



Issue Date: 02 May 2019

BALCA Case No.: 2019-TLN-00112
ETA Case Nos.: H-400-18352-963436

In the Matter of:

TONY'S CONCRETE WORK, LLC,

Employer.

Before: LORANZO M. FLEMING
Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S
DENIAL OF TEMPORARY LABOR CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s (“CO”) denial in the above-captioned H-2B temporary labor certification matter. 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 Department of Homeland Security (“DHS”), “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR §214.2(h)(1)(ii)(D); see also 8 U.S.C. §1101(a)(15)(H)(ii)(b); 8 CFR §214.2(h)(6)(ii)(B); 20 CFR §655.1(a).¹ Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR §214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a CO of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR §655.53 During the administrative review, only the material contained within the appeal file (“AF”)² upon which the denial determination was made may be considered as evidence, while the Employer’s legal argument in its request for review and that legal argument in filed briefs may be considered as argument in the case. 20 CFR §655.61(e).

¹ The Interim Final Rule revising federal regulations related to the H-2B program, 20 CFR Part 655, Subpart A, was published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015) and is effective as of April 29, 2015.

² “AF” refers to the Appeal File and is followed by the page number of the relevant page in the Appeal File.

PROCEDURAL HISTORY

On January 7, 2019,³ the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Tony's Concrete Work, LLC ("Employer."). (AF 73-100). On February 13, 2019, the CO issued a Notice of Deficiency ("NOD"). (AF 65-72). On February 27, 2019, Employer filed its Response to the NOD. (AF 24-64). On March 6, 2019, the CO issued the Final Determination in response to Employer's Response to the NOD. (AF 13-23). On March 21, 2019, Employer appealed the CO's Final Determination Denying Temporary Employment Certification and filed its request for Administrative Review. (AF 1-12).

STATEMENT OF THE CASE

On January 7, 2019, the ETA received an *H-2B Application for Temporary Employment Certification* (ETA Form 9142B) from Employer for 12 "Laborer[s]" as peakload workers from April 1, 2019, to December 1, 2019, in Tolar, Texas. (AF 73-76). The positions were classified as O*Net Code 47-2061, Construction Laborers. (AF 73). No minimum U.S. diploma/degree was required or specific educational requirement was specified in Section F.b of the application. (AF 76). The Employer indicated that no training for the job opportunity or employment was required in Section F.b Item 3. (AF 76). The Employer retained Kevin Lashus as its attorney. (AF 75).

On February 13, 2019, the CO issued a NOD identifying the following deficiencies (AF 65-72):

Deficiency 1: Failure to establish the job as temporary in nature

Applicatory Regulatory Citations: 20 CFR § 655.6(a) and (b)

In accordance with 20 Code of Federal Regulations (CFR) § 655.6(a) and (b), 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.

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.

The employer did not sufficiently demonstrate the requested standard of temporary need.

The employer is requesting 12 Laborers from April 1, 2019 to December 1, 2019 based on a peakload need. 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.

Section B., Item 9 of the ETA Form 9142 indicates the following:

³ Applications filed after April 29, 2015, with an employment start date of need after October 1, 2015, are processed under the Interim Final Rule revising federal regulations related to the H-2B program published in Vol. 80 Fed. Reg. No. 82 at 24042 to 24144 (Apr. 29, 2015). 20 CFR §655.4(e).

This letter is submitted to support the labor certification application and I-129 petition of Tony's Concrete Work, LLC on behalf of multiple (12) foreign nationals.

The employer did not sufficiently demonstrate how its need meets the regulatory standard. The Chicago National Processing Center was unable to view the temporary need statement provided by the employer and no other supporting documents were submitted.

Further, the employer is requesting certification for temporary workers under a peakload need for an area of intended employment that is conducive to year-round outdoor work. Therefore, further explanation and documentation is requested to establish employer's dates of need.

Additional Information Requested:

The employer must 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. If applicable, industry specific documentation that connects the climate in the Tolar, Texas area with the employer's limitation to perform the work outlined in its application from December through March;
3. If applicable, documentation confirming a building season in the Tolar, Texas area, an area conducive to year-round work for the construction trades. This documentation must be from an independent source and can include supportive letters from building trade organizations in the employer's area of intended employment;
4. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period, December through March;
5. A summary listing of all projects in the area of intended employment for 2017 and 2018 calendar years. The list should include start and end dates of each project and worksite addresses;
6. Summarized monthly payroll reports for the 2016, 2017, and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Construction Laborer*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and
7. 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.

Deficiency 2: Failure to establish temporary need for the number of workers requested

Applicable Regulatory Citations: 20 CFR § 655.11(e)(3) and (4)

In accordance with 20 Code of Federal Regulations (CFR) § 655.11(e)(3) and (4), an employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity.

The employer has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.

In its current application, H-400-18352-963436, the employer is seeking certification for 12 Laborers from April 1, 2019 through December 1, 2019. The employer previously received certification for nine Laborers from April 1, 2018 to December 1, 2018 in its previously submitted application, H-400-17336-017800. The employer is therefore requesting an increase of three workers in the total number of workers requested.

The employer did not indicate how it determined that it needs three additional workers during the requested period of need. Further explanation and documentation is requested in order to establish the employer's need for a total of 12 workers.

Additional Information Requested:

The employer must submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. The employer's response must include, but is not limited to, the following:

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

Deficiency 3: Disclosure of foreign worker recruitment

Applicable Regulatory Citations: 20 CFR 655.9(a) and (b)

In accordance with 20 Code of Federal Regulations (CFR) 655.9(a) and (b), the employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*. Those agreements must contain the contractual prohibition against charging fees as set forth in 20 CFR 655.20(p).

The employer, and its attorney or agent, as applicable, must also provide the identity and location of all persons and entities hired by or working for the recruiter or agent referenced in paragraph (a) of this section, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H-2B job opportunities offered by the employer.

The employer's application did not include any agreements between itself or its attorney/agent and an agent or recruiter engaging in the recruitment of H-2B workers.

Additional Information Requested:

The employer and its attorney/agent must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*, including the identity and location of all persons and entities hired by or working for the recruiter or agent. All agreements must contain the

required language prohibiting seeking or receiving payments from prospective employees as indicated at 20 CFR 655.20(p).

OR

The employer must notify the Department that they will not utilize any agent or recruiter for the recruitment of H-2B workers under this *Application for Temporary Employment Certification*.

On February 27, 2019, the Employer's Response to the NOD was received at the Chicago National Processing Center. (AF 24-64). On March 6, 2019, the CO denied the Application for Temporary Employment Certification stating Employer did not meet the requirements specified in 20 CFR 655, Subpart A. (AF 13-23). The CO set forth the following reasons for the denial of the application (AF 17-23):

Deficiency 1: Failure to establish the job as temporary in nature.

In response to the NOD, the employer provided a copy of its NOD, a cover letter of explanation from its attorney, a statement of temporary need, two copies of Indeed.com posting illustrating a background check and drug testing requirements, calendar years 2016 through 2018 payroll for Concrete Worker, simple 2019 contract and work order listing, quarterly and annual tax returns, and State of Texas certificate of formation for the employer.

The employer's NOD directed the employer to submit a summary listing of all projects in the area of intended employment for the previous two calendar years; however, that documentation was not included in its response.

The employer's NOD response did not overcome its deficiency. In its statement of temporary need, the employer explains,

Our services include concrete construction. The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is April 1st, 2019 to December 1st, 2019. Our company currently requires the services of laborers to perform manual labor associated with concrete construction such as cleaning and preparing sites, form setting, mixing and pouring cement, grading, digging, and loading and unloading materials... As is well known, Texas winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be.

To support its business cycle, the employer provided its 2016, 2017, and 2018 payroll. The years 2016 and 2018 indicate Cement Worker, while the 2017 payroll indicates Construction Work. The Department will treat the payroll as representing the same group of workers.

When viewed as a whole, the employer's permanent workers' payroll is showing a pattern of permanent worker numbers going down while temporary worker numbers are increasing. For instance, the 2016 payroll summary shows eight permanent workers employed all year and the employment of at least three *temporary* workers all year. In that same year, the employer employed at most eight temporary workers in its stated peakload months. Then in 2017, the employer began the year with seven permanent workers (one less than the previous year) and in the month of May when it obtained nine temporary workers, the employer's permanent workers went down to five and consequently, the permanent workers' hours reduced greatly. Then, in 2018, the employer maintained a permanent workforce of five workers (three less than in 2016)

and a temporary workforce of 10 workers. In 2019, the employer is requesting 12 temporary workers.

Under a peakload temporary 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. However, its payroll appears to reflect the replacement of its permanent workforce.

Per the employer's statement shown above, it is basing its peakload need on climate in its area of intended employment. The employer's NOD directed it to submit industry specific documentation that connects the climate in the Tolar, Texas area with the employer's limitation to perform the work outlined in its application from December through March. However, the employer's response did not contain any documentation on the climate in its area of intended employment and the duties outlined in its application.

Also, if it was applicable, the employer was to submit documentation confirming a building season in the Tolar, Texas area, an area conducive to year-round work for the construction trades. However, this item was not addressed in the employer's response and no documentation was submitted.

Further, the employer was asked to describe the activities of the employer's permanent Construction Laborers during the stated non-peak period, December through March. However, the employer did not provide an explanation. Therefore, it is not clear if the employer's permanent workers are performing the duties outlined in its application all year-long and if the temporary workers are truly being requested to supplement its permanent workers due to a seasonal or short-term demand.

The employer provided a summary of 2019 projects scheduled to date. However, the summary did not include scheduled work dates or assigned number of workers. The list suggested the employer has 2019 scheduled work; however, it is not clear when the work is scheduled or if the employer schedules its work based on the arrival of a temporary workforce. Therefore, the summary does not provide support for the employer's requested dates of need.

Finally, the employer provided quarterly and annual income tax returns. However, the documents represent the employer's entire operation and are not exclusive to the requested operation or offer support for the employer's requested period of need.

Therefore, the employer did not overcome the deficiency.

Deficiency 2: Failure to establish temporary need for the number of workers requested

In response to the NOD, the employer provided a copy of its NOD, a cover letter of explanation from its attorney, a statement of temporary need, two copies of Indeed.com posting illustrating a background check and drug testing requirements, calendar years 2016 through 2018 payroll for Concrete Worker, simple 2019 contract and work order listing, quarterly and annual tax returns, and State of Texas certificate of formation for the employer.

To support its need for 12 Construction Laborers, the employer provided its 2016, 2017, and 2018 payroll. The years 2016 and 2018 indicate Cement Worker, while the 2017 payroll indicates Construction Work. The Department will treat the payroll as representing the same group of workers.

When viewed as a whole, the employer's permanent workers' payroll is showing a troubling pattern of permanent workers number going down while temporary worker numbers are increasing.

For instance, the 2016 payroll summary shows eight permanent workers employed in all year with the employment of at least three temporary workers all year. In that year, the employer employed at most eight temporary workers. Then in 2017, the employer began the year with seven permanent workers (one less than the previous year) and in May when it obtained nine temporary workers, the employer's permanent workers went down to five and consequently, the permanent workers' hours reduced greatly. Then, in 2018, the employer maintained a permanent workforce of five workers (three less than in 2016) and a temporary workforce of 10 workers. In 2019, the employer is requesting 12 temporary workers.

Under a peakload temporary 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. However, its payroll is showing the replacement of its permanent workforce with temporary workers. Therefore, the employer's true need for a certain number of temporary workers is not clear.

The employer provided a summary of 2019 projects scheduled to date. However, they did not include scheduled work dates or assigned number of workers. The list suggested the employer has 2019 scheduled work; however, it is not clear when the work is scheduled or the number of workers needed.

Finally, the employer provided quarterly and annual income tax returns. However, the documents represent the employer's entire operation and are not exclusive to the requested operation or offer support for the employer's requested period of need.

The employer's NOD suggested documentation supporting the employer's need for 12 Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need. However, the employer did not submit any documentation that points to a need for a certain number of workers.

The employer's true number of workers needed is not clear. Therefore, the employer did not overcome the deficiency.

In accordance with Departmental regulations at 20 CFR §655.51, Subpart A., the Department of Labor has made a final determination on the employer's application. Based on the foregoing reasons, the employer's application is denied.

On March 21, 2019, the Employer filed a timely formal request for administrative review of the CO's denial. (AF 1-12).

DISCUSSION

An Employer seeking certification to employ H-2B nonimmigrant workers bears the burden to establish eligibility for issuance of a requested temporary labor certification. The Employer must establish that the "number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity." 20 C.F.R. 655.11(e)(3) and (4).

Where an Employer has submitted an application for temporary labor certification of H-2B workers and that application fails to meet all the obligations required by 20 CFR Part 655 or other requirements of the H-2B program, the CO issues a NOD to the Employer setting forth the deficiency in the application and permitting the Employer to submit supplemental information and documentation for consideration before issuance of a final determination on the application. 20 CFR §655.31(b). BALCA may only consider the documentation considered by the CO in its

final denial determination as contained in the AF and may also consider the arguments set forth in the Request for Administrative Review and legal briefs submitted to BALCA. 20 CFR §655.61(e).

In this case, the CO determined that the Employer failed to establish that the job opportunity was temporary in nature. Accordingly, the CO requested the Employer to submit additional information. The CO's Final Determination indicates that the Employer failed to submit or acknowledge many of the requests with its response.

In its brief, the Employer argues that the CO failed to give the Employer's certification history appropriate weight and deference in support of its application. In support of its argument, the Employer points to the Department of Labor's *Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need"* (the "9/16 Guidance"). Employer argues that under the 9/16 Guidance, its application for recertification should have been granted on its face without the CO requesting additional information, and that the application should have been adjudicated on the basis of the ETA-9142B filing and prior certification history alone.

The Employer misstates the application of the Regulations. Pursuant to 20 CFR § 655.11(g), the CO is permitted to issue a Request for Information ("RFI") in order determine whether the Employer's application for labor certification should be approved. The Regulations states that "**all** employers . . . that desire to hire H-2B workers must establish their needed for services or labor is temporary by filing an *H-2B Registration* with the Chicago NPC." See 20 CFR § 655.11 (emphasis added). There is no exception for employers who have been previously certified. Indeed, the 9/16 Guidance specifically states, "[T]he 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."

An employer seeking certification under the H-2B program must show that it has a temporary need for workers. 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); 20 C.F.R. § 655.6(a). Employment "is of a temporary nature when the employer needs a worker for a limited period of time" and the "employer must establish that the need for the employee will end in the near, definable future." 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer's need is temporary if it qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b).⁴ "Except where the employer's need is based on a one-time occurrence, the CO will deny a request for a [certification] where the employer has a need lasting more than 9 months." § 655.6(b).

⁴ Because the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

An employer can establish a “peakload need” if it shows 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).

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); *Roadrunner Drywall*, 2017-TLN-00035 (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); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

An employer bears the burden of proof. *Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). Bare assertions without supporting evidence are insufficient to carry the employer’s burden. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). In addition, the burden is on the employer to provide the information and to present it in such a way so that the CO can determine that the employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.*

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.* Inquiry into factual issues “is to be searching and careful,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis that the CO has not itself provided.” *See State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1946)); *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

To obtain certification under the H-2B program, an applicant must establish that its need for workers qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peak-load, or intermittent. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). To establish a peak-load need, an employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due

to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In the instant case, the Employer attempted to establish a peak-load need for 12 Laborers from April 1, 2019, through December 1, 2019. In its brief, the Employer argues that the CO misapplied the application of a "seasonal need" rather than the appropriate "peakload need." However, this is clearly not the case. The CO indicated that "[u]nder a peakload temporary 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-demand." (AF 22). The language is nearly identical to the language of the statute listing the requirement to establish a peakload need. *See* 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Regarding whether the Employer established a temporary peakload need, the CO based the determination primarily on Employer's payroll records, the summary of Employer's 2019 scheduled projects to date, and Employer's quarterly and annual income tax returns. The CO observed that the payroll documentation showed a replacement of the Employer's permanent workforce with temporary workers. The CO stated "[w]hen viewed as a whole, the employer's permanent workers' payroll is showing a pattern of permanent workers numbers going down while temporary worker numbers are increasing." (AF 19). The CO indicated that the Employer's payroll information failed to establish a peakload temporary need because the records appeared to reflect a replacement of its permanent workforce instead of a temporary supplement to its permanent staff.

The payroll records showed that in 2016 the Employer had eight permanent workers and employed at most eight temporary workers. By May of 2017, the number of permanent workers decreased from seven to five after the Employer obtained nine temporary workers, and the number of permanent workers' hours were reduced. In 2018, the Employer maintained five permanent workers and a temporary workforce of ten. The Employer's 2019 application requested twelve temporary workers. This data evidences that Employer's request for temporary workers are increasing while its permanent workforce is diminishing. Under § 214.2(h)(6)(ii)(B)(3), the Employer must establish the temporary workers are to supplement its permanent staff and "that the temporary additions to staff will not become a part of the petitioner's regular operation." In its brief, the Employer failed to address the CO's observation to the payroll records. Accordingly, I find that Employer fails to meet its burden in establishing a peakload need.

In addition to the payroll records, the CO also relied on the Employer's list of scheduled 2019 projects and the Employer's quarterly and annual income tax returns. The CO observed that the Employer did not include with the list any scheduled work dates or the assigned number of workers. The CO stated that "[t]he list suggested the employer has 2019 scheduled work; however, it is not clear when the work is scheduled or the number of workers needed." (AF 22). The CO noted that the income tax returns represented the Employer's entire operation and did not offer support for the Employer's requested period of need. In its analysis, the CO also noted the Employer failed to submit supporting documentation demonstrating its need for 12 Laborers or a need for a certain number of workers. While it does not appear that the CO relied

exclusively on the Employer's failure to produce the suggested documentation, the omission is conspicuous.

The Employer emphasizes that the peakload nature of its business operations is from April 1 through December 1, following a Texas winter. I recognize that Employer's activities may be weather-dependent. However, that is not the only question in analyzing "peakload need." Rather, Employer must demonstrate that "it needs to supplement its permanent staff ... on a temporary basis due to a seasonal or short-term demand." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Based on my review of all the evidence before me, I find that the CO reviewed the evidence submitted by Employer and considered relevant factors, and the Final Determination displayed a rational connection between the facts found and the choices made. *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, I find that the CO reasonably concluded that the records submitted by Employer do not establish a temporary peakload need. Therefore, I conclude that the CO's determination denying Employer's request for temporary labor certification was not arbitrary and capricious.

ORDER

Based on the foregoing, the CO's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

For the Board:

LORANZO M. FLEMING
Administrative Law Judge

LMF/AME/jcb
Newport News, Virginia