



Issue Date: 01 March 2022

OALJ Case No.: 2022-TLN-00034

ETA Case No.: H-400-22001-795631

In the Matter of:

**PACTIV LLC – FRESNO dba
Pactiv Evergreen,**
Employer.

**DECISION AND ORDER REVERSING
DENIAL OF TEMPORARY LABOR CERTIFICATION AND
REMANDING TO THE CERTIFYING OFFICER**

This matter arises under the labor certification program for temporary non-agricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. section 655, subsection (a).¹ Here Pactiv LLC – Fresno dba Pactiv Evergreen (“Employer”) requests review of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program.² The CO denied Employer’s request for 20 H-2B “Packers and Packagers, Hand” (AF³, p. 53) for the period of April 1, 2022, to November 30, 2022, after finding Employer’s application deficient. Following the CO’s denial of its application, Employer timely requested review by the Board of Al-

¹ On April 29, 2015, the Department of Homeland Security jointly published an Interim Final Rule amending the standards and procedures that govern the H-2B temporary labor certification program, and applying to applications with a start date of need after October 2, 2015. *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). All citations to 20 C.F.R. § 655 within this Order are to the Interim Final Rule.

² The H-2B program permits employers to hire foreign workers to perform nonagricultural work within the United States where the employer has established a temporary need. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).

³ “AF” refers to the Administrative Appeal File.

ien Labor Certification Appeals (“BALCA” or “the Board”).⁴ 20 C.F.R. section 655.61, subsection (a).

BALCA’s scope of review is limited to the legal arguments and evidence submitted to the CO before issuance of the final determination.⁵ 20 C.F.R. section 655.61, subsection (a)(5). The request for review may contain only legal arguments and evidence that was submitted to the CO prior to issuance of the final determination. 20 C.F.R. section 655.61, subsection (e). Here, the CO submitted no brief. I must either affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

I now REVERSE the CO’s denial of the labor certification application and find the application sufficient to continue processing accordingly.

Statement of the Case

Employer manufactures and distributes food packaging and food service products (AF, p. 2 and p. 58). It distributes worldwide (AF, p. 58). On January 1, 2022, Employer filed its H-2B Application for Temporary Employment Certification for 20 “Packers and Packagers, Hand” to work at its Fresno, California branch⁶ for the period of April 1, 2022, to November 30, 2022, (AF, p. 53), given its “customer demand exceeds the work capacity of [its] existing staff. . . and [it] has been unsuccessful in [its] attempt to secure local labor to fill [its] positions” (AF, p. 58; *see also* AF, p. 73).

On January 14, 2022, Employer received a Notice of Deficiency (NOD) (AF, p. 40), for deficiencies arising under 20 C.F.R. sections 1) 655.6, subsections (a) and (b), and 2) 655.11, subsections (e)(3)-(4)—failure to establish the job opportunity as temporary in nature and failure to establish a temporary need, respectively (AF, pp. 43-45). The CO determined “[t]he employer has not clearly explained what events

⁴ By designation of the Chief Administrative Law Judge, I am BALCA for purposes of this administrative review. 20 C.F.R. § 655.61, subsection (d).

⁵ Before the current regulations became effective on March 15, 2010, the regulatory standard of review was “legal sufficiency.” 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted “legal sufficiency” to imply an “arbitrary and capricious” standard of review. *See J and V Farms, LLC*, 2015-TLC-00022, slip. op. at 3, n. 1 (Mar. 4, 2016) (citing *Bolton Springs Farm*, 2008-TLC-00028, slip. op. at 6 (May 16, 2008)). But the earlier regulations did not define “legal sufficiency.” *See id.*; 20 C.F.R. § 655.112(a) (2008). The current regulations omit the reference to “legal sufficiency” and do not address the deference, if any, BALCA should give to the Certifying Officer’s decision. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations’ silence leaves the question open, and requires BALCA judges to determine an appropriate standard of review. In this case it makes no difference, since I would reach the same result even under an “arbitrary and capricious” standard.

⁶ Employer has also filed at least two additional H-2B applications for identical or similar job opportunities in two other branch locations (AF, pp. 33 and 58).

caused the peakload need” (AF, p. 43). To establish a peakload need, the NOD instructed Employer to provide documentation including payroll reports and any “[o]ther evidence and documentation that similarly serves to justify the dates of need being requested for certification” (AF, p. 44). The CO also determined, “The employer did not indicate how it determined that it needs 20 Packers during the requested period of need” (*Id.*). Here also the NOD instructed the Employer to correct this deficiency by submitting payroll reports and “[o]ther evidence and documentation that similarly serves to justify the number of workers, if any” (AF, p. 45).

On January 24, 2022, Employer timely filed its response to the NOD (AF, pp. 34-39). Employer provided graphs displaying product demand for the previous two calendar years, with peak demand corresponding to its second, third, and fourth quarters. It explained its Fresno, CA branch primarily produces food packaging used by restaurants for take-out orders, and its restaurant customer base increases their orders when the weather improves and people are dining outside more. It also explains that the second, third, and fourth quarters correspond to vacation travel seasons and is when vendors begin restocking their inventory in anticipation of the holidays (AF, pp. 34-35). Lastly, Employer explained how it determined 20 workers would be sufficient, given the amount of poundage of product a single worker can package per week (AF, p. 38).

Within its January 24, 2022, response to the NOD, Employer also provided its summarized monthly payroll records for the previous three calendar years. Employer explained it has relied on local staffing agencies to meet its need for temporary labor until April 2021,⁷ and staffing agencies were no longer able to meet its need. However, because of its reliance on these third-party staffing companies who were insufficient, it argued its payroll records do not accurately reflect its need:

The fact that we have been unable to locate adequate staff through agencies results in our payroll records not accurately reflecting our temporary peakload need, but rather a lack of available U.S. workers. We instead ask you to consider the production graphs shown above as supportive of the nature of a temporary peakload demand.

(AF, p. 36).

⁷ Observing Employer’s payroll records, it appears Employer has relied on staffing agencies not only for its peakload temporary labor, but also for all its year-round packing needs until April 2021—the records reflect no full-time permanent workers employed by Employer in the role of Packer until April 2021. The entirety of its packer workforce until April 2021 was comprised of workers supplied from staffing agencies. But beginning in April of 2021, Employer had seven full-time permanent Packers, and as of December of 2021, Employer has 70 full-time workers in the role of Packer (AF, pp. 36-37).

Lastly, Employer also submitted graphs comparing product demand with its actual production (as measured by shipments). It explains,

The difference between the blue line (demand) and the gray & orange lines (shipments) is our staffing shortfall over the past two years. We know from past business practices at this plant located in Fresno, CA that 1 Packer can package roughly between 5,000 to 7,000 pounds of product per week. We require 20 temporary H-2B workers between April and November in order to package and ship the +/2,000,000 to 5,000,000 additional pounds of product that is demanded during our peak season of 35 weeks.

(AF, p. 38). Again, Employer explained its peakload need is best reflected by its production graphs, rather than by its payroll records.

On February 1, 2022, the CO issued a Final Determination (AF, p. 25). It found Employer's application still deficient under section 655.6, subsections (a) and (b). Firstly, the CO found Employer's explanation for the events which caused its peakload need unconvincing:

. . . the primary worksite is located in California which is not known to have inclement weather. If in fact, the company ships its products to other locations in which inclement weather is a factor, that was not explained by the employer, so it is unclear how weather patterns affect the business.

(AF, p. 30). Next, the Final Determination mischaracterized Employer's documentation as "inventory graphs" (AF, p. 30), and did not consider these graphs in its discussion. Rather, the CO, relying entirely on Employer's payroll charts, concluded Employer has failed to demonstrate a seasonal need during the dates of need requested (AF, p. 31).

On February 7, 2022, Employer filed its Request for Appeal, in which it argues it has demonstrated a peakload need in accordance with 8 C.F.R. section 214.2. subsection (h)(6)(ii)(B)(3). Employer also argues the Final Determination was improper in that it failed to consider the entire record of evidence, improperly dismissing Employer's production demand charts as inventory charts and setting them aside (AF, p. 8). Employer also argues the Final Determination erroneously states Employer did not describe the global nature of its distribution (*Id.*). Employer again acknowledges the limited utility of its payroll charts, and argues the Final Determination is improper in acknowledging this point:

. . . the payroll charts have limited utility in the analysis given the labor shortages – specifically, the the inability of the Employer to hire adequate numbers of workers (temporary or otherwise) during the times of year needed to keep pace with production demand. The CO cannot create a “Catch-22” by making a pre-requisite for H-2B program eligibility something that would prevent a new employer from participating in the program if they have been unable to find adequate local labor. If the need exists but the local labor market has been unable to fill the gap in labor, that should not be a sign of a lack of need.

In fact, the discrepancies between the production demand charts and the payroll charts are precisely the point the Employer is trying to make. The Employer’s production charts clearly reflect a need for workers during the requested period of need, and the payroll charts clearly demonstrate that the Employer is failing to satisfy this need with U.S. workers. . . .

(AF, pp. 9-10). Lastly, Employer argues “the CO has impermissibly manufactured a program requirement by requiring the Employer to articulate the specific *cause* of its peakload need” (AF, p. 10) (emphasis original), arguing that all that is required is Employer establish the *existence* of a temporary need. Employer asks I reverse the CO’s denial and remand its application for further processing.

Discussion

The employer bears the burden of proving it is entitled to a temporary labor certification. 8 U.S.C. section 1361; *Jose Uribe Concrete Constr.*, 2019-TLN-00025, at *4. The issuance of a temporary labor certification is a determination by the Secretary of Labor that there are not sufficient qualified U.S. workers available to perform the temporary labor and that employment of the foreign workers “will not adversely affect the wages and working conditions of U.S. workers similarly employed” 20 C.F.R. section 655.1, subsection (a); *see also* 8 C.F.R. section 214.2, subsection (h)(6)(i)(A).

An employer may avail itself of the H-2B non-immigrant program where it establishes a temporary need based on “one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations.” 20 C.F.R. section 655.5, subsection (b). To establish a 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.

8 C.F.R. section 214.2, subsection (h)(6)(ii)(B)(3).

At issue is whether Employer has convincingly established it needs to supplement its permanent staff on a temporary basis due to a seasonal demand. The CO found the Employer failed to adequately explain why it would experience a peakload need from April to November, and thus failed to establish a peakload need. In contra, Employer argues it only needs to establish the *existence* of a peakload need—it need not also establish a *cause* for the peakload need. Moreover, Employer argues it sufficiently documented its peakload need by supplying production demand graphs for the previous two years.

a. Establishment of a Peakload Need

Here, Employer submitted a Detailed Statement of Temporary Need within its application:

Based upon past, current, and projected business volume, as well as local economic conditions at our location in Fresno, CA, we anticipate needing 20 temporary H-2B workers between April and November as manufacturing operations significantly ramp up during this time. *To calculate our projected need, we looked at the historical sales figures over the past number of years as well as the current projection for 2022 (see below).* Our peak figures typically represent a 10% + increase over the lowest quarter of the year (quarter 1). As we currently employ approximately 3,800 workers in the Packers position company-wide, our combined need on all applications represents approximately 10% of this total to meet our peak need. We have adjusted this need throughout our production facilities based on the needs at each facility. *For our facility in Fresno, CA we will need 20 additional workers to fill our packing orders during the peak months of our season. . . .*

As evidence of the peakload nature of our business, we refer you to the below quarterly sales in pounds chart for 2019 through 2021 to-date. We have additionally included quarterly projections for 2022. As the data shows, *sales in the second, third, and fourth quarter are markedly higher than the first quarter*, commensurate with the months during which we experience peak demand for our products.

(AF, p. 73) (emphasis added). The included graphs confirm sales highest in quarters two through four (AF, p. 74). Employer attested it regularly employs perma-

ment workers within this role and these additional temporary staff will not become a part of its regular operation, as it does “not have sufficient fulltime work for additional permanent staff outside of the period of employment” (*Id.*).

The NOD, finding this justification lacking, instructed Employer to submit further evidence in support of its peakload need. It instructed Employer to submit evidence in the form of payroll records, but also allowed for “[o]ther evidence and documentation that similarly serves to justify the dates of need being requested for certification” (AF, p. 44) and “... the number of workers” (AF, p. 45).

In reply, Employer submitted its payroll records with accompanying explanation of their limited utility (AF, pp. 36-38). Employer explained until April 2021, its staffing needs were entirely fulfilled by staffing agencies. After April 2021, Employer found staffing agencies insufficient to meet its needs, and explained its payroll records reflect only workers it could find, but not its actual need. It argues its need surpasses the workers employed due to its inability to find willing workers—the very basis for its H-2B application (AF, p. 36). I find Employer’s explanation reasonable.

In support of its need, Employer’s reply to the NOD offered graphs reflecting customer demand juxtaposed against its actual output (AF, pp. 37-38). The graphs reflect demand surpassing its current production capability. Employer anticipates one Packer can package between 5,000-7,000 pounds of product per week, and it would require 20 workers at its Fresno, CA location to package and ship the additional 2,000,000-5,000,000 “pounds of product that is demanded during [its] peak season of 35 weeks” (AF, p. 38). Employer also explained the source of demand as stemming from changes in weather which change consumer behavior, as well as coinciding with vacation travel seasons and vendors restocking their inventory (AF, p. 34-35). I find this evidence sufficient as “other evidence and documentation that similarly serves to justify” the dates of need and number of workers needed.

Despite inviting Employer to supplement its application with “other evidence and documentation” within the NOD, the CO failed to consider these graphs, simply mischaracterizing them as “inventory graphs,” and dismissing them as either misleading or erroneous, because “the primary worksite is in California which is not known to have inclement weather” (AF, p. 30). The CO also dismisses these graphs, because “While there is a peak in Quarter 2, it steadily declines into Quarter 3 and 4” (AF, p. 30). But this observation is consistent with Employer’s own explanation of its peak season – which reaches peak high in Quarter 2, but Quarters 2 through 4 (Employer’s peak season) are consistently higher than Quarter 1 (its non-peak season) (AF, p. 73). Consequently, relying solely on Employer’s payroll records, the CO concludes Employer has failed to establish its peakload need. I find the CO failed to properly consider these graphs and to understand the global nature of Employer’s distribution (as clearly explained within Employer’s initial Detailed Statement of

Need). I conclude Employer has sufficiently established a peakload need from April to November, as defined under 8 C.F.R. section 214.2, subsection (h)(6)(ii)(B)(3).

b. Cause for Peakload Need

At issue is also whether Employer has established an underlying cause for its peakload season. The NOD concluded, “While the employer points to an increase in business during the months of April to November as the cause of its temporary need for workers, it has not explained what *causes it to experience* an increase in business during those months” (AF, p. 43) (emphasis added). The Final Determination echoed a similar sentiment, finding Employer’s documentation insufficient to explain the occurrence of a peakload need (AF, p. 32).

In contra, Employer cites to *Matter of Power House Plastering*, 2018-TLN-00119 (May 16, 2018) (Morris, ALJ). Within *Power House Plastering*, Judge Morris found the employer’s application wrongfully denied, in part, for lack of establishing an underlying cause for its peakload season:

In addition, the CO improperly required Employer to provide an exacting explanation of the cause of its peakload season. . . .

The CO insistence that Employer prove the underlying cause of its “winter-related slow down” is improper, and Employer’s failure to do so does not support a denial. The regulations only require an Employer to prove the *existence* of its peakload season not the *cause* of such a peakload season. See 20 C.F.R. § 655.6(b); 8 C.F.R. § 214.2(h)(6)(ii). While a CO could properly reject an employer’s unsubstantiated and questionable explanation of an alleged peakload season when no evidence of that peakload season otherwise exists, a CO may not require an employer to prove the cause economic, weather-related, or otherwise of a properly substantiated peakload season. Since Employer’s peakload season is adequately documented by its 2017 payroll date, the CO’s skepticism regarding the underlying cause of such a peakload season is irrelevant.

(*Power House Plastering* at 5-6) (emphasis original). I find Judge Morris’ reasoning compelling and well-reasoned, and adopt it here.

Here, the CO remains unconvinced Employer experiences a peakload season from April to November, because of the erroneous assumption that Employer’s distribution is limited to Fresno, California, where weather patterns do not change. The CO also dismisses Employer’s evidence as simply “inventory graphs” and not “demonstrat[ive of] a peak for the months requested” (AF, p. 30). For the foregoing reasons, I find the CO’s reasoning flawed, and found Employer adequately documented a peakload season from Quarter 2 to Quarter 4, or April to November.

Moreover, I find the CO's insistence that Employer explain "what causes it to experience increase in business during those months" (AF, p. 43) improper reason for denial. I find Employer has not only established the existence of a peakload season, but also has provided explanation for the occurrence of its peakload season. Employer has cited changes in weather changing consumer patterns, changes in travel and vacation patterns, and changes in vendor consumption. But, even if it had not, I find such requirement improper and "the CO's skepticism... irrelevant."

The CO denies Employer's application solely on its noncompliance with 20 CFR section 655.6, subsections(a) and (b). For the foregoing reasons, I find Employer has established a temporary need based on a peakload need, pursuant to section 655.6, subsections (a) and (b).

Order

Accordingly, I REVERSE the denial of Employer's application, and REMAND the application to the CO for further processing.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge