



Issue Date: 20 March 2019

BALCA Case No.: 2019-TLN-00054
ETA Case Nos.: H-400-18364-373085

In the Matter of:

TEXAS FIFTH WALL ROOFING SYSTEMS, INC.,
dba TEXAS FIFTH WALL,
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 Texas Fifth Wall Roofing Systems' ("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);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" or "Application"). 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

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 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.

review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

In this case, the CO issued a Final Determination on February 19, 2019, denying Employer’s application for temporary alien labor certification. Employer timely filed a request for review on February 26, 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 36-94.³ The application requested H-2B temporary labor certification for 46 Helpers – Roofers from April 1, 2019 through October 21, 2019. AF 36. The “Statement of Temporary Need” on Employer’s application stated:

This is an application for re-certification of H-400-17306-621563; 8 fewer workers, two months later to coincide with both (1) the decision to deny the January application because it appears the peak load begins in April and (2) the release of the 2nd half FY H-2b visas on April 1.

Our company currently requires the services of roofer-helpers to perform manual labor associated with commercial and residential roofing construction and maintenance. No education required. Transportation is provided to and from area work sites at employer’s expense from centralized pick up location. Our company has a temporary peakload 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 October 21st, during which time we need to substantially supplement the number of workers for our labor force for these positions.

AF 36. In support of its application, Employer provided Payroll Data for Roofer-Helpers from January 2016 through August 2018; a chart of Permanent and Temporary Workforce Hours by Month for the same time period; Quarterly Tax Returns for the first and second quarters of 2018; EFTPS Data on federal tax deposits for the first and second quarters of 2018; charts displaying production earned revenue (March 2015-December 2019) and production labor (March 2015-November 2018); a chart of Actual Earned Revenue by Month through August 2018 and Monthly Earned Revenue Forecast through 2019; a page of computations related to the number of “visas needed”; its Articles of Incorporation; the Final Determination dated December 27, 2018, denying certification for 54 Helper-Roofer in H-400-18308-156657; Employer’s counsel’s Notice of Entry of Appearance; a draft job order; and an Application for Prevailing Wage Determination for a Helper-Roofer. AF 46-94.

On January 24, 2019, the CO issued a Notice of Deficiency (“NOD”) informing Employer that its application failed to meet the criteria for acceptance. AF 27-35. The NOD

³ References to the appeal file will be abbreviated as “AF” followed by the page number.

detailed three deficiencies in Employer's application: Failure to establish the job opportunity as temporary in nature; failure to establish temporary need for the number of workers requested; and issued with the job order assurances and contents. AF 32-35.

Regarding the first deficiency, the CO cited 20 C.F.R. 655.6(a) and (b) and stated that Employer did not sufficiently demonstrate a temporary need. AF 32. The CO pointed to Section B, Item 9 of the application, in which Employer alleged a peakload need because "our busiest seasons are traditionally tied to the spring, summer, and fall months, from approximately April 1st to October 21st," and found that Employer's statement did not fully describe its business history and activities to establish the claimed peakload need, and that the payroll charts and graphs submitted by Employer did not show the claimed peakload period, as the "offpeak month December 2016 has more hours worked than a majority of requested months during the entire year of 2016," "December 2017 has a higher number than April, May, and June of 2017," and "January 2018 has more hours worked than employer's requested peak months during 2018." AF 32. 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 why its submitted payroll data does not show that it has a peakload for temporary workers in the stated occupation from April 1, 2019 to October 21, 2019;
3. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period; 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.

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 32-33.

Regarding the second deficiency, the CO cited 20 C.F.R. 655.11(e)(3) and (4) and stated that Employer did not sufficiently demonstrate that the number of workers requested is true and accurate and represents a bona fide job opportunity. AF 33. The CO stated that Employer "did

not indicate how it determined that it needs 46 Helper-Roofers during the requested period of need,” and further explanation and documentation was needed. *Id.* To address the deficiency, the NOD directed Employer to submit the following:

1. A further explanation with supporting documentation of why the employer is requesting 46 Helper-Roofer workers for Austin, Texas during the dates of need requested;
2. Summarized monthly payroll reports for calendar years 2017 and 2018 that identify, for each month and separately for full-time permanent and temporary employment for Helper-Roofer workers, 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;
3. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation during the stated non-peak period; and
4. Other evidence and documentation that similarly serves to justify the number of workers being requested for certification....

Id.

The third deficiency involved Bexar County being listed as a worksite on the job order, but not on the Application (ETA Form 9142). The CO directed Employer to either remove Bexar County as a worksite in an amended job order, or give the CNPC permission to add Bexar County as a worksite on the Application. AF 34-35. Employer gave permission to add this worksite in its NOD response, and this issue was not cited as a basis for the denial of certification. Therefore, I will not discuss it further.

Employer filed a response to the NOD on February 8, 2019. AF 20-26. Employer’s response began by observing that it had successfully petitioned for temporary labor certification in the past, based on a peakload need for 54 laborers “to assist with the build-up of re-roofing and new construction related to the wet weather conditions routinely associated with Texas winters.” AF 20. Employer stated it “again proposed addressing our peakload need with temporary foreign workers because nothing about the need changed,” but the CO denied its first application on December 27, 2018. In response, Employer “filed for an April 1 start date” in the instant case.

To address the first deficiency, Employer requested to amend its end date of need to December 31, 2019. It explained its business history, dating to its founding in 1973, and its current business activities, which primarily involve roofing on new construction, reroofing, leak repairs and warranty repairs, and finish and inspection services. Its schedule of operations is year-round, but Employer has “experienced historical seasonal fluctuation in the need for our services that we attribute to weather.” Because reroofing involves working on occupied

buildings and removing the existing roof, “[m]arginally better weather and significantly longer hours that occur during our period of need cause a temporary peakload.” With regard to work on new construction, Employer stated that demand also increases during the period of need, but it is “influenced more by the productivity of other trades.” Employer referenced information and attachments to its application in H-400-18308-156657, which are not part of the Appeal File in this case. Employer stated there are “three components of weather that contribute to the seasonality that makes the nature of our temporary worker needs peakload: Rain days, daylight hours and temperature.” Employer stated it cannot install roofing when it is raining or the chance of rain is 30% or greater, when the temperature is below 40 degrees, or in poorly lit conditions. AF 20-21.

As for why its payroll data does not show a peakload need for Helper-Roofers from April 1, 2019 through October 21, 2019, Employer attributed the “poor reflection of the temporary need” to “our inability to employ temporary workers at the time of that need.” “When we are unable to add the manpower in the peak demand period, the project schedules are delayed into months that normally have reduced demand.” AF 21.

Regarding the activities of its permanent Helper-Roofers during the nonpeak period, Employer stated that they perform the same activities during the peak and non-peak periods, but “[t]he demand for those activities increases during our period of need.” For other evidence and documentation, Employer included a chart showing hours, FTE positions, and earnings for its permanent, subcontracted, and temporary workforce from January 2016 through December 2017. AF 22-23.

To address the second deficiency, Employer requested to amend its requested number of workers to 35. Employer explained the number as follows: in December 2017, it employed 22 permanent helper-roofers and incurred subcontractor manhours which equate to 17 workers, for a total of 39 workers. Employer asserted this establishes a need for a permanent workforce of 39 Helper-Roofers. Employer stated that its temporary workforce averaged 5,683 hours per month over 2016 and 2017, which equates to a need for 28 temporary workers. Employer estimated a 26% sales volume increase due to economic conditions and expansion plans, and thus applied a 26% increase to its need for 28 temporary workers, arriving at a total of 35 temporary workers. AF 23.

Employer included summary charts showing hours, FTE positions, and earnings for its permanent, subcontracted, and temporary workforce from January 2016 through December 2017 and from January 2017 through December 2018, and charts showing the number of permanent and temporary manhours worked for the same periods. AF 24-25.

On February 19, 2019, the CO issued a Final Determination on Employer’s application. AF 11-19. The CO denied Employer’s application for temporary labor certification after concluding that Employer did not overcome the first and second deficiencies. AF 12. The Denial Discussion for the first deficiency (AF 16-17) noted that Employer asserted that its peakload need in the spring, summer and fall was due to weather conditions that affect the roofing industry, but Employer then argued that its payroll records do not correlate to the stated period of need because its worker needs can be variable and not perfectly predictable. The CO

found that as Employer attributed its peakload need to weather, that factor is reasonably predictable from year to year. The CO also noted that no supporting documents were submitted to support Employer's statement that rainy days, daylight hours, and temperature dictate its needs, or to support its statement that client preferences (for occupied buildings) contribute to the peakload need. Additionally, the CO found that Employer's payroll data does not support a peakload need from April 1, 2019 to December 31, 2019.

With regard to the second deficiency, the Denial Discussion (AF 19) noted Employer's amendment of the number of requested workers to 35, and its explanation that it needs 35 workers based on payroll record averages in the stated peakload months. The CO found that, as discussed in the first deficiency, Employer's payroll data does not demonstrate a peakload need for the months April through December. Accordingly, Employer's payroll data does not demonstrate that an additional 35 workers are needed to meet the peakload demand.

For those reasons, Employer's application for temporary labor certification was denied.

Employer timely filed an appeal of the CO's denial on February 26, 2019. AF 1-10. I issued a *Notice of Assignment and Expedited Briefing Schedule* on March 5, 2019, which allowed the parties to file briefs within seven business days of receipt of the Appeal File. Employer filed a brief on March 15, 2019. The CO did not file a brief.

In its brief, Employer first argued that the CO failed to follow the DOL's 2016 guidance regarding subsequent determinations of an employer's previously certified temporary need. Employer asserted that its application should have been granted "on its face," without requiring additional documentation, and that the insistence on additional documentation in the NOD violates the 2016 guidance. Employer argued that it had a "multi-year history of previously approved certifications" demonstrating that peakload staffing needs recur in its business, and the prior applications "were not appreciably more detailed in explaining those points than the present application," so the instant application should have been "readily granted." Employer contended that the CO's failure to follow the 2016 guidance and give weight and deference to the prior certifications was arbitrary and capricious, and requires reversal.

Next, Employer argued that the CO failed to properly evaluate the evidence, including "the thorough analysis of permanent versus temporary manhours, payroll reports, and letters of intent/contracts from the commercial property owners/leasers and homebuilders to whom Texas Fifth Wall provides subcontractor services." Employer's argument, however, began citing and discussing materials that do not appear in the Appeal File. Employer made repeated references to purported letters of intent "from several of its largest consumers of subcontractor services," but those letters are not in the Appeal File for this case (H-400-18364-373085). Employer stated that its President confirmed a 200% increase in demand in Travis County, Texas, in his letter responding to the NOD, but that discussion does not appear in the letter. (See AF 20-26). Employer referenced the "CO's criticism of those letters" of intent and the CO's imposition of a requirement that Employer's services to commercial leasers and homebuilders "are not needed outside of the stated dates" (citing AF 16-18), but those statements and discussions do not appear at pages 16-18 or elsewhere in the Appeal File. Employer argued that the CO erred in determining that the anticipated contracts fail to demonstrate "what causes the peak within a

contract” (citing AF 22-26), and that in any event, the letters of intent make that demonstration; however, the Appeal File does not contain this determination by the CO or the letters of intent, and pages 22-26 of the Appeal File contain the latter pages of Employer’s response to the NOD.

Employer next argued that its evidence “provides direct proof of a peak in demand for its services . . . in a particular window of time,” and that the CO erred in relying on Employer’s past records to determine its “forward-looking need” in 2019. Employer asserted the CO incorrectly applied the test for a seasonal need, rather than a peakload need. Employer argued that the absence of past peaks at the same point in time as the requested period of need “is a far cry from conclusive proof, as the CO believed, that there is no need for temporary workers in 2018.” Employer asserted that while seasonal needs must recur at the same time (i.e., the same season) each year, peakload needs need not recur at the same time, and the CO erred in ascribing too much weight to whether past years’ records showed a peak at the stated period of need.

Employer asserted that the CO made “an unspoken, negative assessment” of its veracity as demonstrated by findings regarding the monthly average precipitation in Austin, Texas, and argued that the CO should not make subjective determinations as to the credibility of an employer’s statements. The purported statements regarding the monthly average rainfall in Austin appears to have been an issue in the previous Application filed by Employer (H-400-18308-156657, denied December 27, 2018), but it was not an issue in this case, and the material quoted by Employer does not appear at the cited page of the Appeal File.

Employer also contended the CO improperly relied upon the number of temporary workers employed in 2016-2018, but the quotes set out in Employer’s brief do not appear on the page of the Appeal File cited by Employer or elsewhere in the Final Determination. Additionally, Employer argued in a footnote that the CO erred in relying on a “partial” payroll report for 2018 and the failure to employ H-2B workers that year, because “the company did not even exist prior to July 20, 2017.” (Citing AF 51). Employer’s response to the NOD states that it was founded in 1973 (AF 21), and its Articles of Incorporation, submitted with its Application, show that it was incorporated in 1980. AF 61. Employer submitted payroll data—with its Application, in its response to the NOD, and in the brief itself—for calendar years 2016-2018. Thus, in addition to challenging purported statements that the CO did not make in this case, Employer’s argument that it did not exist at the challenged time is demonstrably untrue.⁴

With regard to the second deficiency, Employer argued that it has maintained a “notably stable” permanent workforce averaging 112 workers, but its total workforce (including temporary workers) has varied much more substantially. Employer attributed this “to the very factor driving [its] H-2B application in the first place: its inability to find US workers to supplement or grow its permanent staff.” Employer also argued there was a strong correlation between its sales figures and the total hours worked by its permanent and H-2B workforce, as demonstrated by tables showing hours worked in years 2016, 2017, and 2018. Employer argued

⁴ It is not clear why so many of Employer’s arguments rely on facts or materials not present in this case, because the “Background” section of Employer’s brief reflects the correct filing dates and Appeal File page numbers of the pertinent documents. The “Argument” section, however, contains several apparent references to a record in another case, and/or to materials submitted with a previous Application. In any event, the references do not correspond to the Appeal File in this case.

that the 2019 work orders and anticipated contracts demonstrated how many H-2B workers it would need in 2019. Due to increased demand and an inability to recruit locally, Employer argued its request for 46 H-2B workers was justified.

Finally, Employer argued that if the Board determined that “requested decrease in H-2B workers” (apparently from the application denied in December 2018) was not justified, it should reverse the CO’s determination and “direct the CO to grant a partial certification for 54 workers.”

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 also 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 46 helpers-roofers, alleging a peakload period from April 1, 2019, through October 21, 2019. In its response to the NOD, Employer requested to amend its request to 35 workers, from April 1, 2019 through December 31, 2019. Employer has not established the claimed peakload period.

First, Employer's argument under the 9/16 Guidance is unavailing. Employer relies on an announcement posted on the Office of Foreign Labor Certification website dated September 1, 2016, to argue that the CO erred in requiring supporting documentation at all, because the CO should have deferred to the approval of prior applications and granted this application on its face. Employer's arguments with regard to the 9/16 Guidance have been rejected by the Board. *Cooper Roofing & Solar*, 2018-TLN-00056 (Feb. 15, 2018) (the regulation and the Guidance require a CO to request additional documentation in some circumstances and do not prohibit such requests in other circumstances, and "[o]nce the CO requested additional documentation, it was incumbent upon the Employer to produce such documentation."); *Hernandez Texas Five Star Construction, Inc.*, 2018-TLN-00120 (May 14, 2018). Moreover, the 9/16 Guidance does not require routine approval of applications from Employers who previously received certification, and does not prohibit requests for supporting documents. Instead, the 9/16 Guidance states that, because many employers use the H-2B visa program on a predictable and recurring business cycle for job opportunities which were previously granted labor certification, such employers need not submit supporting documentation *at the time of filing* the Form 9142, and may instead retain that documentation in the event an NOD is issued by the CO. The employers should "clearly explain the nature of the employer's business or operations, why the job opportunity and number of workers being requested for certification reflect a temporary need, and how the request ... meets one of the four DHS regulatory standards." The CO will review the employer's statement of temporary need and its recent filing history, and may issue an NOD requesting an additional explanation or supporting documentation if the job offer has changed or is unclear, if other information about the nature of the employer's need requires further information, or if there are inconsistencies between the employer's statements and other evidence in the current or prior applications. "The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer's

current need is temporary in nature.”⁵ Thus, the 9/16 Guidance allows employers to retain their supporting documentation unless and until the CO requests it in an NOD; the 9/16 Guidance does not require the CO to approve applications on their face because a prior application was approved, or preclude the CO from issuing an NOD for further explanation or supporting documentation. Employer cannot prevail on its argument that the CO’s “failure” to approve the application without issuing an NOD was arbitrary and capricious.

Further, the fact that a 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) (noting that even if two similar cases were decided differently, that does not compel the conclusion that certification should be granted in the case at bar, because it is possible the other case was decided incorrectly and should have been denied).

Second, Employer’s several arguments that rely on evidence and arguments that do not appear in the Appeal File must fail. The Board’s review of the CO’s determination is limited to the Appeal File, the request for review, and legal briefs. 20 C.F.R. § 655.61(e). Employer’s references to materials outside of the record in this case, including the repeated reliance on purported letters of intent that do not appear in the Appeal File, cannot be considered.

Third, the CO correctly determined that Employer did not establish that it experiences a peakload during the claimed period of need. In the Form 9142, Employer attested that it has a temporary peakload need for 46 helper-roofers because its “busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to October 21st.” Employer’s payroll data, however, does not support this claim.

Employer submitted payroll data charts showing the total hours worked per month in the following categories: permanent work force regular hours, permanent work force overtime hours, subcontracted workers hours, H2B workers hours,⁶ and total hours.

In 2016, February had the third-highest number of hours worked, and December had the fourth-highest number of hours worked; both of these months fall outside the April-October claimed peak.⁷ Employer’s permanent workforce worked more hours in each month of January, February, and March 2016 than in any other month that year. Moreover, the difference between the total work hours of non-peak months January and March 2016 (14,573 and 14,271 respectively) and the total work hours of alleged peak months April, May, June, July, and October 2016 (ranging from 15,056-15,939) does not show an increase in demand sufficient to justify a need for 46 (or 35) temporary workers.

⁵ The 9/16 Guidance is available at: https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf.

⁶ Although Employer argued it had previously established a peakload need for 54 supplemental workers, the payroll data it submitted shows it employed a high of 24 full time H-2B workers. *See, e.g.*, AF 47.

⁷ Employer’s request to amend the period of need to run through the end of December creates other issues, as November 2016 had the lowest number of hours worked.

In 2017, the months with the highest number of hours worked were July, August, and October (ranging from 12,707 to 13,778); the next highest numbers were in February and March (11,069 and 10,292, respectively). April, May, June, and September 2017—all within the alleged peak period—each had a total number of hours worked less than 9,000. Thus, as in 2016, Employer’s roofers often worked more hours in the alleged non-peak months than in the alleged peak months.

In 2018, payroll data shows the total number of hours worked fluctuated monthly, with lows in February (8,285 hours), May (9,789 hours), and September (9,871 hours); and highs in November (15,777 hours), December (14,089 hours), August (12,955 hours), and October (12,669 hours). January, March, April, June, and July had total hours worked ranging from 10,039 to 11,614. Thus, the numbers were average in January, down in February, average in March and April, down in May, average in June and July, up in August, down in September, and up in October through December. As in 2016 and 2017, roofers worked more hours in “non-peak” months (January and March) than in “peak” months (May, June, and September). This payroll data shows fluctuations in demand, but it does not establish a peak from April 1 through October 21 (or through December 31). 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).

In sum, the record does not support Employer’s assertion that it has a peakload demand from April 1 through October 21 (or from April 1 through December 31, under Employer’s requested amendment).

Employer made various arguments as to why its documentation did not support its claimed period of peakload need. Employer argued that DOL has recognized that a peakload need may recur at different times of the year, or multiple times in the same year, depending on the facts of a specific case. That does not aid Employer in this case, because here, Employer asserted that its “busiest seasons are traditionally tied to the spring, summer and fall,” due to unfavorable weather conditions in the winter. Thus, in this specific case, Employer claimed one peakload period extending from spring (April 1) through fall (October 21, or December 31 in its request to amend), and the record does not show the peak that Employer alleged.

Employer also asserted (in the response to the NOD) that the inability to meet demand with temporary workers during the alleged “peak” months pushes work into the alleged “nonpeak” months, but that explanation runs counter to Employer’s primary claim that it experiences a peak in spring, summer, and fall because the nature of roofing work limits the hours that can be worked in winter due to the effects of temperature, daylight hours, and rain.⁸ If it were true that Employer suffers a slower period in winter because weather factors limit the available work hours, it would not be the case that Employer’s roofers work more hours in the winter.

⁸ Specifically, Employer asserted that it is unable to install roofing when temperatures fall below 40 degrees, when it is raining or the chance of rain is 30% or greater, or when the limited daylight hours of winter cause poorly lit conditions. AF 21.

Employer argued that it should not be dispositive that its past data did not show the alleged peak. However, “the CO is not required to take the employer at its word.” *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012). The Board 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). Additionally, the purported letters of intent that Employer cited as proof of an anticipated 2019 increase in demand are not in the record. 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 here was improper.

Finally, it bears noting that Employer’s graph of “Permanent and Temporary Workforce Hours by Month” (AF 48) shows that it employs “temporary” workers every month of the year—an indication that it has a need for more permanent staff. Likewise, Employer’s claim of a peakload period from January 21, 2019 through October 21, 2019 in its previous application (see AF 68-71), followed by its claim of a peakload period from April 21, 2019 through October 21, 2019 in the instant application (see AF 36) and its requested amendment of the period of need through December 31, 2019 (AF 21), shows that Employer has claimed a need for temporary H-2B workers in every month of 2019. This suggests that Employer may have a year-round or permanent, rather than temporary, need for workers. Employer has not shown that its need for Helper-Roofers “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).

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 that its request for temporary labor certification meets the regulatory criteria for a peakload, temporary need for 46 or 35 Helper–Roofers. 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