

# U.S. Department of Labor

Board of Alien Labor Certification Appeals  
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**Issue Date: 05 June 2020**

**BALCA Case No.:** 2020-TLN-00044  
**ETA Case No.:** H-400-20072-402530

*In the Matter of:*

**FP Legend Stone, LLP**

Before: Theresa C. Timlin  
Administrative Law Judge

## **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

The above-captioned case arises from a request for review by FP Legend Stone, LLP (“Employer”) of a United States Department of Labor (“DOL”) Certifying Officer’s denial of its 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. *See* 8 U.S.C. § 1101 (a)(15)(H)(ii)(b)<sup>1</sup>; 8 C.F.R. § 214.2 (h)(6)(i); 20 C.F.R. part 655, subpart A.<sup>2</sup>

The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States “if unemployed persons capable of performing such service or labor cannot be found [in the United States].” 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor, Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for Temporary Employment Certification (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for

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<sup>1</sup> 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).

<sup>2</sup> 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 problem. *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 Decision and Order are to the IFR.

Temporary Employment Certification (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R § 655.20.

After the CNPC accepts an employer’s application for processing, a Certifying Officer (“CO”) reviews the application. The CO will either request additional information or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). 20 C.F.R. § 655.33(a).

## I. STATEMENT OF THE CASE

On March 12, 2020, Employer filed an H-2B Application for Temporary Employment Certification (“ETA Form 9142b”) for the job titled “Laborer,” Standard Occupational Classification (“SOC”) code/occupational title 53-7062.00, Laborers and Freight, Stock, and Material Movers, Hand. AF 40.<sup>3</sup> Employer requested twenty Laborers for a period of employment starting from May 26, 2020 to October 15, 2020. *Id.* Employer listed the nature of the temporary need as a peakload need. *Id.* Employer attached an addendum for its statement of need. *Id.*

On March 24, 2020, the CO issued a Notice of Deficiency (“NOD”), notifying Employer that its application had three deficiencies and failed to meet the acceptance criteria.

First, the CO found that Employer failed to establish that the job opportunity is temporary in nature under 20 C.F.R. § 655.6(a) and (b). AF 36. The CO stated that Employer failed to demonstrate a peakload need in its application. *Id.* The CO provided the following explanation for why Employer insufficiently demonstrated peakload need:

The employer has stated that weather is a determining factor for its peakload standard of need and that it is unable to engage in consistent business during winter months. However, the employer’s statements are unclear as the weather in the employer’s area of intended employment in Williamson County, Texas is favorable to year-round outdoor work.

Without an explanation or further supporting documents that show a clear relationship between the requested number of workers and the projected work to be done, the employer’s need for 20 Laborers and Freight, Stock, and Material Movers, Hand on a temporary peakload basis during the dates requested is unclear.

*Id.* The CO directed Employer to submit the following documents:

- 1) A statement describing the employer’s business history and activities (*i.e.*, primary products or services) and schedule of operations throughout the year;
- 2) An explanation and supporting documentation that substantiates the employer’s statement that its work during non-peak period of mid-October to mid-January

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<sup>3</sup> For the purposes of this opinion, “AF” stands for “Appeal File.”

because the cold and wet weather in Williamson County, Texas is not conducive to the duties outlined in its application. The documentation must include weather data and industry data regarding the job duties and the effects of climate on those duties. The employer must ensure that the documentation is specific to the climate in its area of intended employment;

3) If the employer believes there is a schedule or season for providing rock quarry products and services in Williamson County, Texas then the employer must submit documentation to support a schedule/season. 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 summary listing of all projects in the area of intended employment for 2018 and up-to-date 2019 calendar year. The list should include start and end dates of each project and worksite addresses;

5) Summarized monthly payroll reports for 2018 and up-to-date 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Laborers, 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;

6) An explanation of the data in submitted payroll documentation; 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 must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 36–37.<sup>4</sup> (Emphasis in original).

Second, the CO found that Employer failed to establish temporary need for the number of workers requested pursuant to 20 C.F.R. § 655.11(e)(3) and (4). AF 37. The CO noted that Employer had not sufficiently demonstrated that “the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” *Id.* The CO wrote the following about Employer's deficiency:

In its current application, H-400-20072-402530, the employer is requesting certification for 20 Laborers and Freight, Stock, and Material Movers, Hand from May 26, 2020 to October 15, 2020. The employer did not indicate how it determined that it needs 20 Laborers and Freight, Stock, and Material Movers, Hand, during the requested period of need. Further explanation and

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<sup>4</sup> The CO further noted that “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 37.

documentation is required in order to establish the employer's need for the 20 Laborers and Freight, Stock, and Material Movers, Hand.

AF 37–38. The CO directed Employer to submit the following:

- 1) An explanation with supporting documentation of how the employer figured its need for 20 Laborers and Freight, Stock, and Material Movers, Hand for Williamson [C]ounty, Texas during the dates of need requested;
- 2) Summarized monthly payroll reports for 2018 and up-to-date 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Laborers, 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) An explanation of the data in submitted payroll documentation; and
- 4) Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

AF 38.<sup>5</sup>

Third, the CO found that Employer failed to submit a complete and accurate ETA Form 9142 under 20 C.F.R. § 655.15(a). *Id.* The CO noted that Employer inaccurately completed the following fields on its ETA Form 9142:

- 1) Section F.d, Item 5 indicates “Yes” that there will be Board, Lodging, or Other Facilities offered. However, Section F.d, Item 6 does not state if there are housing deductions nor if the housing is optional. Additionally, the employer's submitted job order indicates “Assistance finding and securing lodging is not available. Employer will make all deductions required by law from each paycheck as well as for optional employer provided housing at \$25/wk;” and
- 2) The employer's submitted job order indicates “Other benefits provided to U.S. and H2B workers are the following: optional health insurance 50% paid by the employer.” However, this is not included in Section F.d.6 of the ETA Form 9142.

AF 38–39.

The CO listed the following as the required modifications:

- 1) Amend Section F.d, Item 6 to indicate “Assistance finding and securing lodging is not available. Employer will make all deductions required by law from each paycheck as well as for optional employer provided housing at \$25/wk,” as it is indicated in the job order; and

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<sup>5</sup> See Note 4, *supra*.

2) Amend Section F.d.6 to indicate “Other benefits provided to U.S. and H2B workers are the following: optional health insurance 50% paid by the employer” as it is indicated in the job order.

AF 39.

On March 26, 2020, Employer responded to the CO’s request, providing documentation in support of its application, including a copy of the Notice of Deficiency, and a Letter of Explanation. AF 22–31.

On March 27, 2020, the Chicago National Processing Center sent correspondence to Employer regarding amendments to Form ETA-9142 indicating that they had amended the application to account for Employer’s correction to the form. AF 21.

On April 1, 2020, the CO issued a Non-Acceptance Denial (“Denial”). AF 11–20. The CO found that Employer had corrected its third deficiency, but that Employer’s first and second deficiency still remained. Employer had failed to establish the job opportunity as temporary in nature under 20 C.F.R. § 655.6(a) and (b), and Employer failed to establish temporary need for the number of workers requested under 20 C.F.R. § 655.11(e)(3) and (4). *Id.* The CO concluded that Employer did not overcome the first deficiency because of the following:

The employer was instructed to provide summarized monthly payroll reports for 2018 and up-to-date 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Laborers*, the total number of workers or staff employed, total hours worked, and total earnings received. The employer explains that it has been in business since 2019. In its NOD response, the employer did not provide any payroll reports for May through October of 2019.

Furthermore, the employer was instructed to provide an explanation and supporting documentation that substantiates the employer’s statement that its work during its non-peak period of mid-October to mid-January because the cold and wet weather in Williamson County, Texas is not conducive to the duties outlined in its application. The documentation was to include weather data and industry data regarding the job duties and the effects of climate on those duties. The employer was to ensure that the documentation is specific to the climate in its area of intended employment. The employer did not provide such data, or any weather data for Texas in its NOD response.

*Id.* (Emphasis in original.) The CO concluded that it remained “unclear to what extent weather has on the employer’s overall operations,” and that Employer accordingly did not support its peakload period of need from May 26, 2020 through October 15, 2020 to overcome the deficiency.

The CO concluded that Employer did not overcome the second deficiency because of the following:

The employer did not provide sufficient supporting documentation to establish [its need for its requested number of workers]. Additionally, the employer went on to state the state of Texas will need 724,512 skilled tradespeople by [A]ugust 2021, however it did not describe how it determined it requires 20 workers. The employer did describe the number of workers it requires.

The employer was instructed to provide summarized monthly payroll reports for 2018 and up-to-date 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Laborers, the total number of workers or staff employed, total hours worked, and total earnings received. The employer explains that it has been in business since 2019. In its NOD response, the employer did not provide any payroll reports for May through October of 2019.

*Id.* (Emphasis in original.) The CO concluded that, based on this information, it remained unclear how the employer had determined its temporary need for twenty workers, as Employer “did not submit sufficient explanation and documentation to establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity.” *Id.* The CO accordingly determined that Employer did not overcome the deficiency. *Id.*

On May 5, 2020, Employer submitted a request for review before the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). AF 1–10. Employer’s Request included a copy of the Final Determination. *Id.* BALCA docketed Employer’s appeal on May 11, 2020. The undersigned received the Appeal File on May 13, 2020 and issued a Notice of Assignment and Expedited Briefing Schedule on May 13, 2020, allowing the Employer, and the Solicitor, on behalf of the CO, to file briefs no later than May 22, 2020. On May 27, 2020, the undersigned granted Employer until May 29, 2020 to file a brief. Employer submitted its brief on May 29, 2020. The CO did not submit a brief.

## II. EMPLOYER’S ARGUMENTS

Employer offered a brief in support of its position that “the CO erred, acted arbitrarily and capriciously, and abused her discretion in denying FP Legend Stone’s application for a temporary labor re-certification to support H-2B visas to supplement FP Legend Stone’s permanent workforce during a forecast period of peakload need.” Employer asserts that the CO applied the wrong standard of analysis of need, as she used the standard for “seasonal” need rather than “peakload” need.

Employer argues that the CO’s conclusion that Employer failed to demonstrate a temporary peakload need is inconsistent with the administrative record. It asserts that the identified deficiencies were “thoroughly debunked by FP Legend Stone’s evidence, and none justified denial of the requested certification.” Employer further asserts that the CO dismissed the following evidence that it provided: “the thorough analysis of permanent versus temporary manhours, payroll reports, and letters of intent/contracts from the residual homebuilders to whom FP Legend Stone provides services.” It argues that it did not provide forward-looking contracts

because of the nature of its industry, but that it instead “provided detailed manhour and payrolls (sic) data—the same data used to support the favorable applications from prior years—and, included letters of intent from several of its largest consumers of subcontractor services,”<sup>6</sup> which directly evidence Employer’s need and the temporary timeframe that Employer would require additional need for.<sup>7</sup> Employer asserts that it was improper for the CO to perform a credibility determination on the letters of intent from customers with respect to the impact of weather on Employer’s business.

Employer articulates its argument that the CO applied the improper “seasonal” standard as opposed to the “peakload” standard as follows:

The CO’s criticisms of [the letters of intent] are severely misplaced. There is no requirement that FP Legend Stone’s services to the residential contractors “are not needed outside of the stated dates.” AR.P.7-10. Imposing such a requirement misunderstands the nature of peakload need. What FP Legend Stone had to demonstrate was that there was a temporary excess demand for its services—a “peak,” not that all demand from a customer ceased outside that peak period. Indeed, the evidentiary standard demanded by the CO would actually require the employer to *disprove* the existence of a permanent workforce—an essential element of temporary peakload need not in dispute here. *See* 8 C.F.R. §214.2(h)(6)(ii)(B)(3). The regulations do not require such an incoherent result. It is quite clear, the CO misapplied the application of a “seasonal” need, rather than the more appropriate “peakload” need.

Employer further asserts that the CO “erred in assessing that the anticipated contracts fail to demonstrate ‘what causes peak within a contract.’” Employer argues, however, that this is not its burden: “[I]t has to establish the fact of a peak, not demonstrate the ‘why’ of one.” Employer additionally states that, even if this was its burden, the letters establish precisely that fact.

Employer also argues that the evidence supports its stated period of need. It asserts that it submitted “direct proof of a peak in demand for its services from four of its largest customers in a particular window of time,” which “alone is sufficient to establish both the peak and its anticipated beginning and end dates, and none of the CO’s red-herring criticisms vitiate the letters’ probative value on those crucial points.” Employer further alleges that the CO applied the wrong test in evaluating Employer’s period of need:

Equally clear, however, is that the CO evaluated the evidence establishing FP Legend Stone’s period of need under the incorrect test. Specifically, by insisting that past years’ patterns of sales and H-2B employment had to justify the months

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<sup>6</sup> Employer cited to AF 29–31 and AF 50–81 to support its proposition.

<sup>7</sup> Employer specifically cites to and discusses the letter from co-owner Fabian Hernandez found at AF 29–31 as an example: “In it, he ‘confirms’ that customers will employ FP Legend Stone to provide material for residential construction in Northern states, where historically their need begins to wain in October.” Employer asserts that the letter “expressly identifies that... ‘[w]e have a tremendous amount of work to get done for the dates that we are requesting workers.’”

in 2020 for which FP Legend Stone had a forward-looking need, the CO improperly applied a seasonal standard to evaluate a peakload need. *See* AR.P8–12. Application of that erroneous standard of review was a legal error and merits reversal, and it also resulted in a clear misperception of the merits of FP Legend Stone’s application.

According to the CO’s analysis, FP Legend Stone’s payroll and sales data could be entirely dismissed as irrelevant because those figures did not, on their face, demonstrate an unvarying need for a similar level of H-2B workers every year between January and October, the months in 2020 in which FP Legend Stone identified an impending peakload need.

Using the same reasoning, the CO also dismissed FP Legend Stone’s sales figures for failing to show “a sustained peak in the employer’s sales during its requested dates of need”—*i.e.*, between January and October. AR.P.9. Again, this flies in the face of twelve previously approved Labor Certifications—ostensibly, correctly determined by a more seasoned, expert Certifying Officer.<sup>8</sup>

Employer addresses how it is unaware of any BALCA precedent that allows the CO to make credibility determinations, and that equally, it is unclear to Employer where the CO obtained proof about the commercial and industrial building market. It argues that the CO’s language in its decision “betrays an unspoken, negative assessment of FP Legend Stone’s veracity.” Employer elaborated upon this further as follows:

That is particularly clear, for instance, in the CO’s *sua sponte* proclamation that purported monthly temperature and average precipitation for states outside of the Texas area—figures that appear nowhere in the administrative record and for which no citation is even offered – somehow disprove FP Legend Stone’s assertion of a “winter-related slowdown in residential building.” Regardless of the accuracy of the CO’s numbers—and, to be clear, a “winter-related slowdown” may have many contributing factors, of which temperature is only one – the larger point is that COs generally should not be making subjective determinations as to the credibility of employer’s statements or evidence. Rather, absent an “articulable basis to doubt [an applicant’s] credibility,” the CO’s role is appropriately limited to determining whether that evidence, taken as true demonstrates a temporary need. Here, there is no articulable basis for doubting FP Legend Stone’s veracity, and, indisputably, the CO never articulated one. Accordingly, looking behind FP Legend Stone’s evidence in search of a reasons (sic) to deny the application was another error further justifying reversal.

Employer further asserted that the CO erred in considering the pieces of information it submitted in isolation, rather than as a whole.

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<sup>8</sup> Employer further asserted on this point that it did not have to “show ‘a sustained peak in the employer’s sales’ or high levels of H-2B employment during the same months of 2019 to prove that its need in 2020 was temporary. Indeed, holding peakload need claims to such a standard clearly violates the meaning ascribed to ‘peakload’” by the Department of Labor and the Department of Homeland Security.

### III. SCOPE AND STANDARD OF REVIEW

BALCA has a limited standard of review in H-2B cases. Specifically, BALCA may only consider the appeal file, the parties' legal briefs, and the employer's request for review, which may contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e). After considering the evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's denial of temporary labor certification, or
- (2) Direct the CO to grant temporary labor certification, or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.33(e)(1)–(3).

While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip. op. at 6 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016); *see also J&V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 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 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").

### IV. DISCUSSION

#### **A. Employer Cites to Evidence in its Brief that the Appeal File Does Not Contain**

Prior to addressing whether or not the CO acted in an arbitrary and capricious manner in denying Employer's application, it is necessary to address Employer's assertion that the CO disregarded Employer's evidence and erroneously made a credibility determination as to the veracity of Employer's evidence.

As stated above, BALCA may only consider the appeal file, the parties' legal briefs, and the employer's request for review, which may contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.33(e).

The Appeal File in this matter contains the following:

- Employer's May 5, 2020 request for Administrative Review, including: 1) the Request for Administrative Review, and 2) a copy of the Final Determination (AF 1–10);
- The CO's April 1, 2020 Final Determination (AF 11–20);
- March 27, 2020 e-mail correspondence from the Chicago NPC to Employer regarding amendments to Form ETA-9142 (AF 21);
- Employer's March 26, 2020 response to Notice of Deficiency including: 1) a copy of the Notice of Deficiency and 2) a letter of explanation (AF 22–31);
- The March 24, 2020 Notice of Deficiency (AF 32–39); and
- Employer's March 12, 2020 Application for Temporary Labor Certification including: 1) ETA Form 9142B, 2) Signed Appendix B; 3) Job Order; 4) Non Recruiter Statement; 5) Company Agreement; and 6) Prevailing Wage Determination, P-400-19227-040870 (AF 40–85).

Employer, in arguing that the CO erred in her determination, cites to evidence that it alleges establishes that the CO failed to evaluate in support of its application: "detailed manhour and payroll data – the same data used to support favorable applications from prior years – and, included letters of intent from several of its largest consumers of subcontractor services. AR.P AR.P (sic) 29–31, 50–80." The Appeal File contains none of these documents. While the Letter of Explanation contained in Employer's Response to the Notice of Deficiency includes a statement that its customers have indicated a "trend" present within the industry, the Appeal File does not contain the letters themselves to substantiate this point. AF 29–31.

Employer's applications from prior years, and the evidence that Employer submitted as part of the application process for those matters, also are not evidence in this matter, nor does certification in years prior guarantee certification in this matter. *See ATP Agri-Services, Inc.*, 2019-TLC-00050 at 9 (May 17, 2019) ("[T]he fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial"); *Double J Harvesting, Inc.*, 2019-TLC-0005 at 6–7 (July 2, 2019) (same); *Wickstrum Harvesting, Inc.*, 2018-TLC-00018 at 8 (May 3, 2018) (finding that the certification of prior applications "is irrelevant to the present proceeding"); *Titus Works*, 2018-TLN-00045 at 7 ("[T]he fact that previous Applications were approved is irrelevant."); *AC Sweepers*, 2017-TLN-00012 at 8 (Jan. 11, 2017) ("Employer also argued that its application should be certified because its previous application was certified on the same basis. However, prior certification does not guarantee future certification"); *Newsham Hybrids (USA), Inc.*, 1998-TLC-00011 at 5 (May 29, 1998) ("Employer's reference to certification of a prior identical application is irrelevant to the application at bench").

BALCA cannot review Employer's argument that the CO made an improper credibility determination when the Appeal File does not include the referenced evidence. While the Appeal File did contain a letter that cites to a "trend" generally, as stated above, the Appeal File does not contain any of the additional evidence that Employer argues the CO did not properly evaluate.

The CO did not make a “credibility determination” by finding the evidence provided in this letter insufficient to cure the deficiencies, but rather, made a determination that more evidence was required to support a “peakload need.”

There is no indication in the Appeal File that the CO had the opportunity to review any of the additional evidence Employer mentioned in its brief. Additionally, as none of this evidence is in the Appeal File, the undersigned cannot review it or consider it in her analysis of this matter on behalf of BALCA. The undersigned thus bases her analysis below on whether the CO acted in an arbitrary and capricious matter below solely on the evidence contained in the appeal file actually submitted to the CO, and she will not consider Employer’s arguments with respect to evidence that was unavailable to the CO at the time of her determination and is unavailable to the undersigned now. 20 C.F.R. § 655.61(a)(5) (“In such cases, the request for review...[m]ay contain only legal argument and such evidence that was actually before the CO before the date the CO’s determination was issued.”)

**B. Employer Failed to Establish that the Job Opportunity is Temporary in Nature**

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *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).

The DHS regulations provide that employment “is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer bears the burden of establishing the temporary nature of its need. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *see also Tampa Ship*, 2009-TLNL-00044, slip op. at 5 (May 8, 2009). Here, Employer requested temporary workers for a “peakload” need. To establish a peakload 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).

Employer has not established that it has a temporary peakload need for twenty Laborers. It has failed to provide sufficient proof that it “regularly employs permanent workers to perform the services or labor at the place of employment.” After the CO requested payroll information to establish that Employer had regularly employed permanent workers, Employer did not furnish this information. Even though Employer asserted in its response to the NOD that it is a “new business since 2019,” it still failed to provide the CO with any information that would allow her to determine that Employer regularly employed a permanent work staff. *See* AF 22–31. The

only information that Employer provided regarding its permanent work staff in its response to the NOD was a statement that “[o]ur permanent workers occupation performs the same activities during the non-peak period,” which is insufficient. *Id.*

Employer has also failed to demonstrate 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.” In Employer’s ETA Form 9142, Employer provided the following statement:

Our company currently requires the service of laborers to perform manual labor associated with work at a stone quarry carry stack, catch separate good and bad rock materials, palletize finished rock at a rock quarry, and clean rock debris from rock and work areas and lift up to 50lbs. No education/experience required. Transportation is provided to and from work area sites at Employer[’s] expense from centralized Williamson County pickup location. Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer, and fall months, from approximately January 15<sup>th</sup> to October 15<sup>th</sup>, during which time we need to substantially supplement the number of workers for our labor force for these positions. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peak load workers during these winter months (we do however continue to employ some year-round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the winter months, approximately October 15<sup>th</sup> to January 15<sup>th</sup> because the cold and wet weather is not conducive to separating blocks of rough dimension stone at a quarry. Also, construction and landscaping in general slows down, and since our stone is used for construction and landscaping projects, our peak load is directly tied to those industries, and therefore the need for laborers is substantially reduced.

AF 45.

In its NOD, the CO requested that Employer provide “[a]n explanation and supporting documentation that substantiates the employer’s statement that its work during its non-peak period of mid-October to mid-January because the cold and wet weather in Williamson County, Texas is not conducive to the duties outlined in its application,” including “weather data and industry data regarding the job duties and the effects of climate on those duties.” AF 37. In its response to the NOD, Employer provided the following explanation:

The agency has agreed with other quarries in the area that there is a pattern of peak load need for twenty temporary laborers to assist with quarry related operations to impact the wet/cold weather conditions routinely associated with Texas winters upon real estate sales. (Other approved applications within the same MSA)[.] Our customers have indicated that there is a precipitous decrease in residential home purchases in the Fall because of the holiday season and a measureable increase in demand near the end of the school year beginning in

March each year because families with children are hoping to resettle prior to the beginning of the school year. It's enough of a "trend" to be classified as a predictable pattern. As we are a quarry company most of the business is attributed to new home construction.

As was the case in previous years, with other quarries within the same area this year we proposed addressing our peak load need with temporary foreign workers, nothing about that need has changed.

Due to liability issues, state regulations regarding project bidding, the unpredictability of individual projects' absorption rate, variations in commodity costs, and residential construction bidding in the Central Texas market is always done on a per phase basis, not in large multi-year projects. In the residential construction industry, and within the confines of corporate mandates, federal law and state regulations, this is the most concrete evidence that can be provided in response to the Department's request for additional information. Market indicators have shown that there will be another increase in residential permits for 2020 and that the workflow for stucco will follow historical patterns, with a peak running from early spring to winter.

Quarry worker shortages are adding weeks and months to the time it takes to complete homes and apartments. Studies have shown, the state of Texas will need 724,512 skilled tradespeople by August 2021. Lack of new supply is pushing up prices on new and existing properties threatens affordability and the health of our local economy. We urge your approval of this application with the evidence of demonstrated need that has been provided.

[...]

Our schedule of operation is year-round. We will experience our peak load to be April to October. We attribute to weather, there are three components of weather that contribute to our peak load season: Rain[y] days, daylight hours and temperatures. We are unable to conduct quarry operations on rainy days, and our last daylight ours limits the time we able to work.

AF 29–30.

The information that Employer provided to the CO is insufficient to establish a peakload period. Employer has provided no documentation to substantiate its claims that there is a "pattern of peakload need" or "enough of a 'trend' to be classified as a predictable pattern," or that its period of need is its "busy season." AF 29, 45. Employer cannot establish peakload need merely by claiming there is a pattern or trend without providing further data in support of this claim.

Given the information of record, the CO did not act in an arbitrary and capricious manner in finding that Employer failed to provide the necessary information for the CO to find a

peakload need under 8 C.F.R. § 214(h)(6)(ii)(B)(3). The undersigned finds that Employer failed to establish a peakload need.

**C. Employer Failed to Establish Temporary Need for the Number of Workers Requested**

The CO, upon reviewing the H-2B registration and its accompanying documentation, is to make a determination based on the following factors:

- 1) The job classification and duties qualify as non-agricultural;
- 2) The Employer's need for services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;
- 3) The number of worker positions and period of need are justified; and
- 4) The request represents a bona fide job opportunity.

20 C.F.R. § 655.11(e).

Employer has not established that the number of worker positions and period of need are justified, nor has it established that its request represents a bona fide job opportunity. Employer, in its initial application, requested certification for twenty Laborers and Freight, Stock, and Material Movers, Hand during its requested period of need. AF 40–85. In its NOD, CO found that Employer did not indicate that it had determined that it needed twenty Laborers and Freight, Stock, and Material Movers, Hand, and requested further explanation and documentation as to its need for that number of requested workers. AF 32–39. Employer, in its response to the NOD, indicated that “[s]tudies have shown, the state of Texas will need 724,512 skilled tradespeople by August 2021,” but it did not provide any documentation or specific explanation as to why it needed twenty Laborers and Freight, Stock, and Material Movers, Hand during its requested period of need. AF 22–31. The Employer also did not provide any records of current workers employed in the Laborer and Freight, Stock, and Material Movers, Hand position that Employer requested H-2B workers for, and so, it is unclear from the record if this is a bona fide job opportunity. Thus, the undersigned finds that Employer failed to justify the number of Laborers and Freight, Stock, and Material Movers, Hand sought or that it was presenting a bona fide job opportunity in its submissions to the CO it provided in response to the NOD.

Given the information of record, the CO did not act in an arbitrary and capricious manner in finding that Employer failed to provide the necessary information to establish its need for twenty workers and that it was providing a bona fide job opportunity under 20 C.F.R. § 655.11(e)(3) and (4). The undersigned thus finds that Employer did not establish its need for twenty Laborers and Freight, Stock, and Material Movers, Hand during its requested period of need, or that it presented a bona fide job opportunity.

**V. CONCLUSION**

For the reasons above, the evidence presented by Employer fails to support its temporary need for twenty Laborers and Freight, Stock, and Material Movers, Hand from May 26, 2020 through October 15, 2020. It was not an abuse of discretion for the CO to issue a denial of

Employer's application. In light of the foregoing, the record establishes that Employer failed the temporary nature of the job opportunity and the temporary need for the number of requested workers.

**ORDER**

In light of the foregoing, the Certifying Officer's decision is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey