



Issue Date: 02 November 2020

**BALCA Case No.:** 2021-TLN-00005  
**ETA Case No.:** H-400-20225-764464

*In the Matter of:*

**GOLDEN SNOW SERVICES LLC,**  
*Employer.*

**Certifying Officer:** Chicago National Processing Center

**Appearances:** Kevin Lashus  
Austin, TX  
*For the Employer*

Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

**Before:** Drew A. Swank  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF  
TEMPORARY LABOR CERTIFICATION**

This case arises from a request for review filed by Golden Snow Services LLC (“Employer”) of the Certifying Officer’s (“CO”) decision to deny its 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 (DHS). *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

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

<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

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* (“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 August 12, 2020, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 40 laborers under the SOC code “Laborers and Freight, Stock, and Material Movers, Hand,” for the period of November 10, 2020 to March 31, 2021. AF 278-301.<sup>3</sup> Employer indicated that the nature of its temporary need was “seasonal.” On Employer’s application (Form 9142), in regard to the job duties, Employer stated, “Organize and prepare stock of holiday décor material, install, and/or remove materials from job sites. Load and unload materials and prepare for storage. Lifting required up to 50 lbs.”

In response to its statement of temporary need, Employer attached a statement in support of the temporary labor certification application. Employer noted the following:

This letter is submitted to support the labor certification application and I-129 petition of Golden Snow Services, LLC on behalf of multiple (40) aliens. Our company is engaged in the snow removal business in the Utah County, Utah area. Our services include snow clean up and removal. The dates during which most of our business activity occurs, and during which we have the most need for temporary seasonal workers is November 10, 2020 to March 31, 2021.

Our Company currently requires the services of laborers to perform manual labor associated with shovel accumulated deposits of snow on an ongoing basis in extreme weather conditions on various properties, operate snow blower, organize and prepare stock of holiday décor material. Install and/or remove materials from job sites. Load and unload materials and prepare for storage. Lift up to 50 lbs. No education required. Transportation is provided to and from area work sites at Employer’s expense from centralized Utah County pick up location.

Our Company has a temporary seasonal need for persons with these skills because our busiest seasons are traditionally tied to the holiday season from approximately November 10<sup>th</sup> to March 31<sup>st</sup> during which time we need to substantially supplement the number of workers for our labor force for these positions. Our

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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.

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

temporary seasonal holiday décor installation workers are only needed during the holiday seasons (for putting up and taking down lights before and after the holidays) and do not become a part of our permanent labor force. We need our workers on November 10<sup>th</sup>, so that they are prepared to begin as soon as our work increases for the holiday season. We feel certain that our sudden and substantial need for seasonal workers, as described above, clearly qualified us as a seasonal H-2B business. Our Company has tried to recruit U.S. workers during our busiest seasons. Most of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary seasonal need for the 40 H-2B workers we are asking for in 2021, but cannot anticipate, at this time that we will need H-2B workers in 2022 due to fluctuations in the economy.

Our dates and number of workers have not changed from our last year's application. As such, we are not submitting additional supporting documentation in accordance with September 1, 2016 Department of Labor announcement that additional information would not be required with the application in such cases...

We are not hiring a recruiter to help us recruit H-2B workers this year since all of our H2B workers are returning workers and any new H-2B workers are being recruited from our existing workforce so there is no contract with a recruiter attached.

These foreign H-2B workers whom we desire to hire will possess the requisite abilities for this position. Our Company has never hired persons for these positions with less ability than these foreign H-2B workers possess. Therefore, our company wishes to employ them for a seasonal as snow removal. This period will be required in order for them to complete the seasonal job responsibilities required of them. After this assignment, they will return to their country of origin to continue their present occupation. If for any reason any of these workers need to return back to their country of origin on or before March 31<sup>st</sup>, 2021, our company will pay the costs of their transportation and subsistence to return to their country of origin.

AF 283.

The CO issued a Notice of Deficiency ("NOD") on August 19, 2020, listing two deficiencies in the Employer's application. AF 272-277. The CO noted the first deficiency as the Employer's "[f]ailure to establish temporary need for the number of workers requested." In regard to this deficiency, the CO stated that the employer had not established that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity, as required by 20 C.F.R. § 655.11(e)(3) and (4). The CO noted that the Employer was requesting certification for 40 laborers from November 10, 2020 through March 31, 2021 in its current application. The CO also noted that the Employer had previously received certification for 8 laborers from November 15, 2019 to March 31, 2020 in its previously

submitted application. The CO determined that further explanation and documentation was necessary to establish Employer's need for 40 laborers. AF 276.

The CO directed the employer to submit further documentation including an explanation with supporting documentation as to why the employer is requesting 40 laborers for Orem, Utah during the requested dates of need. The CO stated that such documentation should include contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year identifying full time permanent and temporary workers in the requested occupation for each month, as well as the total number of workers or staff employed, total hours worked and total earnings received. The CO directed that the payroll records submitted be signed by the Employer attesting that the information presented was compiled from the Employer's actual accounting records or system. The CO also requested that the Employer submit an explanation of the payroll documentation submitted and other evidence and documentation that similarly serves to justify the number of workers requested. *Id.*

The CO also listed a second deficiency regarding the job order assurances and contents. The CO cited 20 C.F.R. § 655.18(a)(1) which states:

The employer's job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2B workers. This does not relieve the employer from providing to H-2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers ...

AF 276-277.

The CO noted that Employer's ETA Form 9142 indicated that on the job training would be offered, however Employer's job order from the state of Utah, which was submitted with Employer's application, did not indicate that on the job training would be offered. AF 277. In addition, the CO noted that the job order listed an outdated transportation and subsistence rate of "\$12.48 per day to a maximum of \$55.00" while the transportation and subsistence rates have been updated to \$12.68 per day to a maximum of \$55.00. *Id.* Accordingly, the CO directed the Employer to submit an amended job order with language stating all benefits and wages offered to H-2B workers and which is consistent with the Employer's ETA Form 9142. The CO noted that the Employer's NOD response must include corrected language which remedies the deficiency so that the Chicago NPC can provide this information to the SWA. In the alternative Employer could submit an already amended job order that contains all of the required language noted above. *Id.*

On September 2 and 3, 2020, Employer filed its response to the Notice of Deficiency. AF 131-271. In its September 2, 2020 letter Employer states that it determined its need for 40 workers for the 2020/2021 season on the basis of the contracts and letters of intent that it has in place for the upcoming holiday and snow season. AF 270. It noted that it was attaching its

financial statement for the requested period. It asserted that it is unable to find U.S. workers to take these seasonal positions and therefore subcontracts the work as U.S. workers generally want year round employment. It also asserted that its sales have increased since the sales charts from 2018-2019, with sales increasing substantially since 2018. Employer also stated that it anticipated that this increase will continue into 2021. In regard to the second deficiency, Employer stated that it was attaching an amended job order which indicates that job training will be provided. Employer also stated that it amended the job order to reflect the correct subsistence rate of \$12.68 per day to a maximum of \$55.00. Employer's response included copies of its 2018 quarterly federal tax return, its November 2019 - March 2020 profit and loss documentation, its job order, its 2018-2019 monthly payroll, and its 2018-2019 monthly sales chart. AF 131-269.

On September 29, 2020, the CO issued a Final Determination Denial to the Employer, stating that the noted deficiencies remained. AF 9-15. In regard to the first deficiency, the CO acknowledged the information submitted by the Employer, noting that the information included payroll reports for "snow removal laborer" for 2018 and 2019, 25 contracts for 2020-2021, sales reports for 2018 and 2019, a profit and loss report from November 2019 through March 2020 and IRS Form 941, quarterly federal tax returns for quarters one, two and four in 2018.

The CO determined that the information and documentation submitted did not overcome the deficiency. Specifically, the CO found that the payroll reports submitted did not fulfill the CO's request in the NOD for the following:

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; and an explanation of the data in submitted payroll documentation. (emphasis in the original)

AF 13.

The CO pointed out that the Employer's application is requesting "40 Laborers, SOC Occupational Title Laborers and Freight, Stock, and Material Movers, Hand." However, Employer's submitted payroll documentation was for "snow removal laborer." The CO recited the job duties as listed in the Employer's application (ETA Form 9142), its prevailing wage determination (ETA Form 9141) and in its job order, all of which note the duties as "organize and prepare stock of holiday decor material, install and/or remove materials from job sites, load and unload materials and prepare for storage, lifting required up to 50 lbs." *Id.* The CO noted that none of the listed job duties related to snow removal and that the employer did not identify any snow removal duties in its application. The CO stated that the Employer cannot amend the job duties in its application after the National Prevailing Wage Center ("NPWC") has issued a Prevailing Wage Determination (PWD). Accordingly, the CO determined that the submitted payroll information did not support that the Employer has a temporary need for the requested 40 laborers from November 10, 2020 through March 31, 2021 and that the request represents a bona fide job opportunity.

The CO also found the contract documentation did not adequately support the number of requested workers in the requested position. AF 14. The CO noted that the “customer-client, Woodbury Corp.” did not sign any of the contracts and each of the contracts describe services related to snow, plowing, snow removal and ice removal, while none of the contracts include any services related to installing and removing holiday décor. The CO further noted that none of the contracts submitted indicate any worksite locations in Orem, Utah, even though the Employer’s application indicated that additional worksites were in Orem, Utah. For these reasons the CO determined that the work contracts did not support the temporary need for 40 laborers or that the request represented a bona fide job opportunity.

Additionally, the CO determined that the sales reports, profit and loss report and the quarterly tax returns submitted failed to establish a need for 40 laborers to organize and prepare stock of holiday décor material and install and/or remove materials from job sites from November 10, 2020 through March 31 2021. *Id.* Therefore, the CO concluded that the Employer did not establish that the number of worker positions and period of need are justified, nor that its request represented a bona fide job opportunity.

In regard to the second noted deficiency, the CO acknowledged that the Employer had submitted an amended job order that corrected the amount for the transportation and subsistence rates. However, the CO determined that the amended job order failed to correct the error regarding whether it provides on the job training. Therefore the discrepancy between the Employer’s application, which notes that the Employer provides on the job training, and the Employer’s job order, which fails to address this matter, still remained. Accordingly Employer also failed to overcome the second deficiency related to the regulatory requirements pertaining to job order assurances and contents. AF 14-15.

As Employer failed to overcome the noted deficiencies, the CO denied the Employer’s application for temporary labor certification.

On October 8, 2020, Employer made a timely request for administrative review of the CO’s determination. No legal argument was contained in the Employer’s request for review. AF 1-8.

By Order issued on October 19, 2020, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before October 28, 2020. Neither the Employer nor the CO submitted a brief in this matter.

### **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 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)).

### **STANDARD OF REVIEW**

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 in H-2B matters. BALCA has, fairly consistently, articulated 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). However, *see also Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) and *Gallegos Masonry, Inc.*, 2018-TLN-00115 (May 10, 2018) (recognizing 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; but in the absence of such an interpretation, the CO's finding would be reviewed *de novo*).<sup>4</sup>

In the current case, which does not involve a longstanding policy-based interpretation of a regulation by the OFLC, the undersigned finds that deference need not be shown to the CO's determination. However, for the reasons discussed below, I find the record supports the CO's determination in this case, as Employer has failed to meet its burden of establishing a temporary need for the number of workers requested between November 10, 2020 and March 31, 2021.

### **ISSUE**

Whether the CO properly denied the Employer's temporary labor certification application due to 1) Employer's failure to meet its burden of establishing its temporary need for 40 laborers

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<sup>4</sup> The approach taken in *Zeta Worldforce, Inc.*, is consistent with BALCA's discussion of the 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 "worksites" 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." 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. However, 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." *Cf. Best Solutions USA, LLC*, 2018-TLN-00117 at footnote 2 (May 22, 2018) (BALCA judge declining to apply "the so-called 'arbitrary and capricious' standard of review ... and will instead simply determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient in light of the written record provided").

under the noted SOC code, for the period of November 10, 2020 through March 31, 2021, and 2) Employer's failure to comply with the regulations regarding job order assurances and contents.

## 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).<sup>5</sup> 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 Employer bears the burden of establishing why the job opportunity and number of workers requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering*, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In this case the Employer is alleging that it has a temporary need for 40 laborers under the SOC code "Laborers and Freight, Stock, and Material Movers, Hand" for the period of November 10, 2020 to March 31, 2021 based upon a seasonal need. AF 278-301. To establish a seasonal need according to the DHS regulation,

[t]he petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner

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<sup>5</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

shall specify the period(s) of time during each year in which it does not need the service or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.

(8 C.F.R. §214.2(h)(6)(ii)(B)(2)).

In this case the CO’s final denial is based primarily on Employer’s failure to establish the temporary need for the number of workers requested. An Employer must demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4). *See Roadrunner Drywall*, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need).

In the final denial letter the CO acknowledged the information submitted by the Employer, noting that the information included payroll reports for “snow removal laborer” for 2018 and 2019, 25 contracts for 2020-2021, sales reports for 2018 and 2019, a profit and loss report from November 2019 through March 2020 and IRS Form 941 quarterly federal tax returns for quarters one, two and four in 2018. Employer submitted the following payroll charts for 2018 and 2019:

Designated Occupation: Payroll Report Period:  
Snow Removal Laborer Calendar Year 2018

Month_-	Permanent Employment			Temporary Employment		
	Total Workers	Total Hours Worked	Total Earnings Received	Total Workers	Total Hours Worked	Total Earnings Received
January	0	0	\$ 0.00	24	1096.38	\$15 173.99
February	0	0	\$ 0.00	24	646.18	\$ 8,959.70
March	0	0	\$ 0.00	24	1204.15	\$18,686.10
April	0	0	\$ 0.00	3	210	\$ 2,520.00
May	0	0	\$0.00	0	0	\$ 0.00
June	0	0	\$ 0.00	0	0	\$ <b>0.00</b>
July	0	0	\$ 0.00	0	0	\$ 0.00
August	0	0	\$ 0.00	0	0	\$ 0.00
September	0	0	\$ 0.00	0	0	\$ 0.00
October	0	0	\$ 0.00	0	0	\$ 0.00
November	0	0	\$ 0.00	0	0	\$ 0.00
December	0	0	\$ 0.00	22	425.10	\$ 6 967.52

Designated Occupation: Payroll Report Period:  
Snow Removal Laborer Calendar Year 2019

Month	Permanent Employment			Temporary Employment		
	Total Workers	Total Hours Worked	Total Earnings Received	Total Workers	Total Hours Worked	Total Earnings Received
January	0	0	\$ 0.00	26	773.42	\$13 341.70
February	0	0	\$ 0.00	29	1256.86	\$22,622.40
March	0	0	\$ 0.00	24	595.90	\$10 422.62
April	0	0	\$ 0.00	10	53.50	\$ 790.00
May	0	0	\$ 0.00	0	0	\$ 0.00
June	0	0	\$ 0.00	0	0	\$ 0.00
July	0	0	\$ 0.00	0	0	\$ 0.00
August	0	0	\$ 0.00	0	0	\$ 0.00
September	0	0	\$ 0.00	0	0	\$ 0.00
October	0	0	\$ 0.00	0	0	\$ 0.00
November	0	0	\$ 0.00	0	0	\$ 0.00
December	0	0	\$ 0.00	0	0	0

The CO determined that the payroll information submitted by the Employer did not fulfill the CO’s request for the following:

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; and an explanation of the data in submitted payroll documentation. (emphasis in the original)

AF 13.

The CO pointed out that the position designated in the charts is the snow removal position, whereas the position noted in Employer’s application, job order and prevailing wage determination was for the SOC code “Laborers, SOC Occupational Title Laborers and Freight, Stock, and Material Movers, Hand.” The CO noted that the job duties specified in Employer’s application, job order and prevailing wage determination were listed as “organize and prepare stock of holiday decor material, install and/or remove materials from job sites, load and unload materials and prepare for storage, lifting required up to 50 lbs.” *Id.* The CO noted that the listed job duties do not involve any duties related to snow removal. Accordingly, the CO determined that the submitted payroll information did not support that the Employer has a temporary need for the requested 40 laborers from November 10, 2020 through March 31, 2021 and that the request represents a bona fide job opportunity.

The CO’s finding, that this payroll information did not establish the Employer’s need for 40 workers in the requested position, is reasonable. As noted by the CO it is not clear that the submitted information is for the requested position. However, in addition, the information does not clearly correlate to a need for workers during the requested period of November 10, 2020 through March 31, 2021. Neither of the submitted charts lists any temporary workers for the

month of November and the 2019 chart lists no workers for the months of November and December. It is also unclear whether the submitted payroll charts pertain to a particular position, or represent all the laborers employed by the Employer. Clearly the information submitted by the Employer does not comply with the CO's request for "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; and an explanation of the data in submitted payroll documentation." Not only are the records limited and non-compliant but they are not accompanied by any explanation that would allow for a finding that they correlate to a need for 40 laborers in the requested position for the period of November 10, 2020 to March 31, 2021.

As determined by the CO, the other records submitted by the Employer also fail to establish the Employer's need for the 40 workers requested during the stated period of need. The submitted contracts, sales reports, profit and loss report and the quarterly tax returns fail to establish a need for 40 laborers to organize and prepare stock of holiday décor material and install and/or remove materials from job sites from November 10, 2020 through March 31 2021. The Employer has provided no adequate explanation for how these documents would correlate to its request for 40 laborers during the requested period of need.

In addition, Employer has not made any legal argument in either its request for review, or in a brief, as to why the undersigned should find that it has met its burden of proof in establishing its temporary need for the number of workers requested under the H-2B regulations.

The undersigned finds that the Employer has failed to provide the documentation and explanation requested by the CO, which would have allowed the CO to reasonably determine whether the request for 40 temporary laborers represents a "bona fide job opportunity" as required by 20 C.F.R. § 655.11(e) (3) and (4). See *Roadrunner Drywall Corp.* 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers or period of need). See also *North Country Wreaths*, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 ("it is the Employer's burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word"); and *Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) ("An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of document-on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers"). Accordingly, the CO's denial of the Employer's application for failure to establish its temporary need for the number of workers requested is supported by the record.<sup>6</sup>

For the reasons stated above, Employer has failed to meet its burden of establishing a bona fide need for the 40 requested laborers for the period of need requested.

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<sup>6</sup> The undersigned also finds that the CO correctly determined that Employer had failed to provide an amended job order correcting its error specifying whether it provided on the job training to its U.S. workers. AF 14-15.

## **CONCLUSION**

Employer has failed to meet its burden of establishing its temporary need for 40 laborers under the SOC code “Laborers and Freight, Stock, and Material Movers, Hand” for the period of November 10, 2020 to March 31, 2021. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is **AFFIRMED**.

**SO ORDERED.**

For the Board of Alien Labor Certification Appeals:

**DREW A. SWANK**  
Administrative Law Judge