



Issue Date: 05 December 2019

BALCA Case No.: 2020-TLN-00014

ETA Case No.: H-400-19281-075913

In the Matter of:

Guadalupe Mountain Fencing, LLC

Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from Guadalupe Mountain Fencing, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny 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 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 (“DHS”). *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).²

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department of Labor’s Employment and Training Administration (“ETA”) 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).

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018). The continuing resolution signed into law on November 21, 2019, did not modify this requirement. *See* Further Continuing Appropriations Act, 2020, Pub. L. No. 116-69, Division A (2019). The current continuing resolution expires on December 20, 2019.

² On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

BACKGROUND

Employer's Application

On October 8, 2019, Employer submitted its Form 9142B application for temporary H-2B labor certification with ETA. (AF 754-770.³) Employer requested certification for one laborer to perform work as a fence erector. (AF 754.) Employer identified the nature of its temporary need as “peakload” and the period of intended employment as January 1, 2020, to October 1, 2020. (AF 754.) Employer explained that the one additional laborer “is needed for workload increase.” (AF 754.) The requested employee would work at various locations in eastern New Mexico. (AF 756, 766, 768-69.) The employee’s job duties would include “removal of fence and fence material as well as the installation of fence and fence material.” (AF 756.)

Legal Standard

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). “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.” 20 C.F.R. § 655.6(b). 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 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 both to provide the necessary supporting information and to present it in such a way that the CO can determine that the employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

³ In this Decision and Order, “AF” stands for “Appeal File.”

Notice of Deficiency

On October 17, 2019, the CO issued a Notice of Deficiency (“NOD”). (AF 746-753.) The CO first concluded that Employer failed to establish that the job opportunity was temporary in nature in accordance with 20 C.F.R. §§ 655.6(a) and (b). (AF 750.) The CO explained that Employer’s statement of temporary need (“Worker is needed for workload increase”) was not supported by any documentation showing that Employer experiences an increase in workload during the requested dates of need. (AF 750.) Furthermore, Employer did not explain what events caused the seasonal or short-term demand that lead to its peakload temporary need. (AF 750.)

In order to remedy this deficiency, Employer was instructed to submit the following: (1) a statement describing the employer’s business history, activities, and schedule of operations throughout the year; (2) a summary listing of all projects in the area of intended employment for the previous two calendar years; (3) summarized monthly payroll reports for the 2018 and 2019 calendar years that identify, by each month, the number of temporary and permanent fence erectors employed, total hours worked, and total earnings received; (4) an explanation of the data in submitted payroll documentation; and (5) any other evidence and documentation that similarly serves to justify the dates of need being requested for certification. (AF 750-751.)

According to the CO, the Employer’s application was also deficient for failure to submit an acceptable job order in accordance with 20 C.F.R. §§ 655.16 and 655.18. (AF 751.) The CO noted that, in its job order, Employer provided: “Wage is \$12.49 depending on experience. Overtime wage is \$18.74/hr depending on experience (1 ½ times regular rate).” (AF 751, 762.) The CO explained that Employer “is required to pay at minimum \$12.49 with an overtime rate of \$18.74, regardless of its experience requirement. Further, the employer did not indicate in its job order or its application that experience was required for the job opportunity.” (AF 751.) Additionally, Employer indicated in its job order that “[d]aily subsistence will be provided at a rate of \$12.26 per day during travel to a maximum of \$51.00 per day with receipts.” (AF 762.) However, according to the CO, the Department has updated the required transportation and subsistence rates. (AF 751.) Therefore, the CO notified Employer that it must provide daily subsistence rates at a cost of \$12.46 per day during travel to a maximum of \$55.00 per day with receipts. (AF 751.)

In order to remedy this deficiency, the CO instructed Employer to submit amended job order language and: (1) omit language indicating that the basic and overtime wage is dependent on experience; and (2) indicate the amount for daily subsistence will be at least \$12.46 per day during travel to a maximum of \$55.00 per day with receipts. (AF 752.) The CO notified Employer that it could do this by either (1) including corrected language in its NOD response; or (2) submitting an already-amended job order that contains all of the required content. (AF 752-753.)⁴

⁴ The CO identified one additional deficiency, which is not at issue here.

Employer's Response

On October 28, 2019, Employer submitted its response to the NOD. (AF 23-745.) Included in its response were (1) an amended job order; (2) permission to amend application;⁵ (3) a summary listing of projects; and (4) payroll records from January 2018 to September 2019. (AF 23-745.) In response to the first identified deficiency, Employer explained: "Our operations are year-round. There are numerous ongoing projects as well as many upcoming projects that are planned to be started within the next few months." (AF 27.) The summary list of projects is a ten-page document that identifies numerous projects by client, completion date, and contract amount. (AF 27-36.) Employer also submitted detailed monthly payroll reports from January 2018 through September 2019. For each month within that time span, Employer submitted a report exceeding twenty, and often thirty, pages. The total submission of payroll reports exceeded 700 pages. (AF 38-745.)

Employer submitted an amended job order in response to the second identified deficiency. In the amended job order, under the "Hours & Wages" section, Employer indicated: "Wage is \$12.49/hour depending on experience. Overtime wage is \$18.74/hour depending on experience (1 ½ times regular rate)." (AF 24.) Under the "Additional Benefits/Terms & Conditions" section, Employer wrote: "Daily subsistence will be provided at a rate of \$12.46 per day during travel to a maximum of \$55.00 per day with receipts." (AF 24.)

Final Determination

On November 1, 2019, Employer was notified by email that additional information was needed to continue processing Employer's application. (AF 22.) Specifically, Employer's amended job order failed to "omit the language indicating the basic and overtime wage is depending on experience." (AF 22.)

Also on November 1, 2019,⁶ the CO issued a Final Determination denying Employer's application. (AF 12-21.) The Final Determination describes two deficiencies in Employer's application. First, Employer failed to establish that the job opportunity is temporary in nature. (AF 15.) The Final Determination included the following chart, which sets forth the number of projects by month in 2018 and 2019.⁷

MONTH	LIST OF COMPLETED & ONGOING PROJECTS
January	15
February	19

⁵ This permission related to the NOD's third deficiency (which is not at issue here), so it will not be discussed herein.

⁶ It is unclear why the Final Determination was issued on the same day Employer was notified by email that additional information was needed. In any case, it was incumbent upon Employer to provide a complete response to the initial NOD in order to remedy the deficiencies identified therein. For the reasons set forth below, I conclude Employer did not do so, and the CO properly denied the application.

⁷ The CO compiled this list from Employer's summary list of projects submitted in response to the NOD. (AF 27-36.)

March	17
April	24
May	10
June	24
July	40
August	57
September	16
October	18
November	20
December	21

(AF 17). In comparing the period of intended employment (January to October) with this chart, the CO explained:

The employer has more projects in its non-peak month of October (18) than it has during its peak months of January (15), March (17), May (10), and September (16). Additionally, the employer has more projects in its non-peak month of November (20) than it has during its peak months of January (15), February (19), March (17), May (10), and September (16). Lastly, the employer has more projects in its non-peak month of December (21) than it did during its peak months of January (15), February (19), March (17), May (10), and September (16). Based on the summary listing of completed and ongoing projects submitted, the employer has a year-round need for fence installation and fence removal, and its need is not tied to a peak in business. The employer's need is based on the number of projects acquired by the employer that needs to be completed by the employer year-round. The employer is not experiencing a specific peak in business throughout the year.

(AF 17-18.)

Moreover, the CO explained that the Department had requested "summarized payroll reports for the 2018 thru 2019 calendar years that identify for each month and separately for full-time permanent and temporary employment in the requested occupation Fence Erectors, the total number of workers or staff employed, total hours worked, and total earnings received." (AF 18.) However, Employer did not summarize its payroll records in this manner. (AF 18.) Because of Employer's failure to summarize the payroll records in the manner requested, the CO explained that the Department was unable to analyze the payroll records in order to determine whether Employer had established a peakload need during the period of intended employment. (AF 18.) Accordingly, the CO concluded that Employer failed to establish a peakload need. (AF 18.)

The second deficiency identified in the Final Determination concerned Employer's failure to submit an acceptable job order. (AF 18.) The CO explained that the amended job order that Employer submitted in response to the NOD indicated that Employer will pay the basic wage rate of \$12.49 per hour depending on experience and an overtime wage rate of \$18.74 per hour depending on experience. (AF 20.) However, according to the CO, Employer must pay those prevailing wage rates *regardless of experience*. (AF 20.) Because the amended job order

submitted by Employer in response to the NOD still included the “depending on experience” language, the CO concluded that Employer had failed to submit an acceptable job order. (AF 20.)

Employer’s Appeal

On November 8, 2019, Employer submitted a formal request for administrative review. (AF 1-11.) Employer’s owner wrote:

I am requesting this review because of I feel that we are in need of this worker as a fence erector. Our company is based in southeastern New Mexico, right in the middle of the Permian Basin which has boomed over the last few years with oil production. We are consistently doing numerous jobs out in the oilfield, in which many of these were not submitted with the answer to the deficiency because they are not large jobs. We have numerous small jobs come up on a daily basis and with the employees that we have, it is hard to keep up with everything. I feel that with the oilfield and the economy that we are experiencing now in our area, that the whole year is busy. We really do not have any slow times, it is always at peak and we are always busy. Guadalupe Mountain Fencing has grown exponentially within the last few years. Because of the growth of the company and the growth of the area, we do not have enough help to keep up with the demand.

(AF 1.)

The Office of Administrative Law Judges received the appeal file on November 21, 2019. I issued a Notice of Assignment and Expedited Briefing Schedule on November 25, 2019. The CO did not submit a brief. This decision is issued within ten business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

STANDARD OF REVIEW

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). 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.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

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. *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (Mar. 6, 2019); *The Yard Experts, Inc.*, 2017-TLN-00024 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 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 provided. *State Farm*, 463 U.S. at 43; *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”).

DISCUSSION

Temporary Need

As set forth above, the CO first concluded that Employer failed to establish a temporary need. The applicable regulation provides that 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. 20 C.F.R. § 655.6(b). To qualify as a peakload need, the employer:

must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.

8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

On its Form ETA-9142B, Employer listed the nature of its temporary need as peakload. (AF 754.) In explaining its temporary need, Employer wrote only: “Worker is needed for workload increase.” (AF 754.) No other information was provided with Employer’s application that could support its burden to prove a peakload need.

Because this brief explanation obviously failed to justify Employer’s alleged peakload need, the CO directed Employer to submit additional information and documentation in the NOD. The information the CO specifically requested included: (1) a summary listing of all projects in the area of intended employment for the previous two calendar years; (2) summarized monthly payroll reports for the 2018 and 2019 calendar years that identify, by each month, the number of temporary and permanent fence erectors employed, total hours worked, and total earnings received; and (3) an explanation of the data in submitted payroll documentation. (AF 750-751.)

In response, Employer submitted a summary listing of projects from 2018 to 2019 and over 700 pages of detailed monthly payroll records from January 2018 through September 2019. (AF 23-745.) As noted above, Employer carries the burden to provide information to the CO and to present the information in such a way that enables the CO to determine whether Employer has established a legitimate temporary need for the number of workers requested. “An employer cannot just toss hundreds of puzzle pieces—or hundreds of pages of document—on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.” *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

Here, Employer did not summarize its payroll records in the manner requested by the CO or, indeed, in any helpful manner. Although voluminous, the payroll records do not distinguish between temporary and permanent employees, and they do not specifically identify which employees worked as fence erectors. The records simply list the wages and withholdings of individual employees. Employer thus failed to indicate the number of permanent fence erectors that it employs, their hours worked, and their earnings received, as requested by the CO. Accordingly, the CO reasonably concluded that Employer’s payroll records do not satisfy its burden to substantiate its alleged peakload need.

Even were I to assume that all of the employees listed in the payroll records worked as fence erectors, the payroll records still do not establish a peakload need for temporary labor from January through September. For instance, it appears that, in 2018, Employer employed 40 employees in January (a month of alleged peakload need) and 47 employees in November (an alleged non-peakload month). (AF 38-61; 370-401.) Employing more workers during a non-peakload month than during a peakload month obviously does not support Employer’s requested period of temporary need. *See Progressio, LLC, d/b/a La Michoacana Meat*, 2013-TLN-00007 (Nov. 27, 2012) (affirming denial where the employer’s payroll records did not demonstrate a consistent need for increased labor during the entire alleged period of temporary need). For these reasons, Employer’s payroll records fail to establish that Employer employs permanent fence erectors, that Employer needs to supplement its permanent staff on a temporary basis, or that the temporary additions will not become part of Employer’s regular operation, as is required under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Similarly, Employer’s summary list of projects does not support its alleged peakload need from January through September. The chart below reflects the number of projects completed in each month, according to Employer’s summary list:⁸

Month and Year	Number of Projects
July 2018	29
August 2018	18
September 2018	16
October 2018	18

⁸ This chart differs from the CO’s chart set forth above in that each month of 2018 and 2019 is listed separately, whereas (where there was overlap, specifically in July and August) the CO listed the total number of projects from both 2018 and 2019. Additionally, although the CO described the projects as “completed and ongoing,” it appears that each project on Employer’s list was completed because each project listed a completion date.

November 2018	20
December 2018	21
January 2019	15
February 2019	19
March 2019	17
April 2019	24
May 2019	10
June 2019	23
July 2019	11
August 2019	39

Based solely on the number of projects completed in each month, it does not appear that Employer has a peakload need for labor from January through September. Rather, it appears Employer has a year-round need for labor. Employer’s projects were relatively steady throughout the year, with the only significant uptick in projects occurring in July 2018 and August 2019. As the CO points out, Employer completed more projects in November and December 2018 (alleged non-peak months) than it did in several other alleged peak months, including August 2018, September 2018, and January through March 2019. Thus, it is unclear how this list could support Employer’s alleged temporary need.⁹

In its request for administrative review, Employer explained that there has been a boom in oil production in southeastern New Mexico, so Employer is “consistently doing numerous jobs out in the oilfield.” (AF 1.) However, Employer failed to provide any useful data or documentation to support the argument that the increase in oil production has resulted in Employer’s alleged temporary peakload need for labor. As noted above, bare assertions without supporting evidence are insufficient to carry an employer’s burden to prove its temporary need. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). Employer also indicated that “many of [its oilfield projects] were not submitted with the answer to the deficiency because they are not large jobs.” (AF 1.) Again, it is Employer’s responsibility to properly prove and document its temporary need for labor. If Employer failed to include projects on its summary list that would have helped make such a showing, that error (and the consequences thereof) lies with Employer alone.

Employer also admitted that it has a year-round need for labor in its request for administrative review. Employer’s owner wrote: “I feel that with the oilfield and the economy that we are experiencing now in our area, that the whole year is busy. We really do not have any slow times, it is always at peak and we are always busy.” (AF 1.) It is difficult to see how Employer has a peakload need from January through September when the documents submitted, and Employer’s own words, confirm that it has a steady, year-round business that requires workers throughout the entire year. Based on the foregoing analysis, I agree with the CO’s conclusion that Employer failed to establish a temporary peakload need for one additional fence erector.

⁹ If Employer believed consideration of the contract amount of each project would support its alleged period of temporary need, it was incumbent upon Employer to explain its position and to offer any calculations necessary to justify its position. In the absence of any such argument or explanation, it was reasonable for the CO to rely on the number of projects to analyze whether Employer sufficiently supported its alleged period of temporary need.

Job Order

The second deficiency identified in the Final Determination was Employer's failure to submit an acceptable job order. According to § 655.18, an Employer's job order must:

Specify the wage that the employer is offering, intends to offer, or will provide to H-2B workers, or, in the event that there are multiple wage offers, the range of wage offers, and ensure that the wage offer equals or exceeds the highest of the prevailing wage or the Federal, State, or local minimum wage.

20 C.F.R. § 655.18(b)(5) (emphasis added).

In the amended job order that Employer submitted in response to the NOD, Employer indicated: "Wage is \$12.49/hour depending on experience. Overtime wage is \$18.74/hour depending on experience (1 ½ times regular rate)." (AF 24.) Based on the plain language of § 655.18(b)(5), Employer must pay, at a minimum, the prevailing wage. In the NOD, the CO specifically instructed Employer to omit the "depending on experience" language from its job order. Because Employer failed to do so, and because the CO apparently read the job order language to require certain experience to earn the prevailing wage, the CO determined the job order was not in compliance.

Although Employer's job order could be interpreted as offering a wage *greater than* the prevailing wage if the temporary laborer had relevant experience, the CO's interpretation of the job order language—that certain experience may be required to earn the prevailing wage—was reasonable. If Employer wanted to leave open the possibility of paying a wage greater than the prevailing wage, the job order language should have said so more precisely. Instead, Employer left the "depending on experience" language in its job order, despite specifically being directed to omit such language by the CO. (AF 752.) I conclude the CO did not act arbitrarily in determining that Employer's application should be denied on this basis.¹⁰

Based on my review of the entire record and the foregoing analysis, I find that the CO considered the relevant evidence and rationally concluded that Employer failed to establish its temporary peakload need for one fence erector under § 655.6(b) and also failed to submit a job order in compliance with § 655.18. Therefore, I conclude the CO's Final Determination denying Employer's application for temporary labor certification was not arbitrary and capricious.

CONCLUSION AND ORDER

The Certifying Officer did not act in an arbitrary and capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B).

¹⁰ As set forth above, the CO issued the Final Determination on the same day Employer was notified by email that additional information was needed to correct this deficiency. Even if the CO should have given Employer an opportunity to respond to the email and to correct the job order language, such error is harmless; the CO still had valid grounds to deny the application because Employer failed to establish a temporary need, as explained above.

Accordingly, the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey