



**Issue Date: 02 May 2019**

**BALCA Case No.: 2019-TLN-00113**  
ETA Case No.: H-400-18352-450809

*In the Matter of:*

**HILL STONE COMPANY INC.,**  
*Employer.*

Appearances: Kevin Lashus, Esquire  
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Austin, Texas  
*For the Employer*

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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**  
**AFFIRMING DENIAL OF CERTIFICATION**

This matter arises under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification. 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>

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). 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*

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 affirmed.

### **STATEMENT OF THE CASE**

On January 7, 2019, the Employer filed an Application seeking to hire eight full-time “Laborers” from April 1, 2019, to December 15, 2019, based on a temporary peakload need. (AF at 229).<sup>3</sup> The Application identified the worksite as Georgetown, Texas. (AF 229, 232). In its Statement of Temporary Need, the Employer stated, in part:

Our company has a temporary peak load need . . . because our busiest seasons are traditionally tied to the spring, summer and fall months . . . . As is well known, Idaho winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable. . . . Due to the nature of our work we are unable to engage in much business during the winter months . . . because the cold and wet weather is not conducive to rock quarry work. Also, construction and landscaping in general slows down, and since our stone is used for construction and landscaping projects, our peak load need is directly tied to those industries, and therefore the need for laborers is substantially reduced.

(AF 243).

On February 26, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF at 222-28). 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). (AF 225). Specifically, the CO

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*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.

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

noted that the Employer provided a worksite address in Texas, but its Statement of Temporary Need referred to winter conditions in Idaho. (AF 226). The CO stated that the Employer's peakload need was "substantially based upon an off season of winter," but Texas "typically ha[s] warm weather winters." (AF 226). The CO additionally determined that the Employer failed to sufficiently demonstrate "that the number of workers requested on the application is true and accurate and represents bona fide job opportunities," citing to 20 C.F.R. § 655.11(e)(3) & (4). (AF at 226-27). The CO found that the Employer "did not indicate how it determined that it needs eight Laborers during the requested period of need." (AF at 227). The CO directed the Employer to provide specific, outlined documentation to cure these deficiencies.<sup>4</sup> (AF 225-27).

On March 11, 2019, the Employer responded to the NOD. (AF 26-220). The Employer explained it operates a quarry and stone supply business out of Texas, and experiences a peakload need because many of its major customers, including retail sellers, landscaping companies and residential home builders, are peak-load businesses themselves. (AF 34). The Employer asserted "even in Texas" most residential construction is performed from March through November. (AF 34). The Employer provided documentation with its response to the NOD, including summarized monthly payroll data from 2015 to 2018, job summaries, invoices and checks for the year 2018, and seven letters of intent from prospective customers. (AF at 26-220).

On March 21, 2019, the CO issued a Final Determination denying certification, based on her finding that the Employer did not establish a peakload need or the need for the number of workers requested pursuant to 20 C.F.R. § 655.6(a) & (b) and 20 C.F.R. § 655.11(e)(3) & (4). (AF at 12-21). The CO stated that the Employer did not provide any information to substantiate that its work is limited by weather conditions in Texas, and found that the Employer's payroll documentation, invoices from 2018, and letters of intent did not support a peakload need. (AF at 20-21).

The Employer timely requested administrative review of the denial of the Application before the Board. (AF at 1). On April 18, 2019, I issued a Notice of Docketing and Expedited Briefing Schedule allowing the parties to file briefs within seven business days. On April 26,

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<sup>4</sup> 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.

2019, both the CO and the Employer filed appellate briefs (“CO Br.” and “Er. Br.” respectively). The CO argues in her brief that the documentation provided by the Employer failed to establish a peakload need, based on either climate or a construction schedule, and failed to establish the need for eight Laborers. (CO Br. at 4, 6). While the Employer in its brief urges reversal of the CO’s denial, the argument section of its brief appears to be discussing another application for certification not before me, as it refers to a different job position, differing reasons for denial not mentioned by the CO, and documentation not included in this matter. (Er. Br. 6, 7-9, 11, 13). For this reason, I give little credence to the Employer’s arguments made on appeal as they do not correlate with the specific facts in this case.

## **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). At issue on appeal is whether the Employer has adequately documented a temporary, peakload need for eight Laborers.

### *1. Prior Certifications*

As an initial matter, the Employer asserts because the CO has certified its applications involving “identical issues” in previous years,<sup>5</sup> it was not required to submit additional documentation in support of its present Application, and the CO should have given deference to these prior certified applications, in accordance with the ETA’s Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers (“Guidance”), effective September 1, 2016.<sup>6</sup> (AF at 33-34, 243); (Er. Br. at 3-7). To the Employer’s point, the Guidance does encourage COs to strongly consider past certifications in making their determinations and to limit requests for additional documentation. The Guidance states:

The Department notes that many employers use the H-2B visa program on a predictable and recurring, seasonal business cycle, and these job opportunities

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<sup>5</sup> The Appeal File does not contain any documentation of these prior certifications, and I must therefore rely on the Employer’s representation that identical applications were previously certified by the Department of Labor.

<sup>6</sup> The Guidance is available at [https://www.foreignlaborcert.doleta.gov/pdf/FINAL\\_Announcement\\_H-2B\\_Submission\\_of\\_Documentation\\_Temporary\\_Need\\_082016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf).

were previously granted labor certification. Thus, the nature of the need for the services to be performed has been and may continue to be determined temporary. The additional documentation submitted by many employers, which is substantially similar from year-to-year for the same employer or a particular industry, creates an unnecessary burden for employers as well as the CO, who must review all documents submitted with each application.... The CO will review the employer's statement of temporary need as well as its recent filing history (if applicable) to determine whether the nature of the employer's temporary need on the current application meets the standard for temporary need under the regulations. If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued....

It is the quality, consistency and probative value of the information provided on the Form ETA-9142B itself that will be determinative in the CO's assessment of temporary need. The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer's current need is temporary in nature. Likewise, inconsistencies between the employer's written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.

In the wake of the Guidance, BALCA has emphasized its non-regulatory status and has held that while "applications should reasonably be reviewed within the context of the previous certifications," the Guidance "does not allow a non-meritorious application to 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).

In this case, there were inconsistent statements in the Application, with the Statement of Temporary Need referencing winters in Idaho and the application listing the sole worksite as Georgetown, Texas. (AF 232, 243). Further, by the Employer's own admission, the current application seeks eight workers, a change from its previous application seeking only six workers. (AF 243). I therefore find, under the Guidance and recent case law, it was appropriate for the CO to seek additional documentation in this matter rather than relying exclusively on previous 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 Employer provided two reasons for its alleged peakload need,<sup>7</sup> the first being that work is limited in the winter months due to weather conditions. (AF 34, 243). I agree with the CO that the Employer failed to adequately explain how Texas winters limit business operations. In its response to the NOD, the Employer did not clarify its initial reference to Idaho winters in its Statement of Temporary Need, and merely stated that “even in Texas” most residential construction is performed from March through November. (AF 34,243). This statement alone, without any supporting documentation or explanation, is insufficient to establish a peakload need based on weather conditions. *See AB Controls & Technology, Inc.*, 2013-TLN-00022, PDF at 7 (Jan. 17, 2013) (stating “[a] bare assertion without supporting evidence is insufficient to carry the Employer’s burden of proof.”) (internal citations omitted).

The Employer additionally asserts its peakload need is tied to its customers’ “busy construction season which runs Spring to November/December each year.” (AF 33). The Employer explained that it supplies stone to retail sellers, landscaping companies and residential home builders for construction and landscaping projects, which generally are performed from

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<sup>7</sup> To the extent the Employer asserts a labor shortage is causing its need for H-2B workers, the CO correctly noted this is not a valid reason for temporary need. (AF 21, 35); *BMC West LLC*, 2018-TLN-00100, PDF at 10 (July 17, 2018).

March through November. (AF 34). While on its face, a peakload need based on a construction schedule is plausible, the documentation provided does not support such a peakload need.

The Employer provided payroll data for the years 2015 to 2018. (AF 37-39). The CO correctly found that the payroll data from 2015 to 2017 shows a reduction in permanent employees during the purported peakload period, suggesting that the Employer is merely replacing, rather than supplementing, its permanent staff with temporary employees. (AF 20). BALCA has consistently upheld denials where there is a reduction of permanent workers during the alleged peakload months. *See Unlimited Drywall and Painting LLC*, 2018-TLN-00063, PDF at 6 (Mar. 16, 2018); *Roadrunner Drywall*, 2017-TLN-00035, PDF at 8-10 (May 4, 2017). Further, the total hours worked, for both permanent employees and for combined permanent and temporary employees, show no discernible increase in hours during the alleged peakload months, and in several instances employees worked less hours during peakload months than in non-peakload months.<sup>8</sup> (AF 38-39). Therefore the 2015-2017 payroll data does not support a finding that there is an increased need for workers from April 1st to December 15th.

In contrast, the 2018 payroll data, when viewed in isolation, is consistent with a peakload need. (AF 39). In 2018, there was an increase in permanent employees during the peakload period, with 8 permanent employees during the non-peakload months of January through March, and between 9 and 11 permanent employees from April to December. (AF 39). In addition, the total hours worked for permanent employees and temporary employees combined was consistently higher in the peakload months compared with the non-peakload months, suggesting a higher workload. However, I do not find the 2018 data, standing alone, sufficient to establish peakload need when viewed in the context of the other documentation provided in this matter.

As stated above, the payroll data for the three years prior to 2018, from 2015 to 2017, do not support a peakload need from April to December. While the Employer asserts that the CO improperly relied on these past years' payroll data under the peakload standard, and that such evidence is only relevant under the seasonal standard, I do not find this argument persuasive. (Er. Br. at 10-12). The definition of peakload need states that an employer must establish a temporary need to supplement its permanent staff "due to a *seasonal* or short term demand." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3)(emphasis added). Here, the Employer does not allege a short-term

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<sup>8</sup> For example, in 2017, the highest total hours worked was in March, a non-peakload month. (AF 38).

demand, but rather asserts a peakload need based on the “construction *season* which runs Spring to November/December *each year*.” (AF 33) (emphasis added). Because the Employer alleges a peakload need based on a seasonal demand, I find the previous years’ payroll data to be probative of peakload need. Since three of the four past years’ payroll data do not show an increased need for workers during the alleged “construction season,” of April 1st through December 15, 2019, I find the payroll data as a whole does not support a finding of peakload need.

In addition, the 2018 payroll data is contradicted by the Employer’s 2018 invoices and job summaries, which do not establish an increase in business during the Employer’s stated period of need. (AF 40-204). The CO included in her Final Determination the following chart, which compiles the individual invoices provided for 2018:

<b><u>Contractor Job Summaries - 2018</u></b>	
<b>Month</b>	<b>Total Sales</b>
January	\$91,202.60
February	\$81,656.02
March	\$101,260.61
April	\$108,656.54
May	\$111,197.02
June	\$76,257.19
July	\$83,206.00
August	\$67,144.10
September	\$82,460.53
October	\$73,451.41
November	\$78,775.59
December	\$55,579.85

(AF 21).

As argued in the CO’s appellate brief, and seen by the above chart, the sales in the non-peakload months of January through March were higher than sales in several of the alleged peakload months. (CO Br. at 4). In fact, the non-peakload month of March had the third highest amount of sales for the year. (AF 21). The Employer’s invoices for 2018 do not show a recurring or consistent increase in sales during the alleged construction season, and therefore do not support a finding of a peakload need.

The Employer additionally submitted seven letters of intent from customers, all stating “the peak months that services are performed for our company by Hill Stone Company Inc. are April 01 – December 15, 2019,”<sup>9</sup> (AF 211-218) (emphasis omitted). These letters do indicate the reason for the peak months, and the identical, conclusory language in each letter diminishes their persuasive value. *San Felipe Stone*, 2019-TLN-00039, PDF at 9 (Mar. 7, 2019); *Titus Works, LLC*, 2019-TLN-00023 (Feb. 8, 2019). These generic letters without any details as to the nature of the customers’ needs, do not overcome the contradictory payroll data and the customer invoices for 2018. (AF 211).

After review of the documentation provided in this matter, I find that the Employer has not met its burden of establishing it has a peakload period of need for eight Laborers from April 1, 2019, to December 15, 2019.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts

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<sup>9</sup> As an exception, one client letter identifies the dates of need as February 15 to November 15, 2019. (AF 218).