



**Issue Date: 06 March 2019**

BALCA CASE NO.: 2019-TLN-00034

ETA CASE NO.: H-400-18362-609788

*In the Matter of:*

**WOODPECKER CABINETS, INC.,**  
Employer.

**DECISION AND ORDER**  
**REQUIRING H-2B CERTIFICATION**

This matter is before the Board of Alien Labor Certification Appeals on Woodpecker Cabinets, Inc.'s application for a certification under the H-2B nonimmigrant alien worker program.<sup>1</sup> The certifying officer at the Department of Labor's Employment and Training Administration notified Woodpecker of deficiencies in the application. Woodpecker supplemented its submissions. The certifying officer then denied the application. Woodpecker timely requested BALCA review.

This Decision and Order is based on a written record, which consists of the Appeal File and Woodpecker's request for review. 20 C.F.R. § 655.61(e). The time having run, no party filed a brief. I will reverse the certifying officer's denial of the labor certification.

Findings of Fact

Woodpecker describes itself as a "producer of cabinets." AF at 32, 43.<sup>2</sup> It applied for an H-2B Temporary Employment Certification based on an asserted peakload temporary need. *Id.* at 9. It sought to hire ten "Carpenter Helpers" to work in Greenville, Texas from April 1, 2019 to November 16, 2019. *Id.* at 32. Woodpecker stated that the workers would "assist carpenters & perform a variety of duties: use, supply, or hold materials & tools, clean the work area and/or equipment. Collect rubble, debris & trash for proper disposal. Must be able to work in hot/cold weather." *Id.* at 34. Woodpecker provided a worksite address in Greenville. *Id.* at 35.

Woodpecker describes its need as temporary peakload:

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<sup>1</sup> See Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

<sup>2</sup> "AF" refers to the Appeal File.

We need 10 temporary workers to meet the increased demand on our company during our busiest time each year. Since we are a producer of cabinets, the major portion of our business is performed during the construction and building season, which is between the middle of February and the middle of November. The cabinet and fine woodwork business is directly related to the holiday season. During the holiday season of mid-November to mid-February there are not as many houses being [built;] therefore, we do no[t] need the extra help during those months. More specifically, our residential remodel clients do not want us working on their homes, [especially] the kitchens during the holiday season from mid-November through January. Demo, plumbing and electrical takes place before we can do the cabinetry – so we do not begin full force until the middle of February. We have followed this same schedule since 2012.

*Id.* at 43.

*Notice of Deficiency.* The certifying officer found that Woodpecker’s application failed to establish (1) the job opportunity as temporary and (2) the need for the number of workers requested. *Id.* at 29-30. The certifying officer required additional information on these deficiencies.

As to a showing that the job need was temporary, the certifying officer required Woodpecker to submit:

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. Explanation and supporting documents that substantiate that its type of work cannot be performed due to holiday season and weather related issues.
3. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
4. Summarized monthly payroll reports for the [2017] and [2018] calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Carpenters helper*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

*Id.* at 29-30 (emphasis deleted).

On this issue, Woodpecker submitted monthly payroll reports for 2017 and 2018 that identified the total number of permanent and temporary workers, the total hours worked by permanent and temporary workers, and their total earnings. Woodpecker signed and certified that the monthly payroll report was “accurate and based on individual payroll records maintained by” Woodpecker. *Id.* at 23.

As for a showing that Woodpecker needed 10 workers, the CO requested additional explanation and documentation. *Id.* at 30. The CO found Woodpecker’s response sufficient, as do I. I therefore need not belabor this second issue.

*Denial of application.* On January 30, 2019, the certifying officer denied Woodpecker’s application. The CO concluded that, even considering Woodpecker’s supplemental response, it had not shown that the job would be temporary. The CO explained that Woodpecker’s 2017 and 2018 payroll reports failed to show how Woodpecker determined that it has a temporary need for ten Carpenter Helpers from April 1, 2019 to November 16, 2019. The certifying officer created the chart below to summarize the 2017 and 2018 payroll reports:

2017				2018			
Month	Permanent Hours	Temporary Hours	Total Hours	Month	Permanent Hours	Temporary Hours	Total Hours
January	656	0	656	January	656.14	0	656.14
February	656	82.39	738.39	February	664.41	0	664.41
March	795.31	2342.88	3138.19	March	849.1	0	849.1
April	645.92	1864.85	2510.77	April	444.74	1465.87	1910.61
May	639.36	1817.15	2456.51	May	677.88	1741.85	2419.73
June	811.59	1957.49	2769.08	June	764.19	1553.4	2317.59
July	669.89	1445.9	2115.79	July	695.16	1652.02	2347.18
August	650.63	1822.07	2472.7	August	571.8	2258.81	2830.61
September	746.78	2203.57	2950.35	September	666.99	1727.26	2394.25
October	657.39	1658.64	2316.03	October	701.29	1708.83	2410.12
November	662.11	1300.71	1962.82	November	824.96	1359.97	2184.93
December	578.93	0	578.93	December	663.54	0	663.54

*Id.* at 20.

The CO made three observations based on this report. First, the peakload months from March to November 2017 show consistent total hours worked. *Id.* at 21. Second, in 2017, permanent workers worked nearly the same hours during peak months (April-November) as nonpeak months (December-February). *Id.* Third, in 2018, permanent workers worked fewer hours in the peakload months of April and August than in non-peakload months (December-March). *Id.*

The CO concluded that (1) Woodpecker failed to explain or document why there was less need for this kind of work because of the winter holidays and the weather at that time of year, and (2) Woodpecker failed to show that there is a construction and building season in the Greenville area. The CO noted that Woodpecker could have provided, for example, documentation of

monthly production numbers for the industry over the two years to support its assertion that this is a peakload need during the requested months. *Id.*

*History of certifications.*<sup>3</sup> Since 2012, Woodpecker has obtained temporary workers under the H-2B nonimmigrant alien worker program based on a showing of temporary peakload need from mid-February to mid-November.<sup>4</sup> In its three most recent applications for temporary workers, Woodpecker submitted the same statement of temporary peakload need. A certifying officer approved each of these applications. On November 26, 2018, Woodpecker submitted an application for a February 2019 start date with the same statement of temporary peakload need. Again, a certifying officer notified Woodpecker that its application was approved. But Woodpecker decided to withdraw that application and substitute the present application for a *shorter* period: April 1 through November 30, 2019.

### Discussion

*Standard of review.* The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer's determination. When the certifying officer's determination turns on the Employment and Training Administration's long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. *Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (describing deference courts give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer's determination unless it is arbitrary, capricious, or inconsistent with the ETA's established policy interpretation. Absent ETA's long-standing, policy-based interpretation of a regulation, I conclude that BALCA should review the certifying officer's denial *de novo*.

Here, the certifying officer's determination is not based on any ETA long-established, policy-based interpretation of a regulation. As described above, the certifying officer's denial is based an analysis of the particular facts in this application. If anything, the many previous approvals that ETA has given this employer on the same application when submitted in other years shows that nothing in this application runs afoul of any long-established ETA policy. Therefore, I review the certifying officer's denial *de novo*.

*H-2B program requirements.* An employer seeking certification under the H-2B program must "establish that its need for non-agricultural services or labor is temporary, regardless of whether

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<sup>3</sup> The certifying officer is expected to review the applicant's history of certifications. *See* U.S. Dep't of Labor, Employment and Training Administration, *Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Woodpeckers: Submission of Documentation Demonstrating "Temporary Need"* (Sept. 1, 2016), [https://www.foreignlaborcert.doleta.gov/pdf/FINAL\\_Announcement\\_H-2B\\_Submission\\_of\\_Documentation\\_Temporary\\_Need\\_082016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf) ("The certifying officer will review the employer's statement of temporary need as well as its recent filing history (if applicable) to determine whether the nature of the employer's temporary need on the current application meets the standard for temporary need under the regulations."). In addition, Woodpecker mentioned its history since 2012 in its statement of peakload need. I therefore take official notice of Department's prior certifications. *See* 29 C.F.R. § 18.84.

<sup>4</sup> In 2018 and in the current application for 2019, Woodpecker moved the start of the temporary peakload from February to April because the H-2B cap was reached in February.

the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer’s need is temporary if it is: “a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.” 20 C.F.R. § 655.6(b).

An employer establishes 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). The employer must also demonstrate that the number of positions is justified and that the request represents a *bona fide* job opportunity. 20 C.F.R. § 655.11(e)(3)-(4).

*Peakload need.* Woodpecker states that it requires fewer employees during the holiday season for a two reasons: (1) home construction is down between mid-November and mid-February and (2) residential remodel clients do not want Woodpecker working inside their homes, especially their kitchens, during the holiday season. The latter reason is compelling enough to show that a seasonal demand exists for Woodpecker’s services. I accept that fewer people want workers in their homes during the Thanksgiving, Christmas, and New Year’s holidays because many families gather at home during those weeks, and others entertain guests in their homes. The gatherings often involve food, making kitchen renovation especially irksome.

Even if Woodpecker’s understanding of the market for its products is in error, its payroll reports lead to the same conclusion. The 2017 and 2018 reports consistently show substantially fewer hours in total worked in the non-peak months. This establishes that Woodpecker had less work to do in the times it asserts as off-peak. From February to November, the total hours of work increase substantially and require the addition of temporary workers. That is consistent with a showing of a peakload need for the temporary workers.

As the certifying officer noted, there is a limited amount of contrary data in 2018 (but not 2017). In 2018, workers worked fewer hours in the would-be peakload months of April and August than in non-peakload months (January-March and December). The numbers do not show a peakload need during those two months.

But Woodpecker has to base its needs to hire on its overall historical experience over the years; it cannot hire temporary workers for April through November and lay them off for a couple three- or four-week periods within those eight months. Finding two exceptions in the 24 months of data available does not lead me to a different conclusion: I continue to find that Woodpecker has shown the peakload temporary need it asserts.<sup>5</sup>

Woodpecker’s history of certifications also supports a finding of a temporary peakload need. Since 2012, Woodpecker each year has obtained temporary workers under the H-2B nonimmigrant alien worker program from mid-February to mid-November. While previous

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<sup>5</sup> If several months during the 2019 peakload produce data showing that the ten temporary workers (or some of them) were not necessary, and if Woodpecker makes a similar application in 2020, the certifying officer might look at the data for 2018 and 2019 and rightly conclude that Woodpecker’s showing for a temporary peakload need for 10 workers at that point is insufficient.

approvals are not controlling – either on the certifying officer or on this Office (OALJ), the uniformity of the approvals reflects that many Department of Labor officials over the years have found the same (or similar) applications from Woodpecker legally sufficient. I find nothing in this application or its supporting data that leads me to depart from those past approvals.

Indeed, only about three months ago, a certifying officer approved Woodpecker’s application to cover a *longer* period of temporary peakload need: February through November, not April through November. In my view, it is a greater challenge for Woodpecker to show that the longer period of time was temporary than the shorter period. February through November begins to approach being a full year, or at the least, is closer to a full year than is April to November. That makes a denial of the current application more difficult to understand.

*Conclusion.* Considering Woodpecker’s statement of need, its 2017 and 2018 payroll reports, and its eight-year history of certifications, I conclude that Woodpecker has established a temporary peakload need from April 1, 2019 to November 16, 2019 for ten Carpenter Helpers in Greenville, Texas.

Order

The certifying officer’s denial of Woodpecker’s certification is REVERSED. This matter is REMANDED to the certifying officer for certification of the ten temporary workers based on Woodpecker Cabinet, Inc.’s H-2B application.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN  
Administrative Law Judge