



**Issue Date: 15 February 2018**

**BALCA Case No.:** 2018-TLN-00056  
**ETA Case No.:** H-400-17306-310264

*In the Matter of:*  
**COOPER ROOFING & SOLAR,**  
*Employer.*

**Certifying Officer:** Leslie Abella  
Chicago National Processing Center

**Appearance:** Kevin Lashus, Esq.  
Fisher Broyles, LLP  
Austin, Texas  
*For the Employer*

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

**Before:** Jason A. Golden  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

This case arises from Cooper Roofing & Solar’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this

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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, 2017, Pub. L. No. 115-30, Division H, Title I, § 113 (2017). This definition has remained in place through subsequent appropriations legislation, including the current continuing resolution. *See* Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).

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. A CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or the “Board”). 20 C.F.R. § 655.61(a).

## **BACKGROUND**

On November 2, 2017, the Department of Labor’s ETA received an Application for Temporary Employment Certification from the Employer (“Application”). (AF 4; *see* AF 54-87.)<sup>3</sup> The Employer sought a temporary labor certification to hire 55 roofer helpers from January 15, 2018 to October 15, 2018 (or 9 months). The Employer described the nature of its temporary need as “peakload,” and justified such need as follows:

This is a petition for re-certification: H-400-16322-010044 and H-400-15306-047113; 10 % increase in the request for employees; two weeks earlier start date because of the robust construction market in Las Vegas--both within DOL guidance (Sept. 1, 2016)

As with last year, we are asking the DOL to certify that a sufficient number of able, willing and qualified U.S. workers are NOT available at the time and place needed to fill the roofer-helper opportunities for which this certification is being requested because of the winter-related slow down in residential building in Nevada.

(AF 54.) The Employer identified the area in which the roofer helpers would work as Clark County, Nevada, which includes Las Vegas. (AF 57.)

On November 9, 2017, the CO issued a Notice of Deficiency (“NOD”). (AF 49-53.) The CO identified the following deficiencies in the Employer’s Application: 1) a failure to satisfy application filing requirements; and 2) a failure to submit a complete and accurate ETA Form 9142. (AF 52-53.)<sup>4</sup> The Employer appears to have cured these deficiencies and they are not at issue in this appeal. (*See* AF 1-12, 40-48.)

On December 5, 2017, the CO issued a second NOD, with the following stated deficiencies: 1) a failure to establish that the job opportunity is temporary; and 2) a failure to

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<sup>2</sup> On April 29, 2015, the Department of Labor 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 this case. All citations to 20 C.F.R. Part 655 in this Decision and Order are to the IFR.

<sup>3</sup> References to the appeal file in this Decision and Order are abbreviated with an “AF” followed by the page number.

<sup>4</sup> To resolve one of these deficiencies, the Application was amended to change the start date for temporary labor from January 15 to January 16, 2018. (AF 47.)

establish temporary need for the number of workers requested. (AF 40-46.)<sup>5</sup> The bases for the first stated deficiency were that:

- a. The Employer's work is done in Texas, which is relatively favorable to year-round outside work, so the Employer's peak should not be caused by climate change as it asserts.
- b. It is unclear whether the Employer's peak season resulted from its past ability to acquire a temporary workforce, and why the Employer does not secure sufficient contracts during its nonpeak times.
- c. The Employer asserts that it does not have a sufficient number of able, willing, and qualified U.S. workers. However, a labor shortage, in and of itself, is not a temporary event.
- d. It is unclear whether the Employer will experience a true peak in its business during its requested dates of need and whether the Employer will experience a lull in business during its non-peak dates. Further explanation and documentation is needed to support the Employer's alleged peakload need. (AF 43-44.)

The CO required the Employer to submit documentation to cure these deficiencies and specified certain documentation that should be included, such as payroll summaries for 2015 and 2016, a summary of monthly projects for 2015 and 2016, signed contracts, and evidence that the Employer's work cannot be done during its nonpeak period. (AF 44-45.)

On December 14, 2017, the Employer responded to the second NOD. (*See* AF 30-39.) The Employer's response stated that the roofer helpers' work is to be performed in Nevada, not Texas, and included: the prior year's certification letter from ETA dated December 14, 2015, a letter from the Southern Nevada Home Builders Association ("Association") dated December 7, 2017, a "Gnatt" chart showing proposed building in the area, payroll summaries for 2015 and 2016, and overtime data for 2013-2015. (*See id.*) The Employer asserted that because the number of temporary workers that it seeks to hire is not more than 20% greater than the prior year that, according to the Department of Labor's September 1, 2016 announcement, it should not be required to submit additional supporting documents. (AF 30.) The Employer also explained why it could not provide signed contracts. (*See* AF 32.)

On January 2, 2018, the CO denied the Employer's Application. (*See* AF 14-29.) In reaching her final determination, the CO considered the Employer's Application and its response to the second NOD dated December 14, 2017, including: the Association's December 7 letter, the chart showing proposed building (a/k/a project list), payroll summaries, and overtime data. (AF 18-20, 30.) The stated deficiencies underlying such denial were the same as those in the second NOD. (AF 16, 20.) The CO's bases for the deficiencies are essentially the same as those

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<sup>5</sup> As discussed below, the CO's denial is being affirmed based on the first stated deficiency. Thus, a discussion of the second stated deficiency is unnecessary to the outcome of this appeal.

set forth in the second NOD, except the CO found that the Employer's work is done in Nevada,<sup>6</sup> which, like Texas, is relatively favorable to year-round outside work, so the Employer's peak should not be caused by climate change as it asserts. (AF 16-18, 20.)

The Employer submitted this timely appeal to the Board on January 13, 2018, within 10 business days of the CO's decision. The Employer asserted that the CO erroneously determined that it had failed to establish its peakload job opportunity was temporary. (AF 1.) On January 31, 2018, the CO filed a notice that she would not submit a brief, but asked for affirmance of the denial of Employer's Application for the reasons stated in her final determination. Within the extension of time granted by the undersigned on February 1, 2018, the Employer timely filed a brief on February 7, 2018.

## DISCUSSION

### **A. Standard of Review**

The Board's standard of review in H-2B cases is limited. The Board may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

Furthermore, the Board has adopted the position that review of the CO's determination of H-2B applications is governed by the "arbitrary and capricious" standard. *Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape*, 2016-TLN-00045, \*19 (Jun. 15, 2016); *Brooks Ledge, Inc.*, 2016-TLN-00033, \*4-5 (May 10, 2016); see also *J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). In *Three Seasons Landscape Contracting Service*, the Board explained this standard of review as follows:

Under this standard of review, courts "retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision making." Judulang v. Holder, 132 S. Ct. 476, 483-84 (2011). Thus, courts must satisfy themselves that the agency has examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the agency's explanation, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. (citations and internal quotation marks omitted). If the agency has

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<sup>6</sup> Although the CO initially identified Texas in her denial letter as the area in which work will be performed by the requested temporary workers, the CO later noted in her letter that "the employer was still required to explain why its peak season corresponds to climate changes when Nevada has an overall favorable climate year round. The employer did not explain or document the causes for its stated peak period." (AF 18.)

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise,

then it is arbitrary and capricious. *Id.* An agency’s decision is also arbitrary and capricious when it fails to “cogently explain why it has exercised its discretion in a given manner.” *Id.* at 48. Inquiry into these factual issues “is to be searching and careful ....” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

*Three Seasons Landscape Contracting Service*, 2016-TLN-00045, \*19.

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also* *Cajun Constructors, Inc.*, 2011-TLN-00004, \*7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, \*2 (Sep. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, \*5 (Jul. 28, 2009). To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. §§ 655.6(b), 655.11(a)(3). The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a). The applicable regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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 peak load need, or an intermittent need.

In this case, the Employer alleges that it has a peakload need for 55 roof helpers. 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 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).

**B. The CO’s Determination that the Employer Failed to Establish that Its Need Is Temporary**

**1. The CO’s First Basis for Denial – the Weather**

The CO found that Nevada is relatively favorable to year-round, outside work, and the Employer did not show that its peakload need was caused by climate change. The Employer

argues that had the CO given even minimal weight to its two prior applications, which it referenced in its present Application, she would have certified the Employer's temporary need. (Emp. Brf. 8.)<sup>7</sup> In the Employer's prior application for 2016, the Employer explained its temporary need as follows:

**Our yearly schedule of operations is very much determined by how most major housing developers program their calendar year. Developers in Las Vegas Metropolitan area will use the last months of November to January as their home planning and new model building months where only a few slabs are poured which is typically slow season for us.** Most builders imposed themselves yearly goals, based on a myriad of economic variables. Roofers start getting busier in the Las Vegas, NV market right after the framers because we need to load up tile on those roof tops in early February due to the fact that we are right after framing. The early goal for most developers is to build and ready homes at subdivisions for the showroom season which is in the spring season. With orders at hand, then **we get even busier during February and through-out the summer months and all the way through end of October** because we need to fulfill the demand sold and additional spec homes demanded by builders for year-end closings and public reporting. Finally, after the end of October is slow again and it will usually be used for repairs and pick up work.

(Emp. Brf. 7-8; AF 90, 96 (emphasis added).) The Employer argues that this "explain[s] why its peak season occurs in the non-winter months, and it has little to do with the weather." (Emp. Brf. 10.)

In its present Application, the Employer stated: "U.S. workers are NOT available at the time and place needed . . . because of the winter-related slow down in residential building in Nevada." (AF 54.) It was not unreasonable for the CO to infer from this statement that the Employer's peakload and slowdown were weather related. However, had the CO considered this statement in conjunction with the Employer's explanation of its peakload need found in its prior application for 2016, the CO could not have reasonably reached the same conclusion. There is no evidence in the record that the CO considered the Employer's explanation of its peakload need found in its prior application. Moreover, the Employer is correct that "[t]here is no identified basis for the CO's patently subjective assessment of Nevada's winter climate or its suitability for residential construction, and none whatsoever appears anywhere in the record." (Emp. Brf. 10.) The CO's inquiry into this factual issue was not searching and careful. Her first basis for denying Employer's Application was not rational. However, my inquiry does not end here. Under the arbitrary and capricious standard, if there is any rational basis for the CO's determination, it must be sustained. *See Dellew Corp. v. United States*, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); *Erinys Iraq Ltd. v. United States*, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); *see also Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 669, n.11 (9<sup>th</sup> Cir. 1980).

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<sup>7</sup> Although the Employer references two prior ETA case numbers, H-400-16322-010044 and H-400-15306-047113, in its Application, only the application for 2016, with case no. H-400-15306-047113, is included in the Appeal File. (AF 38, 54, 88.) There is no indication in the record that the CO considered the application with case no. H-400-16322-010044. Because that application is not in the Appeal File, I cannot consider it. *See* 20 C.F.R. § 655.61.

## 2. The CO's Second and Third Bases for Denial

The CO found that the Employer failed to establish its need was temporary because it was unclear to the CO whether the Employer's peak season resulted from its past ability to acquire a temporary workforce, and why the Employer did not secure sufficient contracts during its nonpeak times. Putting aside the Employer's biting criticism of this rationale, the Employer does point to its explanation of need in its prior application, (AF 90, 96), the letters from its customers, Lennar, Pulte Homes, and Century Communities, (AF 63-65), and correspondence from the Association dated October 25, 2017, (AF 66-68), in support of a peakload in its industry and its own business. As the Employer notes, its explanation in its prior application supports a peakload from January through October. The letters from Lennar and Pulte Homes expressly state that their peak needs for the Employer's services are from January 2018 through November 2018. (AF 63-64.) And, the Association's October 25 letter supports a peakload in the industry from late January through November. (AF 67.) Contrary to the CO's assertion, it is not unclear why the Employer may have a peakload need from January through October 2018 – that is when the industry and its customers demand its services. For this same reason, it is not unclear why the Employer did not secure sufficient contracts during its nonpeak times.

Additionally, the CO's own determination that the Employer did not have temporary labor on its payroll in 2015 and a majority of 2016, even though it was certified for 50 temporary workers in 2016, runs counter to the CO's suggestion that the Employer's peak season resulted from its past ability to acquire a temporary workforce. Again, it appears that the CO did not examine all the relevant data. Her second basis for denial is clearly contrary to the evidence.

The CO finds support for her third rationale - a labor shortage, in and of itself, is not a temporary event - in the Association's statement that "[c]onstruction worker shortages are adding weeks and months to the time it takes to complete homes and apartments. . . ." (AF 20.) However, when considered with the other statements in the Association's letters, the customers' letters, and the Employer's own explanation of its peakload need, this rationale is not supported by the evidence.

## 3. The Employer's Reliance on the 9/16 Guidance

The Employer heavily relies on *ETA's Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating "Temporary Need"* (Sep. 1, 2016) ("9/16 Guidance"),<sup>8</sup> in its Application, response to the second NOD, and brief. (AF 30, 54; Emp. Brf.) The 9/16 Guidance provides:

To reduce paperwork and streamline the adjudication of temporary need, effectively [sic] immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B "Temporary Need Information," Field 9 "Statement of Temporary Need" of the Form ETA-9142B. . . . Other documentation or evidence demonstrating temporary need is not required to be filed

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<sup>8</sup> [https://www.foreignlaborcert.doleta.gov/pdf/FINAL\\_Announcement\\_H-2B\\_Submission\\_of\\_Documentation\\_Temporary\\_Need\\_082016.pdf](https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf).

with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.

The Employer argues that had the CO followed the 9/16 Guidance, she should have granted the Employer's Application without calling for additional supporting documentation. And, this alleged error by the CO requires reversal of her decision. This argument is not well taken.

The 9/16 Guidance is not a regulation and is not in evidence. Even assuming *arguendo* that I could consider such guidance,<sup>9</sup> its language does not assist the Employer. Once the CO requested additional documentation, it was incumbent upon the Employer to produce such documentation. "The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *Application for Temporary Employment Certification*." 20 C.F.R. § 655.32(a) (emphasis in original); *Saigon Restaurant*, 2016-TLN-00053, \*5-6 (Jul. 8, 2016). The Employer cites to no authority that would allow me to ignore its burden of proof or reverse the CO's denial based on an alleged error by the CO in requesting additional information.

Moreover, the Employer has not demonstrated that the CO was prohibited from requesting any additional information. 20 C.F.R. § 655.31(a) and the 9/16 Guidance both require a CO to issue a notice of deficiency under certain circumstances. They do not expressly prohibit a CO from requesting additional information in other circumstances. And, I need not decide whether § 655.31(a) or the 9/16 Guidance restrict a CO's authority in this regard. The circumstances under which a CO is required to request additional information is broad:

If the CO determines the *Application for Temporary Employment Certification* and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer . . . .

20 C.F.R. § 655.31(a) (emphasis in original).

If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued. . . . The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer's current need is temporary in nature. Likewise, **inconsistencies between the employer's written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.**

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<sup>9</sup> The Board has looked to ETA's website before. In another H2-B certification case, the Board used ETA's website to determine how ETA interprets applicable regulations. *See, e.g., Deboer Brothers Landscaping, Inc.*, 2009-TLN-00018, \*4 (Apr. 3, 2009) (ETA "appears to have interpreted the peakload definition differently. Specifically, ETA has suggested that a landscaping business has a peakload need if it requires more workers every spring, summer, and fall than it does during the winter. ETA, *Frequently Asked Questions: H2-B Processing (Round 1)* 4, [http://www.foreignlaborcert.doleta.gov/pdf/h2b\\_faqs\\_round1.pdf](http://www.foreignlaborcert.doleta.gov/pdf/h2b_faqs_round1.pdf)"). The Board has also taken judicial notice in at least one prior H2-B certification case. *See, e.g., Stonehenge Framing, LLC*, 2010-TLN-00032 \*5 ("within [the Board's] parameters to take judicial notice of a map showing the driving distance between Austin, Texas, and Marble Falls, Texas").

(9/16 Guide (emphasis added).)

The Employer's Application requested an increase in the number of additional workers and a start date of January 15, 2018, which was two weeks earlier than in its prior application. (See AF 54.) But, the Employer's prior application for 2016, which the Employer relies upon in support of its present Application, stated that the peakload "begins in early February." (AF 90.) This alone creates enough of an inconsistency to justify the CO's request for additional information. The CO did not act irrationally in requesting additional information from the Employer. And, even if she had, that is not the determinative issue here. The determinative issue is whether the CO had a rational basis for her final determination.

**4. The CO's Fourth Basis for Denial – Lack of Clarity Regarding Whether the Employer Will Experience a True Peak and a Lull in Business – Further Explanation and Documentation Is Needed.**

Although the CO's inquiry was not searching and careful in certain respects and some of the reasons she gave for her decision run counter to the evidence, the Employer bears the burden of proving that it is entitled to temporary labor certification. There is conflicting evidence regarding whether the Employer has a peakload need in the relevant area from January through October.

As the CO noted, the Employer's payroll records demonstrate that it did not have temporary labor on its payroll in 2015, and a majority of 2016. (See AF 19, 30-31.) The Employer did not explain to the CO why this occurred despite its prior temporary labor certifications.<sup>10</sup> Also, the Employer's total payrolls for November and December 2015, were higher than all but one of its alleged peakload months in 2015, and the Employer did not attempt to reconcile this information with its alleged need. (See *id.*) The CO found that these records did not justify the Employer's alleged peakload need and she was correct.

The CO also found that the project list for 2017 failed to support the Employer's alleged peakload need, but instead appeared to demonstrate a permanent need for temporary workers. There were 40, 59, 49, and 62 projects listed for the off peak months of January, October, November, and December, respectively. There were 35, 65, 41, 61, 42, 40, 51, and 50 projects listed for the peak months of February through September. (AF 19, 34-37.) It was reasonable for

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<sup>10</sup> In its Brief, the Employer argues that:

[D]evelopments downstream of OFLC's action certifying [its] need prevented [it] from actually employing its full complement of H-2B workers. In 2016, [Employer's] approved labor certification was the subject of a Request for Evidence by USCIS in Case No. WAC1605850711. That RFE delayed [Employer's] recruitment and placement of workers and resulted in an increased cost in mobilization when they finally arrived in August, precipitating a decision by [Employer] to decrease the number of men mobilized. . . .

(Emp. Brf. 16.) Employer's factual explanation for why it did not have temporary labor on its payroll in 2015, and a majority of 2016 appears reasonable, but it is not in the Appeal File. Because the Employer did not submit this explanation to the CO before she issued her final determination, I cannot consider it here. See 20 C.F.R. § 655.61.

the CO to conclude that the project list shows a comparable number of projects in Employer's off peak months to its peakload months in 2017. Again, the Employer did not attempt to reconcile this information with its alleged peakload need.

The second NOD required that "[i]f the submitted document(s) and its relationship to the employer's need are not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) support its need for temporary workers." (AF 45.) The Employer did not do this.

Additionally, much of the supporting documentation provided by the Employer was incomplete. As the CO noted, the payroll records include only the amounts paid to workers, not the hours worked or the number of workers, even though the CO expressly requested all this information. The 2016 payroll records did not include pay for November and December. (AF 19, 31, 45-46.) The Employer's graph of overtime expenditures from 2013 through 2015 did not include January or February. (AF 33.) Consequently, the CO found the graph unhelpful. (AF. 19-20.)

In light of the inconsistent evidence regarding peakload need and the Employer's failure to explain such inconsistencies or submit all the information reasonably requested by the CO, the CO's conclusion that the Employer failed to establish a peakload need during the dates requested was rational and supported by the evidence. Consequently, the CO's denial of the Employer's Application was proper and not arbitrary or capricious.

### **ORDER**

For the foregoing reasons, the Certifying Officer's final determination denying certification is AFFIRMED.

For the Board:

JASON A. GOLDEN  
Administrative Law Judge