



Issue Date: 05 May 2020

OALJ Case No.: 2020-TLN-00039

ETA Case No.: H-400-20002-229141

In the Matter of:

RM AZTEC CONSTRUCTION, LLC,
Employer.

**DECISION AND ORDER REVERSING CERTIFYING OFFICER'S DENIAL OF
LABOR CERTIFICATION**

ORDER OF REMAND

This matter arises under 8 U.S.C. § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, and the H-2B rules and regulations governing temporary labor certification. The H-2B program permits employers to hire foreign workers to perform nonagricultural work within the United States on a temporary basis, as defined by the United States Department of Homeland Security. 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).¹

SUMMARY

Employer RM Aztec Construction, LLC, d/b/a Aztec Construction ("Employer"), operates a general construction company in Lubbock County, Texas. Its business involves the framing, sheathing, and roofing of new construction homes in and around Lubbock County, Texas.

On January 2, 2020, Employer filed an application with the United States Department of Labor, Office of Foreign Labor Certification requesting H-2B temporary labor certification for eight framers. Employer stated these workers were needed to fill peakload need in Employer's construction business from April 1, 2020 through December 18, 2020. On March 30, 2020, the

¹ On April 29, 2015, the United States Department of Labor ("DOL") and the United States Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 CFR Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

Certifying Officer denied Employer's application in a Final Determination. In an attachment to the Final Determination, the Certifying Officer stated the "employer did not sufficiently demonstrate the requested standard of temporary need." (AF 88). Specifically, the Certifying Officer stated that the evidence submitted by Employer in response to the Notice of Deficiency did "not support the employer's statements that weather is a controlling factor on its ability to do this work." (AF 90). The Certifying Officer also stated that Employer's evidence of a labor shortage "no matter how severe does not constitute a temporary need." (AF 91). After review of the Appeal File², the court finds that the evidence submitted does establish Employer's temporary peakload need for eight framers from April 1, 2020 through December 18, 2020. Based on this finding, the court REVERSES and REMANDS the Certifying Officer's denial of Employer's application for temporary labor certification.

ISSUE

The issue before the court is whether the Employer established a temporary peakload need for eight framers from April 1, 2020 to December 18, 2020.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On January 2, 2020, Employer filed its *H-2B Application for Temporary Employment Certification, Form ETA-9142B*. (AF 2, 161-172). In its application, Employer stated that its business performed residential construction. To fulfill a projected peakload need during the upcoming building season, Employer requested certification for eight³ framers. In support of its asserted peakload need, Employer stated:

During the months of mid-December to the end of February it is considered our off season, due to the inclement weather and the safety of our employees. The cold weather along with ground freezing temperatures make it difficult to lay the foundation. Cold weather causes the compressors to freeze and in turn, do not generate air; thus, making it difficult to operate the nail guns. Ice is another issue, as the wood gets too cold and wet, which makes it difficult to cut. During this inclement weather, it is extremely dangerous for employees, with risks that include slipping on wet, icy surfaces. This also makes it difficult to have anyone trying to get on top of metal scaffolds, used for putting up ceilings and roofs. Although our normal period of need begins on March 1, due to timing considerations and complications in the program we will be starting the

² The court received the Appeal File on April 23, 2020.

³ The ETA Form-9142B in the Appeal File lists that Employer's request was for eight framers. (AF 161). However, Employer originally requested 10 framers and multiple references to 10 framer positions are found within the Appeal File. (AF 174). On March 18, 2020, Employer revised its projected peakload need to eight framers and requested that its application be amended accordingly. (AF 99).

application process later this year. We are currently requesting a period of need beginning on April 1, 2020 through December 18, 2020. We will need temporary workers to supplement our permanent staff. The lack of labor will have a dramatic impact on our business.

(AF 166).

Employer stated that the framers job description included “[f]raming lumber, plywood, windows, while wearing a tool belt. Measure, cut, and shape wood. Build structures from wood and supporting materials. Install doors, windows, walls and roofing.” (AF 163). Workers were projected to work from 8 AM to 6 PM, Monday through Friday, at various build sites in and around Lubbock County, Texas. (AF 166, 168).

On March 5, 2020, the Certifying Officer handling Employer’s application with the National Processing Center issued a Notice of Deficiency to Employer. (AF 156-159). The Certifying Officer stated Employer’s application was deficient on two grounds.

The first deficiency noted by the Certifying Officer was Employer’s “[f]ailure to establish the job opportunity as temporary in nature” pursuant to 20 C.F.R. § 655.6(a) and (b). (AF 158). After reviewing Employer’s application, the Certifying Officer stated that “[t]he employer has stated that weather is a determining factor for is [sic] peakload standard of need; however, the weather in the area of intended employment *appears to be favorable to outdoor work year-round.*” (AF 158) (Emphasis added). To address this deficiency, the Certifying Officer requested that Employer submit “further explanation and documentation,” including:

- (1) Documentation concerning the weather in the area of intended employment to support the employer’s statements that weather is a controlling factor on its ability to do its work;
- (2) Supporting documents that substantiate the employer’s statements indicating that it experiences an increased demand for services during the warmer weather months in the employer’s area of intended employment in Texas. This documentation can include supportive letters from building trade organizations in the employer’s area of intended employment;
- (3) A summary listing of all projects in the area of intended employment for its previous calendar year. This list should include start and end dates of each project and worksite addresses;
- (4) Summarized monthly payroll reports for 2018 and 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Framers, 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;
- (5) An explanation of the data in submitted payroll documentation; and
- (6) Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

(AF 159).

The second deficiency noted by the Certifying Officer was Employer's "[f]ailure to establish temporary need for the number of workers requested." Id.; 20 C.F.R. § 655.11(e)(3), (4). The Certifying Officer stated that Employer "did not indicate how it determined that it needs 10 Framers during the requested period of need." (AF 159). The Certifying Officer requested that Employer submit additional information to address this deficiency.⁴ Id.

On March 19, 2020, Employer submitted its response to the Notice of Deficiency. Its response included:

- (1) Receipts from builder Ventura Homes in Lubbock County, Texas from April 2019 through December 2019 for framing and construction work (AF 136-153);
- (2) A supporting letter from Larry Driskell Construction, LLC (AF 135);
- (3) A letter from Ventura Homes vice president Jeff Seal attesting to Aztec's labor on behalf of Ventura and the homes they were responsible for building in 2019 and continuing into 2020 (AF 134);
- (4) A letter detailing Employer's materials cost on a monthly basis in 2019 (AF 133);
- (5) Employer's profit and loss on a month by month basis, beginning January 2017 and ending December 2018 (AF 124-127);
- (6) IRS Forms 941 for 2017 and 2018 showing Employer's quarterly federal tax liability (AF 101-119);
- (7) A payroll summary, showing number of workers, hours worked, and earnings (AF 120); and
- (8) A letter written by Employer which asserted its temporary need met the definition of a peakload need, which explained why the winter weather conditions in Lubbock County were unsuitable for construction work, and Employer's difficulties with obtaining labor. (AF 97-100).

The builder receipts submitted by Employer detailed construction sites where Employer provided "framing/cornish" services to Ventura Homes on construction projects. These receipts included projects from April 3, 2019 to December 12, 2019. (AF 136-153).

Employer's supporting letter from Larry Driskell Construction, LLC was written by the president of the company, Mr. Larry Driskell. In his letter, Mr. Driskell stated:

For the last several years the housing market in Lubbock and the surrounding area has been strong. However, we have increasingly seen delays in construction due to our subcontractors experiencing difficulty finding workers who have the skills and are willing and able to work in our industry. Contrary to popular conception [sic], many aspects of residential home construction require workers who are quite skilled. Our work is also often difficult, physically demanding, "out in the weather" and seasonal.

(AF 135).

⁴ This deficiency was cured by Employer and was not listed by the Certifying Officer on the Final Determination attachment as grounds for denial of the application. (AF 85-89).

Mr. Driskell stated that, due to this, their business had been experiencing “delays in getting new homes and remodels starting [sic] and completed.” Id.

The letter from Ventura Homes’ vice president Mr. Jeff Seal stated that Employer had been subcontracting for Ventura Homes for the last three years. (AF 134). Mr. Seal then provided 45 projects that Aztec had worked on in 2019 or was projected to work on in 2020. Id. This letter was accompanied by a list of the starting and ending dates for these projects. (AF 128-131).

Employer’s letter detailing its 2019 materials cost showed the following monthly breakdown of its expenditures:

Month	Material Expenses
January	\$8,443.61
February	\$6,943.61
March	\$6,607.48
April	\$7,082.60
May	\$8,557.04
June	\$11,303.12
July	\$10,587.99
August	\$10,802.06
September	\$11,953.95
October	\$9,303.93
November	\$10,862.71
December	\$2,917.67

(AF 132-133).

The payroll summary provided by Employer showed:

Month/Year	Total Permanent Workers	Total Hours Worked	Total Earnings
January 2018	3	460	\$14,416.72
February 2018	3	484	\$14,583.41
March 2018	3	488	\$15,833.36
April 2018	3	510	\$15,841.72
May 2018	4	732	\$23,234.06
June 2018	4	536	\$19,466.75
July 2018	4	472	\$16,800.06
August 2018	4	680	\$22,987.55

September 2018	4	456	\$17,146.74
October 2018	4	484	\$16,860.08
November 2018	4	696	\$21,843.40
December 2018	4	571	\$16,502.71
January 2019	4	708	\$19,571.18
February 2019	4	672	\$18,565.64
March 2019	4	584	\$17,186.74
April 2019	4	584	\$17,675.07
May 2019	4	804	\$20,840.65
June 2019	4	648	\$19,286.74
July 2019	4	740	\$22,903.39
August 2019	4	896	\$25,623.43
September 2019	4	692	\$22,051.75
October 2019	4	824	\$26,793.41
November 2019	4	776	\$26,256.42
December 2019	4	784	\$23,063.41

(AF 120).

Employer stated in the same summary that it had zero temporary workers in 2018 and 2019. (AF 120).

In its response to the Certifying Officer, the Employer stated in a letter to the Certifying Officer and the Department of Labor that since 2016 “we have experienced an increased workload from spring through fall each year resulting in a temporary need for additional workers at that time.” (AF 97). Employer stated:

During the spring, summer, and fall months we experience warmer, drier (colder temperatures result in slower evaporation resulting in wet, sloppy job site conditions as rain puddles and sits) weather conditions that are conducive to construction operations, and the longer daylight hours during this period allows us to complete more work on any given day. The winter weather is so severe in

Lubbock, Texas (North Texas) that the ground will be frozen making it very difficult to perform the initial digging required to pour a foundation. As a result, fewer foundations are poured during the winter months. This results in the decrease of framing work, as you must have a foundation to build upon. Further, cold weather in the winter months causes the compressors to freeze and stop working so nail guns will not function. Lumber will also freeze, which creates cutting and nailing problems. There are dangers encountered with icy surfaces, including scaffolds and high surfaces.... Our customers are homebuilders and general contractors of large building projects that need our services normally between the period of March through the middle of December, in order to fit within their building timelines. These timelines are largely driven by weather conditions and market trends, which again peak during the spring, summer, and fall months.

The specific period of our need has generally fallen between the months of March through mid-December, and we need temporary laborers to supplement our permanent staff.... These temporary workers will not become part of our permanent operations because we do not have enough business during the winter months from late December through February to keep them employed. We do perform some work throughout the year, but we operate at a reduced level during the winter months. Historically, temperatures are much warmer during the months of March through early December. The winter months contain an increased danger of “northers”, which are fast moving winter weather systems that come through Texas with rapidly dropping temperatures, sometimes below freezing. Lubbock, Texas which is located in the panhandle and experiences extremely cold temperatures during the winter months. We have included a sampling of weather reports for December 2018 – February 2019 indicating daily temperatures as low as 25 degrees Fahrenheit in December, 18 degrees Fahrenheit in January, and 14 degrees Fahrenheit in February. We have also included a report showing that the average monthly snowfall in Lubbock ranges from 2-3 inches from December through February. These winter weather events greatly disrupt our ability to complete projects during the winter months. As a result, we schedule the majority of our work between March and early December.

...

This is our first year attempting to utilize the H2B program, and we have been unable to find temporary labor locally, which has caused instability and turnover issues with our workforce. Our inability to find local temporary labor has also created an inability to complete work during our season which has created a situation where we have a significant backlog of projects that must be completed during our period of temporary need. If we do not have additional temporary labor to assist us complete these projects, we will continue to be unable to complete them during the season and eventually we could lose the work. Despite these difficulties, the [payroll] summation still shows that in 2018 the hours for framers increased by an average of 20% during the months of our period of need on the present application (April through December) compared to the average hours during the months outside of our current application. In 2019, the hours for

framers increased by an average of 15% during the months of our period of need compared to the months outside of our period of need.

(AF 97-100).

On March 23, 2020, the Certifying Officer contacted Employer and noted that the weather documentation cited by Employer in its response was not submitted with the rest of Employer's response to the Notice of Deficiency. (AF 95). In response, Employer submitted two pages from the website U.S. CLIMATE DATA showing the average high and low temperatures by month in Lubbock County, Texas. (AF 92-93). This data indicated that in January, the average high was 54 degrees Fahrenheit; in February, the average high was 59 degrees; in March, the average high was 67 degrees; and in April, the average high was 75 degrees. The average low in January was 26 degrees; in February, the average low was 30 degrees; in March, the average low was 37 degrees; and in April, the average low was 46 degrees. (AF 92).

On March 30, 2020, the Certifying Officer issued her Final Determination, denying Employer's request for H-2B certification. (AF 85). Attached to the Final Determination was an Attachment to Final Determination – Denial, which outlined the reasons for the applications denial. The denial discussion was eight paragraphs long, and focused solely on the U.S. CLIMATE DATA information Employer provided on March 23, 2020, as well as Employer's written response to the Notice of Deficiency. While the denial listed the other documentation Employer provided, it did not address the weight or relevance of that evidence. (AF 88-91).

The Certifying Officer stated that the application was denied on the ground that Employer did not "establish the job opportunity as temporary in nature." After reviewing the evidence submitted by Employer in its response to the Notice of Deficiency, the Certifying Officer stated that Employer's "explanation and documentation of its temporary need did not overcome the deficiency." (AF 89). The Certifying Officer stated that while the climate data submitted by Employer showed that the average monthly low temperature in Lubbock County, Texas was 26-30 degrees Fahrenheit, "it should be noted that the average lows of any day will occur in the middle of the night when workers are not performing their duties." (AF 89). Based upon this, the Certifying Officer found that "the average temperatures year-round do not support the employer's statements that weather is a controlling factor on its ability to do this work." (AF 90). The Certifying Officer also stated that Employer's explanation that the area of intended employment faced a labor shortage did not constitute a temporary need under the regulations. (AF 91).

On April 8, 2020, Employer noted its appeal to the Board of Alien Labor Certification Appeals. In its appeal, Employer stated that the Certifying Officer's determination regarding Employer's asserted peakload need contained "factual errors concerning the interpretation of the evidence originally presented along with an overriding failure to consider all evidence submitted." (AF 7). Employer also submitted additional climate data, with daily breakdowns of high and low temperatures.⁵ Employer moved that the Board reverse the findings of the Certifying Officer and

⁵ The additional climate and weather data submitted by Employer with its appeal was not submitted to the Certifying Officer for review. The regulations provide that an Administrative Law Judge 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). Additionally, exhibits attached to the request for review are impermissible where they contain evidence outside of the

remand the matter to the National Processing Center with instruction to issue a Notice of Acceptance. Id.

APPLICABLE LAW

Employers who seek to hire foreign workers under this program must receive labor certification from the United States Department of Labor. A Certifying Officer in the Office of Foreign Labor Certification of the United States Department of Labor's Employment and Training Administration reviews applications for temporary labor certification under the H-2B program. Following the Certifying Officer'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. 20 C.F.R. § 655.61(a).

To obtain certification under the H-2B program, an employer must establish that its need for workers qualifies as temporary under one of four standards: one time occurrence, seasonal, peakload, or intermittent. 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). To prove 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 CFR 214.2(h)(6)(ii)(B)(3) (Emphasis added).

An employer must also demonstrate that "[t]he job classification and duties qualify as non-agricultural;... [t]he number of workers and period of need requested are justified; and the request represents a bona fide job opportunity." 20 C.F.R. § 655.11(e)(1), (3)-(4). The burden of proof to establish eligibility for temporary alien labor certification under the H-2B visa program rests on the petitioning employer. 8 U.S.C. § 1361.

ANALYSIS AND FINDINGS OF FACT

On March 30, 2020, the Certifying Officer denied Employer's H-2B application on the ground that Employer failed to "establish the job opportunity as temporary in nature" pursuant to 20 C.F.R. 655.6(a)-(b). The sufficiency of the Certifying Officer's findings supporting this denial is the focus of this court's administrative review. The court must decide whether Employer established that the proposed employment is of a "seasonal or short-term demand." 8 CFR 214.2(h)(6)(ii)(B)(3).

"evidence as was actually submitted to the CO before the date the CO's determination was issued." Id. at (a)(5). As such, this evidence is impermissible and has not been considered.

I. Did Employer Establish a Peakload Need for Eight Framers from April 1, 2020 through December 18, 2020?

Employer argued that its peakload need for additional workers from April 1, 2020 to December 18, 2020 is both seasonal and short-term demand because it is a period of increased labor tied to the cyclical nature of the residential construction industry, which is heavily influenced by the weather. However, the Certifying Officer stated that “the average temperatures year-round do not support the employer’s statements that weather is a controlling factor on its ability to do this work.” (AF 90).

The court notes that to establish peakload need, an Employer may show *either* a **seasonal or short-term demand**. 8 CFR 214.2(h)(6)(ii)(B)(3) (Emphasis added). The regulations do not require the Employer to show both. Here, the Employer submitted evidence that supported its assertion of an increased short-term demand for construction labor from April through December. This included earnings records that showed much higher payroll expenses in Employer’s asserted period of peakload need. For example, in 2019, Employer’s average payroll expenditure in the non-peakload months of January through March was \$18,471.69. (AF 120). In the peakload months of April through December, Employer’s average payroll expenditure rose to \$22,721.58. *Id.* Based on the evidence in the record, Employer had the same number of workers during all of 2019, which demonstrates that demand for their labor did increase in the peakload months as they worked increased hours during these months.

Employer’s argument that a bona fide short-term demand for increased labor existed is also supported by the rise in its materials expenditures in 2019.

Month	Material Expenses
January	\$8,443.61
February	\$6,943.61
March	\$6,607.48
April	\$7,082.60
May	\$8,557.04
June	\$11,303.12
July	\$10,587.99
August	\$10,802.06
September	\$11,953.95
October	\$9,303.93
November	\$10,862.71
December	\$2,917.67

While such an increase may not be solely attributable to an increased demand for labor (for example, costs may rise where there is a material shortage), the higher expenditures on materials from June through November supported Employer’s claim that a short-term demand for labor existed during these months.

The Certifying Officer did not address this evidence in making her findings. Instead, she addressed only the weather information provided by Employer and Employer’s statements in its

response letter, which indicated there was a labor shortage in Lubbock County, Texas. As noted by the United States Supreme Court, an agency factfinder “must examine the relevant data and articulate a satisfactory explanation for its action.” Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Here, the court cannot find that the Certifying Officer adequately examined the relevant data or articulated a satisfactory explanation for the denial of Employer’s application where there is substantial evidence in the record supporting Employer’s claim that it has a temporary peakload need for labor due to both seasonal and short-term demand. While the scope of administrative review is narrow, see 20 C.F.R. § 655.61, the court finds that the Certifying Officer failed to address the evidence in the context of Employer’s stated peakload need due to a short-term demand for labor. The Certifying Officer’s denial was not supported by the evidence in the record and the requirements of the regulations.

Additionally, while the Certifying Officer determined that the weather in Lubbock County, Texas was not a “controlling factor on [Employer’s] ability to do this work,” the Certifying Officer did not adequately explain the basis for making this determination based on the evidence in the record. The climate data submitted by Employer showed that the average lows were below freezing in the months of January and February. While the climate data submitted by Employer also showed that average high temperatures exceeded freezing in non-peakload months, the Certifying Officer did not address Employer’s statement that “[d]uring the spring, summer, and fall months we experience warmer, drier (colder temperatures result in slower evaporation resulting in wet, sloppy job site conditions as rain puddles and sits) weather conditions that are conducive to construction operations, and the longer daylight hours during this period allows us to complete more work on any given day.” (AF 97-98). In making her findings, the Certifying Officer stated “it should be noted that the average lows of any day will occur in the middle of the night when workers are not performing their duties” and “the average temperatures year-round do not support the employer’s statements that weather is a controlling factor on its ability to do this work.” (AF 89-90). This explanation that weather was not a controlling factor on Employer’s ability to do its work did not address the issues with evaporation at wet work sites or reduced daylight hours that Employer raised in its response to the Notice of Deficiency. Additionally, the Certifying Officer’s statement in the Notice of Deficiency that the weather in Lubbock County, Texas “appears to be favorable to outdoor work year-round” provided no citation or supporting evidence and appears to have been solely based on conjecture. (AF 158). While the burden to prove temporary peakload need rests on the Employer, this does not allow the agency factfinder to speculate or engage in hypothetical conjecture not supported by the evidence in the record.

After review of the evidence in the record, the court finds that the Employer’s evidence demonstrates both a seasonal and short-term demand peakload need. The evidence submitted by Employer shows that temperatures are lower in the non-peakload months and sufficiently explains that these lower temperatures carry negative repercussions for the construction business. The lower temperatures impact the ability to start work due to issues with wet worksites and fewer daylight hours suitable for working. Additionally, Employer’s business records show a spike in payroll and material expenses which are indicative of an increase in demand for labor from April to December.

Based on the above, the court finds that the Certifying Officer’s denial of Employer’s application for temporary labor certification was not supported by the evidence in the record and “failed to

examine the relevant data and articulate a satisfactory explanation for its action.” Motor Vehicle Mfrs. Ass'n, Inc. 463 U.S. at 43. For this reason, the court reverses the decision of the Certifying Officer and instructs it to certify Employer’s application for temporary labor certification. The evidence submitted by Employer shows a peakload need for temporary labor based on both seasonal and short-term demand.

ORDER

It is hereby **ORDERED** that the Certifying Officer’s denial of Employer’s application for temporary labor certification is REVERSED and REMANDED to the Certifying Officer for further processing and certification of Employer’s application.

The court requests that this Order be served on the following parties by email: (1) the Office of the Solicitor, counsel for the Claimant; (2) Mary Mata, representative for the Employer; and (3) the Office of Foreign Labor Certification.

DO NOT E-MAIL OR RESPOND TO THE SENDER’S E-MAIL ADDRESS.

E-MAILS SENT TO THE NEWPORT NEWS OFFICE OF ADMINISTRATIVE LAW JUDGES’ E-MAIL ADDRESS (OALJ-NewportNews@DOL.GOV) WILL ONLY BE ACCEPTED DURING THE COVID-19 PANDEMIC.

SO ORDERED.

Dana Rosen
Administrative Law Judge

DR/TRL
Newport News, Virginia