

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 April 2020

BALCA Case No.: 2020-TLN-00033
ETA Case No.: H-400-20002-228753

In the Matter of:

RBD HOLDINGS, LLC,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Leon R. Sequeira, Esq.
Prospect, Kentucky
For the Employer

Matthew Bernt, Esq. Associate Solicitor and Tamara Y. Hoflejzer, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

**DECISION AND ORDER REVERSING THE CERTIFYING OFFICER'S DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This case arises from the request for review of RBD Holdings, LLC (“Employer”) in regard to the Certifying Officer’s (“CO”) denial of Employer’s 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);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this

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

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* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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).

BACKGROUND

On January 2, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 25 construction laborers for the period of April 1, 2020, to November 30, 2020. AF 30-201.³ Employer indicated that the nature of its temporary need was “peakload.” Employer attached a statement regarding its temporary need which included the following statement regarding its alleged peakload operations:

We specialize in pre-engineered steel structure building erection. Our peak load activities ramp up in early spring when weather is favorable and subsequently reduces with the onset of winter. The fall and winter seasons are a classic period for dangerous construction sites, where the ground is slippery and wet. The cold weather means that workers need to dress up warmly, with extra padding, this leads to less mobility and more accidents. The cold and wet seasons bring a plethora of issues that cover every aspect of construction. Preparing equipment with different oils that withstand the colder temperatures as well as protect them from rust and corrosion. Winter brings colder temperatures, saturated ground conditions and shorter daylight hours all of which make employment of large numbers of workers unnecessary since we never know when the weather will permit construction activities.

AF 54.

Employer also provided information regarding the average high and low temperatures in the Little Rock Arkansas area by month. *Id.* In regard to its peakload need Employer stated:

We require the assistance of H-2B workers based upon a peakload labor need, defined as regularly employing permanent workers to perform the services or labor, with a need to supplement this permanent staff on a temporary basis in order to adequately address a short-term demand with additional workers who do

² 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 have 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.

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

not become a part of our regular operation. Specifically, our temporary need is based upon a peakload need in that:

- A. we operate year round with a peak need February – December;
- B. we need to supplement with workers on a temporary basis;
- C. this temporary need is the result of increased short-term customer demand, manifested through increased construction activities during the fair weather months; and
- D. these temporary workers will not become part of our regular operation because we do not have sufficient work for additional fulltime workers during the non-peak months.

AF 54-55.

Employer also represented that its need met the requirement that the temporary need ends in the near definable future because its request for H-2B workers was strictly for a limited period of time as noted in its application and ends before the area’s winter season. Employer further stated:

In determining the number of requested workers, we carefully analyzed our historical need for temporary workers taking into account the contracts and/or agreements we have in place several months prior to our requested start date of need for the workers. We know from our experience the productivity of workers and we use this business knowledge to calculate the number of workers we expect to need in relation to our planned business for the requested employment period. We are requesting the same number of workers as last season. Our normal start date is February but we have truncated our season to April 1st due to the imposition of the USCIS cap. We may in future years return to our normal February start.

AF 55.

Employer also stated that it was attaching contracts in support of its temporary need. *Id.* In addition, Employer attached a detailed project summary for the 2020 season listing specific contracts, estimated start dates, duration of projects and estimated number of workers needed for each project. AF 56-59. Multiple purchase orders and contracts signed in the fall and winter of 2019 were also included with the application.

The CO issued a notice of deficiency (“NOD”) on February 12, 2020, in the current case, listing only one deficiency in the Employer’s application. AF 24-28. The CO noted the deficiency as “[f]ailure to establish the job opportunity as temporary in nature.” The CO cited 20 C.F.R. § 655.6(a) and (b) for the requirement that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” AF 27. The CO cited the regulatory language which states that an “employer’s need is considered temporary if justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations.” 20 C.F.R. § 655.6(b). *Id.*

The CO stated that the Employer did not demonstrate the requested standard of need which in this case was peakload. The CO noted that in order to establish a peakload need, the Employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation. *Id.*

The CO determined that the documentation submitted by the employer was not sufficient to establish its peakload need for 25 construction laborers from April 1, 2020, through November 11, 2020. The CO noted Employer's application stated:

Specifically, our temporary need is based upon a peakload need in that:

- A. we operate year round with a peak need February – December ;
- B. we need to supplement with workers on a temporary basis;
- C. this temporary need is the result of increased short- term customer demand, manifested through increased construction activities during the fair weather months; and
- D. these temporary workers will not become part of our regular operation because we do not have sufficient work for additional fulltime workers during the non-peak months...

We specialize in pre-engineered steel structure building erection. Our peak load activities ramp up in early spring when weather is favorable and subsequently reduces with the onset of winter. The fall and winter seasons are a classic period for dangerous construction sites, where the ground is slippery and wet. The cold weather means that workers need to dress up warmly, with extra padding, this leads to less mobility and more accidents. The cold and wet seasons bring a plethora of issues that cover every aspect of construction. Preparing equipment with different oils that withstand the colder temperatures as well as protect them from rust and corrosion. Winter brings colder temperatures, saturated ground conditions and shorter daylight hours all of which make employment of large numbers of workers unnecessary since we never know when the weather will permit construction activities.

After quoting the above portions of the Employer's application, the CO stated:

[E]mployer did not sufficiently demonstrate how its need meets the regulatory standard. The employer explains that its workload demand decreases between December and January due to having less contracts as a result of weather conditions in those months affecting construction in the area of intended employment of Pine Bluff, Arkansas. The employer, however, did not provide any supporting documentation showing that the weather conditions in Pine Bluff, Arkansas from December through February affect construction work as to cause it to experience a peakload need for workers from February through December. In addition, the employer has not provided documentation establishing that its job duties cannot be fulfilled during cold weather climates.

AF 27-28.

The CO directed the Employer to submit the following information and documentation:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period;
3. An explanation with supporting documents that substantiates that the type of construction work requested cannot be performed under the weather conditions found in Pine Bluff, Arkansas during the non-requested months of December through February.
4. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
5. Summarized monthly payroll reports for the 2018 and 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Construction Laborer, 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
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 28.

On February 20, 2020 Employer filed a response to the Notice of Deficiency providing additional supporting information and further explanation of the submitted documentation. Employer specifically addressed each of the enumerated items listed by the CO and either provided information or referred the CO to the information which it had previously submitted in its original application materials. In particular Employer provided a project summary for 2018 and 2019, as well as payroll information for 2018 and 2019. AF 12-22.

On March 18, 2020, the CO issued a Final Determination Denial to the Employer, stating that the noted deficiency regarding Employer's failure to establish the job opportunity as temporary in nature, still remained and therefore the application was denied.

The CO noted some of the items that Employer submitted including information pertaining to its prior certified application. However the CO went on to state:

The employer was requested to submit a detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period. In response, the employer stated, "During January through March we have much less work to perform than during the other months of the year." However, the Statement of Temporary Need submitted in the initial application indicates that February, not April, is the employer's true peakload period, with April being requested only due to the H-2B cap being met. The employer's statement in this regard contradicts the statement in its Statement of Temporary Need. The Department also notes that a need period of February through December (Feb 1 through Dec 31) is more than 10 months. The Department is unable to determine the employer's period of need, if any, due to the conflicts described above.

Accordingly the CO concluded the Employer had not sufficiently explained and supported that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand. Therefore, the CO determined the Employer did not overcome the deficiency and Employer's application was denied. AF 10.

On March 23, 2020, Employer made a timely request for administrative review of the CO's determination. AF 1-2. By order dated March 30, 2020, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before April 7, 2020. Both the Employer and the CO filed timely briefs.

Attorney Tamara Y. Hoflejer of the Office of the U.S. Department of Labor Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a brief in this matter on April 7, 2020, on behalf of the Certifying Officer. The Solicitor argues that the CO's denial of the Employer's application for temporary labor certification should be affirmed because the CO correctly determined that the Employer failed to carry its burden of demonstrating it was entitled to certification based on the evidence before the CO.

The Solicitor cites authority for the proposition that the burden is on the petitioning Employer to prove its eligibility for temporary labor need based on the stated standard, which in this case is peak load. The Solicitor states that the Employer failed to provide sufficient evidence or documentation in response to the CO's request. The Solicitor stresses that bare assertions are insufficient and the Employer must provide sufficient documentation to support the basis for its temporary need. The Solicitor attempts to support the CO's demand that the Employer support a temporary need between February and December which the Solicitor asserts is eleven months of the year. The Solicitor asserts that the Employer provided no documentation that the peakload is tied to the weather. The Solicitor claims the Employer's statements show a consistent year-round need which the Employer may be modifying due to the imposition of the USCIS cap. The Solicitor states that employers may not claim an earlier or later date of need as a strategy to get an H-2B visa before the cap is reached, citing *AC Sweepers*, 2017-TLN-00012 (Jan. 1, 2017) and *Marco, LLC, d/b/a Evergreen Lawn Care & Rainmaker Irrigation*, 2009-TLN-00043 (Apr. 9, 2009).

The Solicitor asserts that the documentation provided by the Employer does not support its temporary need and attempts to discuss the documentation in a selective way to support the CO's conclusion. In this regard it should be noted that the Solicitor makes statements and conclusions which were not given by the CO, and some of which are not supported by the documentation in the record.⁴ In sum the Solicitor asserts that the CO's denial should be affirmed because the "employer did not meet its burden of proving that it has a temporary need for workers for any portion of its purported period of need."

Employer also submitted a timely brief. In its brief, Employer argues that the CO acted arbitrarily and capriciously in denying the Employer's application for temporary labor certification. In particular the Employer asserts that the CO failed to properly consider the documentation submitted which supports its temporary peakload need, and instead the CO "confuses and conflates" separate responses given by the Employer to the CO's questions. Employer also asserts that the CO's final denial letter raises additional issues concerning alleged ambiguities in its application, which the CO had not raised in the notice of deficiency, thereby depriving Employer the opportunity to respond to and explain the alleged minor inconsistencies in its responses. Employer asserts that the Employer provided the requested documentation and explanations in response to each of the CO's numbered requests in the NOD and those responses demonstrate the Application meets the standards for certification.

Employer points out that its application is claiming a period of need between April 1, 2020, and November 30, 2020. It states that although its explanations referred to a general need for temporary workers between February and December, this is a general statement and is not the specific period of need for which Employer is requesting certification to employ H-2B workers. Further Employer argues that it does not claim its payroll reports and contracts with clients support a longer period of need than the requested April 1, 2020, to November 30, 2020. Therefore, Employer argues that it is unreasonable for the CO to claim that Employer has requested a period of need between February and December and specifically February 1, to December 31.

Employer also asserts that the submitted payroll information supports the period of need and that Employer adequately provided all necessary information to prove its temporary peakload need for the requested period of April 1, 2020, and November 30, 2020. Accordingly Employer argues that the CO's denial should be reversed as the denial was arbitrary and capricious.

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the

⁴ For example, the Solicitor attempts to discuss details of payroll records from 2018 and 2019 which were never addressed by the CO or used as a basis for the denial. Further, the Solicitor inaccurately states, "the 2020 project summary lists mainly projects that start in winter non-peak months." As discussed below, although the 2020 project summary lists some projects starting in late February or March, all projects are performed primarily or entirely during the requested period of need, April 1, 2020, through November 30, 2020. Nine of the sixteen projects listed have estimated start dates commencing after April 1, 2020, and would be completed entirely during the period of need.

Employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

- (1) Affirm the CO's determination; or
- (2) Reverse or modify the CO's determination; or
- (3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO's determination in H-2B temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

Some BALCA cases have recognized a distinction in BALCA's review of the CO's determination involving review of a long established policy-based interpretation of a regulation by the Office of Foreign Labor Certification ("OFLC"), in which case OFLC's interpretation would be owed considerable deference. However, in the absence of such an interpretation, the CO's finding would be reviewed *de novo*. *In the matter of Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017). *See also Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018).

I find that the approach taken in *Zeta Worldforce, Inc.*, is consistent with BALCA's discussion of the proper standard of review in *Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). In *Brook Ledge*, a three-judge BALCA panel held that the CO's definition of a "worksite" was not entitled to deference where the OFLC or the CO had articulated no clear definition of the term. BALCA noted that the CO offered "no reasoned explanation for its determination and apparently seeks deference based merely on the fact that the decision was issued by OFLC," adding that there is "no legal support for such a contention." *Id.*

While the *Brook Ledge* panel acknowledged that it reviewed the CO's decision under an arbitrary and capricious standard, the panel ultimately found that deference to the CO's determination was unwarranted. The panel explained that where the review did not involve a longstanding or clearly articulated interpretation of a regulation, and the CO had not shown that he had considered the relevant factors and articulated a rational connection between the facts found and the choice made, BALCA need not defer to the OFLC's or the CO's interpretation.⁵

Similarly, in the current case and for the reasons discussed below, I find that the CO has not provided a rational connection between the pertinent facts and the CO's final determination and therefore deference to the CO's determination is not warranted.

⁵In *Brook Ledge Inc.*, 2016 TLN 00033, slip op. at 5 (May 10, 2016), the BALCA panel stated, "We take no issue with the assertion that BALCA should defer to OFLC's rational and reasonable interpretation of an ambiguous regulatory term."

ISSUE

Whether the Certifying Officer properly denied the Employer's H-2B application due to Employer's failure to establish that its request for 25 construction laborers for the period of April 1, 2020, to November 30, 2020, was based upon a "temporary" employment need, according to the Employer's stated standard of "peakload" need.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is "temporary." Temporary need is defined by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii).⁶ This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification 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).

The DHS regulation further states in regard to the nature of petitioner's need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

8 C.F.R. § 214.2(h)(6)(ii)(B).

The DOL regulation addressing temporary need in H2-B cases also states, "The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations." 20 C.F.R. § 655.6.

The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflects a temporary need within the meaning of the H-2B program. *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial

⁶ Pursuant to the Department of Labor Appropriations Act, 2016 (Div. H, Title I of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (Dec. 18, 2015) the definition of temporary need is governed by Department of Homeland Security (DHS) regulation, 8 C.F.R. § 214.2(h)(6)(ii). *See also* 20 C.F.R. § 655.6(b).

where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In the current case, the Employer applied for temporary labor certification for 25 construction laborers for the period of April 1, 2020, to November 30, 2020, on the basis of a “peakload” need. AF 30. In regard to peakload need the DHS regulation states, “[t]he petitioner 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In regard to its business operations and peakload need for 25 construction laborers Employer stated:

We specialize in pre-engineered steel structure building erection. Our peak load activities ramp up in early spring when weather is favorable and subsequently reduces with the onset of winter. The fall and winter seasons are a classic period for dangerous construction sites, where the ground is slippery and wet. The cold weather means that workers need to dress up warmly, with extra padding, this leads to less mobility and more accidents. The cold and wet seasons bring a plethora of issues that cover every aspect of construction. Preparing equipment with different oils that withstand the colder temperatures as well as protect them from rust and corrosion. Winter brings colder temperatures, saturated ground conditions and shorter daylight hours all of which make employment of large numbers of workers unnecessary since we never know when the weather will permit construction activities.

AF 54.

Employer also provided information regarding the average high and low temperatures in the Little Rock Arkansas area by month and confirmed that the temporary workers would not become part of its permanent workforce as required by the regulation. *Id.* Employer asserted that it operated year round with a peakload between February – December. It therefore needed to supplement its workforce with temporary workers due to the increased short-term customer demand, manifested through increased construction activities during the fair weather months. Employer also represented that its need met the requirement that the temporary need ends in the near definable future because its request for H-2B workers was strictly for a limited period of time as noted in its application and ends before the area’s winter season.

In support of its temporary need, Employer also attached contracts and a detailed project summary for the 2020 season listing specific contracts, estimated start dates, duration of projects and estimated number of workers needed for each project. AF 56-59. Multiple purchase orders and contracts signed in the fall and winter of 2019 were also included with the application.

The Employer's 2020 project summary is a detailed summary specifying in addition to the name of each project with the name and address of the client, the estimated start date, and the duration of project, the estimated number of workers needed for each project, as well as the estimated number of H-2B temporary workers needed to support the permanent U.S. workers on each project. All of the projects contained in the Employer's 2020 project summary identify work that will be performed during the requested period of need, April 1, 2020 – November 30, 2020, although some of these projects have an estimated start date in late February or March. All jobs, however, extend into, and will be performed primarily or entirely in the requested period of need. Nine of the sixteen projects listed have estimated start dates commencing after April 1, 2020, and would be completed entirely during the period of need.

It is not clear whether the CO reviewed this information in detail because the CO never comments specifically on the details of the 2020 project summary which on its face support the Employer's requested dates of need, and is consistent with the explanations provided by the Employer regarding its business operations, as well as its stated need for temporary H-2B workers on a peakload basis.

The CO issued a notice of deficiency on February 12, 2020, listing the only deficiency as Employer's failure to establish the job opportunity as temporary in nature. In addition to citing and stating the regulatory language, the CO quoted a part of the Employer's explanation. The CO then determined that the documentation submitted by the employer was not sufficient to establish its peakload need for 25 construction laborers from April 1, 2020, through November 11, 2020. The CO stated:

[the] employer did not sufficiently demonstrate how its need meets the regulatory standard. The employer explains that its workload demand decreases between December and January due to having less contracts as a result of weather conditions in those months affecting construction in the area of intended employment of Pine Bluff, Arkansas. The employer, however, did not provide any supporting documentation showing that the weather conditions in Pine Bluff, Arkansas from December through February affect construction work as to cause it to experience a peakload need for workers from February through December. In addition, the employer has not provided documentation establishing that its job duties cannot be fulfilled during cold weather climates.

AF 27-28.

These statements appear to overlook the weather information submitted by the Employer in regard to the Little Rock Arkansas area, an area which is approximately 40 miles from Pine Bluff, Arkansas. The CO also apparently disregards the explanation in the Employer's application materials regarding how the weather conditions affect its workload. The CO also unreasonably requires that the Employer prove that job duties cannot be performed during the cold weather months rather than requiring the Employer to prove why the weather causes the Employer to experience a peak load need for its workers during the months where the climate is more moderate, particularly between April 1, 2020, and November 30, 2020 which is Employer's requested peak load period.

In the NOD, the CO directs the Employer to supply additional information, some of which had previously been supplied, as well as payroll information for the years 2018 and 2019. Employer responded to the Notice of Deficiency specifically responding to each of the CO's requested submissions and either directing the CO to where the information was contained in the original application, or providing the additional information or records requested.

On March 18, 2020, the CO issued a Final Determination Denial to the Employer, stating that the noted deficiency regarding Employer's failure to establish the job opportunity as temporary in nature, still remained and therefore the application was denied. The CO stated the following in support of the denial:

The employer was requested to submit a detailed explanation as to the activities of the employer's permanent workers in this same occupation during the stated non-peak period. In response, the employer stated, "During January through March we have much less work to perform than during the other months of the year." However, the Statement of Temporary Need submitted in the initial application indicates that February, not April, is the employer's true peakload period, with April being requested only due to the H-2B cap being met. The employer's statement in this regard contradicts the statement in its Statement of Temporary Need. The Department also notes that a need period of February through December (Feb 1 through Dec 31) is more than 10 months. The Department is unable to determine the employer's period of need, if any, due to the conflicts described above.

The CO's explanation is confusing at best. Although the Employer's current application is only requesting workers from April 1, 2020, through November 30, 2020, the CO appears to be requiring the Employer to support a period of need of February 1 through December 31, 2020, even though these dates are not requested in the current application, nor is it clear that they were requested on past certified applications. Although Employer had noted in its submitted materials that it "operate[s] year round with a peak need February – December" it did not specify February 1, or December 31, 2020, (as noted in the Employer's brief) and a date of November 30 is arguably consistent with a beginning of December slow down. Further, Employer pointed out in its materials that it had used a February 1, 2020, start date in a prior application, but noted that the visa cap in previous years had prevented it from obtaining workers in early February. Employer stated in the response to the NOD:

We know from our experience the productivity of workers and we use this business knowledge to calculate the number of workers we expect to need in relation to our planned business for the requested employment period. We are requesting the same number of workers as last season. Our normal start date is February but we have truncated our season to April 1st due to the imposition of the USCIS cap. We may in future years return to our normal February start.

AF 55.

The Solicitor argues in her brief that an Employer should not be allowed to change its dates of need due to the occurrence of the USCIS visa cap and cites a case where BALCA denied an application where the Employer attempted to bring workers in earlier than the actual period of peakload need, in order to have the application processed before the cap was met. *See AC Sweepers*, 2017-TLN-00012 (Jan. 1, 2017). This is not an accurate description of what occurred in this case, and the facts are clearly distinguishable from the case cited by the Solicitor, which involves an application denied on multiple grounds. Arguably in the current case, the Employer requested a later date due to its knowledge that the visa cap for the first half of the fiscal year had been met and the unavailability of visas prior to April. Employer accurately stated it would normally need workers in February, which is when its peakload need generally begins, but because of the visa cap, it knew it could not obtain the additional temporary workers until April. Instead of requesting an earlier date of need, as in the case cited by the Solicitor, Employer actually requested a later date of need and accurately stated its basis for doing so. *See Park Range Construction*, 2020-TLN-00004 (Nov. 7, 2019) (BALCA reversing CO and granting Employer's application for extension of period of need where start date was delayed due to delay in obtaining temporary workers due to visa cap). Further, and most importantly, Employer points out that its project summary and its evidence of contracted work actually support the requested period of April 1, 2020, to November 30, 2020.

If Employers were prohibited from honestly acknowledging that there is a visa cap imposed which affects obtaining visas in certain months, as the Solicitor suggests, then every Employer whose peakload need begins during the gap between the two allotments of visas would be prohibited from ever using the H-2B program, even for a limited part of its peakload season. This could not possibly be considered a fair or equitable result. However, more importantly, the documentation provided by the Employer, including its 2020 project summary and other information, provided support Employer's requested period of need of April 1, 2020, to November 30, 2020. There can be no reasonable basis for the CO to impose dates of need not requested (February 1st to December 31st), and then deny an application because the dates imposed by the CO are not supported by the Employer's documentation. The CO has not provided a reasoned explanation for denying Employer's application that is supported by the relevant facts.

The undersigned has reviewed the documentation and explanations provided by the Employer and finds that the Employer has met its burden of proving its temporary need for 25 construction laborers for the requested peakload period of April 1, 2020 to November 30, 2020. The Employer has provided a thorough explanation of how the weather conditions in its area affect its business operations and cause a peakload need for temporary workers between April 1, 2020 and November 30, 2020. The submitted 2020 project summary and other information provided by the Employer are consistent with, and support, the Employer's temporary need for the requested peakload period of April 1, 2020 to November 30, 2020.

ORDER

For the reasons stated above, Employer has met its burden of showing its temporary employment need for 25 construction laborers between April 1, 2020, and November 30, 2020.

The CO's non-acceptance denial is determined to be unsupported by the record and therefore is **REVERSED**. 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 of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge