



Issue Date: 31 January 2018

BALCA Case No.: 2018-TLN-00048

ETA Case No.: H-400-17262-858370

In the Matter of:

3-G CONSTRUCTION COMPANY, INC.,
Employer.

DECISION AND ORDER AFFIRMING THE
DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to 3-G Construction Company, Inc.’s (“Employer”) request for administrative review of the Certifying Officer’s (“CO”) Non-Acceptance Denial in the above captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one time, seasonal, peakload, or intermittent basis.² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”).³ A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA.⁴

¹ 20 C.F.R. Part 655.

² 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 8 C.F.R. § 214.2(h)(6)(iii).

⁴ 20 C.F.R. § 655.61(a).

STATEMENT OF THE CASE

Employer is located in Phoenix, Arizona and employs workers to provide framing services in residential, commercial and custom homes throughout the year.⁵ On 27 Oct 17, Employer applied for H-2B temporary labor certification, seeking approval to hire 15 foreign nationals as Carpenters from 25 Jan 18 to 25 Oct 18, based on a peakload need.⁶ Employer stated that the 2018 peakload period was a result of increased demand for their framing services, specifically, a projected growth of 9% to 11% over 2017.⁷

On 6 Nov 17, the CO issued a Notice of Deficiency (“NOD”), which outlined three deficiencies in employer’s application.⁸ Specifically, the CO determined that employer failed to: (1) establish the job opportunity as temporary in nature; (2) establish temporary need for the number of workers requested; and (3) submit an acceptable job order.⁹ Regarding the first two deficiencies, which are the only issues left on appeal, the CO stated that Employer neither submitted sufficient information to establish its requested standard of need for the period of intended employment, nor distinguished how many permanent and temporary Carpenters it has in its current workforce.¹⁰ The CO requested that Employer submit supporting evidence justifying the dates of need for labor and requested, among other documents,¹¹

a detailed statement of temporary need containing . . . [a] description of the business history and activities (i.e. primary products or services) and schedule of operations through the year; and . . . [a]n explanation regarding why the nature of the job opportunity and number of foreign workers being requested for certification reflect a temporary need; [s]ummarized monthly payroll reports for a minimum of two previous calendar years, including 2015 and 2016, that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation of Carpenters, the total number of workers or staff employed, total hours worked, and total earnings received. . . ; [and s]ummarized contracts, not

⁵ Appeal File (AF) 115.

⁶ AF 104.

⁷ AF 116.

⁸ AF 94-103.

⁹ AF 97-103.

¹⁰ AF 97-100.

¹¹ AF 98.

already submitted, that would show an increase amount of work will be performed during the requested dates of need[.]

On 21 Nov 17, Employer filed a response to the CO's NOD and submitted a revised statement of need, summarized payroll reports for 2015 and 2016, a work project itinerary report for 2016 through forecasted 2018, and a letter of intent to contract.¹²

On 25 Dec 17, the CO issued a Non-Acceptance Denial.¹³ Although Employer cured one of the three deficiencies outlined in the NOD, the CO concluded that Employer failed to submit evidence establishing the job opportunity as temporary in nature and the temporary need for the number of workers requested.¹⁴ Specifically, Employer did not provide any documentation to establish its requested standard of need or period of intended employment.¹⁵

On 2 Jan 18, Employer requested timely administrative review of the CO's Non-Acceptance Denial.¹⁶ BALCA received the Administrative File on 12 Jan 18 and a Supplemental Administrative File on 17 Jan 18. The Solicitor filed a notice on 17 Jan 18 that it would not be filing a brief in this matter. Due to inclement weather the Covington, LA BALCA office was closed from 17-18 Jan 18. Due to lapse in funding, the office was also closed on 22 Jan 18. On 24 Jan 18, I issued a Notice of Docketing and Order Setting Briefing Schedule, permitting Employer and counsel for the CO ("Solicitor") to file briefs by close of business on the seventh business day after the administrative file was received.¹⁷ Also on 24 Jan 18, Employer filed its brief.¹⁸

¹² AF 64-93.

¹³ AF 41-58. Although this date appears to be a typographical error since 25 Dec is a federal holiday, the Non-Acceptance Denial is, in fact, dated 25 Dec 17.

¹⁴ AF 43-49.

¹⁵ AF 43.

¹⁶ AF 1; 20 C.F.R. § 655.61.

¹⁷ 20 C.F.R. § 655.61(c).

¹⁸ This 4 page brief is not paginated but, when referenced, will still be referenced with page numbers.

APPLICABLE LAW

BALCA's standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and Employer's request for administrative review, which may only contain legal arguments and evidence that Employer actually submitted to the CO before the date the CO issued a final determination.¹⁹ A CO's denial of certification must be upheld unless shown by Employer to be arbitrary or capricious or otherwise not in accordance with law.²⁰ After considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action.²¹

Employer bears the burden of proving that it is entitled to temporary labor certification.²² The CO may only grant the employer's application to admit H-2B workers for temporary nonagricultural employment if employer has demonstrated that: (1) insufficiently qualified U.S. workers are available to perform the temporary services or labor for which the employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.²³

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."²⁴ Temporary need, for the H-2B program, is defined as:²⁵

¹⁹ 20 C.F.R. § 655.61.

²⁰ See *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016); *Tarilas Corp.*, 2015-TLN-00016, slip op. at 5 (Mar. 5, 2015).

²¹ 20 C.F.R. § 655.61(e).

²² 8 U.S.C. § 1361; see also *Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed, Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); and *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009).

²³ 20 C.F.R. § 655.1(a).

²⁴ 20 C.F.R. § 655.6(a).

²⁵ 8 C.F.R. § 214.2(h)(6)(ii)(B). See also Department of Labor Appropriations Act, 2017 (Div. H, Title I of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31), § 113 (May 5, 2017).

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 petitioners need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.

To establish a peakload need, the law requires a petitioner to “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.”²⁶

If I affirm the CO’s denial on any singular basis, I need not look further to other denial reasons to decide whether those would also be affirmed.

THE CO’S NON-ACCEPTANCE DENIAL

The CO’s 25 Dec 17 Non-Acceptance Denial was based on his determinations that:

1) Employer failed to establish the job opportunity as temporary in nature.²⁷

The CO explained that

The employer states in ETA Form 9142, Section B, Item 9, that it has a short-term demand for 15 temporary Carpenters to supplement its permanent staff at its job site. The employer explains that it will experience a short-term demand from 25 Jan 18 to 25 Oct 18, and that it projects a growth in its business of 9% to 11% for 2018 that necessitates 15 Carpenters to supplement its permanent workforce.

However, the employer has not sufficiently explained and supported what causes it to experience a peakload need for carpenters from 25 Jan 18 to 25 Oct 18. The employer attested that it has been operating since 1974. While the employer had been certified for Helpers of Carpenters in the previous year (H-400-17003-907219), it has no history of requesting carpenters per se through the H-2B program. The employer has not explained how it operated without temporary carpenters in prior years. Although the employer stated that its need for

²⁶ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

²⁷ AF 23-27.

carpenters this year is due to a growth in business, it has not explained how such a growth has created a short-term need for additional carpenters rather than a permanent need. It is therefore not clear whether the employer will experience an actual short-term, peakload demand for carpenters.

Further, the employer submitted a letter of intent and a job itinerary report for 2016 through projected 2018. The letter of intent indicates that the employer is projected to provide services in the area of intended employment from February 1 to November 15 in 2018. While the letter demonstrates that the employer does have work to be performed during the requested period of need, it does not show the extent of work the employer will be contracted to provide and whether such would create a peakload demand that would necessitate temporary workers to supplement its permanent workforce. The job itinerary report, on the other hand, shows a trend of increased work starting in May and June instead of late January or early February. The job itinerary as presented is also unclear on whether the listed workers needed per month are permanent or temporary, and whether the workers are Carpenters or Carpenter Helpers. It is therefore unclear whether the employer has an actual peakload need for carpenters from late January through October 2018. .

The employer explains that it experiences a peakload need for workers, "...because we work in a fast pace[d] environment and home[s] must be built on a schedule. Most builders imposed [sic] themselves yearly goals, based on some myriad economic variables and we need to fulfill the demand sold and additional spec homes demanded by builders for year-end closings and public reporting." However, the employer did not provide any documentation to support its statement regarding the cause of its peakload need.

The employer does not have a history of requesting carpenters in prior years. While the employer provided a completed work and job itinerary chart that lists the number of workers it had for each month, the chart does not differentiate between occupations. Therefore, the chart does not demonstrate how the employer has a need for carpenters only during the requested period of need. The employer's full history for all requested occupations appears to show that the employer has a permanent need for workers and if the employer is able to secure workers, it has the work to keep them busy. This illustrates a permanent need for workers and not a temporary need.

[Although] the employer also submitted 2015 and 2016 payrolls as requested. . . the payrolls do not support the employer's peakload requested dates of need, 25 Jan 18 through 25 Oct 18, as its total hours worked fluctuate from year to year. For instance, in 2015, the employer's least amount of hours worked were in the beginning of the year from January through April. In 2016, the employer's least monthly hours worked were in January and from October through December. Again, the reason for the employer's peak remains unclear as it seems to alter from year to year and does not seem to be temporary.

Further, the employer submitted one letter of intent from Pulte Development Corporation that indicates its peak months that services are performed in Maricopa County are from 1 Feb 18 to 31 Oct 18. This single letter of intent does not support Employer's change in dates of need that were attested to in its previous application, 1 Apr 17 through 15 Dec 17. Again, the employer appears to have a year-round need for these workers.

2) Employer failed to establish temporary need for the number of workers requested.²⁸ The CO explained that

The employer did not include adequate attestations to justify the need for 15 Carpenters during the period of 25 Jan 18 through 25 Oct 18. The employer states in ETA Form 9142, Section B., Item 9 that it needs 15 Carpenters to supplement its permanent workforce during the requested period of temporary need. The employer explained that it based its determination on a projected growth of 9% to 11% in its business in 2018, and that it will need 15 Carpenters to supplement its current workforce of 140 permanent workers and 82 temporary workers.

However, the employer has not distinguished how many permanent carpenters it has in its current workforce, permanent and temporary. The employer has no history of requesting carpenters per se through the H-2B program and has not explained whether it hired temporary carpenters in the past and at what number. It is therefore unclear why the employer needs the requested number of carpenters for its period of need.

Moreover, the employer submitted a job itinerary report for 2016 through projected 2018. While the job itinerary lists the number of workers needed per month, as presented it does not distinguish between carpenters and non-carpenters, permanent and temporary. The job itinerary as presented also does not show the number of hours carpenters worked per month. It is therefore unclear how the

²⁸ AF 27-29.

employer quantitatively determined that it has a need for 15 carpenters during the requested period of need of 25 Jan 18 to 25 Oct 18.

EMPLOYER'S RESPONSE

Employer answers that its request for 15 carpenters 25 Jan 18 – 25 Oct 18 should be approved, arguing that:

- 1) **It did establish the job opportunity as temporary in nature.** Employer explains that

February, March, and May have the same amount of work and workers needed, so the CO erred by concluding that its increased need of Carpenters does not appear to begin until May.²⁹

The chart provided by Employer shows a need of 29 Carpenters in December 2018 and January 2018 – non peakload months.³⁰ Its second lowest need is in November 2018 – also a non peakload month – during which it needs 32 Carpenters.³¹ However, Employer considers February, March, and May peakload months, and is requesting 15 additional Carpenters, when it shows a need for a mere 1 more Carpenter (33) during these months than in a non peakload month.³² Employer's months of highest need are August 2018 and September 2018, where it states a need for 47 Carpenters.³³

While Employer is correct that February, March, and May all have the same amount of work and workers needed, the CO was actually acting in Employer's favor by suggesting the trend of increased work started in May and June. The fact that February, March, and May are included in Employer's requested peakload need, when those months are within the lowest six months of need shown on the job itinerary, is one reason Employer was denied the requested number of H-2B workers for the requisite time period.

Employer also points out that the CO states, "The job itinerary as presented is also unclear on whether the listed workers needed per month are permanent or temporary, and whether the workers are carpenters or helpers of carpenters."³⁴ Employer responds that it "would like to demonstrate that section 3 of the job itinerary chart clearly identifies the job classification..."³⁵ Employer is correct; it

²⁹ Brief at 1.

³⁰ *Id.* at 2.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ AF 24.

³⁵ Brief at 2.

did provide a breakdown of the classification of the requested workers.³⁶ However, the CO also needed the breakdown of how many of these positions are already fulfilled by Employer's permanent staff. Employer notes that in its response to the NOD it did state, "We currently have 165 total field workers, 28 carpenters, and 137 helpers of carpenters (H-2B temporary workers included)."³⁷ Employer's payroll records for 2015 and 2016 show that Employer did have temporary carpenters on its staff at least half of those months, and had up to 8 on its staff in a single month.³⁸ It is unclear whether Employer has any temporary carpenters included in the current staff numbers provided in its November 2017 application and what those numbers are forecasted to be during its period of request.

Employer then highlights that the CO, at one point, appears to have used the wrong standard in evaluating Employer's need. The CO looks at Employer's certified application for 50 Helper of Carpenters for April – December 2017 and points out that Employer has not justified the change in dates of need when requesting Carpenters from January – October 2018.

Employer cites to the USCIS website:³⁹

The Difference Between a Seasonal and Peakload Need

Although the definition of peakload need uses the phrase "seasonal or short-term demand," there are significant differences between these two types of temporary needs. Unlike in the case of a seasonal need, a petitioner claiming a peakload need must demonstrate the existence of a permanent workforce. Moreover, a peakload need may recur at different times of the year and/or multiple times in the same year. On the other hand, a seasonal need might be based around a sports season that extends for the same six months, year after year. A peakload need would typically last for a shorter amount of time and may recur several months later during the same year (for example, during the Memorial Day weekend and again during Labor Day weekend). Depending on the facts of a specific case, a peakload need may also recur at the same time year after year. Generally, extension petitions covering consecutive periods of time without a significant break do not establish either peakload or seasonal need.

³⁶ AF 7; 13; 80; 86; 118.

³⁷ AF 6.

³⁸ AF 10-11.

³⁹ <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/guidance-temporary-need-h-2b-petitions>. Last visited on 26 Jan 18.

In some cases, peakload needs may be unpredictable in nature. In contrast, our regulations state that seasonal needs may not be unpredictable or subject to change.

The CO's denial does seem to suggest at one point that Employer has not justified its change of dates in need:⁴⁰

This single letter of intent does not support the employer's **change in dates of need** that were attested to in its previous application, April 1 through December 15. Again, the employer appears to have a year-round need for these workers.

The employer has not adequately supported a temporary need for carpenters from January 25, 2018 to October 25, 2018 in Maricopa County/ Phoenix-Mesa- Scottsdale, AZ MSA. While the employer states that it has a peakload need based on its acquired contracts, the employer did not sufficiently explain how such contracts are unique to the employer as to create a **change in its requested dates of need** from its previous application.

The regulations do require justification for any change in dates of need for a Seasonal need.⁴¹ That same justification is not included in the peakload need requirements⁴² and, in fact, provided guidance states the contrary that “a peakload need may recur at different times of the year[.]”⁴³ However, the CO looked at Employer's filing history in expressing a legitimate concern about whether an initial need of 50 carpenter helpers from April – December 2017, coupled with subsequent requests for 60 carpenter helpers and 15 carpenters from January – October 2018, shows a year-round need for “temporary” employees. Moreover, within the entire rest of the Non-Acceptance Denial, the CO applies the correct standard. Consequently, I find that to the extent the CO erroneously applied a requirement for Seasonal need to this case, it is harmless error.

⁴⁰ AF 27 (emphasis added).

⁴¹ 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

⁴² 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

⁴³ See USCIS website at note 29, *supra*.

2) It did establish temporary need for the number of workers requested.⁴⁴
Employer explains that

the chart entitled 3-G Job Itinerary 2018 & Completed 2017-2016 Report “clearly shows how we determine and justify the need for 15 carpenters. . . . Also, [w]e will need a[] high of 47 carpenters during our peakload months, which [is] how we justified the need for 15 carpenters.” The chart does not show a need for 15 carpenters each month in which Employer has requested them. Additionally, this chart fails to provide the underlying data as to how employer came to project a 9-11% growth (summarized contracts, etc.) or the current and projected numbers of permanent and temporary carpenters during that time.

DISCUSSION

A primary issue for review is whether Employer has established a temporary need for workers. To obtain certification under the H-2B program, 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.⁴⁵

Employer alleges it has a peakload need for 15 Carpenters.⁴⁶ In order to establish such a peakload need, 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 in that the temporary additions to staff will not become a part of the petitioner’s regular operation.”⁴⁷

Employer provided its numbers of permanent and temporary carpenters in its Summarized Monthly Payroll Reports for 2015 and 2016. It did not provide the CO with the projected numbers of permanent and temporary carpenters during the period of need, or the summarized monthly payroll for 2017, which was not required by the CO, but would have been helpful.

⁴⁴ Brief at 3.

⁴⁵ 20 C.F.R. § 655.6(b); 20 C.F.R. § 655.11(a)(3).

⁴⁶ AF 104.

⁴⁷ 20 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Employer provides a chart entitled “Units to Complet[e] Per Month 2018.”⁴⁸ The first row, “WORK TO BE COMPLETED”, ranges from 75 to 120 units to complete per month.⁴⁹ Though Employer states “[t]his report shows the **contracted** units per month for 2018 (emphasis added),” Employer has not provided the supporting summarized contracts. Employer states “[t]his increase is a demand from our clients, mainly from Pulte Homes and AV Homes (letters of intent attached).”⁵⁰ It did provide two letters of intent, one from Pulte Development Corporation⁵¹ and the other AV Homes,⁵² stating that these clients intend on using Employer for carpentry services from 1 Feb 18 until 31 Oct 18. These letters do not include any data to suggest how many Carpenters will be required to complete these jobs for either client, but both say “[t]o perform the required services will require a substantial number of workers, and it is difficult, if not impossible, to find U.S. workers ready, willing and able to perform this work.” Employer based its numbers of requested carpenters directly on the number of projects to complete in 2018, but has not shown how it reasonably determined this number of projects each month. Employer needed to provide the underlying data as to how it determined the number of projects to complete in 2018.

A peakload need assumes that an employer has enough permanent staff on its payroll to cover its baseline need and needs to augment that permanent staff on a temporary basis with foreign national workers. Employer’s “Units to Complet[e] Per Month 2018” chart shows that in January and December, the two months of lowest need, Employer states a need for a total of 29 Carpenters.⁵³ Employer states “When our peakload ends, we will no longer need temporary workers, our permanent workers will thereafter, fully assume the slower months’ demand for our services.”⁵⁴ Employer either has enough permanent workers to cover even the stated 32 carpenters needed in November 2018, or should increase its permanent staff to account for the minimum need throughout the year, Employer cannot use a peakload request to augment its staff numbers up to its baseline, year round need.

⁴⁸ AF 7.

⁴⁹ AF 6.

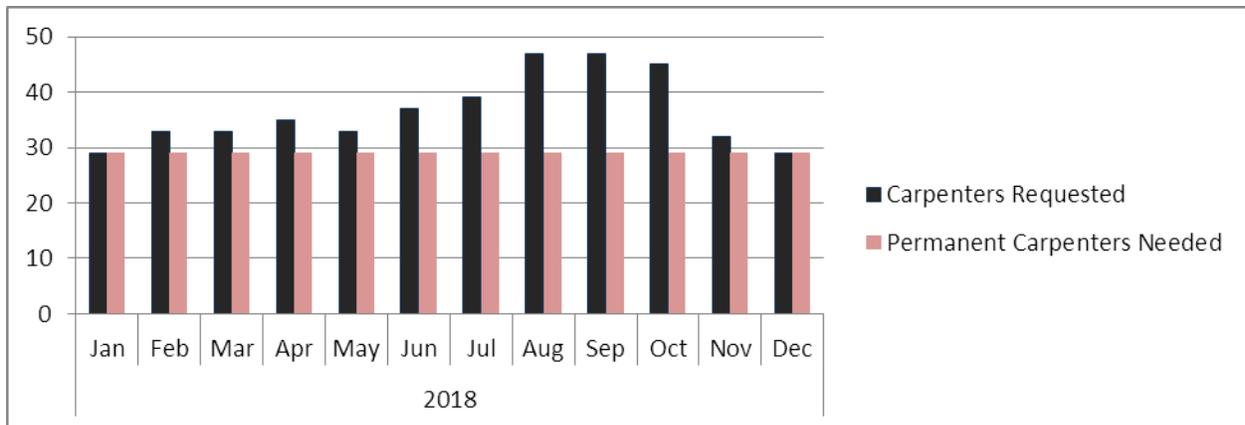
⁵⁰ *Id.*

⁵¹ AF 85.

⁵² AF 119.

⁵³ AF 85; 119.

⁵⁴ AF 7.



Carpenters Requested v. Permanent Carpenters Needed

Assuming, arguendo, that Employer had provided the background data to support the work to be completed (summarized contracts, etc.) as the CO requested, it would appear that Employer does have a peakload need. The dates of that need, however, seem to be from June 2018 through October 2018, and a reasonable number would be the workers needed each of those months MINUS the minimum amount of carpenters needed per month (29), averaged, which amounts to 14 carpenters.

Given that the nine month peakload is a regular part of the yearly demand cycle (which appears to be at least partly seasonal), it would be much more accurate to call the other three months a slow period.⁵⁵

⁵⁵ Schools employ most teachers for nine months out of the year. A small number of teachers are employed year-round to teach summer school during the other months. Using Employer's logic, a school's need of regular, full time, nine month teachers would be considered a peakload need. Teachers employed during the regular school year are not considered a temporary addition to a school's staff, and in the instant case, a nine month need each year for many more workers than in holiday months should not qualify as a peakload need.

After reviewing the record and the parties' legal arguments, I cannot find that the CO's decision that Employer has failed to establish that it has a temporary need for H-2B workers from 25 Jan 18 through 25 Oct 18 was either arbitrary, capricious, or otherwise not in accordance with law.

ORDER AND DECISION

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

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge