

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 13 April 2018**

**BALCA Case No.: 2018-TLN-00081**  
**ETA Case No.: H-400-17362-671185**

*In the Matter of:*

**SUN STATE COMPONENTS OF NEVADA,**  
*Employer.*

Appearances: Kevin R. Lashus, Esq.  
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Austin, Texas  
*For the Employer*

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Office of the Solicitor  
U.S. Department of Labor  
Washington DC  
*For the Certifying Officer*

Before: **JERRY R. DeMAIO**  
Administrative Law Judge

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

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("BALCA") of the denial by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA") of its application for an H-2B temporary labor certification. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655, Subpart A.<sup>1</sup> For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

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<sup>1</sup> On April 29, 2015, the Department of Labor ("DOL") and the Department of Homeland Security jointly published an Interim Final Rule ("2015 IFR") amending the standards and procedures for the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). This case will be heard under the procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

## **STATEMENT OF THE CASE**

On June 14, 2017, Sun State Components of Nevada (“Employer”) filed an application for H-2B temporary labor certification with the ETA. (AF 20-79)<sup>2</sup>. The application sought to certify the employment of ten truss assemblers for employment in the United States from April 1, 2018 through December 31, 2018. (AF 20). On January 29, 2018, the CO issued a Notice of Deficiency (“NOD”) under 20 C.F.R. § 655.31, notifying the Employer that its application had failed to meet the criteria for certification (AF 14-19).

First, the CO determined that the Employer had failed to establish the job opportunity as temporary in nature, citing 20 CFR 655.6(a) and (b). In response, the CO asked the Employer to provide an updated temporary need statement, containing (1) a description of the employer’s business history and activities (i.e. primary products or services) and a schedule of operations throughout the year; and (2) evidence justifying the Employer’s standard of temporary need, including monthly invoices from the previous calendar year, signed service contracts from customers for the previous year, and summarized monthly payroll reports for a minimum of one previous calendar year. (AF 17-18). The CO noted that, if the documents submitted were not clear to a layperson, then the Employer must also submit an explanation of how the documents support the requested dates of need.

The second item on the NOD was the Employer’s failure to establish temporary need for the number of workers requested, under 20 C.F.R. § 655.11(e)(3) and (4). To resolve this issue, the CO requested that the Employer submit: (1) A statement indicating the total number of workers the employer is requesting; (2) an explanation, with supporting documentation, as to why the employer is requesting ten truss assemblers for North Las Vegas during the time of need; (3) documentation supporting the employer’s need, such as contracts, letters of intent, etc.; (4) summarized monthly payroll reports for the last year; and (5) any other evidence that justifies the number of workers requested. The NOD gave the Employer 10 business days from the date of issuance of the NOD. (AF 19).

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<sup>2</sup> Citations to the appeal file are abbreviated “AF” followed by the page number.

On February 15, 2018, the CO denied the temporary labor certification application. (AF 5-6). As grounds for denial, the CO noted that, following the issuance of the NOD, the Employer submitted neither a modified application within ten business days, nor requested review before an administrative law judge under 20 C.F.R. § 655.51. As a result, the application was denied under 20 C.F.R. § 655.31(b)(4).

On March 1, 2018, the Employer requested administrative review of the denial before BALCA. (AF 1). On March 15, 2018, a Notice of Docketing was issued allowing the parties to file briefs within 7 business days. On March 29, 2018, the Employer filed a brief in support of its position.

## **DISCUSSION**

The Employer's brief argues that the CO's denial failed to follow Department guidance on temporary need, and the Employer's past certifications justify its temporary peakload need. However, the basis for denial was not substantive, it was a failure of the Employer to respond in a timely manner to the Notice of Deficiency.

If a CO determines that an Application for Temporary Employment Certification is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO may issue a Notice of Deficiency (NOD) to the employer, as was done in this case. 20 C.F.R. § 655.31(a). By regulation, the NOD must include certain elements. First, the NOD must note the deficiencies identified. 20 C.F.R. § 655.31(a) & (b)(1). The NOD must give the employer an opportunity to submit a modified Application within 10 business days from the date of the NOD. 20 C.F.R. § 655.31(b)(2). The NOD must also offer the employer an opportunity to request, within 10 business days, an administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61, and the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's decision. 20 C.F.R. § 655.31(b)(3). Finally, the NOD must State that if the employer does not comply with the requirements of this section by either submitting a modified application or requesting administrative review before an ALJ under § 655.61 within 10 business days, the CO will deny the application. Such a denial is final, and cannot be appealed. 20 CFR § 655.31(b)(4).

Here, the CO issued a NOD that contained all of the requisite elements. The NOD was issued on January 29, 2018. The ten-business-day deadline ran out on February 12, 2018, and the denial was issued on February 15, 2018. Prior to February 15<sup>th</sup>, the record contains no response to the NOD. An amended application was not submitted, nor was new evidence, a request for administrative review, or any legal argument as to why the CO's decision was incorrect. In its brief the Employer does not address the issue of timeliness or the fact that it failed to respond to the NOD. Under 20 C.F.R. § 655.31(b)(4), therefore, the Application was properly denied.

**ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Board:

**JERRY R. DeMAIO**  
Administrative Law Judge