

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 04 June 2020**

**BALCA Case No.: 2020-TLN-00045**  
**ETA Case No.: H-400-20002-224404**

*In the Matter of:*

**AMERICLEAN OF PCB, LLC,**  
*Employer.*

Before: Jonathan C. Calianos  
Administrative Law Judge

Appearances: Richard Alvoid, Esq.  
Richard Alvoid, PA Immigration Law Offices  
Pensacola, FL  
*For Employer*

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Washington, D.C.  
*For the Certifying Officer*

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

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, 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>

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). *See Further Consolidated Appropriations Act, 2020*, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

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 affirmed.

### **STATEMENT OF THE CASE**

On January 2, 2020, Employer filed an application seeking to hire 80 full-time “Housekeepers” from April 1, 2020, to November 1, 2020, in Panama City Beach, Florida, based on a temporary peakload need. (AF 102, 105).<sup>3</sup> In its Statement of Temporary Need, Employer asserted that its “peak business months are from April to November of each year for the course of the tourist season along the Gulf Coast of Florida.” (AF 102). Employer provided documentation in support of its application, including a statement from Employer’s General Manager, Jason Dishon, articles about vacationing and condominiums in Panama City Beach, an article about housekeeper staffing, Monthly Revenue by Service for 2019, Profit & Loss by Month for 2019, Contractor Compensation by Service for 2019, and six contracts for housekeeping services. (AF 120-200).

On February 13, 2020, the CO issued a Notice of Deficiency (“NOD”), stating that Employer did not “sufficiently demonstrate the requested standard of temporary need,” as

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<sup>2</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 *et seq.* (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

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

required by 20 C.F.R. § 655.6(a) & (b).<sup>4</sup> (AF 99-100). The CO requested further information to cure the deficiency, including a statement explaining Employer's temporary peakload need and the following additional documentation:

1. Monthly invoices from previous calendar year 2019, clearly showing that work will be performed for each month during the requested period of need . . . .;
2. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, 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; and
3. An explanation of the data in submitted payroll documentation.

(AF 100).

On February 21, 2020, Employer filed a Response to the NOD, attaching Monthly Invoices for 2019, a Payroll Summary by Employee for 2019, a Payroll Summary showing total wages earned for 2019, and a 1099 Transactions Detail Report for 2019. (AF 36-94). Employer also provided an Affidavit from its General Manager, Jason Dishon, stating that the invoices provided show customers requesting cleaning services for the previous year and the monthly payroll reports for the previous calendar year show wages earned by permanent and temporary employees. (AF 44).

On March 25, 2020, the CO issued a Final Determination denying certification based on a failure to establish a peakload need pursuant to 20 C.F.R. § 655.6(a) & (b). (AF 27-34). The CO stated that while Employer submitted invoices for May 1, 2019, through November 27, 2019, the requested dates of need are for April 1, 2020, through November 1, 2020, and the invoice data did not support the period of need requested. (AF 32). The CO further found that the payroll data submitted was not summarized as a monthly payroll report identifying for each month, and separately for permanent and temporary employees, the total number of workers or staff employed in the requested occupation and the total earnings received, and was not signed by

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<sup>4</sup> The CO identified two additional deficiencies in the NOD: failure to establish a temporary need for the number of workers requested as required by 20 C.F.R. § 655.1(e)(3) & (4); and failure to submit a complete and accurate ETA Form 9142 as required by 20 C.F.R. § 655.15(a). Because I uphold the denial of certification based on Employer's failure to establish a peakload need, I need not address these additional deficiencies herein. (AF 27-34).

Employer attesting that the information submitted was compiled from Employer's actual accounting records. (AF 32). The CO determined that because the payroll data did not include all the information specified, it was insufficient to support a peakload need. (AF 32). Lastly, the CO stated that Employer failed to provide an explanation of temporary need as requested in the NOD. (AF 32). The CO, therefore, concluded that "the Employer's explanation and documentation of its temporary need did not overcome the deficiency." (AF 32).

On April 9, 2020, Employer timely requested administrative review of the denial of its application before the Board. (AF at 1-26). Employer argued that contrary to the CO's findings, it did provide an explanation for its peakload need, namely that its need is based on the warmer months, which are attractive to both tourists and Florida residents. (AF 7). Employer further asserted that the CO improperly discounted its monthly invoices, stating that the CO specifically requested invoices from 2019, and not 2020, and the invoices covered seven of the eight months of the season for which temporary need is alleged. (AF 5). Employer stated that it produced invoices as requested by the CO and these invoices show the job opportunity is temporary in nature and will not exceed one year. (AF 5-6). As for the payroll data, Employer argued that while it was not presented in the manner requested in the NOD, it did distinguish between wages for fulltime staff and seasonal employees. (AF 6). Employer averred that the 1099 Transaction Detail Report shows months and wages earned by each temporary worker for 2019, and the Payroll Summary shows the wages earned by permanent employees for 2019, which coupled with the Payroll Summary by Employees, shows the hours worked and wages earned per month. (AF 6). Employer claimed that the evidence as a whole establishes a temporary need beginning on April 1, 2020. (AF 6).

The matter was referred to BALCA and assigned to me. On May 20, 2020, I issued a Notice of Docketing and Expedited Briefing Schedule allowing the parties to file briefs within seven business days. On May 26, 2020, Employer filed a letter indicating that it will be resting on the brief submitted with its Request for Review. On May 29, 2020, the CO filed an appellate brief, seeking affirmance on the basis that Employer's documentation provided did not establish a peakload need as required by the regulations.

### **DISCUSSION**

At issue on appeal is whether Employer has adequately documented a temporary, peakload need for 80 Housekeepers from April 1 to November 1, 2020. 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, peakload, or intermittent. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii); 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 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.

Employer argues that it has a peakload need for Housekeepers based on a tourist season along the Gulf Coast of Florida. (AF 7, 102). In support of its alleged peakload need, Employer submitted an article from U.S. News entitled "Best Times to Visit Panama City Beach," which states that that best time to visit the area is May through October, and that there is a low season from November through February due to cooler temperatures. (AF 121). While this article provides some support for a tourist season, the article, standing alone, cannot establish a peakload need for Employer's specific business. Employer did not provide any explanation, with its initial application, or in response to the NOD, of how its housekeeping services are tied to the weather or a tourist season.

I further find that the documentation provided is insufficient to establish the requisite peakload need. Employer provided payroll data for 2019, identifying 21 employees on the payroll along with their wages for the year. (AF 82-83). There is no indication of whether the employees identified were housekeepers or whether they were permanent or temporary staff, as required by the NOD. (AF 82-83). In fact, Employer conceded that the payroll data accounted

only for permanent employees. (AF 6). The payroll data also fails to provide a monthly breakdown of wages earned as required by the NOD and is silent as to number of hours worked. (AF 6, 82-83). Without a monthly accounting of the total wages earned and/or hours worked by both permanent and temporary employees, I cannot assess whether there is an increased need for temporary workers during the alleged peakload period of April 1 through November 1, compared with non-peakload months.<sup>5</sup> (AF 82-83).

Employer additionally submitted the following documents, all pertaining to the year 2019: an Invoice List by Date, a 1099 Transaction Detail Report, Monthly Revenue by Service, Profit and Loss by Month, and Contractor Compensation by Service. (AF 50-81, 84-94, 129-31). The fatal flaw with all these documents is that none of them cover the full calendar year of 2019, but rather only reflect the months of May through either October or November.<sup>6</sup> Employer failed to provide any explanation as to why it did not submit data for the other months of the year, including the month of April, which is part of the alleged peakload season. (See AF 5). Without data for the entirety of the 2019 calendar year, I cannot assess whether there is an uptick in revenues or wages during the alleged peakload months, compared with the non-peak load months, to support a finding of a peakload need.<sup>7</sup> (AF 129).

Employer asserts that all the evidence, when viewed as a whole, addresses both permanent and temporary (or contractor) employees and establishes a peakload need. (AF 6). However, for the reasons discussed above, I find that each document provided is missing critical information, precluding any comparison of peakload versus non-peakload months, for either temporary or permanent employees, and without this information I cannot determine whether there is an increased demand for workers during the dates requested. Reviewing the documentation as a whole does not cure these major deficiencies with the data provided.

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<sup>5</sup> Without a monthly breakdown, I also cannot confirm that Employer has a need for permanent employees year-round, a required element of peakload need under the regulations. 8 C.F.R. § 214.2(h)(6)(ii) (“[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.”) (emphasis added).

<sup>6</sup> While some of the documents suggest in the heading that they cover a longer period of time, up to the full calendar year, a closer look at the actual data provided shows dates from May to either October or November only. (See AF 50-81, 84-94, 103).

<sup>7</sup> While Employer also submitted six contracts for housekeeping services, these contract do not establish a peakload need, as the contracts indicated that the services would be performed throughout the contract period, ranging from one to two years, and therefore based on these contracts, the services provided were not tied to any particular season. (AF 132-63).

After reviewing all of the documentation provided in this matter and for the reasons discussed above, I find that Employer has not met its burden of establishing it has a peakload period of need for 80 Housekeepers from April 1, 2020, to November 1, 2020.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
District Chief Administrative Law Judge

Boston, Massachusetts