



Issue Date: 27 February 2020

BALCA Case No.: 2020-TLN-00023

ETA Case No.: H-400-20002-224623

In the Matter of:

BMC EAST, LLC,
Employer.

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This case arises from the request of BMC East, LLC (“Employer”) for review of the Certifying Officer’s (CO) decision to deny an application for temporary labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary non-agricultural 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. 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). For the reasons set forth below, the CO’s denial of temporary certification is reversed and the CO is directed to certify Employer’s application.

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 Appropriation 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. 24,024 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.

Statement of the Case

On January 2, 2020, Employer filed an H-2B Application for Temporary Employment Certification with the United States Department of Labor, requesting certification for 20 Assemblers from April 1, 2020 through November 30, 2020. (AF 254-305). On January 8, 2020, the CO issued a Notice of Deficiency, identifying four deficiencies in the application. (AF 245-53). On January 17, 2020, Employer filed a response to the Notice of Deficiency. (AF 54-244). On January 21, 2020, the CO sent an email to Employer advising its application was amended as requested. (AF 53).

On January 24, 2020, the CO issued a Final Determination denying Employer's application for temporary labor certification. (AF 43-52). The CO determined Employer failed to sufficiently demonstrate that it needs 20 workers during the requested period of need. (AF 47). First, the CO recited the reasons for issuing the Notice of Deficiency:

The payroll for 2019 indicates that the permanent workers worked full time only in the months of April, May and June during the entire period of need. In addition, it appears that there is not a significant difference in the full time hours worked during the requested peakload period than during the nonpeak period. Therefore, it is unclear how the employer determined its need for 20 workers during the requested period of need.

Designated Occupation: Marietta Truss (Profit Center # 4141), Component Assemblers Payroll Reporting Period: Calendar Year 2019

2019						
Month	Full Time			Seasonal		
	Employees	Sum of Hours	Sum of Earnings	Employees	Sum of Hours	Sum of Earnings
1	11	930	\$13,977.82	2	270	\$3,543.50
2	11	1682	\$26,387.15	2	373	\$5,041.03
3	20	2605	\$41,478.90	4	339	\$4,781.82
4	23	3966	\$65,616.67	4	451	\$7,820.00
5	24	4354	\$74,754.78	6	824	\$13,183.84
6	24	4186	\$70,134.66	4	776	\$12,438.61
7	24	3534	\$59,504.77	4	718	\$11,554.29
8	27	3693	\$64,588.36	4	537	\$9,667.67
9	28	3584	\$63,081.51	2	280	\$5,364.18
10	28	2014	\$34,187.12	2	147	\$2,845.01
11	29	1302	\$22,206.53	2	76	\$1,524.80
12						
Grand Total		31,849	\$535,918.28		4791	\$77,764.76

Additionally, the employer submitted its 2018 payroll which is significantly inconsistent with regard to the temporary/seasonal workers than the previously submitted 2018 payroll for its previous application, H-400-18360-065996 for the same worksite location and occupation.

Below reflects the 2018 payroll that the employer submitted with its current application H-400-20002-224623.

Designated Occupation: Payroll Reporting Period:
 Marietta Components (Profit Center # 4141), Production Workers Calendar Year 2018

2018						
Month	Full Time			Seasonal		
	Employees	Sum of Hours	Sum of Earnings	Employees	Sum of Hours	Sum of Earnings
1	18	1824	\$27,744.79	4	480	\$5,969.71
2	17	2124	\$34,849.86	6	711	\$9,635.08
3	17	2222	\$36,745.86	7	960	\$12,984.63
4	16	1500	\$24,831.89	7	949	\$12,896.04
5	15	1473	\$23,077.54	6	1014	\$13,873.61
6	15	1944	\$30,337.01	10	932	\$12,551.41
7	16	1991	\$31,962.17	12	1559	\$22,081.07
8	20	1587	\$24,294.74	32	2693	\$34,811.77
9	17	1623	\$23,203.14	20	1485	\$19,050.12
10	17	1819	\$27,049.18	19	1959	\$25,907.44
11	17	1959	\$29,360.60	21	1783	\$22,812.19
12						
Grand Total		20,068	\$313,456.79		14,525	\$192,573.07

The 2018 payroll that the employer submitted with the current application indicates that permanent workers worked less than full time during the entire requested period of need. Additionally, the 2018 payroll reflects that the months of August, September and November were the only months that the employer hired 20 temporary workers or more was September of 2018. Therefore, it is unclear how the employer concluded that it needs 20 temporary workers from April 1, 2020 through November 30, 2020.

Below is the 2018 payroll report that the employer submitted with its previous application H-400-18360-065996, which demonstrates that there are inconsistencies between the number of temporary workers it reported in its 2019 filing and 2020 filing.³

Based on the lack of full time hours worked during the requested period of time and the inconsistencies between the submitted payrolls for 2018, it is difficult to determine how the employer determined its need for 20 workers [from] April 1, 2020 through November 30, 2020. Thus, further explanation and documentation are requested in order to establish the employer's need for the 20 Assemblers.

(AF 48-49). Next, the CO provided the following rationale for denying the application after considering Employer's response to the Notice of Deficiency:

³ There is an extended blank space following this paragraph, and the described report does not appear in the CO's Final Determination.

In response to the NOD, the employer submitted a narrative response, unsigned 2019 and 2018 payroll for Assemblers, Letter from Human Resources, 2017 through 2019 Turnover Rate, Metro Study Forecast monthly sales report for Single Family and Multi Family Homes in Atlanta, 2016 Contract from Lennar Homes, LLC that was fully executed in 2017 (August 1, 2016 and will expire on November 30, 2020), Renewed contracts for 2017 and 2018 from Lennar Homes, LLC, 2016 Contract from Beazer Homes Corp., a Tennessee Corporation that was fully executed in 2017 (submitted twice), fully executed 2015 Contract from Pulte Purchasing Corporation which is for a period of five years, and Renewed contracts for 2016 and 2017 from Pulte Purchasing Corporation.

The employer's response states:

Due to differences in BMC's accounting software, a software glitch that caused hours to be underreported, and a human error and led to certain employees being erroneously excluded from the count. There was also a high rate of turnover that led to the employee count being higher than was reflected by the hours worked.... The 2018 report submitted last year was believed to be accurate when it was submitted, but the new software is more accurate.

In addition the employer states:

BMC noticed that even the 2018 and 2019 payroll reports submitted this year are not accurately reflecting the number of workers and the number of total man hours worked, due to the parameters/filters used to generate the report and the absences of employees during the peak period. Due to that fact, BMC is now submitting under the Tab1 a copy of the revised 2018 and 2019 Payroll Report that now correctly includes all component workers for Marietta Truss.

The employer's above-mentioned statements describe a series of events that caused payroll inaccuracies for 2018 and 2019. For the previously submitted 2018 payroll, it points to the new software as being "more accurate" but then states that it noticed that the reports submitted for its current application were inaccurate. It submitted revised reports in support of these findings. The employer contends that it is need of 20 workers based on due [*sic*] to a labor shortage and increased demand for business.

However, the revised 2018 payroll, demonstrated below, reflects that the employer had more full time hours and number of workers than its 2019 payroll.⁴

⁴ The report the CO described does not appear in the document.

Designated Occupation, Marietta Truss (Profit Center # 4141), Component Assemblers
 Payroll Reporting Period: Calendar Year 2018

Demonstrated below, the 2019 payroll reflects that there is a drastic difference in the number of workers than the 2018 payroll. The number of hours worked in March, which is during the employer's stated non-peakload month, reflects *more* hours worked of 7,145 in total than during July, October, and November which are identified as its peakload months. The total number of hours worked in July was 6,694, October was 5,972 and November was 6,908. Thus, the employer has not demonstrated that it has a peakload need during the months of April through November.

Designated Occupation, Marietta Truss (Profit Center # 4141), Component Assemblers
 Payroll Reporting Period: Calendar Year 2019

2019						
Month	Full Time			Seasonal		
	Employees	Sum of Hours	Sum of Earnings	Employees	Sum of Hours	Sum of Earnings
1	35	3408	\$51,625	2	270	\$3,543
2	32	4801	\$76,814	2	373	\$5,041
3	37	6806	\$109,321	4	339	\$4,782
4	45	7245	\$121,226	4	451	\$7,820
5	59	9592	\$166,044	6	824	\$13,184
6	43	6927	\$121,123	4	776	\$12,439
7	45	5976	\$105,548	4	718	\$11,554
8	52	9058	\$156,903	4	537	\$9,668
9	48	8088	\$134,017	2	280	\$5,364
10	45	6119	\$96,933	2	147	\$2,845
11	40	6832	\$107,027	2	76	\$1,524
12	35	4907	\$79,970	2	61	\$1,223
Grand Total		84610	\$1,326,551		4852	\$78,987

The employer also indicates that there was were [sic] absences during its stated peakload period; however there are not a significant amount of overtime hours demonstrated during this period that would indicate that the employer has a need for 20 additional workers. Thus, the payroll documentation was not sufficient to support its requested need.

The employer submitted a Metro Study Forecast monthly sales report for Single Family and Multi Family Homes in Atlanta which also shows that the employer sales were higher during its nonpeak months in comparison to its peak months. Therefore, the employer's monthly sales report does not support its suggested peakload need for the number of workers requested.

The employer submitted contracts in support of its application which were for 2016 through 2018. However, these are not new contracts that would attest to the employer's increased demand but a consistent work flow. Thus,

the submitted contracts did not sufficiently support its requested need for 20 workers.

The employer’s explanation and documentation of its temporary need did not overcome the deficiency.

(AF 50-52). On February 6, 2020, Employer filed its request for administrative review before BALCA. (AF 1-42). The Solicitor declined to file a brief in this matter.

Employer’s Arguments

Employer asserts three general arguments in support of its argument that its application for temporary labor certification should be granted.

First, Employer argues the payroll evidence demonstrates a need for 20 temporary workers. According to Employer, the 2019 payroll data shows Employer employed between 34 and 41 workers in its off-peak months (December, January, February, and March) and it employed between 42 and 65 workers, averaging 51 employees, during its peak months (April through November). (AF 2). Employer currently employs 34 workers, which leaves it short 17 employees. *Id.* Employer contends the payroll system “is not reflecting the correct number of hours worked due to the filters and parameters used to separate the various worker positions,” and thus the payroll underreports the amount of overtime worked. *Id.* Regardless, Employer argues, the payroll reports justify its need for 20 employees even with underreported hours. *Id.*

Employer contends the CO “picked apart each month during the period, rather than review the peak period as a whole,” which is arbitrary and capricious, citing *Permanent Workers, LLC*, 2019-TLN-00108 (May 9, 2018). (AF 3). Employer states “[d]uring the peak [months] employees worked full-time (average of over 157 hours per month) and during the non-peak, they worked an average of 140 hours per month. *Id.* In support of its argument, Employer provided the following chart:

Month	Number of Employees	Average Number of Employees	Total Number of Hours Worked	Average Number of Hours Worked
December	37	37.25	4968	5241.25
January	37		3678	
February	34		5174	
March	41		7145	
April	49	50.625	7696	7955.75
May	65		10416	
June	47		7703	
July	49		6694	
August	56		9595	
September	50		8368	
October	47		6266	
November	42		6908	

Employer states it appears the CO “failed to review the amended 2018 payroll reports, as they demonstrate and support the need for 20 temporary worker.” (AF 4). Employer states in 2018 it “employed an average of 36 employees per month during its nonpeak months and 59 employees per month during its peak months, and based on full-time average, the employees were working full-time for most peak months.” *Id.*

Second, Employer argues the CO failed to address evidence of Employer’s high turnover rate and its impact on the payroll numbers. Employer states the “turnover statistics provided show that many employees are not staying long-term and this skews the apparent number of employees per month.” (AF 5). Employer contends that “the real average numbers worked by each employee are higher than reflected in the chart, because if a worker worked only one week out of the month, they were still included in the number of employees that were reported but they may have worked only 40 hours or less, which skews the data to show fewer average hours worked by each employee.” *Id.*

And third, Employer argues the CO disregarded other evidence supporting Employer’s need for 20 temporary workers. Employer contends “[t]he letters of intent and the sales charts ... clearly demonstrate the need for additional labor force.” *Id.* Employer states its “need for 20 workers is based on the Company’s board footage per man-hour metric and the demand for building components. BMC services the majority of Atlanta’s top 25 home builders, and has provided 5 national contracts to the OFLC, in addition to letters of intent.” Employers states the letters of intent “identify an intent to purchase a total of over \$11.1 million in sales during the peak season in 2020.” *Id.* Employer explains the “matrix used to determine its work force needs assumes that one worker will produce 110 board feet per hour. At \$1.50 per board foot, \$11.1 million in sales is equal to 7,400,000 board feet, which requires 67,272 man-hours in an eight month period, or just over 8,400 man-hours per month, which requires 52.5 employees working at their maximum productivity. Employees are not always able to produce 110 board feet per hour, and therefore BMC needs more than 52 employees per month to meet the demand.” (AF 6).

Standard of Review

When an employer requests review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal argument and evidence that was submitted to the CO prior to issuance of a final determination. The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case back to the CO for further action. *Id.* at 7 (internal quotation marks omitted).

“Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO’s determinations.” *Guadalupe Mountain*

Fencing, 2020-TLN-00014 (Dec. 5, 2019). See also *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (March 6, 2019); *The Yard Experts, Inc.*, 2017-TLN-00024 (March 14, 2017). Under the arbitrary and capricious standard of review, a reviewing body retains an important role in ensuring reasoned decision making. *Guadalupe Mountain Fencing, supra*, slip op. at 6 (citation 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. A determination is considered arbitrary 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. Inquiry into factual issues is to be searching and careful, but the Board may not supply a reasoned basis that the CO has not provided.” *Id.* at 7 (citations and internal quotations omitted).

Discussion

As set forth above, the CO denied Employer’s application for failure to establish a need for 20 assemblers. Based on my review of the record, I conclude the CO’s findings underlying her decision are factually flawed and irrelevant to the ultimate question of whether Employer needs additional workers. Moreover, the CO inexplicably disregarded contrary probative evidence supporting Employer’s requested need. Accordingly, I conclude the CO acted arbitrarily and capriciously in denying Employer’s application for temporary labor certification.

The CO offered the following reasons for denying Employer’s application: (1) the revised 2018 payroll showed more full time hours and number of workers than its 2019 payroll; (2) the 2019 payroll showed Employer’s workers worked more hours in March, a non-peak load month, than worked in peakload months of July, October, and November; (3) the 2019 payroll did not demonstrate a “significant amount of overtime hours” during its peakload period that would justify a need for 20 additional workers; (4) the Metro Study Forecast monthly showed Employer’s sales were higher during non-peak months; and (5) the contracts submitted were not new and thus did not support a claim of increased demand. I will address each finding in turn.

First, the reports demonstrate that Employer’s full-time workers worked a total of 73,602 hours in 2018 and a total of 79,759 hours in 2019.⁵ Even if the CO was correct that Employer had more full time hours and number of workers in 2018 than it did in 2019, that fact does not contradict Employer’s need for 20 additional workers.

Second, the fact the 2019 payroll shows more hours worked in March, a non-peakload month, than it did during peakload months, also does not contradict Employer’s need for 20 additional workers. This fact is relevant to whether Employer has established a peakload need – not whether additional workers are necessary to supplement its workforce. The CO chose to deny the application for

⁵ Employer’s revised 2019 payroll summary states its full time workers worked a total of 84,610 hours, however this is incorrect.

failure to justify the number of workers requested, not because it failed to demonstrate a peakload need. I decline to supply a reason supporting the denial that was not offered by the CO herself.

Third, it is unclear how the CO determined there were not a “significant amount of overtime hours” worked during Employer’s 2019 peakload period. The chart below summarizes the 2019 revised payroll report submitted to the CO:

Month	Total Number of Workers	Total Number of Hours Worked	Average Number of Hours Worked Per Employee
January	37	3678	99.4
February	34	5174	152.2
March	41	7145	174.3
April	49	7696	157.1
May	65	10416	160.2
June	47	7703	163.9
July	49	6694	136.6
August	56	9595	171.3
September	50	8368	167.4
October	47	6266	133.3
November	42	6908	164.5
December	37	4968	134.3

The regulations define “full time” employment as 35 hours per week. 20 C.F.R. § 655.5. This corresponds to approximately 140 hours per month. With the exception of July and October, Employer’s workers worked well more than 140 hours per month on average. Employer explained that its payroll number underestimate the true averages because employees that worked for a short period of time were still included in the count. The CO acknowledged some “absences” but inexplicably declined to discuss Employer’s turnover data and how such data may skew the payroll numbers. Accordingly, the CO’s finding there were not a “significant amount of overtime hours” worked during Employer’s 2019 peakload period does not withstand scrutiny.

Fourth, the Metro Study Forecast did not purport to provide Employer’s sales numbers. The Metro Study Forecast demonstrated the average number of single family and multi-family starts in the Atlanta metropolitan market in the past five years.

Fifth, the fact the contracts Employer submitted were not new does not contradict Employer’s need for additional workers. Employer submitted the contracts to demonstrate that it has a working relationship with home builders in the Atlanta market. Moreover, while summarily dismissing Employer’s contracts as irrelevant, the CO inexplicably declined to discuss the letters of intent which show customers have collectively declared an intent to purchase approximately \$11 million worth of product from Employer. Having failed to discuss important probative evidence, the CO’s reasoning here cannot be affirmed.

Based on my own review of the record here, I conclude Employer has satisfied its burden of proving the requested need for 20 Assemblers is justified.

ORDER

For the foregoing reasons, IT IS ORDERED that the CO's denial of temporary labor certification is REVERSED and the CO is DIRECTED to certify Employer's application for 20 Assemblers between April 1, 2020 and November 30, 2020.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/PML/ksw
Newport News, Virginia