U.S. Department of Labor

Board of Alien Labor Certification Appeals
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BALCA Case Nos.: 2019-TLN-00105
ETA Case Nos.: H-400-18361-168088

2019-TLN-00106
H-400-18361-261565

2019-TLN-00107
H-400-18361-202009

In the Matter of:

REECE ALBERT, INC.,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kevin Lashus, Esq.
Austin, Texas
For the Employer

Leticia Sierra, Attorney
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Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Drew A. Swank
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Reece Albert Inc.'s ("Employer") request for review of the Certifying Officer's ("CO") decision to deny its applications 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);[1] 20 C.F.R. § 655.6(b).[2] 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).

BACKGROUND

On January 7, 2019, the Department of Labor's Employment and Training Administration ("ETA") received three applications for temporary labor certification from Employer requesting certification for three different construction positions for the period of April 1, 2019 to December 21, 2019. These three appeals were consolidated at the request of the parties, for purposes of decision and briefing, by the undersigned's April 24, 2019 Order Granting Motion to Consolidate Related Appeals. Case No. 2019-TLN-00105 involves Employer's request for nine front end loader operators, Case No. 2019-TLN-00106 involves Employer's request for eight truck drivers (occupational title of light truck or delivery services drivers) and case No. 2019-TLN-00107 involves Employer's request for eight machine operators. AF (105) 101-188.[3] Employer indicated that the nature of its temporary need in all three cases was "peakload." In Employer's applications it stated the following in regard to its temporary need:

> Our company is engaged in the heavy construction business in various counties in Texas. Our services include building roads, bridges, and overpasses. 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 1, 2019 to December 21, 2019. Our company has been engaged in business since 1968 and has gross revenues of $85,487,936 for the last fiscal year. Our company currently requires the services of laborers to perform manual labor associated with building roads, bridges and overpasses such as operating loader… Our company has a temporary

[1] 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).

[2] 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 have 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.

[3] References to the appeal file will be abbreviated with an "AF (105)" followed by the page number for references to 2019-TLN-105, "AF (106)" followed by the page number for references to 2019-TLN-106 and "AF(107)" followed by the page number for references to 2019-TLN-107. For the most part Employer offered the same or similar materials in support of its application in all three cases. Therefore only the page references for 2019-TLN-105 will generally be given but it should be noted that the page references vary slightly for the other two cases. Only where the applications or findings of the CO differ substantively will all three case files be specifically referenced.

> 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 December 21st, 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 wettest 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 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 December 21st to April 1st, because the cold and wet weather is not conducive to operating a self-propelled gasoline or diesel machine or operating a rubber-tired loader. Also, construction in general slows down and the need for laborers is substantially reduced. This is a new application. Since no previous supporting documentation exists to refer to from prior applications, the additional supporting documentation is attached. We are asking for 9 months experience, as is normal for our industry as demonstrated by the attached documents … Our company has extensively recruited U.S. workers to fill these positions without success. Specifically, our company has engaged in newspaper ad campaigns and online advertisements without receiving any adequate response or being able to hire sufficient numbers of U.S. workers to meet our demand for this number of workers as quickly as they are needed once the weather changes. We have found the local labor market to be completely inadequate and unable to meet our need for these peak load workers during our busiest seasons. Most of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for the H-2B workers we are asking for in 2019, but cannot anticipate, at this time, that we will need H-2B workers in 2020 due to fluctuations in the economy …

AF (105) 111.

In support of its application Employer attached a copy of its job order, its articles of incorporation, copies of its corporate tax return for years 2016 and 2017 and quarterly returns for four quarters for 2016 and 2017 and the first three quarters of 2018. AF (105) 113-180.

The CO issued a Notice of Deficiency ("NOD") on February 21, 2019, (February 22, 2019 in 2019-TLN-106 and 107) listing three deficiencies in the Employer's application. AF (105) 93-100.[4] As Deficiency three related to multiple areas of intended employment was

[4] The Notice of deficiency in Case 2019-TLN-107 also listed a fourth deficiency regarding Employer's failure to comply with regulatory provisions regarding disclosure of foreign recruitment agencies. Counsel for the CO stated in the attachment to her Motion to Consolidate Related Cases, that this deficiency regarding disclosure of foreign worker recruitment was listed in error as "employer stated it was not using a recruiter." See CO's Motion to

apparently cured by the Employer through its subsequent responses and submissions to the CO, this decision will only address the remaining two deficiencies which were the basis for the CO's final denial in this matter.

The CO noted the first deficiency as "[f]ailure to establish the job opportunity as temporary in nature." The CO cited 20 C.F.R. § 655.6(a) and (b) for the requirement that "an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary." AF (105) 97. The CO cited the regulatory language which states that an "employer's need is considered temporary if justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations." 20 C.F.R. § 655.6(b). *Id.*

The CO stated that the Employer did not demonstrate the requested standard of need which in this case was peakload. The CO noted that in order to establish a peakload need, the 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. *Id.*

The CO observed that Employer cited weather as a determining factor for its peakload need, however Employer had not provided any evidence or documentation that its business slows significantly during its non-peak season due to winter weather conditions. Therefore Employer failed to demonstrate how it met the regulatory standard.

The CO pointed out that the tax returns and other information provided by the Employer were insufficient to establish its requested period of need between April 1, 2019 and December 21, 2019.

Therefore, the CO determined that further explanation and documentation were necessary. Specific documentation requested included 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. An explanation and supporting documents that substantiate that employer's type of work cannot be performed during the winter months, from January through March, due to cold and wet weather not being conducive to driving light capacity truck for transporting loads of construction material in Odessa, Texas, as well as documentation to show that such weather conditions exist in the area of intended employment;

Consolidate Related Appeals Attachment page 3. Accordingly this deficiency will not be addressed in this decision. Further, as the CO's denials of Employer's applications are affirmed on other grounds, the question of disclosure of foreign worker recruitment is moot.

> 3. Summarized monthly payroll reports for two previous calendar years 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 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 (105) 97-98.

In regard to the second deficiency – Failure to establish temporary need for the number of workers requested, the CO cited 20 C.F.R. § 655.11(e)(3) and (4). The CO determined that employer had not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. Employer had not adequately justified its need for nine front end loader operators for the period of need requested or that the job request represents a bona fide job opportunity. The CO reminded the Employer that a labor market inadequacy alone is insufficient to justify a temporary need. AF (105) 98-99.

Again the CO requested further explanation and specific documentation including summarized monthly payroll reports for two previous calendar years that identify full time permanent and temporary employment in the requested occupation, as well as the total number of workers, total hours worked and total earnings received, as well as other documentation supporting and justifying the number of construction laborers requested. *Id.*

On March 8, 2019, Employer filed a response to the Notice of Deficiency providing additional information and further explanation of the submitted documentation, which it asserted supported its temporary need for the number of workers requested. AF (105) 24-92. Employer stated in its cover letter that it is a federal contractor based in San Angelo, Texas, and is in the business of maintaining state highways and roads for federal agencies such as the Texas Department of Transportation. Employer noted that it had incorrectly failed to indicate on its application that it was a job contractor and gave permission to the CO to amend its application to indicate that it was. AF (105) 24.

Employer again asserted that it was only able to perform the work of end loader operator (machine operator and truck driver in other applications) during the months of April to December due to the cold temperatures and moisture from the rain and sleet during the months of

January through March in Texas. Employer provided copies of FEMA weather briefings as evidence of the inclement weather in southwest Texas. AF (105) 30-92.

Employer stated in its cover letter that it was providing a few of the contracts which it stated were in place for 2019, totaling over a million dollars and asserted it would have more contracts coming in as it approached the start of its peakload season. Although Employer did not provide actual copies of contracts, it did supply two cover letters from the Texas Department of Transportation ("DOT") dated September 18, 2018 referring to two contracts, as well as letters dated December 12, 2018 and December 5, 2018 from the city of Del Rio and the city of San Angelo notifying Employer that contracts had been awarded. None of these letters provided any information regarding the terms of the contracts in relation to the dates that work would begin or estimated dates of completion. AF (105) 26-29. These letters are found in the Appeal File for Case No. 2019-TLN-105 but are not in the Appeal File for Case Nos. 2019-TLN-106 and 107.

Employer again submitted its quarterly tax returns for years 2016 through 2018 (only first three quarters of 2018 are included), and asserted that these quarterly returns show the total wages, tips and other compensation increase substantially from the first quarter going into the second, third and fourth quarters. AF (105) 122-175.

In regard to the second deficiency concerning the specific number of workers requested, Employer stated generally that it was unable to find a sufficient number of workers to fill these seasonal positions. Employer stated that it determined that it needs the eight workers requested because of the number of contracts it has in place for the year which total millions of dollars and which are still increasing. AF (105) 25.

Employer also gave permission to the CO to amend its application to remove certain worksites in order to be in compliance with regulations pertaining to multiple areas of intended employment as directed by the CO. *Id.*

On March 12, 2019, the CO issued a Non-Acceptance Denial to the Employer, stating that deficiencies in Employer's application still remained and therefore the application was denied. AF (105) 8-16. The CO acknowledged the information submitted by the Employer but determined that the information did not overcome the deficiencies regarding its failure to establish its temporary need and a bona fide need for the number of workers requested.

The CO stated that the Employer did not provide any documentation substantiating that it cannot perform the type of work required under Texas winter conditions between January and March. The CO pointed out that average low temperatures in certain peakload months such as November were actually greater than average low temperatures in the non-peak load month of March. The CO also stated that the average low temperatures during peak and non-peak months was not significantly different. The CO also asserted that the month with the most rainy days is September with an average of 4 rainy days followed by May through August and October, each with an average of 3 rainy days. Therefore the CO concluded the employer's statements regarding inclement weather during the non-peak months are not supported by climate data. *Id.*

The CO also noted that the employer did not provide summarized monthly payroll reports nor did the employer include other evidence and documentation that similarly served to justify the dates of need requested. The CO also noted that the quarterly tax returns (Form 941) did not support the Employer's requested dates of need. Therefore, the CO determined Employer did not overcome its failure to establish its peakload standard of need. *Id.*

The CO noted that the Employer provided information regarding several awarded contracts but this information did not indicate "the scope of work, number of workers needed to complete the contract, start and end date dates of each contract, or give any indication that the contracts awarded can only be completed within the employer's period of intended employment due to the employer's inability to complete the scope of work during Texas winter conditions." The CO further stated that it was unclear whether the Employer would complete each project during the dates of need requested. Therefore the CO determined that Employer failed to overcome the deficiency. AF (105) 14.

Regarding the Employer's failure to establish a bona fide need for the number of workers requested, the CO determined that Employer did not provide any additional documentation or evidence indicating when the construction season occurs or that the employer's business operations are tied to the busy construction season. Therefore, the CO concluded that it appears the Employer performs its services year round. The CO further stated that a "labor shortage within the area of intended employment does not constitute a peakload need." AF (105) 16.

On March 26, 2019, Employer submitted a request for administrative review to the Chief Administrative Law Judge regarding the CO's March 12, 2019 denial. Employer stated in its request for review that it reserved the right to submit a brief in support of its appeal. AF (105) 1-7.

By Order dated April 18, 2019, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before April 29, 2019.

On April 29, 2019, Employer filed a brief by email to OALJ-filings. Employer argues generally that the CO erred, acted arbitrarily and capriciously, and abused her discretion in denying Employer's three applications for temporary labor certification. Employer states that the CO incorrectly applied a "seasonal" need analysis to the evidence rather than a "peakload" need analysis. Employer argues that the CO dismissed critical evidence which supported its temporary need, which included payroll reports and letters of intent/contracts from the customers to whom Reece Albert provides services. Employer stated that it provided "detailed man-hour payrolls data- the same data used to support the favorable applications from prior years."

This statement is in fact puzzling as it is not consistent with the information in the record. Employer failed to provide any payroll information in any of these three cases. Although quarterly tax returns were provided which indicated the number of workers to which wages were paid, there was no evidence submitted which separated the worker information into permanent and temporary workers and no information was broken down by position, or by month, as requested by the CO. Further, Employer's counsel appears to indicate in its brief that Employer had prior H-2B applications which were certified, although Employer stated in its temporary

need statement that this is a first time application and therefore records of temporary workers utilized as a result of the H-2B program were not available. AF (105) 111.

Employer also argues that the CO's criticism of the contract information and letters of intent submitted by the Employer is misplaced because the CO had commented that the contracts could apply to times outside of the stated period of need, because the contract information did not specify the months when the work would be performed or completed. (It should be noted that contract information was only found in the Appeal File for Case No. 2019-TLN-105 and that no such information was found in Case Nos. 2019-TLN-106 and 107.) Employer asserts that Employer is not required to show that it does not perform work outside the period of requested need, only that it has temporary excess demand for its services, i.e., a "peak" in its workload.

Attorney Leticia Sierra of the Office of the U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief in this matter on April 29, 2019, on behalf of the Certifying Officer. The Solicitor argues that the CO's denial of the Employer's applications for temporary labor certification should be affirmed because the CO correctly determined that the Employer failed to carry its burden of demonstrating it was entitled to certification based on the evidence before the CO.

The Solicitor asserts that the Employer failed to provide the information requested by the CO in the Notice of Deficiency and also failed to provide any other documents which adequately met its burden of proving its temporary peakload need in its three applications.

The Solicitor argues that Employer failed to provide payroll records or other information which would provide evidence of a "peak" in the demand for the employer's services. She noted that Employer failed to provide evidence of workload and staffing baselines against which to assess the employer's H-2B claim of a peakload need. The Solicitor asserts that the quarterly tax returns and other tax information which Employer provided, were not adequate substitutes for payroll records as they did not focus on the specific area of intended employment or the occupations for which certification is sought.

The Solicitor notes that the Employer also failed to provide the summary listing of the Employer's projects in the area of employment for the previous two calendar years which was requested by the CO. She argues that the letters provided by Employer notifying the Employer of contract awards did not include copies of the contracts to which the notices referred. Thus the letters were not adequate to prove peakload need as they did not contain information of start and end dates or worksites.

The Solicitor argues that since the Employer failed to provide the payroll and other documentation requested by the CO and Employer also failed to provide any alternate information sufficient to establish its temporary need, Employer failed to meet its burden of proving its temporary peakload need for the requested period of need.

Likewise the Solicitor also argues that because Employer failed to provide the requested documentation it failed to establish its request for specific number of worker positions requested and that the request represents bona fide job opportunities.

For the above noted reasons, the Solicitor asserts that the CO's denial of Employer's temporary labor applications should be affirmed.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO's determination; or
(2) Reverse or modify the CO's determination; or
(3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

ISSUES

Whether the Certifying Officer properly denied the Employer's H-2B application due to:

1) Employer's failure to establish that its request for nine front end loader operators, eight truck drivers and eight machine operators for the period of April 1, 2019 to December 21, 2019 was based upon a "temporary" employment need, according to the Employer's stated standard of "peakload" need; and

2) Employer's failure to establish a bona fide need for the number of workers requested.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii)(A). This regulation states:

> (A) Definition. Temporary services or labor under the H-2B classification 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).

The DHS regulation further states in regard to the nature of petitioner's need:

> Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. §214.2(h)(6)(ii)(B).

The DOL regulation addressing temporary need in H-2B cases also states:

> 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.

20 C.F.R. §655.6.

In the current cases, the Employer applied for temporary labor certification for nine front end loader operators, eight truck drivers, and eight machine operators, for the period of April 1, 2019 to December 21, 2019, on the basis of a "peakload" need. AF (105) 101. In regard to peakload need the DHS regulation states, "[t]he petitioner 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).

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflects a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ 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).

An Employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4). *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers or period of need);

In this case, in support of its peakload need between April 1, 2019 and December 21, 2019, the Employer submitted weather data relevant to the general geographical area of intended employment consisting of five FEMA weather threat bulletins regarding the weather conditions for January 2, 2019, January 8, 2019, February 4, 2019, February 5, 2019 and March 8, 2019 including forecasts for the week following those bulletins. AF (105) 30-93. Although these weather bulletins provide information on the weather conditions on those specific dates they do not offer information regarding the monthly averages pertaining to temperature or rainfall, nor

how the weather in Employer's non-peak load months compares to the weather in the Employer's busier peakload season. In Case No. 2019-TLN-107, the CO reasonably stated in the final denial letter that the weather information submitted by Employer "is only a snapshot of this year and is not a comprehensive supportive document for the type of weather in this area of Texas during this timeframe." In the final determinations, the CO cited average low temperatures in Texas which it indicated did not support a significant difference in peak load months as compared to certain non-peak load months.

However, even if the Employer were able to show that the weather conditions in its non-peak months were not conducive to construction, Employer failed to provide the necessary documentation to prove it created a peakload need for the requested workers. *See BMC West Corporation and BMC West Corporation d/b/a BMC*, 2016-TLN-00043/44 slip op. at 7-8 (May 31, 2016) (Denial affirmed where employer offered explanation as to why its need changed seasonally but failed to substantiate its dates of need). It is the Employer's burden to establish the basis for its temporary need based on its chosen standard which in this case is peak load. Employer did not adequately explain or support its claim that the weather conditions have caused a peakload need between April 1, 2019 and December 21, 2019.

The CO reasonably requested documentation to support the Employer's peakload need for the requested labor and period of need, which the Employer failed to provide. The CO requested a "summary listing of all projects in the area of intended employment for the previous two calendar years" which noted the start and end dates of each project. AF (105) 97. Employer failed to provide the requested summary, nor did it provide any similar information.

In its response to the Notice of Deficiency Employer stated that it was providing a few of the contracts which it stated were in place for 2019, totaling over a million dollars and asserted it would have more contracts coming in as it approached the start of its peak load season. Employer did not provide actual copies of contracts, but did supply two cover letters from the Texas Department of Transportation ("DOT") dated September 18, 2018 referring to two contracts, as well as letters dated December 12, 2018 and December 5, 2018 from the city of Del Rio and the city of San Angelo notifying Employer that contracts had been awarded. However, none of these letters provided any information regarding the terms of the contracts in relation to the dates that work would begin or estimated dates of completion. AF (105) 26-29. These letters are found in the Appeal File for Case No. 2019-TLN-105 but are not in the Appeal File for Case Nos. 2019-TLN-106 and 107.

The CO correctly observed in its final denial letter that the Employer provided information regarding several awarded contracts but this information did not indicate "the scope of work, number of workers needed to complete the contract, start and end date dates of each contract, or give any indication that the contracts awarded can only be completed within the employer's period of intended employment due to the employer's inability to complete the scope of work during Texas winter conditions." Thus the information supplied by the Employer failed to prove its peakload need during the requested period. It merely showed the Employer had contracts for work which may have been performed during any month of the year. The dates of the award letters were September 18, 2018, December 5, 2018 and December 12, 2018. Therefore it is not clear that the work would not be performed in the non-peak months of January

through March, nor that these contracts created a peakload for the months of April through December. *See Geraldo Concrete, LLC*, 2018-TLN-00122, slip op. at 8 (burden to prove temporary need not met, where letters of intent were "not substantiated by actual contracts, nor [did] they indicate whether employer's services [were] limited to [the claimed months of need)."

The Employer provided copies of income tax returns for the years 2016 through 2018 which show significant income but does not differentiate the months of the year that income was earned, nor does it provide information regarding when the work projects were started or completed. Quarterly reports were submitted for 2016 and 2017 and the first three quarters of 2018, but this information also fails to support a peakload need during the requested period. The quarterly reports for 2017 show wages paid and number of employees of $3,823,257 for 263 employees for the first quarter of 2017; $3,855,522 paid to 258 employees for the second quarter; and $3,961,231 for 268 employees for the third quarter and $4,880,692 paid to 289 employees for the fourth quarter,

These reports show some increase in wages paid to employees between the first and the fourth quarters but these reports are not the equivalent of the payroll information requested by the CO and are insufficient to establish the peak load need for the requested workers during the requested timeframe of April 1, 2019 through December 21, 2019. The CO requested:

> 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[s] [front end loader operator, truck driver, and machine operator] 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;

AF (105) 98.

The quarterly reports do not provide the information requested by the CO. They are not broken down by month, nor do they provide separate information for permanent and temporary employees nor do they provide payroll information for the various positions requested in the Employer's three applications, (front end loader operator, truck driver and machine operator).

The CO is not required to accept the claims of an Employer who does not supply supporting documentation. *See AB Controls & Technology*, 2013-TLN-00022 (Jan. 17, 2013) (bare assertions without supporting evidence are insufficient). *See also 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 CO reasonably requested documentation to support the Employer's specific need for the requested labor and period of need, which the Employer failed to provide. The information provided by the Employer supports a year round need for construction labor but does not establish the peakload need during the requested period of need April 1, 2019 –December 21,

2019), nor did it provide information addressing Employr's need for the specific positions requested, front end loader operators, truck drivers and machine operators.

The regulations are clear that the burden is on the Employer to establish its temporary need on the basis of the chosen standard. *See Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) ("An employer cannot just toss hundreds of puzzle pieces--or hundreds of pages of document—on the table and expect a CO to see if he or she can fit them together. 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.").

Accordingly, based on the information submitted to the CO, and for the reasons stated above, the undersigned finds the CO reasonably determined that the Employer failed to meet its burden of proving its temporary need for the three noted construction positions, for the period of April 1, 2019 to December 21, 2019, based on Employer's stated "peakload" standard, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii), and that the request represents a bona fide job opportunity for the number of workers requested

ORDER

Employer has failed to meet its burden of showing its temporary peakload employment need for nine front end loader operators (Case No. 2019-TLN-00105), eight truck drivers (Case No. 2019-TLN-00106), and eight machine operators (Case No. 2019-TLN-00107), for the period of April 1, 2019 to December 21, 2019, and has also failed to demonstrate a bona fide need for the number of workers requested.

Accordingly, it is hereby **ORDERED** that the Certifying Officer's **DENIALS** of Employer's applications for temporary labor certification in Case Nos. 2019-TLN-00105, 2019-TLN-00106, and 2019-TLN-00107 are **AFFIRMED**.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge