, but for two previous years, and the CO denied the current case under substantially identical circumstances.” (AF 12).

On September 25, 2019, I issued a Notice of Docketing and Expedited Briefing Schedule allowing the parties to file briefs within seven business days, and on October 4, 2019, the Employer filed an appellate brief. The CO did not file an appellate brief in this matter.

**DISCUSSION**

The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties and the request for review, which may only contain legal arguments and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.61(a), (e). After considering all the evidence, the Board may take one of the following actions: “(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)(1)-(3).

At issue on appeal is whether the Employer has adequately documented a temporary, peakload need for thirty Helpers-Carpenters from October 7, 2019 through May 31, 2020.

1. **Prior Certifications**

As an initial matter, the Employer asserts that because the CO has certified substantially identical applications in previous years, the decision to deny certification in this case is arbitrary and capricious. (AF 12). BALCA has held that while “applications should reasonably be reviewed within the context of the previous certifications,” “a non-meritorious application
[cannot] survive simply based on previous years’ approvals.” BMC West LLC, 2018-TLN-00093, PDF at 8-9 (July 12, 2018); see also Cooper Roofing and Solar, 2018-TLN-00080 (Mar. 27, 2018); H & H Tile and Plaster of Austin, Ltd., 2018-TLN-00049, PDF at 11 (Feb. 16, 2018); Jose Uribe Concrete Constr., 2018-TLN-00044 (Feb. 2, 2018). The Appeal File in this matter does not contain any documentation of the prior certifications referenced by the Employer and I, therefore, cannot make any determinations based on these prior applications. Furthermore, even assuming arguendo that identical or similar applications were previously certified, I find, for the reasons discussed infra, that the CO in this case had a legitimate and rationale reason for not summarily granting certification based exclusively on previous applications. Therefore, I do not find that reversal is warranted based solely on previously certified applications.

2. Determination on the Merits

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four 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 qualify for peakload need, an 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.

Id.; see, e.g., Masse Contracting, 2015-TLN-00026 (Apr. 2, 2015); Natron Wood Prods., 2014-TLN-00015 (Mar. 11, 2014); Jamaican Me Clean, LLC, 2014-TLN-00008 (Feb. 5, 2014). An employer must also demonstrate the number of workers and period of need requested are justified, and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3), (4). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

The CO denied certification because the payroll data provided by the Employer did not establish a peakload need for the entire period requested. Specifically, the CO found that while there was a significant increase in business staring in February, the Employer failed to establish a peakload need for the months of October through January. (AF 6-7).
The Employer provided payroll data for the years 2017 to 2019, which included the number of employees (both permanent and temporary), number of hours worked, and total wage earnings, broken down by month. (AF 248-51, 287-89). In 2017, the combined total hours worked for both temporary and permanent employees for the alleged peak-load months of November and December were less than the total hours for the non-peakload months of June, July and August, and the total hours worked for the peak-load month of October was less than the non-peakload month of June. (AF 289). The alleged peak-load month of January saw the least amount of total hours worked for the entire calendar year. (AF 289). In 2018, the peak-load months of November, December and January had less total hours worked than the non-peakload months of June, July, August and September, and the peak-load month of October had less total hours than the non-peakload months of June and August.\(^5\) (AF 250). Looking to the total hours worked for combined permanent and temporary employees, I agree with the CO’s finding that the data does not support a peakload need for the months of October through January.

The Employer argues that the CO never required an explanation of the payroll data and “without knowing what the CO was looking for, the Appellant did not know it needed to provide an explanation for every inconsistency in the data which can easily be attributed to common situations for a construction company.” (AF 10-11). While the Employer asserts that it was not aware that it was required to address the inconsistencies in the payroll data because the CO did not explicitly include such an explanation in her itemized list of requested documents, I do not find this argument to be persuasive. The NOD directly put the Employer on notice that the deficiency was based primarily on payroll data showing a decline in business during a portion of the requested period of need, and based on the CO’s statements, the Employer should have been aware that this issue would need to be addressed in the response to the NOD.\(^6\)

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\(^5\) The 2019 payroll data is limited to the months of January through August, and therefore, does not provide a complete picture for assessing a pattern of peakload need.

\(^6\) While the Employer did provide an explanation for the payroll data showing a reduction of hours and wages for the first time in its request for review and again in its appellate brief, the regulations state that requests for review may only contain legal arguments and evidence that was actually submitted to the CO. (AF 11); 20 C.F.R. § 655.61(a), (e). Since the Employer never provided such an explanation to the CO prior to this appeal, it cannot be considered before BALCA.
The Employer further asserts that the CO ignored its “most common-sense argument presented in both the original application and the NOD” in support of a peakload temporary need. (AF 12). That is, that concrete work is performed in the warmer months and framing work cannot start until after concrete work is complete. (AF 12). The Employer asserts that “this alone strongly demonstrates that the Appellant has a peakload need for the type of work requested.” (AF 12). Despite the Employer’s assertion, the CO did acknowledge and accept the Employer’s statements that concrete is poured during the warmer months and that the framing work is performed after the concrete is completed, but found that the payroll data was inconsistent with a peakload need for the entirety of the requested period of need.7 (AF 100).

After review of the documentation in this matter and arguments presented by the Employer on appeal, I find that the Employer has not met its burden of establishing a temporary need for the entire period requested in the Application, from October 7, 2019 to May 31, 2019. Specifically, the Employer has not established a peakload need for the months of October through January. With that said, the CO acknowledged in her denial that the payroll data does show a peak in business commencing in February and lasting through May, and based on my own review of the payroll data from 2017 through 2019, there is undoubtedly a significant increase in total hours worked during these months. (AF 6-7, 48-51, 287-89).

I, therefore, find it appropriate to remand this matter to the CO to decide whether to grant partial certification by reducing the requested period of need as authorized by 20 C.F.R. § 655.54 and whether she should exercise her discretion to waive applicable time requirements as authorized by 20 C.F.R. § 655.17(a). Erickson Framing Az, 2016-TLN-00016 (Jan. 15, 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, this matter is remanded to the CO for further processing of the application to determine whether to exercise her discretion to approve a reduced period of need.

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7 To the extent that the Employer relies on the contract for the Hastings project, showing dates of service running from October 1, 2019 to May 31, 2019, (AF 321-22), this only establishes that this particular project is being performed during the requested period of need, but does not establish that more workers are needed during this period compared with the remainder of the calendar year.
ORDER

It is hereby ORDERED that: (1) the Certifying Officer’s denial of labor certification is VACATED; and (2) this matter is REMANDED to the Certifying Officer for further processing of the application so she can determine whether to exercise her discretion to approve a reduced period of need.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts