

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 April 2020**

**BALCA Case No.:** 2020-TLN-00038

**ETA Case No.:** H-400-20002-223187

*In the Matter of:*

**RAPID PALLET INCORPORATED,**

*Employer.*

**Appearance:** MYLES R. WREN, Esquire  
Cipriani & Werner  
Scranton, PA  
*For the Employer*

*No Appearance for the Certifying Officer*

**Before:** Christopher Larsen  
Administrative Law Judge

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

This case arises from the request of Rapid Pallet Incorporated (“Employer”) for review of the Certifying Officer’s (“CO”) decision to deny an 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, peak-load, 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);<sup>1</sup> 20 C.F.R.

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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).

§ 655.6(b).<sup>2</sup> 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 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification.

The CO<sup>3</sup> can issue the labor certification only after determining (1) that there are not sufficient U.S. workers who are qualified and available to perform the work in question and (2) that employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. §655.1, subsection (a). The burden of proof is on the employer to show it is entitled to the labor certification. 8 U.S.C. §1361.

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). Employer has done so. By designation of the Chief Administrative Law Judge, I am BALCA for purposes of this administrative review. 20 C.F.R. §655.61, subsection (d).

When an employer requests review of the denial of its application, BALCA’s scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination. 20 C.F.R. § 655.61(a)(5). I must review the CO’s determination based solely only on the Appeal File, the request for review, and any legal briefs submitted. 20 C.F.R. § 655.61(e). I must either affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

The Certifying Officer submitted no brief.

## BACKGROUND

On January 2, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer (AF 186-199).<sup>4</sup> Employer sought to hire sixteen nonimmigrant

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<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 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.

<sup>3</sup> Acting for the Secretary of Labor, 20 C.F.R. §655.2, subsection (a).

<sup>4</sup> I abbreviate references to the appeal file with “AF” followed by the page number.

wooden pallet repairmen to support its business of repairing wooden pallets for reuse primarily in the grocery industry (AF 4, 188). The CO identified three “deficiencies” in the application (AF 177-184), and ultimately denied the application because of them. First, the CO concluded Employer had failed “to establish the job opportunity as temporary in nature” (AF 12-14). Second, the Employer had failed “to establish temporary need for the number of workers requested” (AF 14-15). Finally, the Employer had, at various places in its application, indicated both that board and lodging were, and were not, provided for the nonimmigrant workers (AF 15).

## DISCUSSION

I consider each of the CO’s bases for denial in turn.

### 1. “Temporary” Nature of the Job

For purposes of the H-2B program, a “temporary” job is something other than what the proverbial man-in-the-street might consider a “temporary” job. Under 8 C.F.R. § 214.2, subsection (h)(6)(ii)(B):

(B) Nature of petitioner’s need. 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. . . . The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(2) Seasonal need. The petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.

(3) Peakload need. The petitioner 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.

(4) Intermittent need. The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

Employer argues its need for temporary employees is a peakload need (AF 186, Item B 7). The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017). Thus, Employer must demonstrate 1) that it regularly employs permanent workers to perform the services or labor at the place of employment; 2) 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 3) that the temporary additions to staff will not become a part of the petitioner's regular operation. Although the CO typically, as in this case, requests specific documents and materials in a Notice of Deficiency, an Employer must never lose sight of the fact that its burden is something other than simply to produce the specific materials the CO requests. If those materials do not establish the three conditions outlined in the regulations, the application for certification will fail. The CO cannot simply take an applicant's word for the existence of a peakload need.

The CO concluded Employer had not carried its burden in this case. In particular, the CO was unconvinced Employer had shown a "seasonal or short-term demand" that requires Employer to supplement its permanent staff (AF 181-183; 96-99). Monthly sales figures from 2018 and 2019 do not show consistently increased sales during the months of April through December (AF 97; *see also* AF 5, for corrected figures for October and December, 2019).<sup>5</sup> Of course, because "Rapid

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<sup>5</sup> In fact, Employer contends "Rapid Pallet, Inc. experiences a surge in sales April through May then reoccurs August through December." AF 4. By my own rough calculation, rounded to the nearest dollar, April, 2018, sales were about 102%, and May, 2018, sales about 105%, of the 2018 average, while April, 2019, sales were about 99%, and May, 2019, sales about 102%, of the 2019 average. For the other months of the surge, monthly sales compared to the annual average of sales are August, 2018, 110%; September, 2018, 93%; October, 2018, 112%; November, 2018, 101%; December, 2018, 92%; August, 2019, 101%; September, 2019, 99%; October, 2019, 111%; and November and December, 2019, both 109%. These figures suggest Employer tends to be somewhat busier during the

Pallet was not able to secure any temporary full-time employees in 2018 and 2019” (AF 103), Employer’s sales records for 2018 and 2019 reflect only what Employer was able to produce with its full-time staff. It should have come as no surprise to the CO, and it comes as no surprise to me, that these records, standing alone, do not demonstrate a peakload need.

Apart from the sales figures, Employer admits it does not maintain records of how many pallets it repaired in each month in 2018 and 2019 (AF 103). Of course, even if it had such records, they would, like the sales figures, help establish only the volume of work Employer performed with its current full-time employees. Employer avers the grocery industry

[h]istorically . . . experiences an increase in demand during April and May due to upcoming holiday shipments. This demand reduces in June and July because of heavy vacations in the grocery industry distribution centers. The surge then resumes in August through December because of the volume of nationally recognized holidays. These holidays are celebrated with the consumption of food, which increases the sales in the grocery industry. This trickles back to our pallet industry because the demand to ship more produce requires more pallets.

(AF 102, 4). The CO was unpersuaded by this statement, faulting Employer for its “failure to provide any supporting evidence of the holiday shipments or vacations in the grocery industry distribution centers to which its statement refers” (AF 90). I agree the Employer’s statement does not show first-hand knowledge of the grocery business, however reasonable it may be to assume Employer has at least a passing familiarity with it. Evidence offered by someone in the grocery business in support of the application (such as one of Employer’s customers) might have been more persuasive still.

Elsewhere, Employer avers in support of the application

In prior approval year 2016 we filed for 23 temporary full-time employees, with the delay in arrival we chose to fill 16 visas. The same delay with our approval in 2017 led us only filing 18 visas. These historical decisions proved to Rapid that production is more efficient when Rapid fills 16 temporary full-time employees during our peak need.

(AF 104). Employer offers this observation in response to the CO’s second stated deficiency. I mention it here because it is at least consistent with the notion that Employer experienced a peakload need in 2016 and 2017, which might tend to show

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months in which it alleges a peakload need, but do not persuasively demonstrate a need for sixteen additional employees at one of its two sites.

an ongoing peakload need at present also. The reason it is not persuasive to me, if not to the CO as well, is that it does not comprise direct evidence of such a need. It is merely a statement of Employer's own business judgment with respect to conditions in 2016 and 2017. The CO must make an independent decision, based on something more than the applicant's conclusion that labor certification is appropriate.

I conclude the CO correctly concluded the application does not demonstrate a peakload need.

## 2. Number of Workers Requested

The CO concluded Employer "did not indicate how it determined that it needs 16 Wooden Pallet Repairmen during the requested period of need" (AF 14). The only explanation I find anywhere in the record before me is the Employer's conclusion, quoted above, to the effect its experiences in 2016 and 2017 persuade it "that production is more efficient when Rapid fills 16 temporary full-time employees during our peak need" (AF 104). Just as this conclusion is insufficient to support the assertion that Employer experiences a peakload need annually, it is insufficient to support a conclusion that Employer needs 16 temporary full-time workers in 2018.

Employer's payroll records (AF 16-85) shed no additional light on this question. It appears Employer had 36 full-time workers in 2018, but only 15 of them worked consistently throughout the full year. In April, 2018, by my count, there would have been no more than 23 full-time workers; in May, no more than 20; in August, no more than 20; in September, no more than 22; in October and November, no more than 19; and in December, no more than 22. Employer had 34 full-time workers in 2019, but only 9 of them were on the payroll throughout the year. Thus, in April and May, there would have been about 21 on the job; in August and September, about 16; in October and November, about 17; and in December, about 20. The addition of sixteen additional full-time workers in those months would appear greatly to increase Employer's production capacity. In that context, without better information about the extent of the peakload demand, Employer's request for sixteen additional full-time workers during seven months of the calendar year might suggest Employer may need to enlarge its payroll permanently. The burden is on Employer to demonstrate this is not the case.

I conclude the CO properly concluded Employer had not established its need for the number of workers requested.

## 3. Job Order Assurances

As a separate basis for denial of certification, the CO points out Employer indicated "Yes" at Section F.d. Item 5 of the ETA Form 9142 for Board, Lodging, and Other Facilities, while the job order states "Housing is not provided by the employer" (AF 15). The CO asked Employer either to amend its application, or to give the

CO written permission to amend the application on Employer's behalf. *Id.* Employer has agreed to amend the application (AF 7). Accordingly, the CO should not have denied the application for this reason. But because the CO properly denied the application for other reasons, this point is now moot.

**ORDER**

Economic conditions nationwide, and in the grocery industry in particular, are vastly different today than anyone could have anticipated at the time Employer applied for labor certification. Nevertheless, I must decide this case on the record before me.

The CO's denial of labor certification in this case is affirmed.

**SO ORDERED.**

For the Board:

Christopher Larsen  
Administrative Law Judge