In the Matter of:

PRINCIPAL BUILDERS, INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE
DENIAL OF CERTIFICATION

Employer requests review of the Certifying Officer’s (CO) Non-Acceptance Denial rendered in this H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States on a one time, seasonal, peak load, or intermittent basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (Department). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer’s request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination. A CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or

---

1 20 C.F.R. Part 655.
3 8 C.F.R. § 214.2(h)(6)(iii).
4 20 C.F.R. § 655.61(a).
5 20 C.F.R. § 655.61.
otherwise not in accordance with law. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action.

**PROCEDURAL BACKGROUND**

On 2 Jan 20 Employer applied for H-2B temporary labor certification, seeking approval to hire ten foreign nationals as Construction Laborers from 1 Apr 20 to 15 Dec 20, based on a peak load need.

On 3 Mar 20, the CO issued a Notice of Deficiency (NOD), determining that employer failed to establish the job opportunity as temporary in nature; failed to establish temporary need for the number of workers requested; and failed to provide job order assurances and content.

On 6 Mar 20, Employer responded, including additional payroll information, a supplemental information to justify the dates of need; a description of Employer’s business history, activities, and schedule of operations throughout the year; a list of 2019 transactions by Customer; how it determined the number of workers it requested; and daily temperatures for all of 2019.

On 30 Mar 20, the CO issued a Final Determination denying the H-2B application for failing to establish the job opportunity as temporary in nature and failing to establish temporary need for the number of workers requested.

On 13 Apr 20 Employer filed a Notice of Appeal briefing the issue and claiming the CO arbitrarily and capriciously denied the application. On 21 Apr 20 the case was assigned to me, and on 22 Apr 20 I issued an order giving the parties an opportunity to file briefs. As Employer’s brief had already been submitted, it did not further respond. The Solicitor did not file a brief.

**FACTUAL BACKGROUND**

Employer is a construction company in Iowa, established in 2009, initially providing wood and steel buildings and eventually expanding into concrete services last year. It seeks 10 construction laborers to augment its permanent staff due to an increased demand for its work as

---

6 See Brook Ledge, Inc., 2016-TLN-33, slip op. at 5 (10 May 16).
7 20 C.F.R. § 655.61(e).
8 AF 123.
9 AF 119-120.
10 AF 120-121.
11 AF 121-122.
12 AF 37-114.
13 AF 24-36.
14 AF 128.
weather warms.\textsuperscript{15} Employer only recently started having workers do these duties and does not yet have a full year of payroll records, but claims the number of workers, total hours worked, and total earnings received are highest from April through November.

**APPLICABLE LAW**

**Scope and Standard of Review**

BALCA’s scope of review is limited to the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may only contain legal argument and such evidence actually submitted to the CO.\textsuperscript{16} The employer bears the burden of proof concerning its entitlement to a certification.\textsuperscript{17} The regulations do not specify a standard of review for BALCA but the Board has adopted the arbitrary and capricious standard.\textsuperscript{18}

**H-2B Requirements**

The employer bears the burden of proof on each of the four requirements of an H-2B application. The CO will review the *H-2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

- (1) The job classification and duties qualify as non-agricultural;
- (2) The employer's need for the services or labor to be performed is temporary in nature . . . ;
- (3) The number of worker positions and period of need are justified; and
- (4) The request represents a bona fide job opportunity.

If an employer fails to meet any of the four factors, a CO’s denial should be affirmed.

**Number of Workers Requested**

An employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity.\textsuperscript{19}

**DISCUSSION**

In the Notice of Deficiency, in regards to Deficiency 2, the CO requested supporting evidence and documentation to establish that the number of workers being requested for certification was true and accurate and represented bona fide job opportunities.\textsuperscript{20}

\textsuperscript{15} Id.

\textsuperscript{16} 20 C.F.R. § 655.61, \textit{but see Herder Plumbing, Inc.}, 2013-TLN-25, slip op. at 4 (4 Feb 13) (Procedural due process requires employer be permitted to respond to basis for denial where employer did not previously have opportunity to establish relevant facts.).


\textsuperscript{18} \textit{Brook Ledge}, 2016-TLN-3 (10 May 16); \textit{Three Season Landscape Contracting Services}, 2016-TLN-45 (15 Jun 16).

\textsuperscript{19} 20 C.F.R. § 655.11(e)(3) and (4).
The employer’s response must include, but is not limited to, the following:
1. An explanation with supporting documentation of why the employer is requesting 10 Construction Laborers for Coulter, Iowa during the dates of need requested.
2. If applicable, documentation supporting the employer’s need for 10 Construction Laborers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll report for the 2018 calendar year, and complete 2019 calendar year, that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Construction Laborers in the requested area of intended employment of Coulter, Iowa, 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
4. An explanation of the data in submitted payroll documentation.
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

In response, Employer submitted a 2019 transaction list by customer (below). However, Employer did not submit this in the format directed in the Notice of Deficiency: “A summary listing of all projects in the area of intended employment for its previous calendar year. The list should include start and end dates of each project and worksite addresses.” It is difficult to determine from this list how this supports Employer’s request for 10 additional workers, especially since Employer included clients outside the area of intended employment.

20 AF 120-121.
21 AF 42.
Principal Builders, Inc.
Transaction List by Customer
January through December 2019

1802 - Eagle Grove, IA
1902 - Belmond, IA
1903 - Rake, IA
1904 - Belmond, IA
1905 - Duncombe, IA
1906 - St. Henry, OH
1907 - Welcome, MN
1908 - City of Coulter
1909 - Dows, IA
1910 - Clarkfield, MN
1911 - Sheffield, IA
1912 - Alexander, IA
1913 - Clear Lake, IA
1914 - Jewell, IA
1915 - Boone, IA
1916 - Northwood, IA
1917 - Denison, IA
Coulter, IA

Employer provided payroll charts (below) for 2019 for both its Permanent\textsuperscript{22} and Temporary\textsuperscript{23} workers with the following explanation\textsuperscript{24}

Principal Builders does not have payroll for 2018 because it did not employ permanent or temporary construction laborers to perform concrete work during that time. Prior to 2019, the company built wood and steel buildings (not concrete work). In 2019, the company expanded into concrete and started to employ permanent employees for concrete construction in January 2019. The company did not have any temporary employees in January through of March 2019, and started employing temporary construction laborers in April. Thus, there is no data to report for temporary employees from January through March 2019. It should be noted that August 2019 seems to have a low number of hours.

\textsuperscript{22} AF 44.
\textsuperscript{23} AF 45.
\textsuperscript{24} AF 38.
This is because a group of workers was hired away from the company by another company, leading to a higher number of workers showing on payroll but less hours worked. The same is true for September and October. The company tried to hire additional people but they did not work a full month so less hours are seen in the payroll. The payroll has been updated to include December 2019.

<table>
<thead>
<tr>
<th>Month</th>
<th>Number of Permanent Workers in Occupation</th>
<th>Total Hours Worked by Permanent Workers in Occupation</th>
<th>Total Earnings Received by Permanent Workers in Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan-19</td>
<td>6</td>
<td>712.50</td>
<td>$14,256.99</td>
</tr>
<tr>
<td>Feb-19</td>
<td>6</td>
<td>865.00</td>
<td>$11,103.37</td>
</tr>
<tr>
<td>Mar-19</td>
<td>7</td>
<td>1,082.00</td>
<td>$23,503.51</td>
</tr>
<tr>
<td>Apr-19</td>
<td>7</td>
<td>1,098.00</td>
<td>$22,785.20</td>
</tr>
<tr>
<td>May-19</td>
<td>20</td>
<td>3,079.50</td>
<td>$48,924.25</td>
</tr>
<tr>
<td>Jun-19</td>
<td>23</td>
<td>4,291.50</td>
<td>$90,555.50</td>
</tr>
<tr>
<td>Jul-19</td>
<td>18</td>
<td>3,444.50</td>
<td>$68,356.50</td>
</tr>
<tr>
<td>Aug-19</td>
<td>18</td>
<td>1,663.50</td>
<td>$36,151.50</td>
</tr>
<tr>
<td>Sep-19</td>
<td>3</td>
<td>345.00</td>
<td>$7,738.00</td>
</tr>
<tr>
<td>Oct-19</td>
<td>7</td>
<td>900.50</td>
<td>$11,213.75</td>
</tr>
<tr>
<td>Nov-19</td>
<td>7</td>
<td>1,278.50</td>
<td>$33,670.76</td>
</tr>
<tr>
<td>Dec-19</td>
<td>13</td>
<td>1644.50</td>
<td>$51,958.28</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Month</th>
<th>Number of Temporary Workers in Occupation</th>
<th>Total Hours Worked Temporary Workers in Occupation</th>
<th>Total Earnings Received by Temporary Workers in Occupation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan-19</td>
<td>0</td>
<td>0</td>
<td>$-</td>
</tr>
<tr>
<td>Feb-19</td>
<td>0</td>
<td>0</td>
<td>$-</td>
</tr>
<tr>
<td>Mar-19</td>
<td>0</td>
<td>0</td>
<td>$-</td>
</tr>
<tr>
<td>Apr-19</td>
<td>1</td>
<td>17</td>
<td>$-</td>
</tr>
<tr>
<td>May-19</td>
<td>6</td>
<td>1476</td>
<td>$23,397.97</td>
</tr>
<tr>
<td>Jun-19</td>
<td>7</td>
<td>1535</td>
<td>$26,463.26</td>
</tr>
<tr>
<td>Jul-19</td>
<td>7</td>
<td>1553</td>
<td>$25,913.94</td>
</tr>
<tr>
<td>Aug-19</td>
<td>8</td>
<td>1587</td>
<td>$37,760.87</td>
</tr>
<tr>
<td>Sep-19</td>
<td>8</td>
<td>1694</td>
<td>$33,368.13</td>
</tr>
<tr>
<td>Oct-19</td>
<td>8</td>
<td>1780.25</td>
<td>$38,933.28</td>
</tr>
<tr>
<td>Nov-19</td>
<td>8</td>
<td>1708</td>
<td>$47,688.00</td>
</tr>
<tr>
<td>Dec-19</td>
<td>8</td>
<td>1299</td>
<td>$31,933.60</td>
</tr>
</tbody>
</table>

Employee also gave the following explanation of its need for 10 workers:

[t]he company has $3,000,000.00 worth of work to do this year in two different areas of Iowa, split equally. Each worker should be able to do $100,000.00 worth of concrete work per year. The company has 13 permanent workers, which can complete $1,300,000.00 worth of work. From April through December, $1,700,000 in additional
work needs to be completed. Since each worker is able to complete about $8333.33 per month, this means that an additional 23 workers will be needed in total for both areas of Iowa. Thus, the employer has decided to request 10 additional workers in the Coulter, Iowa area as a modest request, even though a total of 12 (11.5 workers) could possibly be needed during the period of need.

Employer provided no documentation or explanation at how it arrived at those numbers. It did not provide contracts, letters of intent, invoices, etc. that would help the CO determine the legitimacy of the 10 requested job opportunities. Employer argued in its request for review that it had initially submitted invoices for past work as well as some of its bid proposals for 2020, but notes that the CO neither cited nor acknowledged invoices and bid proposals that were included in the application. These documents show that Employer regularly works in the area of intended employment and throughout Iowa and expects to work in the same areas this year. If this is not enough evidence that the job exists and is temporary in nature, as outlined by the preamble to the Final Rule, then what is? The regulations are meant to be flexible. The regulations do not require a contract. The regulations do not require only payroll records. Instead, documentation of temporary need can be provided in other ways, and it is up to the employer to choose how to do so.

Employer submitted five invoices and three bid proposals from 2019 in the initial application. The regulation does not list “bid proposals” as a type of documentation that demonstrates that the job opportunity exists and is temporary in nature, though it does provide leeway in that “other evidence” may satisfy this requirement. I find, however, that in this case, bid proposals and Employer’s conclusory statement of amount of work it has in 2020 do not assist Employer in establishing the number of temporary workers requested.

Employer has the burden to show that a bona fide job opportunity for 10 workers exists. The bid proposals submitted show that there is potential for the job opportunity to exist, but without letters of intent or some other form of documentation showing that customers do indeed plan on using Employer’s concrete services, there is no documentation showing that any specific job orders have been accepted or that Employer’s need is not merely theoretical. The payroll reports and explanation, the list of customers in 2019, and all other provided documents do not help establish the request for a bona fide job opportunity for 10 concrete laborers.

As Employer has failed to show a temporary need for the number of workers it is requesting, I need not continue to review the additional deficiencies upon which the CO based his denial.

25 AF 7.
26 AF 188-203.
Employer has not carried its burden to establish entitlement, thus, I cannot find the CO’s denial to be arbitrary or capricious.

ORDER

In light of the foregoing, the Certifying Officer’s decision denying certification is AFFIRMED.

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge