



Issue Date: 23 December 2019

**BALCA Case No.:** 2020-TLN-00005  
**ETA Case No.:** H-400-19234-045159

*In the Matter of:*

**FALLS FRAMING LLC,**  
*Employer.*

Appearances: Aaron Bernard, Esquire  
The Bernard Firm, P.L.C.  
Ames, Iowa  
*For the Employer*

Rebecca Nielsen, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

Before: **NORAN J. CAMP**  
Administrative Law Judge

**DECISION AND ORDER**  
**REVERSING DENIAL OF CERTIFICATION AND REMAND**

This case arises from Falls Framings’ (“Employer”) request 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, peakload, 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

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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).

<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.

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. If the CO denies 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 will be *reversed*.

## I. BACKGROUND

### A. H-2B Application.

On August 22, 2019, Employer filed an H-2B Application for Temporary Employment Certification (Form ETA-9142B). Administrative File (“AF”) at 109-47. Employer sought to hire 25 “Helpers—Carpenters” for a project in Dothan, Alabama, based upon a temporary “Peakload” need, from November 5, 2019 to May 15, 2020. *Id.* at 109. In its Statement of Temporary Need, Employer stated:

Falls Framing LLC was formed to engage in framing and erecting buildings. ... The majority of the framing work will be completed in the winter months .... Because fertilizer storage facilities are built to be ready for the first period of fertilizer demand, there is little need for additional framers during the summer months of the year. This naturally creates a peakload need for framing construction by Falls Framing LLC and not a year-round need.

*Id.* at 114. In specifically addressing the need for 25 workers, Employer stated that they were needed because of “the vast size of the buildings which must be framed.” *Id.*

### B. Notices of Deficiency & Responses.

On September 3, 2019, the Certifying Officer issued a Notice of Deficiency, finding that the Application could not be accepted because Employer “did not sufficiently demonstrate the requested standard of temporary need.” AF at 102, 106. Specifically, the CO stated that “it is not clear how one project in its operation establishes a peak need.” AF at 106. The CO required “[f]urther explanation and documentation.” AF at 106.

Employer’s counsel submitted a letter in response, addressing the Notice of Deficiency. AF at 89-101. I do not address that letter in detail here, as I find that the application should have been granted on the basis of the information originally submitted.

## II. DISCUSSION

### A. Standard of Review.

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 argument, and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.61(a), (e). The standard of review is not specified in the regulations, and prior BALCA decisions puzzled over what standard to apply. *See ETA v. International Carrier Enterprise, Inc.*, 2020-TLN-00008 at 5 (BALCA Nov. 18, 2019) (noting BALCA decisions have variously considered whether the CO's decision was "arbitrary and capricious," whether it was "legally and factually sufficient light of the written record," or whether it withstood *de novo* review). Employer here argues that the "arbitrary and capricious" standard applies. I need not resolve the issue here, as I find that the CO's decision is erroneous even under the more stringent "arbitrary and capricious" standard.

Employer bears the burden of demonstrating eligibility for the H-2B program. *See* 8 U.S.C. § 1361. 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 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b). Temporary need generally lasts for less than a year. 8 C.F.R. § 214.2(h)(6)(ii)(B). However, the CO is instructed to deny the Application if the need exceeds nine (9) months. 20 C.F.R. § 655.6(b). To qualify for peakload need, an employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, 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.*

The issue before me is whether the CO properly denied certification on the basis that Employer did not establish a temporary need for twenty-five (25) "Helpers – Carpenters" during its alleged peakload period of November 5, 2019 to May 15, 2020.

### B. Resolution.

#### 1. Seasonal or short-term demand for workers.<sup>3</sup>

In support of its Application, Employer submitted a letter from its owner explaining why the need was temporary. AR 118-20. The letter is arguably conclusory, and I cannot say it was arbitrary and capricious for the CO to issue a Notice of Deficiency ("NOD").

However, in response to the NOD, Employer submitted charts showing, for 2018 and for January to September 2019 (the response was submitted mid-September, so there are no numbers for October through December 2019), the number of workers, their hours, earnings for

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<sup>3</sup> The CO does not challenge the other requirements, namely, that Employer regularly employs permanent workers to perform the services, and that the temporary additions will not become a part of the petitioner's regular operation. Accordingly, I do not address these issues.

permanent helper-carpenters and earnings for temporary helper-carpenters. AF at 98-101. The charts show that helper-carpenters are engaged in work at a higher rate during Employer's alleged peakload periods than during other times of the year. Specifically, in 2018, total work hours during the alleged peakload months averaged 9,184 work hours per month (64,291 hours total from November to May 2018), and 5,959 work hours per month during the non-peak months (29,797 hours total from June to October 2018). In 2019, total work hours during the alleged peakload months averaged 12,346 work hours per month (61,729 hours total from January to May 2019), and 3,406 work hours per month during the non-peak months (13,625 hours total from June to September 2019).

The CO rejected the response, stating that the need is based "on a proposal that has not been approved or awarded," and that "a single contract (if secured) does not demonstrate a peakload temporary need." AF at 11. However, the CO does not explain why approval or awarding of the contract is required, nor where in the regulations (or even in sub-regulatory guidance), such a requirement is set forth. Also the CO does not explain the significance of its reference to "a single contract." Its significance is not obvious from the CO's letter, and I am not directed to any regulation or guidance to explain it.

The CO further rejected the response because "it is unclear how the submitted payroll applies to the current case if the employer has not performed any jobs in Dothan, Alabama." AF at 12. However, Employer has shown that its proposed contract is for Dothan, Alabama. *See* AR 122, 125, 133, 136-38. The CO does not explain why prior job experience in Dothan is required, or relevant here, nor identify any regulation or guidance on the matter. The CO further rejected Employer's claim that cold mid-west weather played a role here. AF at 12. The criticism is well-taken, as Dothan, AL is not in the mid-west, and I accept the CO's assertion that its winter temperatures are moderate. However, this criticism does not warrant rejecting the Application, either by itself, or in combination with the CO's other criticisms.

Finally, the CO states that Employer's business "appears to involve acquiring and entering into contracts for its services," and that this "does not demonstrate a specific peakload need." AF at 10. The CO does not explain the relevance of the Employer's entering into contracts, or why entering into contracts should, on its own, demonstrate peakload need. As discussed above, Employer demonstrated peakload need through the charts it submitted.

## 2. Need for 25 temporary workers.

Employer's Application and its response to the NOD contain sufficient information to justify the need for 25 temporary workers. It sets forth the enormous size of the building to be constructed, and the time frame within which it must be completed. *See* AF at 95-96, 114.

The Notice of Deficiency ("NOD") rejects Employer's explanation without adequately stating why they are deficient. *See* AF at 107. Instead, the NOD simply asks for different explanations, summaries and documents. The NOD does not indicate whether the additional requested information is called for by statute or regulation – the cited regulation, 20 C.F.R.

§ 655.6(a) and (b) makes no mention of it – or even if some resource on DOL’s website mentions it.<sup>4</sup>

In any event, Employer’s response to the NOD further explains the need for the 25 temporary workers. *See* AF at 95-96, 98-101. It also provides the other information requested in the NOD, or adequately explains why that information is not forthcoming.

The CO found that the Employer’s response “did not clearly support the employer’s request for 25 temporary workers during its requested period of need,” on the ground that the need is based upon “a proposal that has not been approved or awarded,” there is “no list of projects” in the area, and Employer “has not performed any jobs in Dothan, Alabama.” AF at 13-14. However, the CO offers no explanation for why any of these grounds warrants a denial of the Application.

Accordingly, the denial of the Application on this basis is arbitrary and capricious, and cannot stand.

### **III. ORDER**

For the reasons set forth above, pursuant to 20 C.F.R. § 655.61(e), **IT IS HEREBY ORDERED** that:

1. The CO's denial is **REVERSED**; and
2. This matter is **REMANDED** to the CO for the issuance of the Notice of Acceptance for the 25 requested temporary workers, and for any other appropriate processing in accordance with the regulations.

**SO ORDERED.**

For the Board:

**NORAN J. CAMP**  
Administrative Law Judge

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<sup>4</sup> The NOD cites <http://www.foreignlaborcert.doleta.gov> (last visited by the court on December 23, 2019), but nothing on that page mentions the additional information the NOD calls for. And, my own foray deeper into the site did not reveal this information.