



**Issue Date: 29 April 2020**

**BALCA Case No.: 2020-TLN-00035**  
**ETA Case Nos.: H-400-20002-229313**

*In the Matter of:*

**CENTURION INDUSTRIES**  
**d/b/a A-LERT ROOF SYSTEMS,**  
*Employer.*

**DECISION AND ORDER VACATING DENIAL OF CERTIFICATION AND 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 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. § 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* (“Application”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification (“OFLC”) of the 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).

For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is vacated.

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Department of Defense and Labor Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<sup>2</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification 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.

## STATEMENT OF THE CASE

On January 2, 2020, the Employer filed an Application seeking to hire 10 “Roofer Helpers” from April 1, 2020, to January 1, 2021, based on a temporary peak load need. (AF 183-202).<sup>3</sup>

On February 7, 2020, the CO issued a Notice of Deficiency. (AF 175-182). First, the CO stated the Employer did not sufficiently demonstrate the requested standard of temporary peak load need. Second, the CO stated the Employer failed to establish a temporary need for the number of workers requested and did not indicate how it determined it needed 10 workers during the requested period of need. Third, the CO stated the Employer listed multiple areas of employment that did not appear to be within the same area of intended employment.

On February 24, 2020, the Employer filed a response to the Notice of Deficiency (AF 123-174), and attached the requested documentation, including: the U.S. Citizenship and Immigration’s website page on “Guidance on ‘Temporary Need’ in H-2B Petitions,” and the Cornell legal definition of “preponderance of the evidence” (AF 136-137); monthly summarized Payroll Receipts for permanent workers (AF 138-139); data from weather.com showing monthly average precipitation of the Dallas/FW Metropolitan Statistical Area (AF 141-144); data from University of Texas A&M showing average precipitation in East Texas (AF 145-147); data from weather.us.com showing Texas climate by month (AF 148-151); Monthly Sale Reports (AF 152-153); Contract Billings and Receipts (AF 154-168); and Project Summaries and Scheduled Projects for 2020 (AF 169-174). In support of its argument the roofer workforce works the most hours between April and December, the Employer relies on the 2018 and 2019 payroll reports. (AF 125). The Employer argues the higher demand between April and December requires more workers to work more total hours to meet the demands that is not present during the off-peak season. *Id.*

On April 9, 2020, the CO issued a Final Determination, finding the Employer’s explanations and documentation did not overcome the first and second deficiencies. (AF 108-121). The CO stated the 2018 and 2019 pay roll records showed the Employer used permanent workers year-round and that these workers worked overtime year-round, but the records showed “no significant increase in hours worked from April through January 1st, and no significant decrease from January 2nd through March.” (AF 117). The CO stated March 2019 had the lowest numbers of hours worked in the off-peak season (7,171 hours), but that number was higher than the numbers worked in June (7,126 hours), November (7,028 hours), and December (6,513 hours). *Id.* The CO stated the 2019 payroll record did not indicate a significant difference between the number of workers in the off-peak season versus the peak load season, and that the 2018 payroll record showed there was not an increase in the number of workers until August and that only four months had a higher number of workers than the month of February. *Id.* The CO stated March of 2019 utilized more workers when compared to the peak load season months of May, June, July, October, November, and December. *Id.*

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<sup>3</sup> References to the appeal file will be abbreviated with an “AF” followed by the page number.

On April 9, 2020, the Employer timely requested administrative review, arguing the empirical data demonstrates increased activity and a need for temporary employees during its peak load season. (AF 1-107). First, the Employer argues that the 2018 and 2019 payroll records demonstrate an increase of monthly overtime hours worked during peak load season. (AF 5-6). The Employer argued the 2018 record showed a significant increase in overtime hours worked during peak load season which “clearly shows than an absence in work to perform during the peak load months is not the case, as was implied in the reasoning from the CO’s analysis of the data. This marked increased in overtime hours is consistent throughout the peak load season, with the data showing an increase of 90% during the peak load season.” (AF 6). Employer argues the same trend of increased overtime hours during peak load season is seen in 2019 with an increase of 84%. *Id.* Employer argues this trend of increased overtime hours worked shows an increased period of activity which only occurs during the peak load season as they struggle to meet demand.

Second, the Employer argues the CO erred on focusing on the number of total employees per month and total number of hours worked as evidence to suggest that there was no need for temporary workers. (AF 7). The Employer argues the CO’s reasoning that there was a lack of an increase in workforce is irrelevant and instead the CO should have put that information in context with the overtime records. *Id.* The Employer argues “[a] few number of workers does not correlate to either a lack of workload or a lack of available work, and a turnover of workers does not correlate to a lack of work as suggested by the CO.” *Id.* The Employer argues when this data is compared to the sales data it shows that its sales increase the most during this period and it is clear that it has a definitive peak load period. (AF 10).

Lastly, the Employer argues that a trend supporting a temporary peak load need is present despite the present outliers. (AF 7-8). Employer argues a cause of the outlier months is increment weather and unsafe wind speeds which causes work stoppage and does not truly reflect how busy it is during the peak season. (AF 7). The Employer argues an “one-time drop (an outlier) or fluctuation in hours worked should not negate proof of temporary need if when the entire data set is taken into account it proves a trend that showed a clear need, for a temporary period.” (AF 8).

On April 9, 2020, the undersigned issued a Notice of Assignment and Briefing Schedule, allowing the parties to file briefs. Neither party elected to file appellate briefs in this matter.

## **DISCUSSION**

At issue on appeal is whether the Employer has adequately documented a temporary, peak load need for 10 “Roofer Helpers” from April 1, 2020, to January 1, 2021. The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal arguments and such evidence that was actually submitted to the CO in support of the Application. 20 C.F.R. § 655.61(a), (e).

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, peak load, or intermittent. *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). To qualify for peak load 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.” *Id.*; *see, e.g., Masse Contracting*, 2015-TLN-00026 (Apr. 2, 2015); *Natron Wood Prods.*, 2014-TLN-00015 (Mar. 11, 2014); *Jamaican Me Clean, LLC*, 2014-TLN-00008 (Feb. 5, 2014). An employer must also demonstrate the number of workers and period of need requested are justified, and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3), (4). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

Upon review of the payroll records from 2018 and 2019, I concur with the CO that the data of *total regular hours* worked does not support a peak load need from April 1, 2020 to January 1, 2021. In the Final Decision, the CO stated the payroll records showed that there was no significant increase of total regular hours worked from April through January 1, and no significant decrease in hours worked from January 2 through March.

However, I find the CO failed to take into account the payroll records showing an increase of total overtime hours worked during the Employer’s peak load season compared to its off-peak season. For 2018, the payroll record data shows the peak load months of April (239 total overtime hours worked), June (205 total overtime hours worked), July (229 total overtime hours worked), August (397 total overtime hours worked), September (227 total overtime hours worked), October (132 total overtime hours worked), and November (203 total overtime hours worked) had higher total number of overtime hours worked when compared the total overtime hours worked during the off-peak load months of January (50 total overtime hours worked), February (27 total overtime hours worked), and March (70 total overtime hours worked). The increase of total overtime hours worked during the peak load season when compared to off-peak season is also demonstrated and consistent in the Employer’s 2019 payroll records. The fact that there was not an increase of total overtime hours worked by permanent workers during the off-peak season months demonstrates that Employer does not have a permanent, year-round need, but instead demonstrates that the Employer has a temporary peak load need between April and January 1.

I find the CO erred in denying certification by not considering the total of overtime hours worked during the Employer’s peak load season. Accordingly, I find that the Employer has met its burden of establishing a peak load need for 10 Roofer Helpers for April 1, 2020 to January 1, 2021, and the Employer is entitled to certification.

### **ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer’s denial of labor certification in the above-captioned matter is **VACATED** and this matter is **REMANDED** to the CO for further proceedings consistent with this decision.

I am requesting that this Decision and Order be served on the following parties by email: (1) Employer's counsel, Elizabeth Dubrow, esq.; (2) Office of the Solicitor; and (3) Office of Foreign Labor Certification.

**SO ORDERED.**

LARRY W. PRICE  
Administrative Law Judge

LWP/AME/ksw  
Newport News, Virginia