

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 26 March 2019**

BALCA Case No.: 2019-TLN-00067  
ETA Case No.: H-400-18365-748093

*In the Matter of:*

**MADIGAN HOMES,**  
*Employer.*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

Appearances: Kevin R. Lashus, Esq.  
Fisher Broyles, LLP.  
Austin, TX  
*For the Employer*

Micole Allekote, Esq., Attorney-Advisor  
U.S. Department of Labor, Office of the Solicitor  
200 Constitution Ave., N.W., N-2101  
Washington, D.C. 20210  
*Attorney for the Certifying Officer*

Before: **TIMOTHY J. McGRATH**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Madigan Homes' ("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>

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<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).

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 (“Form 9142”). 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).

## **BACKGROUND**

On January 7, 2019, ETA received an application for H-2B temporary labor certification from Employer for seven “Construction Laborers” from April 1, 2019 to November 14, 2019. (AF 45-72).<sup>3</sup> Employer’s application indicated the job would be performed at multiple worksites in Spicewood, Texas and in the Travis County area of Texas. (AF 48). Employer stated its need was “peakload.”<sup>4</sup> (AF 45).

In its Statement of Temporary Need, Employer explained its peakload need: “[O]ur busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1<sup>st</sup> to November 14<sup>th</sup>, during which time we need to substantially supplement the number of workers for our labor force . . . .”<sup>5</sup> (AF 45, 55). In further support, Employer stated: “Due to the nature of our work we are unable to engage in much business during the winter months, of approximately November 14<sup>th</sup> to April 1<sup>st</sup>, because the cold wet weather is not conducive to

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<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.

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

<sup>4</sup> In its Statement of Temporary Need, Employer wrote: “This is an application for RECERTIFICATION: H-400-16253-262860; same dates of need, 1 additional worker in accordance with DOL Sept. 2016 guidance.” (AF 45).

<sup>5</sup> To be specific, Employer stated it “[r]equires the services of laborers to perform manual labor associated with construction such as digging ditches, loading rock & other construction materials, grading, jack hammering rock, hauling materials to remote sites . . . [and] [l]oading and unloading materials.” (AF 55).

digging ditches, loading rock & other construction materials, grading, jack hammering rock, and hauling materials to remote sites.” (AF 55).

Employer noted that construction “in general slows down” in the winter months. *Id.* However, most of Employer’s construction work “[i]s done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance.” *Id.* Based on their present business, Employer purports it has a temporary peakload need for H-2B workers, but it “[c]annot anticipate . . . that we will need H-2B workers in 2020 due to fluctuations in economy.” *Id.*

On February 7, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF 38-44). In the NOD, the CO notified Employer that its application failed to meet the criteria for acceptance because it did not establish that the job opportunity was temporary in nature in accordance with 20 C.F.R. § 655.6(a) & (b).<sup>6</sup> (AF 42-43). Relevant to the first deficiency, the CO stated Employer “[i]s basing its temporary need on climate in the Spicewood, Texas area. However, climate data for the employer’s area of intended employment shows [that] average low temperatures in its nonpeak period are all above freezing.” (AF 42). The CO pointed out that “[t]he lowest average temperatures in December and January are 42 degrees, which does not represent [the] ‘coldest’ winter climate.” *Id.*

To cure the deficiency, the CO requested Employer provide the following information: (1) a statement describing its business history, activities, and schedule of operations; (2) an explanation and documentation supporting its allegation that construction activity slows significantly each year due to winter weather in Travis County, Texas; (3) summarized monthly payroll reports for a minimum of two previous calendar years that identify for each month, and separately for full-time permanent and temporary Construction Laborers, the total number of workers employed, total hours worked, and total earnings received; and (4) any other relevant evidence to justify its peakload need. (AF 42-43).

On February 22, 2019, in response to the deficiencies outlined by the CO, Employer provided an explanation of its peakload need, two letters of intent, three work contracts, a support letter from the Regional President of Custom Builders USA (“CBUSA”), and its 2019 summarized report of its contracts and work orders. (AF 11-37).

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<sup>6</sup> The CO identified a second deficiency—Employer’s failure to establish temporary need for the number of workers requested. (AF 43-44). Because I affirm the denial of certification based on the first deficiency, I need not address the CO’s second ground for denial.

On February 26, 2019, the CO issued a Final Determination denying Employer's application pursuant to § 655.6(a) & (b) for failing to establish that the job opportunity was temporary in nature. (AF 3-10). The CO found Employer's documentation submitted in response to the NOD insufficient to overcome the deficiency. (AF 7-9).

On March 4, 2019, Employer requested administrative review by BALCA of the denial of its application. (AF 1-2). Upon being assigned to this matter, on March 13, 2019, I issued a Notice of Docketing allowing the parties to file briefs. Employer filed its appellate brief ("Er. Br.") on March 20, 2019. The CO did not file a brief.

## **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 argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.61(a), (e). The issue before me is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for seven Construction Laborers during its alleged peakload period.

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). Temporary need generally lasts for less than a year, but could last up to three years for a one-time event. 8 C.F.R. § 214.2(h)(6)(ii)(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. LLC*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014).

In the NOD, the CO requested Employer provide evidence to corroborate its statement that its construction activity slows during the winter, and other documentation to justify its alleged peakload need. (AF 42-43). In its response to the NOD, Employer notes it "has been in the business of building high end custom homes in and around Austin since 1992." (AF 11).

Employer avers the residential construction market slows due to the winter weather, and “the effects of Christmas season which lingers into late February.” *Id.*

To justify its peakload need, Employer provided the CO with several documents to support that its business experiences a temporary demand for services from April 1, 2019 to November 14, 2019. (AF 11-37). Employer purports that “[t]his evidence of work during these peak times, is the most compelling evidence that anyone could provide, in response to DOL’s request for additional information.”<sup>7</sup> (AF 11).

Employer’s NOD documentation does not sufficiently demonstrate it has a peakload need for temporary workers from April 1, 2019 through November 14, 2019. *See* (AF 11-37). The letters of intent from both Jill Gray and Bernhardt Properties, LLC, indicate a plan to use Employer’s services in 2019 and note “[t]he peak months that services are performed for our company by [Employer] are April 1, 2019 to December 1, 2019.” (AF 13-14). All these letters show is a mere intention of two clients to use Employer’s services within the alleged peakload period; they certainly do not establish that Employer experiences a short-term demand for temporary workers in that timeframe. Even if these client letters were legally binding, they do

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<sup>7</sup> Employer also claims that “it has been engaged in the H2-B Visa process for the last 10 years, and with the exception of last year, [it] ha[s] received work visas for many of the same workers for that same period of time. (AF 11); *see also* (AF 55). In its appellate brief, Employer states it provided evidence to the CO of its prior certifications with its application. (Er. Br. at 2). In light of this, Employer argues “the CO failed to follow recent departmental guidance regarding the processing of renewal applications like Madigan Homes’ application on this record.” (Er. Br. at 1). More specifically, Employer notes its application was most recently certified in 2017. *Id.* at 2. While Employer alleges that it submitted evidence of its prior certifications with its application, the only documentation in the appeal file before me related to a prior application is a copy of Employer’s NOD response associated with its H-2B application last year. *See* (AF 57); (Er. Br. at 2). Since I do not have any of those alleged previously approved applications before me, I cannot evaluate how consistent the information contained in those applications is to the present one.

Nonetheless, mere approval of an employer’s prior application(s) does not satisfy an employer’s burden to establish a temporary need, and it is not an automatic ground for reversing a CO’s denial of certification. *See, e.g., BMC West LLC*, 2018-TLN-00093, PDF at 8-9 (July 12, 2018); *Cooper Roofing and Solar*, 2018-TLN-00080, PDF at 5-6 (Mar. 27, 2018); *Jose Uribe Concrete Construction*, 2018-TLN-00040, PDF at 13 (Feb. 2, 2018); *Rollins Sprinkler & Landscape*, 2017-TLN-00020, PDF at 4-5 (Feb. 23, 2017). Therefore, ETA’s Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers (“Guidance”), made effective on September 1, 2016, which is non-regulatory, does not aid Employer as the record does not contain any of its previously approved applications. According to Employer, its 2018 application was not certified by the CO. *See* (Er. Br. at 2, 7); *see also* (AF 57-59). Even if I were able to consider past applications, the CO’s denial of labor certification would be affirmed based on Employer’s inadequate evidence submitted in response to the NOD related to this appeal.

In its Statement of Temporary Need filed with its application, Employer states that its work is done on a “year to year basis” and it “[c]annot anticipate, at this time, that we will need H-2B workers in 2020 due to fluctuations in economy.” (AF 55). This undercuts its argument on appeal that its 2019 application should have been approved based on a “multi-year history of previously approved applications.” (Er. Br. at 6); (AF 55). As Employer suggested its need for temporary workers changes each year, it is difficult to square how it can now argue that its current application should be approved based upon its prior applications.

not specifically evidence the amount or type of work Employer will perform between April 1 and November 14. Nor do the letters prove that Employer is not contracted for the same or similar amount of work in the alleged off-peak months.

In addition to the letters of intent, Employer submitted three “Residential Construction Contracts” executed in its alleged off-peak period on November 20, 2018, January 16, 2019 and February 3, 2019, respectively. (AF 16-36). The contracts state: “Builder shall commence the Work with (sic) three (3) working days following execution of this contract . . . The Work shall thereafter be continued in accordance with the Builder’s normal construction schedule until the Work is completed. Builder estimates that all repairs will be completed within 10 months from contract date.” (AF 17, 24, 31). Based on this contract language, the CO noted “[i]t is not clear how the contracts support the employer’s dates of need as the dates of service are unclear.” (AF 8). I agree. The contracts suggest Employer will begin work in the purported off-peak period and continue until completed.<sup>8</sup> These contractual agreements simply show Employer was hired to perform construction work this year, but in no way do the agreements demonstrate a short-term consumer demand for services between April 1 and November 14.<sup>9</sup>

The letter from the Regional President of CBUSA indicates that builders in the Austin, Texas area experience a peakload season from early Spring through Thanksgiving, and that construction slows down during the colder weather months. (AF 15). While the letter supports Employer’s contention that the residential construction business in the Austin area slows in the winter season, this alone will not suffice in demonstrating Employer truly has a peakload need from April 1, 2019 to November 14, 2019. As explained earlier, Employer’s letters of intent and work contracts do not corroborate a need to supplement its permanent staff on a temporary basis because of a seasonal or short-term demand in its alleged period of need. Indeed, no information was provided to the CO showing the number of permanent workers Employer regularly employs to perform its construction activities.<sup>10</sup>

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<sup>8</sup> The contracts do not specify the amount of work to be performed in the alleged on-peak months in contrast to the purported off-peak months.

<sup>9</sup> Employer also included with its NOD response a 2019 summary of its construction work to be performed pursuant to its three contracts and two letters of intent submitted to the CO. (AF 37). This does not bolster Employer’s position as the contracts and letters of intent do not establish that it experiences a short-term demand for construction services in its alleged temporary period of need.

<sup>10</sup> It is not apparent how many permanent workers are now being used to perform the work contracts Employer submitted to the CO. Without this information, it is impossible to discern whether Employer’s “temporary additions to staff will . . . become a part of the . . . regular operation.” See § 214.2(h)(6)(ii)(B). Before Employer can show that

Employer bears the burden of demonstrating eligibility for the H-2B program. 8 U.S.C. § 1361. Here, Employer did not submit adequate documentation to bolster its alleged peakload period.<sup>11</sup> Therefore, I find Employer has not met its burden of establishing that its need is truly temporary in the purported peakload period.

**SO ORDERED.**

**TIMOTHY J. McGRATH**  
Administrative Law Judge

Boston, Massachusetts

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foreign workers are needed to supplement permanent employees at its job sites, it must establish that “permanent staff will be working at th[ose] job site[s].” *See Masse Contracting*, PDF at 7. Employer submitted no information in response to the NOD showing that it has permanent construction laborers performing work at the job sites listed in its work contracts and letters of intent. Although requested by the CO in the NOD, there are no payroll reports by month showing the number of permanent workers currently and previously employed to perform construction work, and the hours worked by those employees. In its NOD explanation, Employer states: “We just can’t find good stable workers in the area to do this work,” suggesting it does not regularly employ permanent staff to perform construction work. *See* (AF 12).

<sup>11</sup> In its appellate brief, Employer argues the CO erroneously applied the “seasonal” need analysis in denying certification. *See* (Er. Br. at 1, 10). Employer avers it must demonstrate that “there was a temporary excess demand for its services—a ‘peak,’ not that all demand from a customer ceased outside that peak period.” *Id.* at 10. But Employer failed to provide any compelling evidence that it has a “peak” in demand from customers between April 1 and November 14. The CO therefore appropriately determined that Employer’s NOD documentation was insufficient to establish a peakload need from April 1 through November 14. (AF 6-9).

I also note that Employer’s brief refers to information and documentation, (including payroll data, work hours, and sales reports), which is not before me in this appeal. (Er. Br. at 8-14). It appears Employer may be referencing information provided in support of its prior applications. The administrative file I received consists of seventy-two pages. Before me is Employer’s January 7, 2019 application which includes the Statement of Temporary Need, Employer’s response to Notice of Deficiency for H-400-18066-613918, Employer’s foreign recruiter attestation, a signed DHS Form G-28, job order, and prevailing wage determination. (AF 45-72). In response to the NOD at issue in this appeal, Employer provided a letter of explanation, two letters of intent, three work contracts, a support letter from CBUSA, and a 2019 summary of contracts and work orders. (AF 11-37). There is no payroll data, reports of hours worked, or sales reports in this appeal file.