



Issue Date: 29 March 2019

BALCA Case No.: 2019-TLN-00074  
ETA Case No.: H-400-18351-639627

*In the Matter of:*

**LUZ LERMA CONSTRUCTION, INC.,**  
*Employer.*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

Appearances: Kevin Lashus  
FisherBroyles, LLP  
Austin, Texas  
*Attorney for the Employer*

Micole Allekotte, Esq.  
U.S. Department of Labor, Office of the Solicitor  
Washington, D.C.  
*Attorney 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). Consolidated Appropriations Act, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. *See Further Extension of Continuing Appropriations Act, 2018*, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (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

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 fourteen (14) full-time “Construction Laborers” from April 1, 2019, to December 1, 2019. (AF at 154).<sup>3</sup> The Employer’s Application identified one worksite in Wichita Falls, Texas and indicated it had a “peakload need.” (AF at 154-57).

On February 6, 2019, the CO issued a Notice of Deficiency (“NOD”), identifying two deficiencies – both of which are relevant to this appeal. (AF at 148-53). First, citing 20 C.F.R. § 655.6(a) & (b), the CO found “the [E]mployer did not sufficiently demonstrate the requested standard of temporary need.” (AF at 151). The CO explained that the Employer provided neither “documentation indicating how its business operations have been adversely affected due to harsh winter weather conditions” nor current documentation to supplement “information that was submitted in support of previous applications.” (AF at 151-52). To correct this deficiency, the CO directed the Employer to provide:

1. A statement describing the employer's business history, activities (i.e. primary products or services), and schedule of operations throughout the year;
2. Further explanation and supporting documents that substantiate that its type of work cannot be performed under certain weather conditions;
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... and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. . . .

(AF at 152).

Second, citing to 20 C.F.R. § 655.11(e)(3) and (4), the CO 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.” (AF at 152). The CO explained that the Employer “did not indicate how it determined that it needs 14 additional workers during the

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“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 appear as “(AF at [#]).”

requested period of need.” (AF at 153). To correct this deficiency, the CO directed the Employer to submit:

1. An explanation with supporting documentation of why the employer is requesting 14 Construction Laborers for Wichita Falls, TX during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 14 Construction Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need; and
3. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF at 153).

On February 19, 2019, the Employer responded to the deficiencies outlined by the CO. In its response, the Employer provided a narrative describing its temporary need, seven letters of intent from clients, payroll reports from 2016-2018, a press release from the Austin Board of Realtors, a monthly local market report for December 2018, and various tax forms. (AF at 22-146). The Employer bases its claim for peakload need on adverse weather conditions during non-peakload months and increased consumer demand during peakload months. It also suggests that a local labor shortage due to “higher paying jobs in the cities” contributes to her need for foreign labor. (AF at 22-23).

On February 25, 2019, the CO issued a Final Determination denying the Application pursuant to 20 C.F.R. § 655.6(a) & (b) and 20 C.F.R. § 655.11(e)(3) and (4). (AF at 12-21). To support her denial the CO cites (1) payroll data inconsistent with peakload need and (2) insufficient documentation to support the Employer’s claim. She also indicates that a labor shortage does not constitute temporary peakload need.

Thereafter, the Employer timely requested administrative review of the denial of the Application before the Board. (AF at 1). On March 18, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule allowing the parties to file briefs within seven business days. The CO filed a brief elaborating on her denial while the Employer filed a brief emphasizing its prior certifications and rebutting the CO’s analysis.<sup>4</sup>

### **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). The two issues in this appeal are whether the Employer has adequately documented a temporary need based on peakload, and whether the Employer established a need for 14 construction laborers. I separate the analysis into the two arguments raised in Employer’s appellate brief: (1) “the CO failed to follow recent departmental guidance regarding the processing of renewal applications,” and (2) “the CO erred in her determination of the merits in virtually every critical aspect.” (Er. Br. at 1).

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<sup>4</sup> References to the CO’s appellate brief appear as “(CO Br. at [#]).” References to the Employer’s appellate brief appear as “(Er. Br. at [#]).”

### 1. *Processing of Renewal Applications*

As an initial matter, the Employer asserts pursuant to the ETA's Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers ("Guidance"), effective September 1, 2016, it was not required to submit additional documentation in support of its present Application because the CO has certified its prior applications for ten to twelve construction laborers the past four years.<sup>5</sup> (AF at 163-64); (Er. Br. at 2). To the Employer's point, the Guidance clearly encourages COs to strongly consider past certifications in making their determinations and to limit requests for additional documentation:

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

In the wake of the Guidance, BALCA has held that "applications should reasonably be reviewed within the context of the previous certifications," but has emphasized the non-regulatory status of the Guidance in affirming denials for failure to support the need at present. *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 line with these cases, I reject the Employer's assertion that "the application for recertification by Luz Lerma—which has a documented history of temporary peakload needs justifying issuance of H-2B visas—should have been granted on its face, without call for supplying additional supporting documentation." (Er. Br. at 3). To do so would be to *exclusively* consider previous certifications, rather than to consider the Application *within the context* of previous certifications. As such, I find the CO's request for additional documentation reasonable.

### 2. *Determination of the Merits*

The CO bases both grounds for denial, in part, on payroll data provided by the Employer in its response to the NOD. (AF at 15-21). While the Employer provides potentially meritorious

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<sup>5</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).

explanations to some questions raised by the CO, none are sufficient to overcome the payroll discrepancies identified by the CO in its Final Determination and appellate brief.<sup>6</sup>

Of the supporting documentation provided in the Employer's response to the NOD, most probative are the letters of intent and the payroll data. As noted in the Final Determination, documentation showing market growth and a resulting labor shortage are non-determinative. (AF at 18-19). Ordinarily, BALCA will lend credence to letters of intent since they directly substantiate the consumer's period of need. See *Jose Uribe Concrete Constr.*, 2018-TLN-00044, PDF at 14 (Feb. 2, 2018) (citing letters of intent "in particular" as basis for peakload need); *H and H Tile and Plaster of Austin, LTD*, 2018-TLN-00049, PDF at 11 (Feb. 16, 2018) (finding letters of intent more persuasive than other evidence in establishing peakload need). In the case at hand, the Employer submitted seven letters of intent from future clients, each noting that "[t]he peak months that services are performed for our company are April 1, 2019 to December 1, 2019." (AF at 18, 104-10). Seven client letters identifying peak months might generally be persuasive, but the need described here is refuted by the three years' worth of payroll data provided, and supports the CO's conclusion:

The letters state that the employer provides its services to the contractors during those dates. The letters do not state that the peak need for the employer's services are those dates. It appears that the employer increases its workload due to the availability of a temporary workforce as opposed to a true peakload need in its business operations.

(AF at 18).

While the Employer suggests that, in evaluating each piece of evidence, a CO must not limit their evaluation of the evidence to "considering each piece in isolation," nor "dismissing them individually for failing to support" a request, that is not the case here. (Er. Br. at 14). The payroll data is not merely unresponsive, it is wholly contradictory to the Employer's claim of peakload need.

The payroll discrepancies are first raised in the Final Determination, where the CO uses identical language to address both deficiencies:

The employer provided payroll reports for 2016, 2017, and 2018 to justify its need for 14 additional construction laborers. As the employer has used the H2B program since 2014, the payroll reports show the use of 10 temporary workers during the employer's requested dates of need. However, the payroll for 2017 and 2018 shows that the employer's permanent worker numbers and total hours worked go down when the employer's temporary workforce arrives. This is not consistent with a peakload need and points to a permanent need for workers.

(AF at 18, 21). The CO's claim is elaborated in her appellate brief, with two examples provided that are consistent with the record:

In 2017, the employer's permanent worker numbers decreased from 26 in March to 23 in April, when the employer's temporary workers began working... And in 2018, the employer maintained a consistent permanent workforce of 19-20

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<sup>6</sup> Weather conditions will not be addressed here since there are other, sufficient, grounds for affirming denial.

workers from January through April, followed by a reduction to 15-16 permanent workers from May through August and only 12 workers in September.

(CO Br. at 5). In fact, the least number of permanent workers employed for any month provided was 12 in September 2018, a peak month, while the greatest number of permanent workers employed was 32 in February and March 2016, non-peakload months. (AF at 111-12). Furthermore, while the average number of permanent workers employed during all non-peakload months provided is 24.45, the average during peakload months is 21. (AF at 111-12).

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.” 8 C.F.R § 214.2(h)(6)(ii)(B)(3). The aforementioned payroll trends do not indicate a supplement to permanent staff, but rather a temporary replacement of permanent staff. BALCA has consistently upheld CO denials, based on both deficiencies at issue, where payroll records show that permanent employees decrease during the peakload season. *Unlimited Drywall and Painting LLC*, 2018-TLN-00063, PDF at 6 (Mar. 16, 2018) (affirming denial in part for failure to establish peakload need based on payroll records indicating replacement of permanent employees rather than supplement); *Roadrunner Drywall*, 2017-TLN-00035, PDF at 8-10 (May 4, 2017) (affirming denial based in part on payroll data showing an unexplained, significant decrease in permanent staff alongside Employer’s request for a greater number of temporary workers). Absent any explanation for the reduction of permanent employees during the peakload season,<sup>7</sup> I find the CO correctly denied certification based on both deficiencies.

After review of the record in this matter, I find that the Employer has not met its burden of establishing it has a peakload period of need for 14 Construction Laborers from April 1, 2019, to December 1, 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>7</sup> The Employer failed to address the reduction of permanent employees during the peakload season in its appellate brief.