

**U.S. Department of Labor**

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

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



**Issue Date: 03 May 2019**

**BALCA Case No.: 2019-TLN-00104**  
**ETA Case No.: H-400-18358-858702**

*In the Matter of:*

**PLASTER PROS, LLC,**  
*Employer.*

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus  
Fisher Broyles, LLP  
Austin, Texas  
*For the Employer*

Micole Allekotte, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: **CARRIE BLAND**  
Administrative Law Judge

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

On March 26, 2019, the Board of Alien Labor Certification Appeals (“BALCA”) received a request for administrative review of the Certifying Officer’s Final Determination in the above-captioned H-2B temporary labor certification matter.<sup>1</sup>

The H-2B program permits employers to hire foreign workers to perform temporary,

---

<sup>1</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.

non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis.<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

## STATEMENT OF THE CASE

On January 7, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Plaster Pros, LLC (“Employer”). AF 186 – 209.<sup>3</sup> Employer requested certification for 12 “construction laborers” from April 1, 2019 until November 30, 2019. AF 183. Employer indicated that the nature of its temporary need was a peakload need, and explained that:

Our company is engaged in the pool plaster business in the Tarrant and Dallas County, TX areas. Our services include pool plaster repair and installation. The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is April 1st, 2019 to November 30th, 2019.

...

Our company currently requires the services of laborers to perform manual labor associated with pool plaster repair and installation such as lifting bags of plaster on mixer, adding water, carrying materials to pools, shoveling materials onto pools for plastering. Lifting up to 40lbs.

...

Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to November 30th, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do

---

<sup>2</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B)); 20 C.F.R. § 655.6(b). The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii), pursuant to the Continuing Appropriations Act, 2018, Pub. L. No. 115-56, Division D, § 101(a)(8) (2017).

<sup>3</sup> References to the 206-page appeal file will be abbreviated with an “AF” followed by the page number.

however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the winter months, of approximately November 30th to April 1st, because the cold and wet weather is not conducive to lifting bags of plaster on mixer, adding water, carrying materials to pools, shoveling materials onto pools for plastering. Also, construction in general slows down and the need for laborers is substantially reduced.

AF 193.

On February 19, 2019, the CO issued a Notice of Deficiency (“NOD”) notifying Employer that its application did not comply with the requirements of the H-2B program. AF 176 – 182.

First, the CO identified a “failure to establish the job opportunity as temporary in nature.” The CO said that Employer “has not explained what events cause the peakload and the specific period of time in which the employer will not need the services or labor.” While Employer indicated that it cannot engage in much business during the winter months “because the harsh winter is not conducive to construction work,” the CO said that “employer’s work is done in Texas, which is relatively favorable to year-round outside work.”

The CO requested that the Employer provide:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation during the stated non-peak period;
3. An explanation and supporting documents that substantiate that its type of work cannot be performed under certain weather conditions in Haltom City, TX;
4. 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;
5. Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Laborer, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In

lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 180 – 181.

Second, the CO identified a “failure to establish temporary need for the number of workers requested” in that Employer did not sufficiently demonstrate “that the number of workers requested in the application is true and accurate and represents bona fide job opportunities.” Specifically, the CO said that Employer “did not indicate how it determined that it needs 12 Laborers during the requested period of need.” The CO requested the following:

1. An explanation with supporting documentation of why the employer is requesting 12 Laborers for Haltom City, TX during the dates of need requested;
2. If applicable, documentation supporting the employer's need for 12 Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 181 – 182.

On March 5, 2019, Employer responded to the NOD, including a response letter signed and dated by Steven Hickson, Owner of Plaster Pros; payroll charts for calendar years 2014 through 2018; quarterly reports for calendar years 2015 through 2018; and FEMA Region 6 Weather Threat Briefings for December 2018 through present day 2019. AF 31 – 174.

On March 11, 2019, after reviewing the documentation that Employer submitted in response to the NOD, the CO issued a Final Determination denying Employer's application (“Denial”). AF 13 – 30. The CO explained that the additional information did not address the deficiencies noted in the NOD.

In its Denial, the CO indicated a “failure to establish the job opportunity as temporary in nature.” AF 17. The CO noted that Employer provided a response letter signed and dated by Steven Hickson, Owner of Plaster Pros, payroll charts for calendar years 2014 through 2018, quarterly reports for calendar years 2015 through 2018 and FEMA Region 6 Weather Threat Briefings for December 2018 through present day 2019. However, the CO determined that “the employer did not submit an explanation and supporting documents that substantiate that its type

of work cannot be performed under certain weather conditions in Dallas and Tarrant County, Texas jobsites nor a summary listing of all projects in the area of intended employment for the previous two calendar years, as directed in the employer's NOD." The CO offered particular responses to the items submitted by Employer:

The employer explained that the cold and wet weather along with daylight hours limits its work in Dallas and Tarrant County, Texas. The employer also explained that customer demand is highest from April 1 through November due to the public participating in outdoor activities that involve swimming pools during these months. Yet, the only support for these statements were weather reports from [www.weather.gov.srh](http://www.weather.gov.srh). The weather reports are for specific days and not an annual view of the climatic conditions in the employer's area of intended employment.

...

The employer did not provide any documentation to support customer demand or how the weather during its nonpeak period effects the work performed in the employer's application. The employer was to provide its work schedule with dates of service and worksite locations for the last two years; however, the employer did not provide the requested documentation or provide an explanation as to why the information was not provided. The employer could have provided other documentation such as invoices, industry-accepted guidelines for application and climate, or similar documents to support its statements; however, the employer did not submit such documentation.

The employer also stated that its U.S. workforce is not able to provide the necessary labor when its peak season arrives and that its work often triples during this time. The employer did not submit any supporting documents to show increased customer demand beginning in April and extending through November. More importantly, the employer's permanent workforce has decreased to a single worker in 2018.

...

The employer further noted that the employer cannot find U.S. workers to take these peak-season positions, since U.S. workers want year-round and better paying jobs. As such, the employers states it is desperate need for the peak-season H2B workers. However, the employer appears to have a challenge in recruiting and retaining permanent workers.

...

The employer explained, "[o]ur 2018 payroll chart definitely reflects how much we suffered in labor supply due to the fact that we were hit by the FY2018 H-2B visa cap." However, the employer's payroll shows the employer's challenge in recruiting and retaining a permanent workforce. In 2017, the employer employed

as many as eight permanent workers that worked as many as 1280 monthly hours, including in its nonpeak month of January. In the employer's 2018 payroll, it shows no increased hours in the employer's stated peakload period and shows the most hours worked were in its stated nonpeak load month of January. Further, the employer employed a single worker from February through December working 160 hours per month; however, its earnings received varies during that time from \$4075 through \$7825. Thus, its payroll does not appear to be accurate. Further, the lowest earnings received by that single worker was in the months of October and September, which is not consistent with a peakload that includes those months.

The employer is reminded that under a peakload need the employer must establish that it regularly employs permanent workers to perform the labor at the place of employment and that it needs to temporarily *supplement* its permanent staff due to a seasonal or short-term demand. However, the employer's payroll reflects a dramatic reduction in permanent workers with the request for an increased amount of temporary workers. It is unclear how the employer *supplements* its permanent workers when its permanent worker numbers are being reduced at the request for additional temporary workers. This is not consistent with a peakload demand but rather points to a need for additional permanent workers.

The employer provided no support for its peakload period including support for a construction schedule, increased customer demand, or limits of climatic conditions in Dallas and Tarrant County, Texas. Therefore, the employer did not overcome the deficiency.

AF 17 – 20.

The CO also noted a "failure to establish a temporary need for the number of workers requested." AF 20. In response to the NOD, the employer submitted a response letter signed and dated by Steven Hickson, payroll charts for calendar years 2014 through 2018, quarterly reports for calendar years 2015 through 2018 and FEMA Region 6 Weather Threat Briefings for December 2018 through present day 2019. However, the CO determined that "the employer did not establish a need for 12 Construction Laborers from April 1, 2019 through November 30, 2019." The CO's responses were as follows:

The employer was to provide its work schedule with dates of service and worksite locations for the last two years; however, the employer did not provide the requested documentation or provide an explanation as to why the information was not provided.

To support its need for 12 Construction Laborers, the employer stated that its U.S. workforce is not able to provide the necessary labor when its peak season arrives and that its work often triples during this time. The employer did not submit any supporting documents to show increased customer demand beginning in April and extending through November. More importantly, the employer's permanent

workforce has decreased to a single worker in 2018. The chart below illustrates how the employer's permanent worker hours decreased from a peak in 2017 at 1280 (in its stated nonpeak month of January) to 160 hours in 2018. Therefore, *if* the employer had established a peakload need, a tripling of its work during its requested period, would result in no more than three additional workers.

The employer further noted that the employer cannot find U.S. workers to take these peak-season positions, since U.S. workers want year-round and better paying jobs. As such, the employer states it is desperate need for the peak-season H2B workers. However, the employer appears to have a challenge in recruiting and retaining permanent workers.

...

The employer explained, “[o]ur 2018 payroll chart definitely reflects how much we suffered in labor supply due to the fact that we were hit by the FY2018 H-28 visa cap.” However, the employer's payroll shows the employer's challenge in recruiting and retaining a permanent workforce. In 2017, the employer employed as many as eight permanent workers that worked as many as 1280 monthly hours, including in its nonpeak month of January. In the employer's 2018 payroll, it shows no increased hours in the employer's stated peakload period and shows the most hours worked were in its stated nonpeak load month of January. Further, the employer employed a single worker from February through December working 160 hours per month; however, its earnings received varies during that time from \$4075 through \$7825. Thus, its payroll does not appear to be accurate. Further, the lowest earnings received by that single worker was in the months of October and September, which is not consistent with a peakload that includes those months.

The employer is reminded that under a peakload need the employer must establish that it regularly employs permanent workers to perform the labor at the place of employment and that it needs to temporarily supplement its permanent staff due to a seasonal or short-term demand. However, the employer's payroll reflects a dramatic reduction in permanent workers with the request for an increased amount of temporary workers. It is unclear how the employer supplements its permanent workers when its permanent worker numbers are being reduced at the request for additional temporary workers. This is not consistent with a peakload demand for temporary workers but rather points to a need for additional permanent workers.

Therefore, the employer did not overcome the deficiency.

AF 21 – 23.

On April 26, 2019, Employer filed Applicant's Brief on Appeal (“Brief”), arguing that the CO “acted arbitrarily and capriciously, and abused her discretion in denying Plaster Pros’

application...” (Brief at 1). In its brief, Employer argued that the CO’s decision should be reversed on two grounds: first, because “the CO failed to follow recent departmental guidance regarding the processing of renewal applications like Plaster Pros—guidance that strongly counseled in favor of granting Plaster Pros’ applications on this record.”; second, because “the CO erred in her determination of the merits in virtually every critical respect.” Brief at 1.

With regard to its first argument, Employer cited guidance issued by the Department of Labor on September 1, 2016, which, according to Employer “describes a system of OFLC review of certification application that implements...a reduced burden to prove (and correspondingly lessened degree of regulatory scrutiny of) temporary need for employers that have previously demonstrated such need’s existences in their business.” *Id.* at 5. Employer asserts that this guidance provides that recertification applications “can, and generally should, be adjudicated on the basis of the Form ETA-9141B filing and prior certifications history alone.” *Id.* at 6. Employer then indicated that its application for recertification should have been readily granted because:

Plaster Pros’ CCO affirmed, under penalty of perjury, that its need was both bona fide and temporary. AR.P31-32. The company had a multi-year history of previously approved certification that temporary peakload staffing needs both occurred and recurred in its business. Its prior applications thus adequately explained its business and the peakload needs that arise in that business, having been evaluated under the same substantive definition of “temporary need.” See *id.* (Moreover, those prior applications were not appreciably more detailed in explaining those points than the present application, further demonstrating the sufficiency of the information Plaster Pros provided.) And Plaster Pros specifically stated in its application both that it was seeking “re-certification” and that it would be utilizing “returning workers.”

*Id.*

Employer noted that the CO “foreclosed Plaster Pros’ ability to rely on its past certification” when the CO reconsidered the Texas “winter” and found that “the lowest average temperatures in December and January are 42 degrees, which does not represent ‘coldest’ winter climate.” *Id.* at 7. Employer argued that “the regulations under the 2015 Interim Rule make clear that such reliance is only precluded where the ‘nature of the job classification and/or duties has *materially* changed” (emphasis original), citing to 20 C.F.R. § 655.12(a)(3). According to Employer, the “new” weather analysis is not a material change, and it was error for the CO to not consider Employer’s certification history. *Id.*

With regard to its second argument, Employer asserted that “the CO erred in dismissing the pieces of evidence most critical to proving the temporariness and peakload nature of Plaster Pros’ need—the thorough analysis of permanent versus temporary manhours, payroll reports, and letters of intent/contracts from the residential homebuilders to whom Plaster Pros provides services.” *Id.* at 8. Employer said it did not provide forward-looking contracts for future services because they did not exist, as “that simply is not how construction operates.” *Id.* Employer stated that the manhour and payroll data it provided are “the same data used to support

the favorable applications from prior years—and, included letters of intent from several of its largest consumers of subcontractor services.” *Id.* These, according to Employer, “directly evidence Plaster Pros’ need and the temporary timeframe in which Plaster Pros would require additional labor.” *Id.* Employer accuses the CO of misunderstanding the nature of peakload need, saying that Employer merely “had to 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 9. Employer states that the CO effectively forced Employer to disprove the existence of a permanent workforce, and insists that “the regulations do not require such an incoherent result...It is quite clear, the CO misapplied the application of a ‘seasonal’ need, rather than the more appropriate ‘peakload’ need.” *Id.* Employer further argues that it did not have the burden of demonstrating “what causes the peak within the contract,” as the CO required, but that even so, the letters demonstrate the cause of the peakload need. *Id.* at 10.

Employer also argues that it was error for the CO to find no evidence supporting Employer’s need for the requested dates. Employer first points to letters of intent from “four of its largest customers in a particular window of time,” which Employer asserts “is alone sufficient to establish both the peak and its anticipated beginning and end dates...” *Id.* Employer next argues that the CO improperly applied the standard for “seasonal need” by “insisting that past years’ pattern of sales and H-2B employment had to justify the months of 2019 for which Plaster Pros claimed a forward-looking need.” *Id.* at 10-11. Employer argues it was error for the CO to require Employer to demonstrate “an unvarying need for a similar level of H-2B workers every year between January and October,” and that such a requirement “flies in the face of two previously approved Labor Certifications.” *Id.* at 11. Employer says that it did not have the show “a sustained peak in the employer’s sales” or high levels of H-2B employment during the same months in prior years, because the meaning ascribed to “peakload” by the Department of Labor and Homeland Security says that “[A] peakload need may recur at different times of the year and/or multiple times in the same year.” citing USCIS guidance of temporary need. *Id.* at 12. Employer also criticized the CO for scrutinizing its climate data, and asserted that “COs generally should not be making subjective determinations as to the credibility of employer’s statements or evidence,” and that “absent an articulable basis to doubt [an applicant’s] credibility,” the CO’s role “is appropriately limited to determining whether the evidence, taken as true, demonstrates a temporary need.” *Id.* at 13. According to Employer, the CO should have considered the record as a whole, but instead “consider[ed] each piece in isolation, dismissing them individually for failing to fully support the requested increase, and thus concluding that nothing supported Plasters Pros’ increased need.” *Id.* at 13-14.

On these bases, Employer sought reversal of the CO’s denial.

## **DISCUSSION AND APPLICABLE LAW**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews [H-2B] decisions under an arbitrary and capricious standard. *See Brooks Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). 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 the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After

considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer's application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

The CO denied Employer's application because Employer failed to demonstrate that the job position was temporary in nature; and failed to establish a temporary need for the number of workers requested. AF 13 – 30. The CO said that without the requested information, Employer does not overcome the deficiencies in the NOD.

### ***Temporary Nature of Job Opportunity***

Pursuant to the regulation at 20 C.F.R. § 655.6(a) and (b), an employer seeking certification under the H-2B program “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” Under the regulation, “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 DHS regulations...” In the NOD, the CO said that in order to demonstrate peakload need, Employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation..” AF 72.

In this case, Employer submitted a response letter signed and dated by Steven Hickson, Owner of Plaster Pros. AF 31 – 32; payroll charts for calendar years 2014 through 2018. AF 33 – 36; quarterly reports for calendar years 2015 through 2018. AF 37 – 90; and FEMA Region 6 Weather Threat Briefings for December 2018 through present day 2019. AF 91 – 174.

Employer argues that the CO should only have considered “material” changes from Employer's past successful applications; that Employer's payroll and letters of intent support a temporary need; and that the CO improperly applied “seasonal” analysis rather than “peakload” analysis.

Upon review of the record, I find that Employer has not met the requirement of establishing that the job position is temporary in nature. 20 C.F.R. § 655.6(b) requires employers to justify to the CO that the temporary job position is one of several categories, including

“peakload need.” Although Employer cites to September 2016 guidance from the Department of Labor, such guidance is nonbinding. 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). It was proper for the CO to consider the individual parts of Employer’s application to determine whether they supported a peakload need. This is especially true when considering that Employer failed to provide some of the requested information sought by the CO; other than a statement from owner Steve Hickson, Employer offered no “supporting documents that substantiate that its type of work cannot be performed under certain weather conditions in Haltom City, TX,” as requested by the CO. AF 180. I concur with the CO that the weather reports do not establish a temporary need for Employer, as the reports demonstrate generally favorable weather conditions during the winter months. While Employer makes reference to letters of intent from “four of its largest customers,” no such letters are present in Employer’s application or its response to the NOD. Additionally, the payroll data and monthly reported do not support an increased need in H-2B labor to supplement Employers’ current work force. Rather, as the CO found, Employer’s data show a general decrease in Employer’s permanent workforce during the supposed “peakload” time. As the CO indicated, such a decrease suggests that Employer does not “regularly [employ] 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.”<sup>4</sup> 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

I also find that the CO correctly applied “peakload” analysis and not the “seasonal” analysis alleged by Employer. To qualify as a “seasonal” need, the employer:

[m]ust establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.

8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

To qualify as a “peakload” need, the employer:

[m]ust 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) (emphasis added).

Thus, the term *seasonal* appears within the definition of “peakload” need as one of the avenues by which the employer may demonstrate its peakload need to supplement its permanent

---

<sup>4</sup> *Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation).

workforce. If the employer suggests that certain seasons of the year give rise to a particular peakload need, then the CO must consider whether the employer's evidence supports this temporary need to supplement its workforce. To this end, the Board has consistently found it proper for the CO to consider whether past payroll during the requested period supports a temporary peakload need for workers during the same period in the present. *See Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer's payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need); *Los Altos Mexican Restaurant*, 2016-TLN-00073 (Oct. 28, 2016) (payroll records do support alleged period of need).

In its application Employer highlights the seasonal nature of its peakload need to supplement its workforce:

[o]ur busiest seasons *are traditionally tied to the spring, summer and fall months, from approximately April 1st to November 30th*, during which time we need to substantially supplement the number of workers for our labor force for these positions... Our temporary peak load workers *are only needed during our busy season* and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business *during the winter months, of approximately November 30th to April 1st, because the cold and wet weather is not conducive to lifting bags of plaster on mixer, adding water, carrying materials to pools, shoveling materials onto pools for plastering. Also, construction in general slows down and the need for laborers is substantially reduced.*

AF 193 (emphasis added).

Given Employer's request for peakload need, and its statements that such need usual falls during a particular time of the year, it was proper for the CO to consider whether Employer's documentation supported its request. Such analysis is consistent with deciding whether Employer has demonstrated a peakload need *due to a seasonal or short-term demand* under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

I concur with the CO that Employer has not presented sufficient information to establish that the position is temporary in nature.

### ***Temporary Need for Number of Workers Requested***

The CO also denied Employer's application under the requirement to establish a temporary need for the number of workers requested. According to the regulation at 20 C.F.R. § 655.11(e)(3) and (4), "The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on the following factors...(3) The number of worker positions and period of need are justified; and (4) The request represents a bona fide job opportunity."

Employer argues that the CO misapplied the "seasonal" need standard and that it improperly required Employer to demonstrate the presence of a permanent workforce. Employer

also says that it is not required to demonstrate a peakload during the same period in prior years, as the regulations allow for peakload needs during different times of the years. Employer also points to its letters of intent as proof of increased activity during the requested time period.

I concur with the CO's findings that Employer failed to demonstrate a temporary need for the number of worker's requested. As indicated above, the CO properly applied peakload analysis when it considered whether employer's past payroll supported its need for the requested time period. As the CO indicates, Employer failed to provide work schedules with dates of service and worksite locations for the last two years, nor did it provide an explanation as to why the information was not provided. The employer also failed to submit any supporting documents to show increased customer demand beginning in April and extending through November. The "letters of intent" cited by Employer are absent from both its application and its response to the NOD. Employer's statements that it "suffered in labor supply due to the fact that we were hit by the FY2018 H-28 visa cap" is undermined by the fact that Employer's *non*-H-2B workforce actually decreased during this time. Indeed, in Employer's 2018 payroll, it shows no increased hours in the employer's stated peakload period and shows the most hours worked were in its stated nonpeak load month of January. While the regulations allow for peakload needs at different times of the year, it is Employer who stated in its application that such need traditionally exists during these peak months. It was proper for the CO to consider whether the evidence submitted by employer supported this requested need. Given the issues with Employer's application detailed above, the CO properly found that Employer's evidence did not support its temporary need for the number of workers requested.

It was also proper for the CO to consider whether Employer's evidence supported the existence of a permanent workforce. It is Employer's burden to demonstrate the existence of a permanent workforce for which a peakload supplement is requested. *See Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation). As the CO indicates, under a peakload need "employer must establish that it regularly employs permanent workers to perform the labor at the place of employment and that it needs to temporarily supplement its permanent staff due to a seasonal or short-term demand. However, the employer's payroll reflects a dramatic reduction in permanent workers with the request for an increased amount of temporary workers." AF at 23. I concur with the CO's analysis in this regard, and that the absence of a consistent permanent workforce undermines employer's claim that it seeks to temporarily supplement an existing workforce with the number of worker's requested.

I therefore find that Employer has not presented sufficient information to establish its temporary need for the number of workers requested.

## CONCLUSION

For the reasons above, I find that the evidence presented by the Employer fails to support its temporary need for an additional 12 workers from April 1 to November 30, 2019. I therefore find that it was not an abuse of discretion for the CO to issue a denial of Employer's application.

In light of the foregoing, the record establishes that Employer failed to establish that the temporary nature of the job opportunity, and the temporary need for the number of workers requested. Accordingly, the CO's denial of certification is hereby **AFFIRMED**.

**SO ORDERED.**

For the Board:

**CARRIE BLAND**  
Administrative Law Judge

Washington, D.C.