

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 24 June 2019**

**BALCA Case No.:** 2019-TLN-00137  
**ETA Case No.:** H-400-19114-746218

*In the Matter of:*

**Adam and Adam Transportation Corp. DBA  
Adam and Adam Transportation,**  
*Employer.*

Appearance: Livius Ilasz, Esquire  
New York, NY  
*For the Employer*

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

Before: Susan Hoffman  
Administrative Law Judge

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

This case arises from Adam and Adam Transportation Corp., DBA Adam and Adam Transportation’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

---

<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<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 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 ha[ve] 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.

seek to hire foreign workers under 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). The final Administrative File was submitted to the undersigned on June 12, 2019.

## **I. Background**

On or about November 24, 2018, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 1345-1744.<sup>3</sup> Employer is a private common carrier business, proving transport and delivery of commercial goods. It is incorporated in the State of Illinois and has its principal place of business in Maspeth, New York. Employer applied for temporary labor certification for 10 full-time heavy and tractor-trailer truck drivers. The application states that the laborers are needed on a temporary basis starting July 18, 2019, and ending June 20, 2020, because of temporary need based on a one-time occurrence. *Id.*

Employer states it “permanently employs 14 truck drivers” and requires the services of ten additional truck drivers for a special project. The additional drivers would perform the same general carrier duties as the other drivers to complete this one project, except that the temporary drivers would only work within the New York City area. The normal staff of full time truck drivers work throughout the continental United States. AF 1357-58. A broker, Midwest Trucking Transport d/b/a Midwest Express Inc. (“Midwest Trucking”) retained Employer’s exclusive services for the project, which requires two drivers per truck and a fleet of five heavy tractor trailer trucks. AF 1358. Employer attaches and incorporates into its application the contract, which is dated July 25, 2018, with Midwest Trucking (the “Contract”). AF 1358, 1451. The Contract provides that Employer will utilize its own cold-store tractor-trailer combination trucks and/or trucks having a capacity of at least 80,000 pounds. AF 1542. The “Termination” provision of the Contract provides that “[T]his Offer” shall remain open until July 18, 2019, and shall terminate automatically on that date unless the parties “enter into Agreement.” AF 1545. The provision goes on to state, “Upon acceptance of the instant Offer, this Agreement shall become binding and fully enforceable.” AF 1546. If that happens, the contractual obligations commence on July 18, 2019, and (absent other termination conditions being met) terminates automatically on June 19, 2020, or within eleven months after Employer begins performance, whichever is earlier. *Id.*

Employer states that “the demands of this project are unlike anything that our company has previously attempted or engaged in” and alleges that it does not have enough workers to perform the project. AF 1359. Once the project is completed, Employer does not anticipate needing the additional ten drivers because none of their other contracts have ever required more than one driver per vehicle. Employer currently has nine projects which involve ongoing business relationships. In their regular course of business, Employer “contracts with brokers for

---

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

an indefinite duration and in a non-exclusive capacity.” *Id.* Their regular staff of fourteen drivers can handle those other nine projects. *Id.*

Despite allegedly extensive recruitment efforts over the past two years, Employer has been unable to hire qualified truck drivers on a temporary basis. Over twenty postings on Craigslist.com resulted in a handful of applicants, half of whom lacked the requisite 24 months of experience and the other half were not interested in temporary employment. AF 1360. Employer received no applications in response to a posting on the New York State Job Bank, and advertising in the New York Post newspaper for two consecutive Sundays was to “no avail.” *Id.* Employer has recruited seven foreign nationals from Poland for the project, all of whom possess the requisite 24 months of experience. *Id.* Employer states it has never hired any truck driver with less experience, “nor would it be feasible to do so” due to an alleged exposure to additional liabilities. AF 1361. Employer wishes to “temporarily employ” these individuals “for an initial period of eleven (11) months,” and after completion of the project, they will return to Poland. *Id.*

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency on April 30, 2019. AF 1332-1344 The Certifying Officer (“CO”) noted eight deficiencies in the application and requested that Employer submit additional information. On May 10, 2019, Employer submitted its response to the Notice of Deficiency.<sup>4</sup> AF 883-1331. The response provided additional documentation and/or explanation as to each of the eight noted deficiencies. *Id.*

After receipt of the additional documentation from Employer, the Office of Foreign Labor Certification issued its Final Determination on May 15, 2019. AF 873-882. The Certifying Officer denied Employer’s application, finding that two of the eight deficiencies previously identified in the Notice of Deficiency remained. *Id.* Specifically, the CO identified “Failure to establish the job opportunity as temporary in nature” as Deficiency 1.<sup>5</sup> The CO noted that the Employer had provided an explanation of its one-time temporary need and submitted the Midwest Trucking Contract, IRS Forms 1099 from 2018 issued to independent contractors of Employer, as well as numerous load and rate confirmations. Having considered the Employer’s explanation, the CO determined that Employer has used truck drivers in the past and is currently using truck drivers in its operations. Therefore, Employer had not demonstrated “*it has not had a need in the past for the labor or service and will not need it in the future.*” AF 879 (italics in original). The CO determined that Employer’s explanation did not support its alleged temporary need, but instead confirmed Employer’s use of truck drivers currently and in the past, regardless of the nature of the truck drivers’ assignments or the requirements of the Contract with Midwest Trucking. AF 879. Further, the CO avers that the acceptance of this unique project shows Employer’s willingness to enter into contracts “outside its normal contractual model,” but does not create a one-time need for employment of additional truck drivers. AF 879.

The CO identified “Failure to submit an acceptable job order” as Deficiency 2.<sup>6</sup> Without specifying what required language was missing, the CO concluded it did not contain all the

---

<sup>4</sup> The record reflects a number of duplicate documents that Employer submitted with both its initial application and in response to the Notice of Deficiency.

<sup>5</sup> In the Notice of Deficiency, this deficiency was identified as Deficiency 2.

<sup>6</sup> In the Notice of Deficiency, this deficiency was identified as Deficiency 8.

required language, “including the assurance to use a single workweek as its standard for computing wages due.” Further, Employer failed to provide a copy of the job order for the position to the New York SWA, despite the regulation requiring such submission at the same time an Employer submits its Application for Temporary Employment Certification. AF 881-882.

Employer submitted its Request for Administrative Review on May 30, 2019. AF 1-872.<sup>7</sup> With regard to Deficiency 1, the failure to establish the job opportunity as temporary in nature, Employer acknowledges that it has needed truck drivers in the past and is currently using truck drivers in its operations. But, the Midwest Trucking Contract has a unique requirement that Employer must use two truck drivers for each trip or assignment, and previous operations and contracts had no such requirement. AF 4-5. Employer concludes that this difference in contractual requirement proves its need for temporary workers based on a one-time occurrence. AF 5.

With regard to Deficiency 2, the failure to submit an acceptable job order, Employer argues that it did submit an amended job order to the CO. If the CO found the amended order deficient, it should have given Employer the chance to correct the alleged clerical omission and could have issued a second Notice of Deficiency. Failure of the CO to do so is alleged to be arbitrary and capricious. AF 6-12. Employer also argues that the CO thereby violated due process and equal protection of the law. AF 13.

The Certifying Officer did not file a legal brief on appeal, and the time for doing so has expired. 20 C.F.R. § 655.61(b). Accordingly, this proceeding is now before the undersigned as a designated member of the Board of Alien Labor Certification Appeals for the issuance of this Decision within the parameters of Section 655.61.

## **II. Legal Standard**

The Board’s scope of review in the H-2B program is limited. When an employer requests review under Section 655.61(a), the Board considers “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The Board may not consider new evidence that was not before the Certifying Officer. *See* 20 C.F.R. § 655.61(a)(5). The Board’s authority to act is similarly limited; the Board may either affirm the determination of the Certifying Officer, reverse or modify the determination, or remand the matter back to the Certifying Officer for further action. 20 C.F.R. § 655.61(e). Finally, Section 655.61(f) provides for expedited review of any request for administrative review by the Board. 20 C.F.R. § 655.61(f).

The undersigned notes that the Immigration and Nationality Act and the applicable regulations do not specify a standard of review. Some members of the Board have applied an arbitrary and capricious standard. *See e.g., Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019) (collecting cases). Other members have rejected this standard and applied a less

---

<sup>7</sup> Again, the record reflects a number of duplicate documents that Employer submitted with its initial application, in response to the Notice of Deficiency, and in the request for administrative review. BALCA may only consider the documentation considered by the CO in its final denial determination as contained in the AF and may also consider the arguments set forth in the request for review and legal briefs submitted to BALCA. 20 CFR §655.61(e).

deferential standard. *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) (determining whether the basis provided for the applications denial was legally and factually sufficient in light of the written record); *Saigon Restaurant*, 2016-TLN-00053 (July 8, 2016) (applying a de novo standard of review). The undersigned, however, need not address this issue at this time as the result reached in this matter would be the same regardless of whether the undersigned applied an arbitrary and capricious standard or a de novo standard.

### **III. Discussion**

#### **A. Failure to establish the job opportunity as temporary in nature**

The employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; *Jose Uribe Concrete Constr.*, 2019-TLN-00025 (Feb. 21, 2019). 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. § 655.1(a); *see also* 8 C.F.R. § 214.2(h)(6)(i)(A).

The regulations require that an employer seeking certification must establish that its need for the laborers is temporary, irrespective of whether the position itself is permanent or temporary, and that the need for the labor will end in the “near, definable future.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(A)-(B). A need is temporary where the employer provides justification to the Certifying Officer that the laborers are needed for either: (1) a one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 20 C.F.R. § 655.6(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). Temporary need is limited to periods of up to three years for a one-time event and one year or less for seasonal need, peakload need, and intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). A labor shortage, no matter how severe, does not justify a temporary need. *See, e.g., Coreslab Structures Texas, Inc.*, 2019-TLN-00087 (Apr. 2, 2019).

In evaluating whether a job opportunity is temporary, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need,” rather, “[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL190706 (BIA Nov. 24, 1982). Here, Employer requests temporary workers for a “one-time occurrence.” In order to establish a one-time occurrence, an employer must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. 8 C.F.R. § 214.2(h)(6)(ii)(B)(1); *Richmond Country Constructions, LLC*, 2018-TLN-00164, 2018-TLN-00165, 2018-TLN-00166, 2018-TLN-00167 (Oct. 5, 2018).

As to the first regulatory condition of establishing a temporary need based on a one-time occurrence, Employer has employed truck drivers in the past and so admits. It argues, however, that it has not employed truck drivers on any assignment where two truck drivers would be required for each delivery trip or assignment. In the past, Employer has only employed truck drivers on assignments for which one truck driver is required, but the Midwest Trucking Contract is unique in that it requires two truck drivers for each assignment. AF 5, 891. This

argument is unpersuasive. Simply stating that the project in question requires an additional truck driver for each assignment does not overcome the regulatory mandate that Employer has not employed workers to perform the same “services or labor in the past.” Employer has used truck drivers in the past and continues to use them, regardless of the nature of the specific truck driver assignments.

Further, certain information submitted by Employer raises questions about the reliability and consistency of its evidence. On the one hand, Employer states that it permanently employs fourteen truck drivers (AF 1357) and that its “regular staff” of fourteen drivers can handle its other projects smoothly (AF 1359). On the other, Employer states that “all truck drivers which have been working for this employer in the past and who perform the work for this Applicant/Employer now, were and are independent contractors and not employees.” AF 892, 895. In support of this latter statement, Employer submitted payroll records of fourteen truck drivers for the year 2018, which are IRS Forms 1099-Misc and reports of work payments made to all drivers. AF 939-1000, 1228-1229. Employer asserts that the status of its workers as independent contractors, not employees, means that it cannot require them to remain with Employer and continue to provide transport and delivery of commercial goods. AF 896. Either Employer’s regular staff of permanently employed truck drivers can handle its ongoing business, or Employer cannot rely on its independent contractors to continue to perform services as truck drivers in the ordinary course of its business.

In another instance of conflicting statements, Employer asserts that it has never hired any truck driver with less than 24 months of experience, “nor would it be feasible to do so” due to an alleged exposure to additional liabilities. AF 1361. Yet, in response to the Notice of Deficiency, Employer chose not to provide additional information justifying the experience requirement, but instead amended it to be “no more than 12 months.” AF 900. While curing that particular deficiency, Employer’s response casts some shadow on its previous assertion as to the unfeasibility of hiring truck drivers with less than 24 months of experience.

Employer also fails to establish that it has a singular, unpredictable, non-recurring temporary need for ten truck drivers whose services would not be required in the future. Employer points to the Midwest Trucking Contract as the one-time occurrence justifying its temporary need. This unique project may be a first-time occurrence of a contractual requirement for two drivers per assignment, but Employer does not demonstrate that it could not happen again. Obtaining contracts appears to be the core of Employer’s normal business operations. Employer claims that its temporary need will end when the Midwest Trucking project is completed, but the very nature of its business entails acquiring and fulfilling contractual projects. It is not clear that this project represents a unique event in its business operations or that Employer would be unwilling to accept future contracts which differ from its normal contractual model or, in fact, any future contracts in its normal model. Any additional contract might require Employer to employ additional drivers, and that type of business model does not necessarily meet the regulatory requirements of temporary need. *See, e.g., Matter of Cajun Constructors, Inc.*, 2009-TLN-00096 (Oct. 9, 2009)

In addition, the Midwest Trucking Contract itself is structured as an offer which terminates automatically unless Employer accepts it and thereby enters into an agreement. AF 1545. There appear to be no consequences to Employer if the offer simply expires. The Contract is dated in July 2018 for performance to begin in July 2019. Employer states that the project has

a value more than double the gross income of the business for 2017. The project involves the transport of “special-order gourmet produce and/or other perishable delicacies, that the Broker [Midwest Trucking] has limited supplies of.” AF 1358. It is unclear how the Broker could have limited supplies of perishable goods which need to be delivered over an eleven month period of time. The actual nature of this operation does not appear to be self-contained, as would, for example, the one-time transport and delivery of a durable good. The Contract therefore seems to represent not so much a temporary need as a business opportunity.

If Employer did enter into an agreement with Midwest Trucking, it would be required to provide two drivers per truck and a fleet of five heavy tractor trailer trucks. AF 1358. Employer asserts that its need for services of foreign national truck drivers would end upon completion of the contractual project, but the record contains no information or explanation about the required fleet of trucks. As noted above, the very nature of Employer’s operations requires that, in order for the business to survive, it must continue to provide transport services under contract. Employer has also shown a willingness to engage in business opportunities which would grow and expand its normal operations. Employer has failed to meet its burden to establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future.

In the alternative, Employer could demonstrate that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. Employer fails to meet this regulatory standard as well. Employer makes no showing that it is a business with a permanent employment situation that it needs to supplement. Rather, its entire business appears to be based on a temporary employment situation, with its staff of truck drivers being independent contractors and its operations solely based on contractual relationships.

Employer has failed to meet its burden to establish that it has a temporary need for ten truck drivers on a one-time occurrence basis as required by the controlling regulations.

## **B. Failure to submit an acceptable job order**

Where the Certifying Officer issues a Notice of Deficiency, the failure of the employer to provide all required documentation will result in the denial of the employer’s application. 20 C.F.R. § 655.32(a). The Board, however, has previously held that if the employer explains why it is unable to produce the documentation requested in the Notice of Deficiency and provides alternative evidence, the Certifying Officer may not deny the certification without first considering whether the alternative evidence satisfies the employer’s burden. *International Plant Services, LLC*, 2013-TLN-00014 (Dec. 21, 2012).

Following receipt of the NOD, Employer submitted an amended job order. The Final Determination notes that certain required language was still missing, “including the assurance to use a single workweek as its standard for computing wages due.” Further, Employer failed to provide a copy of the job order for the position to the New York SWA, despite the regulation requiring such submission at the same time an employer submits its Application for Temporary Employment Certification. AF 881-882.

Employer argues that, if the CO found the amended order deficient, it should have given Employer the chance to correct the alleged clerical omission and could have issued a second Notice of Deficiency. Failure of the CO to do so is alleged to be arbitrary and capricious. AF 6-12. Employer also argues that the CO thereby violated due process and equal protection of the law. AF 13.

As Employer acknowledges, the regulatory language is permissive, not mandatory, and states that the CO “*may* issue one or more additional Notices of Deficiency before issuing a decision.” 20 C.F.R. § 655.32(a) (italics added). There is no obligation to issue a second NOD, which undermines Employer’s arguments alleging due process and equal protection violations. Further, Employer does not explain why it did not provide a copy of the job order to the New York SWA when so directed, but instead simply stated that it would do so in the future. Nor did Employer explain why its amended job offer did not include all required language, other than to argue to the undersigned multiple times that it was a “clerical” error or omission. AF 4, 7, 8, 10, 11, 13. Nor did Employer offer any alternative evidence for the CO’s consideration.

Employer failed to fully comply with the Notice of Deficiency within the mandate of the regulations.

#### **IV. Conclusion**

Upon an independent review of the record and the relevant legal authority, the undersigned finds that Employer failed to satisfy its burden of demonstrating that it is entitled to a temporary employment certification under the applicable regulations. Accordingly, the undersigned **AFFIRMS** the final determination of the Certifying Officer denying the temporary labor certification for the reasons stated above.

**SO ORDERED.**

For the Board:

Susan Hoffman  
Administrative Law Judge