



**Issue Date: 27 January 2020**

**BALCA Case No.:** 2020-TLN-00019  
**ETA Case No.:** H-400-19311-131576

*In the Matter of:*

**SLATER PAINTING COMPANY, INC.**  
*Employer.*

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case is before the Board of Alien Labor Certification Appeals (“the Board”) pursuant Slater Painting Company, Inc.’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.<sup>1</sup> 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); 20 C.F.R. § 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 (“Department”) using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department’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. 20 C.F.R. § 655.61(a).

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<sup>1</sup> On April 29, 2015, the Department of Labor 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>2</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current legislation. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019). Accordingly, the undersigned disregards any definition of temporary that is inconsistent with 8 C.F.R. § 214.2(h)(6)(ii)(B), including portions of 20 C.F.R. § 655.6(b).

## **BACKGROUND**

On November 6, 2019, ETA received an application for temporary labor certification from Employer. (AF<sup>3</sup> 95-167.) Employer requested certification for 35 painters for an alleged period of temporary, peakload need from February 3, 2020 through November 20, 2020. (AF 95.) In addition to its Form 9142B, Employer also submitted a statement of temporary need; prevailing wage documentation; letters of intent from customers; a list of current customers; samples of past contracts; past invoices; and recruitment information. (AF 106-60.)

### **Employer's Application**

Employer operates a commercial painting company located in Austin, Texas.<sup>4</sup> (AF 96, 114.) It provides painting services for customers in Austin, namely for construction companies. (AF 114.) The 35 painters Employer requested would be responsible for: applying protective coverings and masking tape to walls and floors; applying putty and caulk; sanding; applying primers, paints, stains, and sealers to equipment and buildings; using rollers, brushes and spray guns; washing and treating surfaces with oil and turpentine; erecting scaffolding and ladders; operating hand and power tools; and performing other related painter tasks. (AF 98.)

Employer explained that its need for workers fluctuates because its “business is tied to other construction industries that are effected by the seasonal nature of the work.” (AF 106.) Employer also indicated that “natural climate changes” and “weather conditions” affect its customers’ businesses. (AF 106.) Based on its “past history of customer demand,” Employer also asserts that its peakload need is recurrent. (AF 106.)

Despite employing permanent workers, Employer claims that it needs to hire additional workers during its alleged peakload season. (AF 114.) Employer is “confident” that it will need to hire additional temporary workers during its alleged peakload season based on its previous experiences, its sales and staffing histories, secured contracts, and “outstanding proposal and bids for future work.” (AF 114.) The documentation included with Employer’s application included a list of customers it expects to perform services for in 2020 and letters of intent from current customers. (AF 114-17, 136-38.) Employer also included “sample” contracts, subcontract work orders, and invoices from 2019. (AF 118-35, 139-55.)

### **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); *see also* 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

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<sup>3</sup> Citations to the Appeal File will be abbreviated with an “AF” followed by the page number.

<sup>4</sup> In its Form 9142B, Employer explains that it is based in Austin, Texas and performs painting services throughout the Austin-Round Rock, Texas metropolitan area. (AF 102.) For ease of discussion, this decision will refer to the entire area simply as “Austin.”

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).

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 must also demonstrate a bona fide need for the specific number of temporary workers and period of need requested. 20 C.F.R. § 655.11(e)(3)-(4); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *North Country Wreaths*, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

The burden of proof is on the employer. *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 information and to present it in such a way so that the CO can determine that the employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

#### Notice of Deficiency

On November 15, 2019, the CO issued a Notice of Deficiency. (AF 90-95.) The CO identified two deficiencies and explained why Employer’s application could not be accepted for consideration.

#### *Deficiency #1*

The CO concluded that Employer had not sufficiently demonstrated that its need is temporary in nature, as defined by 20 C.F.R. § 655.6(a)-(b). (AF 93-94.) The CO provided several reasons supporting this conclusion. First, the CO understood Employer’s alleged peakload need to be based, at least in part, on the weather and the climate in Austin. However, the CO determined that it was not clear, based on Employer’s application and accompanying documentation, if the area was “favorable to year-round employment.” (AF 93.)

Additionally, the CO determined that the list of customers, sample contracts, and invoices, were not relevant to evaluating Employer alleged peakload need. (AF 93.) The CO explained that these documents “do not specify when the projects begin or end, nor do they indicate the number of workers needed for each invoice or project.” (AF 93.) According to the

CO, the letters of intent submitted by Employer also did not support its assertion. These letters indicate that each customer is in need of the services offered by Employer during Employer's alleged peakload season, however, the CO noted that the letters did not discuss the scope of the projects or the number of workers needed. (AF 93.) Furthermore, the CO opined that it was unclear how the list of customers and sample invoices submitted by Employer justify a peakload need.

Accordingly, the CO instructed Employer to submit: a statement describing its business history and activities and a schedule of operations for the year; an explanation and supporting documents that substantiate a peakload need from February through November because of the weather in the local area; independently sourced documentation supporting a finding that there exists a schedule or season for providing painting services in the local area; summary listing of all projects in the area of intended employment for the 2018 and 2019 calendar year, including start and end dates of each project, worksite addresses and the number of painters used on each project; summarized monthly payroll reports for 2018 and 2019 which identify, for each month, the number of full-time and temporary painters, the total number of workers, total hours worked, and total earnings; and any other evidence that would serve to justify Employer's alleged period of need. (AF 93-94.)

#### *Deficiency #2*

Second, the CO concluded 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," as required by 20 C.F.R. § 655.11(e)(3)-(4). (AF 94.) The CO noted that Employer had not submitted any payroll reports to support its alleged need for 35 temporary painters. (AF 95.) Thus, the CO instructed Employer to submit documentation supporting its need for 35 painters. Specifically, the CO ask for a statement, with supporting documentation, explaining how Employer determined 35 painters would be needed, and, summarized monthly payroll reports as described above.

#### Employer's Response to the Notice of Deficiency

On December 2, 2019, Employer responded to the Notice of Deficiency. (AF 33-88.) Employer's response included a letter of explanation; statements describing its history and its business activities; a letter further explaining its alleged peakload need; a copy of a Notice of Certification from ETA, dated January 15, 2019, certifying Employer's request for 35 temporary painters; a letter from a trade organization; letters of intent from Employer's customers; a schedule of Employer's 2020 operations and monthly allocation of painters; a summary of Employer's 2018 and 2019 payroll and staffing levels; and a summary of Employer's 2019 payroll report. Each attachment is discussed more thoroughly below.

In its letter of explanation, Employer clarified that it has a regular, full-time staff of administrative support, estimators, supervisors, and painting crews. (AF 38.) This letter also included a list of 25 of Employer's current customers, as of September 29, 2019, and a print out of Employer's website. (AF 39-40.) Employer also supplemented its explanation and explained that its schedule is dependent upon contractors in other construction trades. (AF 42.) These

contractors must first complete their work before Employer can begin its painting operations. (AF 42.) Employer noted that such dependence, and the climate or weather, are the reasons for its peakload need. (AF 42.) Employer also claimed that the “weather impacts commercial painting services” in Austin. (AF 42.) Employer stated that commercial paint manufacturers “typically post on their own [p]roduct [d]ata [s]heets, [a]pplication [c]onditions of a maximum humidity level of less than 85% and minimum temperature to 50 degrees.” (AF 42.) Based on its “analysis of climatological data,” Employer maintained that from November, December, and January, the average low temperature is below 50 degrees.<sup>5</sup> (AF 42.) The average relative humidity for these months is 82%, 80% and 78%, respectively. (AF 42.) Thus, Employer asserted that performing painting services amid “non-ideal low temperatures and high humidity levels,” “would void the manufacturer warranty.” (AF 42.)

As also discussed in this letter, Employer explained that it based its determination that 35 painters would be needed on “outstanding proposals, established agreements, and signed contracts for projects,” its experience in the painting industry, as well as its supervisors’ and foremen’s review of the complexity of particular upcoming jobs. (AF 43.) Employer also listed 13 companies for which it expects to provide service to in 2020. (AF 44-46.) This list includes the names of each company and what appears to be the specific location of each job. (AF 44-46.)

Employer submitted the first page of Notice of Certification issued by ETA on January 15, 2019. (AF 47.) This document shows that ETA approved Employer’s application for temporary labor certification of 35 painters under the H-2B program. (AF 47.) The period of certification was February 4, 2019 through November 22, 2019. (AF 47.)

Employer’s response also included a group of letters. First, a letter from the Associated Builders and Contractors, Inc., Central Texas Chapter (“ABC Central Texas”), a local trade organization, explained that “due to several factors, manpower needs increase in the February through October time frame and decrease in the months of November, December and January.” (AF 48.) According to ABC Central Texas, many school buildings have projects that must be completed by September and companies are “pressured” to complete new projects for retailers prior to November, or the start of “retail season.” (AF 48.) Finally, ABC Central Texas noted that “[a]verage low temperature[s] in the 30s and 40s” during November, December, and January “prevents some trades from performing their work.” (AF 48.)

Also included was a group of letters styled as “support letters” from several of Employer’s current customers. (AF 49-52.) A letter from the White Construction Company indicated that it had a business relationship with Employer for at least 15 years, that its need for painting services peaks between February and November, and that it intended to contract with Employer to complete approximately 14 projects in 2020. (AF 49.) The principal of Raymond Construction Inc., penned a letter which explained that its relationship with Employer dated back over 20 years, that it experiences a peak load need from February to November, and that it intends to use Employer’s services for four jobs in 2020. (AF 50.) Similarly, the record also includes support letters from American Constructors and Rand Construction Company. (AF 51-52.) Employer has provided services for American Constructors over 20 years, and American Constructors noted

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<sup>5</sup> To support its claims concerning temperature and humidity, Employer cited to the following web pages: [www.noaa.gov](http://www.noaa.gov), [www.usclimatedata.com](http://www.usclimatedata.com), and [www.weather-us.com](http://www.weather-us.com). (AF 42.)

that it was “depending on [Employer] to provide commercial painting services on multiple projects between February and November 2020.” (AF 51.) Finally, the Rand Construction Company also noted that it had worked with Employer for six years and planned on contracting it to complete 25 jobs between February and November 2020. (AF 52.)

Employer’s “schedule of operations” lists numerous jobs to be performed by Employer in 2020. (AF 53.) The schedule identifies each job, the job’s location, the start and end dates for each job, the final contract amount (in dollars), and the date on which the contract for each job was executed. (AF 53.) Employer has also included a chart which summarizes the projected number of permanent painters and temporary painters for each month in 2020. (AF 54.) The chart shows that Employer anticipates employing the following number of permanent painters per month: 48 in January and February; 54 in March and April; 57 in May and June; 60 in July, August, and September; and 50 in October, November, and December. The chart also shows that Employer anticipates employing no temporary painters in January and December, but will employ 35 from February through November.

Next, Employer submitted charts listing the jobs it will be performing in each month of 2020. (AF 55-66.) Each chart lists the name of a job, the job’s location, and the number of permanent and temporary painters that will be assigned to each job. (AF 55-66.) The total number of painters, both permanent and temporary, is equal to the number listed in the summary chart, described above. (*See* AF 54.) For the months of May through December, the final job listed on each chart is “future contracts.” (AF 59-66.) The number of painter associated with each “future contracts” entry is equal to the number of painters needed to ensure that the monthly total equals the monthly total in the summary chart. (*Compare* AF 54 *with* AF 59-66.)

Records relating to the “Texas Workforce Commission’s Unemployment Tax Services” are included in the record. (AF 67-70, 77-80.) These records show that Employer employed the following number of employees in 2018: 69 in January; 62 in February; 83 in March; 108 in April; 102 in May; 122 in June; 122 in July; 127 in August; 122 in September; 128 in October; 107 in November; and 79 in December. For 2019: 71 in January; 71 in February; 69 in March; 72 in April; 84 in May; and 100 in June. These records also indicate the total amount of wages paid by Employer per quarter and other tax information.

Employer also included federal tax filings for each quarter of 2018. (AF 71-78.) These documents list the total amount of wages paid to employees and the number of employees in each quarter. They show that Employer paid the following number of employees per quarter: 71 in the first quarter, 101 in the second quarter, 111 in the third quarter, and 73 in the fourth quarter.

Finally, Employer also submitted summarized payroll records and overtime records for 2019. (AF 80-88.) The summary chart provides the following:

Month	Permanent Employment			Temporary Employment		
	Total Workers	Total Hours Worked	Total Earnings Received	Total Workers	Total Hours Worked	Total Earnings Received
January	69	9,908	182,348	n/a		
February	67	10,531	192,654	n/a		
March	66	13,632	255,419	n/a		
April	68	11,557	222,969	n/a		
May	85	17,820	349,021	n/a		
June	97	16,877	327,931	27	1,216	19,955
July	91	14,334	271,281	28	5,626	95,174
August	87	15,300	288,364	29	5,747	94,794
September	67	8,597	160,332	29	3,365	51,943
October	56	9,420	177,826	29	4,718	73,576
November	59	6,524	126,013	27	2,993	5,088
December						

(AF 81.) No information was provided for the month of December. Employer also noted that it was unable to employ temporary workers in 2019 until “approximately June” because of “the 2019 DHS H2B Visa Cap issues.” (AF 81.)

Employer’s overtime records show the number of hours of overtime worked and the total pay earned by painters per month from January 2019 to June 2019. (AF 80-87.) These records show that painters worked the following number of overtime hours in each month: 854 in January; 647.50 in February; 1,473.50 in March; 1,798 in April; 3,479.50 in May; and 3,317 in June.<sup>6</sup> (AF 80-87.)

#### Final Determination

On December 6, 2019, the CO issued a Final Determination denying Employer’s application for temporary labor certification. (AF 19-32.) The CO concluded that Employer’s submissions failed to remedy the deficiencies identified in the Notice of Deficiency.

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<sup>6</sup> Employer’s monthly overtime records do not correspond directly to one calendar month. The records also do not account for every day in each month. Instead, the records defined each “month” as follows: January is defined as December 29, 2018 through January 19, 2019; February is defined as January 26, 2019 through February 16, 2019; March is defined as February 23, 2019 through March 23, 2019; April is defined as March 30, 2019 through April 20, 2019; May is defined as April 27, 2019 through May 25, 2019; and June is defined as June 1, 2019 through June 22, 2019. (AF 80-87.)

First, the CO concluded that Employer did not establish a temporary peakload need under 20 C.F.R. § 655.6(a) and (b). (AF 22-29.) The CO first addressed Employer’s weather-based claim. Based on the information submitted and resources relied upon by Employer, the CO determined that Employer had not shown that late November through January in Austin is not conducive to the services it provides. (AF 25.)

The CO noted that the weather related information discussed by ABC Central Texas in its support letter was inconsistent with the weather related information provided by Employer. (AF 26.) The CO also found the weather related information provided by Employer was, in and of itself, inadequate to support Employer’s assertion because it did not include the average low temperature for February. (AF 26.) Moreover, using the resources provided by Employer, the CO was able to independently verify that the average low temperature for February (a month within Employer’s alleged peakload season) in Austin was lower than 50 degrees –that is “non-ideal” based on Employer’s assertions. (AF 26.) Furthermore, based on these same resources, the CO determined that the average humidity levels in the area would have been “ideal” from November through January and that the humidity levels were actually highest during the alleged season of peakload need. (AF 27-28.)

The CO also determined that Employer had not submitted independently sourced documentation which sufficiently established a schedule or season for providing painting services. (AF 28.) The CO first noted that the letter of support from ABC Central Texas discussed the construction industry in general and was not specific to commercial painting. (AF 26.) Additionally, the CO explained that ABC Central Texas’ letter was also inadequate because it only showed that there is a demand for painting services leading up to September and November (related to schools and retailers) and that the demand for painting services increases in the spring and summer. (AF 28.) The CO determined that this letter did not support Employer’s assertion that its “peak” season began in February. (AF 28.)

The CO determined that the payroll and overtime information submitted by Employer could not be used to evaluate Employer’s actual monthly work volume and that the letters of intent from Employer’s customers and Employer’s own projections for 2020 were insufficient to support Employer’s alleged peakload need. (AF 28-29.) The CO explained that the payroll and overtime information was insufficient because it did not include information from 2018, as requested. (AF 29.) Without payroll information from 2018, the CO opined that she could not evaluate Employer’s actual monthly need and, thus, could not determine if a peakload need existed between February and November. (AF 29.)

The CO identified additional reasons the payroll and overtime information submitted by Employer was insufficient. The 2019 payroll information did not include the month of December. Thus, the CO determined that it too could not be used to evaluate whether Employer experienced a peakload need from February to November. (AF 29.) The CO noted that the state and federal tax information concerned all employees, it was not specific to painters and did not distinguish between permanent and temporary employees. (AF 29.) In addition, the CO noted that Employer had not explained why it did not submit overtime information for any month after June 2019 or before January 2018.

Finding that Employer's 2019 payroll and overtime information lacking, the CO consequently found that the information relating to 2020 did not independently establish a peakload season from February to November. The CO noted that the letters of intent showed that Employer's painting services are needed between February and November, but did not show that the services were not also needed throughout the remainder of the year. (AF 29.) With respect to the anticipated number of permanent and temporary painters, the CO determined that this information was "only" a projection, not "actual data." (AF 29.) Accordingly, the CO concluded that Employer failed to establish a peakload need as defined under 20 C.F.R. § 655.6(a) and (b).

Second, the CO found that Employer had failed (a) to justify its need for 35 painters and (b) to establish that its request represents a bona fide job opportunity under 20 C.F.R. § 655.11(e)(3)-(4). (AF 29-32.) For the same reasons described above, the CO determined that the payroll information, overtime records, letters of intent, and future projections were inadequate and did not justify Employer's need for 35 painters during its alleged peakload season. (AF 31-32.) The CO explained that, Employer had not provided "sufficient supporting documentation" to enable the CO to "evaluate the number of permanent and temporary workers employed throughout an entire year related to its stated peakload period." (AF 31.)

Having determined that Employer failed to establish a temporary need and failed to justify its specific request for 35 painters, the CO denied Employer application for temporary labor certification in accordance with 20 C.F.R. § 655.51.

### Employer's Appeal

On December 19, 2019, Employer submitted a formal request for administrative review.<sup>7</sup> (AF 1-16.) Employer states that the CO's Final Determination contained "various factual and legal errors, inaccuracies, and omissions, including [the] CO's dismissing probative evidence, as well as misconstruing relevant supporting documentation." (AF 1.) Employer also claims that the CO "selectively chose information to reach a conclusion resulting in an adverse determination, and did not reasonably review the totality of the evidence ... nor adhere to the letter and intent of the [governing regulations]." (AF 1.) Employer also argues, generally, that it complied with the requirements of the regulations and "had provided extensive documentation with [its] application" establishing a peakload need and justifying the number of workers requested. (AF 1-2.)

On January 3, 2020, the Office of Administrative Law Judges ("OALJ") received the Appeal File from the CO. On January 9, 2020, the undersigned issued a Notice of Assignment and Order for Expedited Briefing Schedule, permitting counsel for the CO (the "Solicitor") to file a brief within seven business days of receiving the appeal file. 20 C.F.R. § 655.61(c). On January 15, 2020, the Solicitor filed its brief, urging affirmance of the CO's determination. This

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<sup>7</sup> Employer requested an "Expedited Administrative Review or De Novo Hearing." (AF 1.) However, the regulations governing "H-2B worker" labor certification applications do not allow for a *de novo* hearing. See 20 C.F.R. § 655.61(a).

decision is issued within seven business days of receipt of the Solicitor's brief, as required by 20 C.F.R. § 655.61(f).<sup>8</sup>

### **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 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 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." 20 C.F.R. § 655.61(e). The Board must affirm the CO's determination, reverse or modify the CO's determination, or remand the case to the CO for further action. *Id.*

While 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 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 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 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").

### **DISCUSSION**

Based on a review of all the evidence and the CO's Final Determination, the undersigned finds that the CO reviewed the evidence submitted by Employer and considered relevant factors, and the Final Determination displayed a rational connection between the facts found and the choices made. *See Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

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<sup>8</sup> By order dated January 21, 2020, the undersigned denied Employer's request to file a brief in support of its appeal and rejected Employer's arguments related to prejudice resulting from the CO's alleged failure to timely provide Employer's counsel with a copy of the Appeal File.

29, 43 (1983). Therefore, for the reasons discussed below, it must be concluded that the CO's determination denying Employer's request for temporary labor certification was not arbitrary and capricious.

#### *Failure to Establish a Peakload Need*

As set forth above, 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).

Employer asserted that it had successfully demonstrated a temporary, peakload need for the period of February 3, 2020 through November 20, 2020 based on its anticipated need for temporary painters in 2020, the seasonal demands of the construction industry, and the weather and climate conditions in Austin. (*See* AF 33-88, 95-167.) To support its assertion, Employer submitted records related to payroll, staffing, and taxes; support letters from customers and a trade organization; and weather and climate data. However, after a thorough review and analysis of this evidence submitted, the CO found that Employer had not established a temporary, peakload need.

Initially, the CO determined that records related to Employer's payroll, staffing, and taxes were insufficient to establish an increased need for temporary painters for the alleged period of need. Specifically, the CO noted that Employer had not submitted payroll records from 2018, as requested in the Notice of Deficiency. Employer only submitted tax records from 2018. These records did not distinguish between painters and other types of employees or between permanent and temporary workers. Rather, the 2018 tax records simply refer to the total number of workers and the amount of wages paid.

The CO also considered the records submitted from 2019 to be incomplete and insufficient to support Employer's alleged peakload need. Upon examination, these records too do not distinguish between painters and other employees. Moreover, Employer explained that it was unable to hire any temporary workers in 2019 until June. Because of this, these records are not indicative of Employer's actual need for temporary workers in 2019. Finally, as the CO noted, the 2019 payroll records did not include any information for December 2019, an off-peak month. Employer's 2019 overtime records also did not support its assertion because they did not indicate the number of employees (only the number of hours worked and wages earned) and only covered January 2019 through June 2019 (not the entire year). Without information related to the number of temporary painters employed in 2018 or in December 2019, the CO was not able to evaluate whether Employer actually experienced a peakload need for temporary labor during the alleged period of need. Accordingly, the CO reasonably concluded that these records do not support Employer's alleged peakload need.

The CO had adequate support for finding that the records related to Employer's payroll, staffing, and taxes do not support its assertion of a peakload need. Crucially, the information from years 2018 and 2019 provided by Employer did not enable the CO to ascertain the number

of temporary and permanent painters employed by Employer on a monthly basis. Without a clear picture of the relevant month to month staffing levels, the CO could not have determined if Employer actually needs to supplement its permanent staff due to a temporary need. Thus, the undersigned concludes that the CO reasonably concluded that these records do not support Employer's alleged peakload need.

Although the past records relating to payroll, staffing, and taxes were insufficient, the record before the CO also contained support letters from customers and a trade organization (ABC Central Texas) and Employer's projections for 2020. The CO determined that these records also do not support Employer's alleged peakload need. The CO noted that the support letters from customers did not mention the number of painters that would be needed. Moreover, the support letters did not show that painting services were not also needed throughout the year, *i.e.*, in the non-peak season. They also did not show when within the alleged peakload season the services will be required. Moreover, the support letters also do not explain why Employer's services are in demand during the alleged peak season, why the alleged peak season begins in February, and why the same services could not during the off-peak season. The CO then explained that the letter from ABC Central Texas did not help Employer's cause because it addressed the construction industry as a whole and was not specific to the commercial painting industry.

Finally, after finding all of the evidence on which Employer purported based its 2020 projections on to be unreliable, the CO permissibly rejected the projections as unsupported assertions. *See BMC West Corp.*, 2016-TLN-00039 (May 18, 2016) (citing *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013), "[a] bare assertion without supporting evidence is insufficient to carry the employer's burden of proof."). Thus, once again, the undersigned concludes that the CO reasonably concluded that the support letters and Employer's 2020 projections did not support Employer's alleged peakload need.

The CO also determined that the information related to the weather and climate in Austin does not support Employer's alleged peakload need. Employer claimed it was not "ideal" to provide certain painting services when the temperature drops below 50 degrees or the humidity level exceeds 85%. However, the data cited by Employer belies its own assertions. The CO pointed out that this data showed that the average low temperature in Austin during the month of February is below 50 degrees. Yet February (or all but three days of it) is included in Employer's alleged peakload season. Moreover, these same sources show that the average relative humidity is below 85% all year-round in the area and actually highest during the alleged peakload season.

Additionally, with respect to Employer's weather's related claims, the CO disregarded the support letters from customers and ABC Central Texas. The CO reasoned the support letters from customers did not explain if the alleged increase need for painting services from February to November was weather-related and the letter from ABC Central Texas relied on average temperature figures that were inconsistent with those proffered by Employer. Based on the foregoing, it is clear that the CO considered all of the evidence and reasonably concluded that the weather related information does not support Employer's alleged peakload need. Thus, the undersigned finds no fault with the CO analysis of the weather and climate related information submitted by Employer.

Based on the foregoing analysis, the undersigned agrees with the CO's conclusion and finds that the CO reasonably concluded that Employer failed to establish a temporary, peakload need for 35 painters. The CO clearly identified the deficiencies with respect to Employer's application and initial submissions. The CO explained why the information initially submitted by Employer was insufficient and why the additional information submitted in response failed to overcome the deficiencies. The CO's determinations are adequately supported by the record. All of the relevant evidence was considered and the CO's has satisfactorily explained her conclusion. Accordingly, the CO's determination was not arbitrary and capricious.

*Failure to Establish Temporary Need for the Number of Workers Requested*

Employer also claims that it has established a temporary need for the number of workers requested, thereby satisfying 20 C.F.R. § 655.11(e)(3) and (4). The CO, however, concluded otherwise. The CO explained that Employer was unable to justify its request for 35 temporary painters because the information submitted was insufficient. For the same reasons discussed above, the CO concluded that information submitted by Employer was not sufficient to allow the CO to evaluate Employer's actual monthly staffing levels throughout the entire year. Thus the CO could not determine if a peakload season even existed. The CO again noted that the support letters relied upon by Employer did not indicate how many painters would be needed and during which months.

Here, the CO reasonably concluded that Employer did not establish a temporary need for 35 painters from February to November. The CO clearly explained in the Notice of Deficiency the information needed to overcome the deficiency and the CO reasonably concluded that the information submitted by Employer did not. A finding that Employer met the requirements of 20 C.F.R. § 655.11(e)(3) and (4) would have to be premised on determining Employer had established a temporary need under 20 C.F.R. § 655.61(a) and (b). Because Employer has failed to establish a temporary, peakload need, Employer necessarily cannot demonstrate a temporary need for the specific number of workers requested.

**CONCLUSION**

For the foregoing reasons, the evidence submitted by Employer fails to establish a temporary, peakload need for 35 painters from February 3, 2020 through November 20, 2020. The CO's denial of Employer's labor certification application was not then arbitrary and capricious. In light of the foregoing, the record establishes that Employer failed to establish that the temporary nature of the job opportunity, and the temporary need for the number of workers requested.

**ORDER**

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

For the Board:

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey