



Issue Date: 06 March 2019

BALCA Case No.: 2019-TLN-00038
ETA Case No.: H-400-18333-894092

In the Matter of:

BRAZEN & GREER MASONRY, INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Appearance: Jenine Saleh, Esq.
Antone, Casagrande & Adwers, P.C.
Farmington Hills, MI
For the Employer

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

Before: Jason A. Golden
Administrative Law Judge

DECISION AND ORDER OF REMAND FOR FURTHER ACTION

This case arises from Employer Brazen & Greer Masonry, Inc.’s request for review of the Certifying Officer’s (CO) Final Determination in an H-2B temporary alien labor certification matter. The H-2B non-immigrant 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);¹ 20 C.F.R. § 655.6(b).²

¹ The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division H, Title I, § 113 (2018).

² 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. 24042 *et seq.* (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after

Employers who 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. A certifying officer in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA) reviews applications for temporary labor certification. Following the certifying officer'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 January 7, 2019, the ETA received an Application for Temporary Employment Certification from the Employer (Application). The Employer sought a temporary labor certification to hire six bricklayers from April 1, 2019 to December 31, 2019. (AF 314.)³ The Employer described the nature of its temporary need as “peakload,” and justified such need as follows:

Brazen & Greer Masonry Inc. has a temporary peakload need for 6 additional temporary brick layers and 4 additional temporary construction laborers to meet its business needs during the upcoming 2019 construction and masonry season. (A separate application for the temporary construction laborers is being filed concurrently.) Brazen & Greer Masonry Inc. currently has a permanent year-round staff of thirty-eight (38) workers performing its construction and masonry services and it needs to supplement its permanent staff of workers by the temporary addition of additional brick layers and construction laborers to meet this year's projected peakload business demands. Brazen & Greer Masonry Inc. is presently bidding on projects and securing contracts for 2019 and seeks 10 additional temporary workers, comprised of a mix of brick layers and construction laborers to supplement its permanent staff in order to complete the influx of projects they have already contracted to undertake in 2019, the majority of which will be constructed from April through December 2019.

(*Id.*)

The CO issued a Notice of Deficiency (NOD) on January 16, 2019. (AF 307.) The Employer timely responded to the NOD on January 17, 2019. (AF 41.) The CO issued a Final Determination denying Employer's Application on January 24, 2019. The CO identified the following deficiencies in the Employer's Application and response to the NOD: (1) a failure to establish the job opportunity is temporary in nature pursuant to 20 C.F.R. § 655.6(a) and (b); and (2) a failure to establish temporary need for the number of workers requested pursuant to 20 C.F.R. § 655.11(e)(3) and (4). (AF 33-40.)⁴ The Employer submitted this timely appeal to the

April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). 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.

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

⁴ Although the CO listed several other deficiencies in her NOD, the other deficiencies were addressed in Employer's response to the NOD and not listed as reasons for denial of the Application. (See AF 12-18, 19-22, 28-33.) Therefore, the other deficiencies are not before the Board for review.

Board on February 7, 2019, within 10 business days of the CO's decision. The CO has not file a brief.⁵

DISCUSSION AND APPLICABLE LAW

A. Standard of Review

The Board's standard of review in H-2B certification cases is limited. The Board may only consider the appeal file prepared by the certifying officer, 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 certifying officer before the date the certifying officer issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board must: (1) affirm the certifying officer's determination; (2) reverse or modify the certifying officer's determination; or (3) remand the case to the certifying officer for further action. 20 C.F.R. § 655.61(e).

"Neither the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.* (INA), nor the regulations applicable to H-2B temporary labor certifications, 20 C.F.R. Part 655, Subpart A, identify a specific standard of review for an employer's appeal under 20 C.F.R. § 655.61(e)." *Herder Plumbing, Inc.*, 2019-TLN-00022, *2 (Jan. 23, 2019). The Board has fairly consistently applied the "arbitrary and capricious" standard to review certifying officers' determinations of H-2B applications. *G.A.S. Unlimited, Inc.*, 2018-TLN-00028 (Dec. 21, 2017); *see, e.g., United Forest Services LLC*, 2019-TLN-00028, *3 (Feb. 11, 2019); *Cooper Roofing & Solar*, 2018-TLN-00056, *4-5 (Feb. 15, 2018); *Three Seasons Landscape Contracting Service, Inc.*, 2016-TLN-00045, *19 (Jun. 15, 2016); *Brooks Ledge, Inc.*, 2016-TLN-00033, *4-5 (May10, 2016) (panel decision); *see also J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016). Under the arbitrary and capricious standard, if there is any rational basis for the certifying officer'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 (9th Cir. 1980).). 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

⁵ The undersigned works in the Cincinnati District Office of the Office of Administrative Law Judges and received the appeal file on February 19, 2019. Any delay in issuing this Decision and Order is the result of the Cincinnati District Office suffering severe flooding on March 2, 2019, and temporarily closing for restoration.

clear error of judgment.” *Id.* (citations and internal quotation marks omitted). If the agency has

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 (underlining in original).

However, while a decision of a judge sitting on the Board may be considered persuasive authority by other judges sitting on the Board, it is not binding precedent on them. Thus, there have been some Board decisions in which judges have rejected the arbitrary and capricious standard in favor of a de novo standard of review for appeals of certifying officers’ determinations on H-2B applications. *See, e.g., Herder Plumbing, Inc.*, 2019-TLN-00022, *2-3; *ATP Restaurant Inc.*, 2019-TLN-00018, *5 (Dec. 20, 2018) (“The standard of review is de novo. That, is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided”); *Best Solutions USA, LLC*, 2018-TLN-00117, *2, n. 2 (May 22, 2018). Additionally, in one or more cases, the Board has applied a deferential standard of review for particular types of issues in H2-B certification cases. *See, e.g., Royal Hospitality Services, LLC*, 2011-TLN-00010, *9 (Mar. 29, 2011)(applying a reasonableness standard to review ETA’s policy interpretation of an H-2B regulation). The Employer urges the Board to follow the decision in *Herder Plumbing* and apply a de novo standard of review in this case. (AF 2-3.)

In *Herder Plumbing*, Judge Larry Price wrote:

The Board has fairly often applied an arbitrary and capricious standard to its review of a CO’s determination in a labor certification case, while yet other decisions apply a quasi-hybrid deference standard or *de novo* standard.⁶ The

⁶ “*Cf. Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (applying arbitrary and capricious standard but affording deference where Office of Foreign Labor Certification’s or CO’s interpretation involved longstanding or clearly articulated interpretation of regulation); *Zeta Worldforce, Inc.*, 2018-TLN-00015 (Dec. 15, 2017) (applying *de novo* standard where no such interpretation is at issue); *Albert Einstein Medical Center et al.*, 2009-PER-00379, -81 [sic], slip op. at 31-32 (Nov. 21, 2011) (en banc) (citing 5 U.S.C. § 577(b) rather than § 706(2)(A) and concluding that *de novo* review of CO decisions denying permanent labor certification is appropriate due to intra-agency nature of the adjudication).” *Herder Plumbing, Inc.*, 2019-TLN-00022, *3, n. 4. Contrary to note 4 in *Herder Plumbing*, in *Brook Ledge*, the Board did not afford deference or agree that it should afford deference “where Office of Foreign Labor Certification’s or CO’s interpretation involved longstanding or clearly articulated interpretation of regulation.” Instead, the Board agreed it “should defer to OFLC’s rational and reasonable

arbitrary and capricious standard adopted by the Board no doubt stems from the Administrative Procedure Act. Judicial review under the Administrative Procedure Act provides that an agency's actions, findings, and conclusions shall be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C § 706(2)(A). This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. *Albert Einstein Medical Center, supra*; see also, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989).

Accordingly, in reviewing the CO's decision in the case *sub judice*, I will determine whether the basis stated by the CO for the denial of the application is legally and factually sufficient. . . .^{7]}

Judge Price may be correct that the arbitrary and capricious standard applied in H2-B certification cases derived from the Administrative Procedure Act (APA).⁸ He is certainly correct that 5 U.S.C § 706(2)(A) does not mandate application of the arbitrary and capricious standard in this case.

Additionally, although appeals to the Board in H2-B certification cases are not governed by the hearing provisions of the APA,⁹ there is support in the APA for application of a de novo review standard in H2-B certification cases. Section 557 of the APA states:

- (a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.
- (b) When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. **On appeal from or review**

interpretation of an ambiguous regulatory term." *Brook Ledge, Inc.*, 2016-TLN-00033, *4-6 (panel decision) ("Should the OFLC explain its 'longstanding' definition, or issue guidance, BALCA will review such a policy under the abuse of discretion standard, and will 'defer to the program agency where its actions, interpretative or otherwise, are reasonable and consistent with law, even where its choice is not compelled by law or regulation, and its choice may not be the best one among reasonable alternatives'"). Moreover, in *Zeta Worldforce*, the Board did not apply a de novo standard of review. Instead, it stated that "absent an established policy-based interpretation of the regulations, it would appear that BALCA should review the Certifying Officer's denial *de novo*." *Zeta Worldforce, Inc.*, 2018-TLN-00015, *4 (Dec. 15, 2017). It then stated that it "need not determine the deference owed the certifying officer, for [it] would affirm her decision even were [it] to accord them no deference (i.e. apply *de novo* review)." *Id.*

⁶ 5 U.S.C. § 551, *et seq.*

⁷ "In so doing, I adopt the standard of review as defined in *Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018) for the reasons stated by Administrative Law Judge William T. Barto." *Herder Plumbing, Inc.*, 2019-TLN-00022, *3, n. 5.

⁸ 5 U.S.C. § 551, *et seq.*

⁹ Compare 5 U.S.C. §§ 553, 554, 556, with 20 C.F.R. Part 655, subpart A.

of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. . . .

5 U.S.C. § 557 (emphasis added).¹⁰ Although Section 557 of the APA does not apply to this proceeding by its own terms, in an *en banc* decision in *Albert Einstein Medical Center*,¹¹ the Board stated that:

Given that the APA provides for de novo review of an ALJ decision following a formal hearing unless otherwise specified by an applicable statute or regulation, agency appellate review of a subordinate official's ex parte decision without the trappings of a formal hearing suggests that that de novo review should also apply, unless the matter being reviewed is clearly committed to that subordinate official's discretion or there exists some other legally recognized reason for affording a more deferential standard of review to the agency's decision.

Id. at *29 (footnotes omitted).¹² Thus, Section 557 analogously permits the Board to decide anew the appellate issues before it in H2-B certification cases, except as limited by notice or rule.

In addition to examining the INA, the regulations applicable to H-2B certifications, Board precedent, and the APA, another analytical framework for determining the standard of review is suggested by the Board in *RP Consultants, Inc. v. Administrator*.¹³ In that case, the Board was faced with deciding the standard of review applicable to prevailing wage determination (PWD) cases arising under 20 C.F.R. § 655.731. After reviewing cases arising under other regulatory provisions for guidance and determining that no applicable statute or regulation established the standard of review, the Board decided that it must determine whether the PWD is committed to the certifying officer's discretion. *RP Consultants*, 2009-JSW-00001, *7-10. In doing so, the Board stated:

Section 656.41(c) (2009) provides in pertinent part:

(c) *Review on the record.* The [Administrator] will review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD.

Clearly, the Administrator is vested with significant discretion in reviewing a PWD made by a SWA. As was noted by the *El Rio Grande* panel, perhaps nowhere is there more significant discretion vested in the Administrator than in making prevailing wage determinations. The PWD regulations are complex and require special expertise in application.

¹⁰ Section 556 describes requirements for formal APA hearings.

¹¹ 2009-PER-00379, *26-27 (Nov. 21, 2011).

¹² Although *Albert Einstein Medical Center* involved appeals under the "PERM" regulations found at 20 C.F.R. Part 656, the regulations in PERM and H2-B cases are similar enough for the Board's aforementioned reasoning in *Albert Einstein Medical Center* to apply equally in this case.

¹³ 2009-JSW-00001 (June 30, 2010).

Id. at *10. The Board accordingly held that the standard of review applicable to the appeal of a PWD arising under 20 C.F.R. § 655.731 is abuse of discretion.¹⁴

The certifying officer's discretion, if any, in determining either to certify or deny an application for temporary labor certification is set forth below:

Except as otherwise provided in this paragraph (b), the CO **will** make a determination either to certify or deny the *Application for Temporary Employment Certification*. The CO **will certify the application only if the employer has met all the requirements of this subpart**, including the criteria for certification in §655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

20 C.F.R. § 655.50(b)(emphasis added). Further,

(a) The criteria for certification include whether the employer has a valid *H-2B Registration* to participate in the H-2B program and has complied with all of the requirements necessary to grant the labor certification.

(b) In making a determination whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO **will** count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

(c) A certification **will not** be granted to an employer that has failed to comply with one or more sanctions or remedies imposed by final agency actions under the H-2B program.

20 C.F.R. § 655.53 (emphasis added). By contrast, 20 C.F.R. § 655.54 provides that “[t]he CO **may issue** a partial certification, reducing either the period of need or the number of H-2B workers or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*.”¹⁵ Thus, unlike the decision to grant a partial certification, which appears to involve some discretion similar to that in *RP Consultants*, the certifying officer's decision to certify or deny an application for temporary labor certification involves little or no discretion. If the employer meets all the requirements for certification, the “CO will certify the application.” 20 C.F.R. § 655.50(b). In accordance with *RP Consultants*, this suggests that an arbitrary and capricious standard of review

¹⁴ Courts treat the “abuse of discretion” and “arbitrary and capricious” standards as similar, if not the same. *Rizzo v. Paul Revere Ins. Grp.*, 925 F. Supp. 302 (D.N.J. 1996) (stating that the “arbitrary and capricious” standard of review is essentially one and the same as the “abuse of discretion” standard). The phrases are interchangeable and both are understood to require a reviewing court to affirm, unless an underlying interpretation was unreasonable, irrational, or contrary to language of the statute. *Fabyanic v. Hartford Life and Accident Ins. Co.*, No. 02:08-cv-0400, 2009 U.S. Dist. LEXIS 21777, 2009 WL 775404, at *5 (W.D. Pa. Mar. 18, 2009).

¹⁵ (Boldface added).

is less suitable than a de novo standard of review for determining appeals of H2-B certification cases.

The foregoing analysis could support the Board's use of a de novo standard of review in H2-B certification cases. However, I decline to adopt a de novo standard of review in this case for two reasons. First, the fact that the Board has fairly consistently applied the arbitrary and capricious standard to these types of cases and appears to have used this standard before any of its judges adopted a de novo standard provided notice to applicants, future applicants and certifying officer's alike that the Board would limit its review to determining whether certifying officer's decisions were arbitrary and capricious. This nullifies the persuasiveness that the argument based on Section 557 of the APA may have had.

Second, the doctrine of *stare decisis* compels me to follow the weight of Board precedent in this case. The doctrine is a policy of courts to stand by precedent and not disturb settled points of law. *Neff v. George*, 364 Ill. 306, 4 N.E.2d 388, 390-91 (1936). It is grounded on the theory that security and certainty require that an accepted and established legal principle, under which rights may accrue, be recognized and followed. *Otter Tail Power Co. v. Von Bank*, 72 N.D. 497, 8 N.W.2d 599, 607 (1943). Of course, departure from precedent may be necessary to vindicate plain, obvious principles of law and remedy continued injustice, or where public policy demands it. *Colonial Trust Co. v. Flanagan*, 344 Pa. 556, 25 A.2d 728, 729 (1942). According to the doctrine, it is within the court's discretion to adhere to, modify, or overrule precedent that is later found to be not legally sound depending upon the circumstances of case before it. *Otter Tail Power Co.*, 8 N.W.2d at 607. In the context of U.S. Supreme Court jurisprudence, Justice Souter has described the doctrine of *stare decisis* as:

Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." Nevertheless, when governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." Stare decisis is not an inexorable command; rather it "is a principle of policy and not a mechanical formula of adherence to the latest decision."

Payne v. Tennessee, 501 U.S. 808, 827-30, 111 (1991) (Souter, J., joined by Kennedy, J., concurring) (citations and quotations omitted).

The doctrine of *stare decisis* is especially important in deciding appeals of H2-B certification determinations because there is no procedure in place for *en banc* review of these type of appeals to the Board. See BALCA En Banc Procedures.¹⁶ And, more importantly, the Board's decisions in these cases are the final decisions of the Secretary of Labor. See 20 C.F.R. Part 655, subpart A. Should the Board fail to attempt to provide consistency in its decisions, the fairness and utility of the entire H2-B certification process likely would fall into question.

¹⁶ Found at: https://www.oalj.dol.gov/PUBLIC/INA/REFERENCES/REFERENCE_WORKS/BALCA_EN_BANC_PROCEDURES.HTM.

Employer does not argue and I cannot articulate any injustice, public policy demand, or other compelling reason to abandon Board precedent. Accordingly, until the weight of Board authority favors use of a de novo standard of review in H2-B certification cases, I will continue to follow the arbitrary and capricious standard of review, which has been fairly consistently utilized by the Board in these types of cases.

B. Burden of Proof

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, *2 (Sept. 10, 2014); *Cajun Constructors, Inc.*, 2011-TLN-00004, *7 (Jan. 10, 2011). 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 six bricklayers. 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); *Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014).

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

In the CO’s NOD, she stated that the Employer “did not sufficiently demonstrate the requested standard of temporary need.” (AF 311.) The CO asserted that the documents submitted by the Employer fail to establish a peakload period or when the employer’s peakload period may begin and when it may end. (AF 311.) Hence, the CO requested that the Employer submit further explanation and documents, including:

- (1) A statement describing the Employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;

- (2) An explanation of the duties performed by the Employer's permanent bricklayers during the stated non-peak period;
- (3) "*If applicable*, an explanation and supporting documents that substantiate that its type of work cannot be performed or is lessened under certain weather conditions in the employer's its area of intended [sic];" (AF 311-312),
- (4) "Summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Bricklayer, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system; and" (AF 311-312),
- (5) "Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. . . ." (AF 311-312; underlines in original.) The CO further instructed the Employer that "[i]f the submitted document(s) and its relationship to the [E]mployer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) support its requested dates of need." (AF 312.)

"In response to the NOD, the [E]mployer submitted: a statement from the [E]mployer (AF 48-53); resubmitted a letter from the President of the Union, Bricklayers & Allied Craftworkers Local 2 of Michigan (AF 55); copy of invoices for the year 2018 (AF 57-74); contracts (AF 76-153); building permit data (AF 155-163); graphs provided by the Economic Research Unit (AF 165-172); market data published by the Michigan Department of Treasury (AF 174-176); and copies of article [sic] of the Petoskey News, The Goshen News, Midland Daily News, Grand Rapids Business Journal, and the Detroit News (AF 178-198)." (AF 37; citations to AF added.) Additionally, the Employer also submitted payroll records, (AF 201-239, 242-305), and letters dated January 16, 2019, signed by its President, George Greer, attesting that "the information being presented (including the monthly payroll reports for 2018) was compiled from actual accounting records of Brazen & Greer Masonry, Inc." (AF 200, 241.)

After reviewing the Employer's submission, the CO again determined that the "Employer did not sufficiently demonstrate the requested standard of temporary need and period of need." (AF 36.) "Furthermore, the [E]mployer did not make clear what its seasonal or short-term demand is that results in a temporary need for additional bricklayers." (AF 36.) Specifically, the CO noted that the Employer contends that its requested peakload dates of need are based on a construction season in Southeast Michigan, but concluded that the Employer did not provide documentation to support its statement regarding a construction season and when that season begins and ends. (AF 37.)

In its appeal, the Employer asserts that "[i]t appears the CO overlooked the [E]mployer's cover letter, which explained the context and the purpose of each supporting documentation the [E]mployer provided in their NOD Response." (AF 7.) The Employer is correct; the cover letter, signed by Employer's counsel, does explain the context and purpose of supporting documentation provided by the Employer. (See AF 41-46.)

The Employer asserts that its statement signed by Mr. Greer and found at AF 48-53 (Employer’s Statement) supports that its need is temporary, from April to December. (AF 4, 5.) The Employer notes that the CO did not comment on Employer’s Statement, (AF 4), and specifically points to four quoted portions of Employer’s Statement that it believes are relevant to establishing a temporary need from April to December. The Employer is again correct. The CO did not comment on Employer’s Statement other than to note its inclusion in Employer’s response to the NOD.

Moreover, Employer’s Statement does support Employer’s assertion that it consistently experiences a peak in demand and need from April to December. (See AF 48-53.) Employer’s Statement provides, in part:

1. “Our temporary demand will occur during the peakload construction season this year. Although our business operates year-round, our high-volume peakload need is based on the commercial and industrial construction season in Southeast Michigan, which is from April through December.” (AF 48.)
2. “In order to timely complete all of our contracts during April through December 2019, we must have sufficient staff to field three crews simultaneously (each comprised of approximately 16 workers). We cannot field three crews with our 38 regular workers, and our 38 regular workers cannot fulfill all of the anticipated contracts for the 2019 April to December construction season. We must, then, turn to temporary employees to fill our additional labor need for April - December.” (AF 49.)
3. “Based on our accounting records, we have compiled the following chart comparing average revenue during the peakload construction season (April through December), with that of the low season (January - March) for the last year, and over the last three years, and computed the % difference in monthly revenue between the peakload season vs. the low season.

| CONSTRUCTION SEASON / LOW SEASON | AVERAGE MONTHLY REVENUE | % DIFFERENCE IN MONTHLY REVENUE BETWEEN CONSTRUCTION SEASON/ LOW SEASON |
|---|-------------------------|---|
| Construction Season: April- Dec 2018 | \$770,587.43 | 54.48% higher than low season |
| Low Season: Jan – March 2018 | \$419,808.44 | |
| 3 Year Average of Construction Seasons 2016- 2018: April - December | \$837,658.03 | 66.16 % higher than low season |
| 3 Year Average of Low Seasons 2016 – 2018: Jan – March | \$554,179.59 | |

We are experiencing a similar slowdown in demand for our services this January, and, based on our experience and our conversations and contracts already agreed with clients, we anticipate that demand will increase again in April 2019 and last through December 2019.” (AF 51.)¹⁷

4. “For further support, we attach all of our invoices for 2018. Such invoices indicate over 90% of the work we perform is performed during the months of April to December, evidenced by the “Invoice Date” listed. This reflects the peakload demand for our services during the months of April through December, and supports the fact that we perform (and invoice) over 90% of our work during the peakload construction season between April and December.” (AF 52.)

The CO stated that she was “not clear” how the 18 page Vendor Status Report supports the Employer’s dates or need “and the [E]mployer did not provide any context for its support.” (AF 38.) However, the cover letter of Employer’s response to the NOD describes the documents attached to the letter. The letter describes the second category of attached documents as follows:

- 2) Copy of Brazen & Greer Masonry, Inc.’s Invoices for 2018. Such invoices indicate over 90% of the work Brazen & Greer Masonry, Inc. performs are during the months of April to December, evidenced by the “Invoice Date” listed, as evidence of the peakload demand for Brazen & Greer Masonry, Inc services during the months of April through December.

(AF 42.) This category of documents directly corresponds with the Vendor Status Report, which is attached as “Tab 2” to the response. Thus, contrary to the CO’s assertion, the description above provides clear context for how the Vendor Status Report supports Employer’s peakload demand and the dates of such demand.

Moreover, the invoice information within the Vendor Status Report demonstrates that the Employer invoices 93.11% of its work during the peakload months of April through December. Employer argues that “[i]f the employer did not experience such a high peakload demand, their work and invoices would be proportional, and they would invoice 25% of their work between January and March, and invoice 75% of their work between April and December.” (AF 8.) Employer’s argument has merit.

The CO reported that it was not clear how the contracts submitted by the Employer specifically support its peakload dates of need. (AF 38.) But, upon close inspection, the majority of Employer’s contracts are for work performed during the April to December time period,

¹⁷ The heading “% DIFFERENCE IN MONTHLY REVENUE BETWEEN CONSTRUCTION SEASON/ LOW SEASON” accurately describes the percentages depicted in the third column of the chart above, e.g., $\$419,808.44 / \$770,587.43 = 54.48\%$. However, the statements in the same column that the average monthly revenues in the construction season are X% “higher than low season,” are inaccurate. For instance, the revenue of \$770,587.43 is approximately 83.56% higher than the revenue of \$419,808.44. (83.56% is calculated by dividing \$350,778.99 by \$419,808.44. And, \$350,778.99 is calculated by subtracting \$419,808.44 from \$770,587.43).

which supports Employer's assertion of an April to December peak demand. It is clear enough how the contracts support Employer's peakload dates of demand.

The CO determined that the letter from the President of the Union, Bricklayers & Allied Craftworkers Local 2 of Michigan does not support Employer's dates of need. The letter states that the Employer "communicates with [the Union] regarding available bricklayers to meet their need for increasing their bricklayer field staff." It further states that the Union was unable to meet Employer's demands during the previous year for bricklayers. (AF 55.) The CO is correct that the letter does not support Employer's dates of need, but it does demonstrate that the Employer regularly employs bricklayers and that it has a need for more bricklayers than the union can fill.

The CO determined that the Michigan building permit data submitted by the Employer shows "a peak in obtaining building permits from June through November," but does not support Employer's dates of need. She noted that "once a permit is issued, the permit holder has six months to start construction." (AF 38.) The Employer asserts that the "building permit data reflect [that] the peakload construction demand in Michigan is from April through December." (AF 6.) Specifically, the Employer points to the graph it produced, (*see* AF 155), which "reflects that 62.1 % more permits were issued during the [E]mployer's peakload season, specifically within the [E]mployer's intended area of employment, compared to their non-peakload season." (AF 11.) This evidence may demonstrate a peak in obtaining building permits from June through November, but it also does not contradict a peakload season from April to December since construction under a permit can be commenced within six months after a permit issues.

The CO determined that the various line graphs for employees in the construction industry in Michigan contain inconsistent data and are not specific to the Employer. (AF 44.) The CO noted that the Employer "did not provide any context as to how [the graphs] support its dates of need." (AF 38.) The CO is correct. The graphs are not specific to the Employer and the Employer did not provide context as to how the graphs support Employer's dates of need. It is true that in the fourth page of its cover letter, the Employer explained that:

Graphs provided by the Economic Research Unit at the Federal Reserve Bank of St. Louis using data from the U.S. Bureau of Labor Statistics regarding construction employment and spending in Michigan and nationwide over recent years. As indicated therein, each year the number of employees in the Michigan construction industry is highest from approximately April through December, with January through March each year characterized by reduced demand for construction workers in Michigan. In particular, we note that in 2017 demand remained considerably higher in December compared to January through March.

(AF 44.) However, the CO was not required to speculate why the fact that the number of employees in the Michigan construction industry is highest from approximately April through December supports any particular need by the Employer. And, the Employer did not explain why such fact supports its alleged particular need.

Lastly, the CO reported that the Employer submitted “104 pages of unsummarized” payroll records that “**were not reviewed** as the employer was to submit summarized monthly payroll reports for the 2017 and 2018 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Bricklayer, the total number of workers or staff employed, total hours worked, and total earnings received.” (AF 38, emphasis added.)

The Employer responds “if the CO would have looked at the payroll records submitted, the CO could have easily seen that the last page of every month provided a **summary of the total hours worked for that month and the total earnings received** (“gross pay”). . . . Similarly, for the last page of every month, there was a **summary of the total hours worked for that month, and the total earnings received** (“gross pay”) for, separately, Bricklayers.” (AF 17, some emphasis omitted.)

Former 20 C.F.R. § 655.23(d), which is not included in the IFR, provided that: “failure to comply with an RFI, including not providing all documentation within the specified time period, may result in a denial of the application.” The IFR is silent regarding whether a certifying officer may deny an application for not providing all the documentation requested. And, there is no compelling reason to read such a requirement into the IFR. Since our standard of review is “arbitrary and capricious,” it behooves employers to submit all documents requested by a certifying officer or explain why it has not done so. A certifying officer could reasonably infer that an employer failed to submit requested documentation without adequate explanation because such documentation negates a condition that the employer needs to prove. Such an inference could then be used by a certifying officer **as part of** her reasonable basis to deny certification, assuming she explained her use of the inference in her final determination.¹⁸ However, denying an application for temporary labor certification **solely** because the employer did not submit all the documentation requested by the certifying officer is not permitted by the IFR.

In interpreting former Section 655.23(d), the Board held that where an employer explained why it could not produce the requested documentation and provided alternative evidence, it was an abuse of discretion for the certifying officer to deny certification without considering whether such alternative evidence was sufficient to carry the employer’s burden. *See International Plant Services, LLC*, 2013-TLN-00014, *6 (Dec. 21, 2012); *see also Deboer Brothers Landscaping, Inc.*, 2009-TLN-00018 (Apr. 3, 2009) (ALJ reversed denial of certification notwithstanding the employer’s noncompliance with the RFI). This is a reasonable approach under the IFR as well.

Here, the Employer did not provide the payroll summaries requested by the CO. Instead, it provided monthly payroll reports for 2018. The Employer characterizes the total hours worked and total earnings received, which are listed at the end of each monthly payroll report as “summaries.” However, these are mathematical sums, not summaries. The fact that the records

¹⁸ An employer should also be motivated to submit all documents requested by a certifying officer and explain them to minimize the risk that the certifying officer may view those records differently than the employer. If an explanation of evidence is important enough to submit to the Board, then it is important enough to submit to the certifying officer in the first instance. Failure to do so could cross the line from permissible legal argument to the Board to the impermissible submission of additional evidence.

are not summaries are further evinced by the January 16, 2019 attestations signed by Mr. Greer, which state that “the information being presented (including the monthly payroll reports from 2018) was compiled from the actual accounting records . . .” (AF 200, 241.) There is no information attached to the attestations other than the monthly payroll reports from 2018. Additionally, the Employer submitted no payroll reports or summaries of payroll reports from 2017, or any alternative evidence that would include similar information. And, none of the payroll reports distinguish between permanent and temporary employees as requested by the CO.

The Employer also did not explain why it could not provide the payroll summaries requested by the CO or any payroll records for 2017. The Employer was clearly capable of producing actual summaries. It did so for the 2018 payroll reports in its appeal. (*See* AF 16-18.)

The question then is whether the CO’s decision was arbitrary and capricious because she did not review the 2018 payroll records; did not comment on Employer’s Statement; did not account for the significance of the Vendor Status Report, contracts, or the letter from the President of the Union; placed too much weight on the Michigan building permit data showing a peak in obtaining building permits from June through November; and, failed to explain why the absence of 2017 payroll summaries or records was important to her decision. Because an agency must examine the relevant data, consider the relevant aspects of the problem before it, and articulate a satisfactory explanation for its action, which the CO has not done here, I find that her decision was arbitrary and capricious. *See Three Seasons Landscape Contracting Service*, 2016-TLN-00045, *19 (citing *Motor Vehicle Mfrs. Ass’n, Inc.*, 463 U.S. at 43).

However, this decision does not end my inquiry. Employer bears the ultimate burden of demonstrating entitlement to certification and the CO’s aforementioned failures do not automatically constitute grounds for requiring certification. *See International Plant Services, LLC*, 2013-TLN-00014, *6. As stated above, 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). All the records above establish a demand from April through December. But, it is not clear whether they also establish the remaining elements required by Section 214.2(h)(6)(ii)(B)(3), specifically including whether the Employer needs to supplement its permanent staff on a temporary basis due to such demand. Employer’s payroll records for 2018, in conjunction with the other evidence submitted, may or may not demonstrate this. Because the CO did not review the 2018 payroll records; comment on Employer’s Statement; account for the significance of the Vendor Status Report, contracts, or the letter from the President of the Union; and, failed to explain why the absence of 2017 payroll summaries is important, she must do so on remand and reassess her Final Determination. In doing so, the CO shall not weigh the Michigan building permit data against the Employer.

D. The CO’s Determination that the Employer Failed to Sufficiently Demonstrate that the Number of Workers Requested on the Application is True and Accurate and Represents Bona Fide Job Opportunities

The second deficiency found by the CO is that the Employer did not indicate how it determined that it needs six bricklayers during its asserted peakload period. In her Final Determination, the CO wrote:

In response to the NOD, the employer submitted 104 pages of unsummarized 'PR Distribution By Employee/Job/Code'. The **reports were not reviewed** as the employer was directed to provide a summarized 2018 monthly payroll report that identified for each month and separately for fulltime permanent and temporary employment in the requested occupation Bricklayer, the total number of workers or staff employed, total hours worked, and total earnings received.

Therefore, the documentation did not overcome the deficiency.

(AF 39, emphasis added.) The CO's second stated deficiency suffers from the same problem as the first deficiency. The CO did not review the 2018 payroll reports or comment on Employer's Statement, specifically including those pages found at AF 49-50. Rather, the CO focused on the Employer's failure to provide all of the requested information in the requested format. The CO's failure to review the payroll records and comment on the pages of the Employer's Statement found at AF 49-50 was arbitrary and capricious. On remand, the CO must review, consider, and comment on the payroll records and Employer's Statement and reassess her Final Determination.

ORDER

In light of the foregoing, the Certifying Officer's Final Determination denying certification is REVERSED and REMANDED for further assessment and a new final determination of whether certification should be granted or denied. In her further assessment, the CO shall review and comment on the 2018 payroll records; comment on Employer's Statement; account for the significance of the Vendor Status Report, contracts, and the letter from the President of the Union consistent with this Decision and Order; and, explain the importance, if any, of the absence of 2017 payroll summaries. The CO shall not weigh the Michigan building permit data against the Employer. The CO's comments on all this evidence should explain how it supports her new final determination. Additionally, the CO may consider Employer's appeal brief in her reassessment.

SO ORDERED.

For the Board:

Jason A. Golden
Administrative Law Judge

