



Issue Date: 20 February 2019

BALCA Case No.: 2019-TLN-00031  
ETA Case No.: H-400-18054-944393

*In the Matter of:*

**RAPID PALLET, INC.,**

*Employer.*

Certifying Officer: Leslie Abella  
Chicago National Processing Center

Before: Monica Markley  
Administrative Law Judge

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

This case arises from Rapid Pallet, Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination denying 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> 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 CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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).

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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).

<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.

In this case, the CO issued a Final Determination on January 24, 2019, denying Employer's application for temporary alien labor certification. Employer timely filed a request for review on January 29, 2019.

## BACKGROUND

On January 7, 2019, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Employer. AF 33-49.<sup>3</sup> The application requested H-2B temporary labor certification for 23 Helpers – Production Workers to work as Wooden Pallet Repairers. AF 33. The "Statement of Temporary Need" on Employer's application stated:

Rapid Pallet employs wood pallet repairers on a year-round basis. Rapid Pallet historically experienced a drop in production during the months of January, February, and March, as demonstrated by the monthly production sale revenues.

2016 Jan \$727,150.99; Feb \$939,631.01; Mar \$1,231,581.56; Apr \$1,058,578.27\*; May \$1,46,378.58\*[sic]<sup>4</sup>; Jun \$1,328,831.58; Jul \$1,035,176.79; Aug \$1,190,033.95; Sep \$1,199,013.17; Octo \$1,134,798.18; Nov \$1,029,123.15; Dec \$1,061.845.65.

\*Please note that Rapid Pallet did not obtain its temporary workforce until June of 2016. As you can see we started our peak season out well with our permanent staff, but we were not able to maintain the pace and as you can see sales decreased these months until our workforce was fulfilled.

2017 Jan \$802,450.29; Feb \$910,126.31; Mar \$1,174,856.32; Apr \$1,056,689.24\*; May \$,064,458.33[sic]<sup>5</sup>; Jun \$1,14,980.65\*[sic]<sup>6</sup>; Jul \$1,052,297.69\*; Aug \$1,277,000.67; Sep \$1,187,162.84; Oct \$1,455,201.5; Nov \$1,105,174.04; Dec \$1,161,031.91.

\*Please note that Rapid Pallet did not obtain its temporary workforce until August of 2017. As you can see by our sales, we experienced the same decrease in sales because we were not able to supplement our workforce.

2018 Jan \$1,131,370.42; Feb \$1,108,889.13; Mar \$1,064,717.78; Apr \$1,242,943.32; May \$1,231,421.21; Jun \$1,168,353.04\*; Jul \$1,226,299.29; Aug \$1,342,453.31; Sep \$1,132,708.28\*; Oct \$1,354,236.26; Nov \$1,200,013.06

\*Please note Rapid Pallet did not obtain a temporary workforce in 2018, therefore, our sales number are not as strong during the peakload.

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<sup>3</sup> References to the appeal file will be abbreviated as "AF" followed by the page number.

<sup>4</sup> A digit is missing in this sales figure in Employer's application; the appeal file in case no. 2019-TLN-00011 shows that the sales figure for May 2016 was \$1,046,378.58.

<sup>5</sup> The first digit is missing in this sales figure in Employer's application; the appeal file in case no. 2019-TLN-00011 shows that the sales figure for May 2017 was \$1,064,458.33.

<sup>6</sup> A digit is missing in this sales figure in Employer's application; the appeal file in case no. 2019-TLN-00011 shows that the sales figure for June 2017 was \$1,144,980.65.

\*In addition June & September saw softer numbers because of full time employees taking family vacations.

AF 33, 39.

On January 16, 2019, the CO issued a Notice of Deficiency (“NOD”) informing Employer that its application failed to meet the criteria for acceptance. AF 27-32. The NOD detailed one deficiency in Employer’s application: Failure to establish the job opportunity as temporary in nature. AF 30-32. The CO cited 20 C.F.R. 655.6(a) and (b) and stated that “[t]he employer did not sufficiently demonstrate the requested standard of temporary need” for 23 Wooden Pallet Repairers from April 1, 2019 to December 31, 2019 based on a peakload need. AF 31. The CO pointed to Section B, Item 9 of the application, where Employer asserted that it “historically experienced a drop in production during the months of January, February, and March, as demonstrated by the monthly production sales revenues.” AF 31. The CO found: “Although the employer’s statement of temporary [need] appears to show a peakload need as demonstrated by its sales revenue per month for the years 2016, 2017 and 2018, it does not demonstrate a need for the 23 temporary workers for the attested period of need, nor does it explain what causes its need for temporary workers.” AF 31.

To address the deficiency, the NOD directed Employer to submit the following:

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. 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 that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Wooden Pallet Repairers*, 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
5. 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.

Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

AF 31-32.

Employer filed a timely response to the NOD on January 21, 2019. AF 20-26. Employer's response included a two-page letter and four "Missed Delivery Reports" (one for each year from 2015 to 2018) that appear to be summary reports prepared by Employer. *Id.* Employer's letter explained the company's business history and activities. AF 25-26. Employer remanufactures wooden pallets, by purchasing broken pallets and repairing them to produce new pallets at the grade requested by the customer (often food-grade). Employer operates year-round at a single worksite in Pennsylvania, and maintains a permanent workforce year-round. Employer asserted it needs temporary labor during its peak months, because it "historically experiences a surge in sales between the months of April and December" due "in large part" to "the needs of the grocery distribution industry." AF 25. Employer stated:

Historically Rapid Pallet, Inc. experiences a shortage of 7 trailers per day (4,200 pallets), which is roughly 32 trailer loads a week during these peak months. This equates to 11 wooden pallet repairers at the finishing assembly. To support this surge in production Rapid would require an additional thirteen employees to pry, pull, and dismantle pallets in order to effectively obtain their raw material needs.

AF 25-26. Employer's Missed Delivery Reports for the years 2015-2018 show 0 missed deliveries in January, February, and March of each year, and between 4-9 missed deliveries each month for the months of April through December of each year. AF 21-24. The reports also state the number of wooden pallet repairers staffed full-time for each month, and the number of additional employees needed each month. AF 21-24.

Employer's response to the NOD did not include the monthly payroll reports for 2017 and 2018, which Employer was directed to submit, and which were supposed to separately identify for each month the total number of permanent wooden pallet repairers and the total number of temporary wooden pallet repairers, the total hours worked by permanent employees and by temporary employees, and the total earnings received by permanent employees and by temporary employees.<sup>7</sup> The NOD also required that this documentation be compiled from the employer's actual accounting records or system.

On January 24, 2019, the CO issued a Final Determination on Employer's application. AF 14-19. The CO denied Employer's application for temporary labor certification after

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<sup>7</sup> Employer's response also did not include the summary listing of all projects in the area of intended employment for the previous two years, or a detailed explanation of the activities of Employer's permanent wooden pallet repairers during the stated non-peak period (January-March).

concluding that Employer did not overcome the deficiency. AF 18. The Denial Discussion (AF 18-19) first noted that Employer's NOD response included the Missed Delivery Reports and a letter of explanation, but "did not provide an adequate explanation of its business history, activities (i.e. primary products or services), nor schedule of operations throughout the entire year," and "did not include summarized monthly payroll reports for the 2017 and 2018 calendar years, as directed." AF 18.

Regarding the Missed Delivery Reports, the CO found that Employer "did not provide an explanation as to how these reports support a peakload. Evident in each report, is an increase in its labor force during the employer's stated nonpeak period; illustrating a need for additional permanent workers. The employer did not explain why it employs more Wooden Pallet Repairers during its nonpeak months." AF 18-19.

Regarding Employer's statement that its increased need for wooden pallet repairers is based on an overall increase in demand for pallets in the grocery industry from April through December, the CO found that Employer "did not provide any documentation to supports its statement." AF 19.

The CO also questioned Employer's statement that it requires 11 wooded pallet repairers "at the finishing assembly," and 13 additional employees to dismantle pallets for raw materials (for a total of 24 requested workers), as inconsistent with its request. AF 19.

In sum, the CO found that Employer's "limited explanation and documentation did not point to a peak in its operations from April 1, 2019 through December 31, 2019. Therefore, the employer did not overcome the deficiency." AF 19. Consequently, the Employer's application for temporary labor certification was denied.

Employer timely filed an appeal of the CO's Denial on January 29, 2019. AF 1-13. In its transmittal letter, Employer stated that it has "exhausted all means to hire U.S. workers to fulfill our temporary need during our peak load, however, there is no willing and able U.S. workers that will take the job." AF 1. Employer stated that it has been approved under the H-2B program for seventeen years, up until the last two years, even though its "evidence has been the same." AF 1. Employer alleges that "[t]he last denial is an apparent sabotage to my organization's wellbeing," and that the COs are denying applications "without any just assessment." AF 1. In its request for review, Employer argued that its response to the NOD "demonstrates the clear need for 23 employees." AF 2. Employer argued that the CO failed to grasp that pallet production uses two phases: a disassembling phase and the finishing phase, "which are all job duties of a Wood Pallet Repairer." AF 3. Because the job order included both the assembling and disassembling of pallets, it includes the 11 workers needed for finishing and the 13 workers needed for disassembling, for a total of 23 workers. AF 3. Employer argued it adequately addressed "the cause for its need for temporary workers" in the letter submitted with its response to the NOD, in which it stated that it "predominantly produces food grade pallets and its output is dependent in large part on the needs of the grocery distribution industry," which causes it to experience "a surge in sales between the months of April and December." AF 3. Employer asserted that the sales data in its Application and the production deficit data in its response to the NOD showed a "clear need" for temporary labor. AF 3. Regarding the CO's finding that Employer did not

provide an adequate explanation of its business history, activities, and schedule of operations, Employer argued the CO's denial "makes an alarming appearance that our explanation was not read at all." AF 3. Employer argued that it "defines in the NOD response how we establish the number of individuals needed and further demonstrates this need with historical data in our production shortfalls. The report identifies full time staff members during each month. The Certifying Officer uses turnover, which is natural in every organization, as a means for denial but does not address the actual presenting facts." AF 3. Finally, Employer argued that the historical sales data included in its Application, and the production deficit data included in its NOD response, provided the documentation needed to demonstrate the overall increase in demand in the grocery industry from April through December. AF 3-4.

I issued a Notice of Assignment and Expedited Briefing Schedule on February 5, 2019, which allowed the parties to file briefs within seven business days of receipt of the Appeal File. Neither party filed a brief.

### **LEGAL STANDARD**

BALCA's scope of review is limited to the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may only contain legal argument and such evidence actually submitted to the CO. 20 C.F.R. § 655.61. The employer bears the burden of proof concerning its entitlement to a certification. 8 U.S.C. § 1361; *Cajun Contractors*, 2011-TLN-00004 (Jan. 10, 2011); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017).

### **DISCUSSION**

The H-2B program is designed for employers seeking to import workers to provide temporary nonagricultural services or labor. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Accordingly, an employer seeking H-2B temporary labor certification must establish that its need for nonagricultural services or labor is temporary in nature. 20 C.F.R. § 655.6. Temporary service or labor "refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary." 8 C.F.R. § 214.2(h)(6)(ii)(A). Employment is of a temporary nature when the employer needs a worker for a limited period of time. 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer must establish that its need for temporary services or labor "will end in the near, definable future." *Id.*

The petitioning employer must demonstrate that its need for the services or labor qualifies under one of the four standards of temporary need: a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need); *Baranko Brothers, Inc.*, 2009-TLN-00051 (Apr. 16, 2009); *AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient).

To qualify as a peak load need, the 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peak load, temporary need); *Kiewit Offshore Services, LTD.*, 2013-TLN-00020 (Jan. 15, 2013) (affirming denial where the employer’s documentation revealed that the employer’s alleged “peakload” need spanned at least a 19-month period); *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).

The employer must demonstrate a bona fide need for the number of workers requested. *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application).

Here, Employer requested certification for 23 temporary production helpers (Wooden Pallet Repairers), alleging a peakload period from April 1, 2019, through December 31, 2019. The documentation submitted by Employer fails to establish this peak period.

First, Employer did not submit the documentation requested by the CO in the Notice of Deficiency. The CO directed Employer to submit summarized monthly payroll reports for the 2017 and 2018 calendar years that identify the total number of workers employed, total hours worked, and total earnings received each month by Wooden Pallet Repairers, separated by permanent and temporary employees. The NOD required that the payroll reports be based on information compiled from the employer’s actual accounting records or system. This information would have been very helpful in comparing the work demands in the alleged nonpeak period to the work demands in the alleged peak period, but it was not provided. Employer also did not provide a schedule of operations for the entire year, the summary listing of all projects for the previous two years, or a detailed explanation of the activities of Employer’s permanent wooden pallet repairers during the stated non-peak period (January-March), all of which were required by the NOD. It submitted only the Missed Delivery Reports, which appear to be summaries created by Employer itself and not through its accounting records or system; and the short letter from its operations manager, providing the general overview of the company’s business and the wooden pallet repairer position, and its own claims of a surge in sales and production deficit from April through December. Applications for temporary labor certification are properly denied when the employer does not supply requested information. 20 C.F.R. § 655.32(a); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017); *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017). Because Employer did not supply the information and documentation it was directed to submit by the NOD, the CO properly denied certification.

Second, as the CO noted, the information in the Missed Delivery Reports belie Employer's claim that its need for labor as Wooden Pallet Repairers is decreased in January, February, and March. In 2015, Employer had 23 Wooden Pallet Repairers staffed full-time in January, February, and March, but had only 19 to 22 Wooden Pallet Repairers every other month of 2015. In 2016, Employer had 25 Wooden Pallet Repairers staffed full-time in January, February, and March; it had 24 in April, 23 in September, and a full-time staff of 19 to 22 every other month of 2016. In 2017, Employer had 22 Wooden Pallet Repairers staffed full-time in January and February, 21 in March, 25 in April, 22 in May, and 20 or 21 every other month of 2017. In 2018, Employer had 25 Wooden Pallet Repairers staffed full-time in January, February, and March, 24 in April, and between 19 to 23 full-time Wooden Pallet Repairers every other month of 2018. Thus, with only one exception,<sup>8</sup> the total number of full-time Wooden Pallet Repairers was larger in January, February, and March (the alleged nonpeak months) than it was in every other month over each of the last four years. As noted above, Employer did not submit the additional payroll documentation requested in the Notice of Deficiency. The Board has consistently affirmed denials of certification for applications where an employer's own records belie its claimed peak load periods of need. *See, e.g., DDM Haulers LLC*, 2018-TLN-00037 (Jan. 12, 2018); *Cody Builders Supply*, 2018-TLN-00053 (Feb. 8, 2018); *GM Title, LLC*, 2017-TLN-00032 (Apr. 25, 2017); *Erickson Construction*, 2016-TLN-0050 (Jun. 20, 2016); *Potomac Home Health Care*, 2015-TLN-00047 (May 21, 2015); *Stadium Club, LLC*, 2012-TLN-00002 (Nov. 21, 2011). The record does not show that the CO's denial of certification for failure to show a temporary peak load need was improper here.

Third, Employer provided only its own assertions regarding its monthly production sale revenues and missed deliveries. It did not provide any documentation to support or corroborate the sales revenues or missed deliveries, or the causes for them. It relied only on its word that a surge existed due to the needs of the grocery distribution industry, causing missed deliveries from April through December. "[T]he CO is not required to take the employer at its word." *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012). "The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers." *DTM Trucking, Inc.*, 2018-TLN-00174 (Oct. 10, 2018). BALCA has repeatedly held that "a bare assertion without supporting evidence is insufficient to carry the employer's burden." *Carolina Contracting and Management, LLC*, 2017-TLN-00026 (Apr. 4, 2017) (citing *AB Controls & Technology, Inc.*, 2013-TLN-00022 (Jan. 17, 2013)); *BMC West Corporation*, 2016-TLN-00039/40 (May 18, 2016) (same); *Munoz Enterprises*, 2017-TLN-00016 (Jan. 19, 2017). Therefore, the CO properly relied upon Employer's failure to provide any documentation to support its statement in denying the application.

Fourth, Employer claimed a different period of temporary need in its previous application (H-400-18235-827808), in which it attested that it experienced a peakload need from November 26, 2018 through June 26, 2019. *Rapid Pallet, Inc.*, 2019-TLN-00011 (Dec. 3, 2018). In this case, less than a month after the issuance of the Decision and Order Affirming Denial of

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<sup>8</sup> In April 2017, Employer had 25 full-time Wooden Pallet Repairers, which exceeded the 22 workers employed in January, February, and March of 2017; and in May 2017, Employer had 22 full-time Wooden Pallet Repairers, which matched the number from January-March.

Certification in 2019-TLN-00011, Employer attested that its peak period is April 1, 2019 through December 31, 2019. AF 33, 43. That is, in the instant case, Employer alleges that January through March is its nonpeak period, but in the previous case, Employer alleged that its peak period began November 26, 2018 and continued through June 2019 (thus including January-March 2019). In addition to the contradictory nature of Employer's attestations regarding which months bring a peak demand, this demonstrates that Employer has claimed a need for H-2B workers from November 26, 2018, until December 31, 2019, which is a consecutive period of over a year.<sup>9</sup> This suggests that Employer may have a year-round or permanent, rather than temporary, need for workers. Accordingly, I find that the Employer has not shown that its need for Wooden Pallet Repairers "will end in the near, definable future," as mandated by 8 C.F.R. § 214.2(h)(6)(ii)(B). See *DTM Trucking, Inc.*, 2018-TLN-00174 (Oct. 10, 2018); *Nature's Wood Products, LLC*, 2018-TLN-00173 (Sept. 28, 2018); *Michael J. Doak*, 2016-TLN-00059 (Aug. 15, 2016); *JAJ Hauling, LLC*, 2016-TLN-00054 (Jul. 18, 2016); *Hill 'N' Dale Sales Agency, Inc.*, 2016-TLN-00031 (Apr. 14, 2016).

Finally, the fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial. See *Rollins Sprinkler & Landscape, LLC*, 2017-TLN-00020 (Feb. 23, 2017).

For each of these reasons, the denial of temporary labor certification will be affirmed. The employer bears the burden of demonstrating eligibility for the H-2B program. As discussed above, Employer failed to demonstrate how its request for temporary labor certification meets the regulatory criteria for a peak load, temporary need for 23 Helpers-Production Workers (Wooden Pallet Repairers). Therefore, after reviewing the record in this matter, I find that the CO's denial of certification should not be disturbed.

Accordingly, the CO's denial of labor certification is AFFIRMED.

**SO ORDERED.**

For the Board:

**MONICA MARKLEY**  
Administrative Law Judge

MM/jcb  
Newport News, VA

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<sup>9</sup> The Decision and Order in *Rapid Pallet, Inc.*, 2019-TLN-00011 (Dec. 3, 2018) indicates that prior to the application at issue there, Employer had filed another application for H-2B workers (H-400-17299-091568), requesting 23 Wooden Pallet Repairers from January 2, 2018 through October 31, 2018. Taken together, these three applications demonstrate an ongoing, year-round need for workers in the pallet repairer position.