



**Issue Date: 10 March 2020**

**BALCA Case No.:** 2020-TLN-00027  
**ETA Case No.:** H-400-20002-227873

**GLD CONCRETE, LLC**

*Employer*

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from the request of GLD Concrete, LLC (“Employer”) for review of the Certifying Officer’s (“CO”) decision to deny its 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 non-agricultural 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 (“DHS”). *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup>

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor (“Department”) using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification of the Department’s Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

**BACKGROUND**

On January 2, 2020, ETA received an application for temporary labor certification from Employer. (AF 39-61.)<sup>3</sup> Employer requested certification for forty “construction laborers.” (AF 39.) Employer identified the nature of its temporary need as “peakload” and the period of intended employment as April 1, 2020, to December 23, 2020. (AF 39.) In addition to its Form 9142B, Employer also submitted a Notice of Entry of Appearance as Attorney, a “Statement of

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

<sup>2</sup> On April 29, 2015, the Department of Labor and DHS 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.

<sup>3</sup> In this Decision and Order, “AF” stands for “Appeal File.”

Temporary Need,” a job order, lists of its 2020 contracts and work orders with Tealstone Commercial Inc. and G2 Concrete LLC, and a prevailing wage determination. (AF 48-61.)

### Legal Standard

An employer seeking certification under the H-2B program must show that it has a temporary need for workers. Temporary service or labor “refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.” 8 C.F.R. § 214.2(h)(6)(ii)(A); 20 C.F.R. § 655.6(a). Employment “is of a temporary nature when the employer needs a worker for a limited period of time,” and the “employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

An employer’s need is temporary if it qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b).<sup>4</sup> “Except where the employer’s need is based on a one-time occurrence, the CO will deny a request for a [certification] where the employer has a need lasting more than 9 months.” § 655.6(b). An employer can establish a “peakload need” if it shows 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). An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §§ 655.11(e)(3) and (4); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

An employer bears the burden of proof. *Alter and Son Gen. Eng’g*, 2013-TLN-00003 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). Bare assertions without supporting evidence are insufficient to carry the employer’s burden. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). In addition, the burden is on the employer to provide the information and to present it in such a way so that the CO can determine that the employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

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<sup>4</sup> Because the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant.

## Employer's Application

As set forth above, Employer requested certification for forty construction laborers for an alleged period of peakload temporary need from April 1, 2020, to December 23, 2020. (AF 39.) Employer described a laborer's job duties as follows: "Clean and prepare site, form setting, mixing and pouring cement, reinforce, grading, digging, and loading and unloading used materials." (AF 41.) Employer indicated that the requested employees would work in multiple cities and towns in various counties in Texas, including: Dallas, Tarrant, Collin, and Kaufman. (AF 42, 45.)

On its Form 9142B and its attached "Statement of Temporary Need," Employer explained that it has a temporary peakload need for laborers because "our busiest seasons are traditionally tied to the spring, summer and fall months," and "[a]s is well known, Texas wet winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable." Employer emphasized that it has the least need for laborers during the winter months (approximately December 23 to April 1) because "the cold and wet weather is not conducive to cleaning and preparing sites, form setting, mixing and pouring cement, reinforcing, grading, and digging" and because "construction in general slows down and the need for laborers is substantially reduced." Employer indicated that its temporary workers "do not become a part of our permanent labor force," though Employer does "continue to employ some year round workers." (AF 44, 50.)

To support its temporary peakload need for laborers, Employer's application also included lists of its 2020 contracts and work orders with two companies: Tealstone Commercial Inc. and G2 Concrete LLC. (AF 52-54.) These lists include a contract amount, number of hours, and square footage for each project listed.

## Notice of Deficiency

On January 17, 2020, the CO issued a Notice of Deficiency ("NOD"). (AF 31-38.) The CO identified three deficiencies in Employer's application. First, Employer failed to "establish the job opportunity as temporary in nature" under 20 C.F.R. § 655.6(a) and (b). (AF 35.) According to the CO, Employer did not sufficiently explain what causes it to experience a peakload need that starts in April and ends in December. Though Employer indicated that its requested period of need is dependent on favorable weather conditions, the CO indicated that "the requested job opportunity is in an area where weather conditions do not prevent construction work during winter months." (AF 35.)

Additionally, according to the CO, the "2020 Contracts and Work Orders" lists submitted by Employer "provide no support for the requested dates of need nor justifies a peakload in its business needs in any way." (AF 35.) The CO concluded that it is uncertain whether Employer "experiences a true peak in its business during its requested dates of need or if the employer experiences a lull in business during its nonpeak dates, December 24 through March 31." (AF 35.)

In order to remedy this deficiency, the CO directed Employer to submit supporting documentation, including: (1) a statement of Employer's business activities and schedule of operations throughout the year; (2) an explanation of why construction laborer work cannot be performed under certain weather conditions in Texas; (3) a summary list of all projects in the area of intended employment for the previous two calendar years with project start and end dates and worksite addresses; (4) "Summarized monthly payroll reports for the 2018 and 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Laborer, the total number of workers or staff employed, total hours worked, and total earnings received;" (5) an explanation of the data in the submitted payroll documentation; and (6) any other evidence or documentation that serves to justify the dates of need being requested for certification. (AF 35-36.)

The second deficiency in Employer's application concerned its "failure to establish temporary need for the number of workers requested" under 20 C.F.R. § 655.11(e)(3) and (4). (AF 37). According to the CO, Employer failed to demonstrate that the number of workers requested in its application "is true and accurate and represents bona fide job opportunities" because Employer did not explain how it determined that it needs forty laborers during the requested period of need. (AF 37.)

In order to remedy this deficiency, the CO directed Employer to submit supporting documentation, including: (1) an explanation of why Employer is requesting forty laborers for Texas during the requested dates of need; (2) documentation supporting Employer's need for forty laborers, such as contracts, letters of intent, etc. that specify the number of workers and dates needed; (3) "Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received;" (4) an explanation of the data in the submitted payroll documentation; and (5) any other evidence or documentation that serves to justify the number of workers requested. (AF 37.)

The third deficiency in Employer's application was a "failure to submit a complete and accurate ETA Form 9142" under 20 C.F.R. 655.15(a). (AF 37-38.) According to the CO: "The job order indicates that the worker must lift 45 lbs. However, this lifting requirement is not listed in the application." (AF 38.) Employer was therefore directed to modify its application as follows: "Section F.a., Item 11, Special Requirements must indicate that workers are required to lift 45lbs." The CO noted: "We require your written permission to make any corrections to the application on your behalf." (AF 38.)

#### Employer's Response to the Notice of Deficiency

On February 3, 2020, Employer submitted a letter in response to the NOD. (AF 26-30.) Employer emphasized that it has successfully petitioned the Department for temporary labor certification in the past. (AF 26.) According to Employer, the Department agreed that:

[T]here was a pattern of peak load need for forty temporary laborers to conditions routinely associated with Texas winters upon real estate sales: year over year our

customers have indicated that there is a precipitous decrease in residential home purchases in the Fall because of the holiday season and a measurable increase in demand near the end of the school year beginning in March each year because families with children are hoping to resettle prior to the beginning of the school year. It's enough of a "trend" to be classified as a predictable pattern.

(AF 26.)

Employer explained that it provided with its application detailed summaries of work projections and invoices that "indicate significant market share and a willingness of our builders to continue bidding on concrete work with the company." (AF 26.) According to Employer, "this is the most concrete evidence that can be provided in response to the Department's request for additional information." (AF 26.) Employer added: "Market indicators have shown that there will be another increase in residential permits for 2020 and that the workflow for stucco will follow historical patterns, with a peak running from early spring to winter." (AF 26.)

Employer further explained that construction workers shortages "are adding weeks and months to the time it takes to complete homes and apartments." (AF 27.) According to Employer: "Lack of new supply is pushing up prices on new and existing properties which threatens affordability and the health of our local economy." (AF 27.)

Employer also provided a description of its business. Employer has been in business since 2014 and does "commercial and residential foundations, pre-cast garage, parking lots, podium decks and street paving." (AF 27.) Employer described its schedule of operation as "year-round," with its "peak load" from April to December. (AF 27.) Employer explained that weather causes its peak load season because Employer is "unable to pour concrete on rainy days, concrete takes much longer to dry in low temperatures, and last daylight [h]ours limit the time we are able to work." (AF 27.)

Regarding its permanent workforce, Employer detailed that they perform the same activities during its non-peak period. (AF 28.) These activities include unloading and loading materials, lifting concrete materials and tools, cleaning and preparing job sites, form setting, grading, digging, pouring concrete, finishing concrete, and wrecking. (AF 28.)

Employer also provided two "payroll data" charts—one chart for 2017 and one chart for 2018. Each chart reflects the numbers one through twelve on one axis, and the numbers zero to 800,000 on the other axis. (AF 29-30.)

### Final Determination

On February 12, 2020, the CO issued a Final Determination denying Employer's application. (AF 14-25.) The CO concluded that Employer's response to the NOD failed to remedy all three deficiencies identified in the NOD.

First, Employer failed to establish that the job opportunity is temporary in nature. (AF 17.) Although Employer explained in its response to the NOD that rain, fewer daylight hours,

and colder temperatures affect its ability to work during its alleged non-peak period, Employer did not provide any supporting documentation. (AF 19.) Therefore, the CO determined that it “remains unsubstantiated whether or how weather conditions ... limit the employer’s ability to perform concrete work” during the period of April through December. (AF 20.)

The CO also found fault with Employer’s assertion that it provided invoices and work projections. (AF 20.) Though Employer provided contract summaries with its initial application, it did not submit invoices, either with its initial application or in response to the NOD. (AF 20.) The CO concluded that, “[a]lthough the contract summaries show that the employer has projects and work to perform, they do not demonstrate how the employer has a peakload need from April 1, 2020 to December 23, 2020” because they only provide a list of projects and “do not indicate during which months of the year the employer will perform work.” (AF 20.) The CO noted that, despite being directed to do so in the NOD, Employer failed to submit a “summary listing of all projects in the area of intended employment for the previous two calendar years that include start and end dates of each project and worksite addresses.” (AF 20.)

The CO next addressed the monthly payroll charts for 2017 and 2018 submitted by Employer in response to the NOD. The CO emphasized that the NOD directed Employer to submit “summarized monthly payroll reports for the 2018 and 2019 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Construction Laborers, the total number of workers or staff employed, total hours worked, and total earnings received.”(AF 20.)

However, Employer did not submit any payroll data for 2019, and the payroll charts for 2017 and 2018 do not identify (separately for permanent and temporary laborers) the total number of workers employed and total hours worked per month. (AF 20.) The CO explained: “it is not clear whether the information provided indicates hours worked, earnings received, or something else, or whether the data pertains to permanent workers, temporary workers, or both.” (AF 20.) The CO also noted that Employer did not submit an explanation of the payroll data as requested. (AF 20.)

Employer cited to a prior application for temporary labor certification and to a labor shortage to support its temporary need. The CO reminded Employer that each application is evaluated on its own merit and that “a labor shortage, no matter how severe, does not justify a temporary need for workers.” (AF 22.) Because of its failure to submit documentation that substantiates its need, the CO concluded that Employer did not demonstrate “how it experiences a peakload need for Construction Laborers from April 1, 2020 to December 23, 2020” (AF 22.)

The second deficiency identified in the Final Determination was Employer’s “failure to establish temporary need for the number of workers requested.” (AF 22.) In the NOD, Employer was directed to submit documentation to justify the number of workers requested. (AF 24.) Yet, according to the CO, in its response to the NOD, Employer provided no documentation to support its request for forty laborers. Again, the CO explained that the 2017 and 2018 monthly payroll charts “are not summarized and presented in a manner that shows the total number of hours worked for each month, separately for permanent and temporary workers” so it is “not

clear from the payroll charts how the employer has a need for 40 Construction Laborers.” (AF 24.)

The third deficiency in Employer’s application was a “failure to submit a complete and accurate ETA Form 9142.” (AF 24.) Employer’s job order indicated that the requested workers must lift forty-five pounds. (AF 24.) However, this lifting requirement was not included in Employer’s application. (AF 24.) Employer was therefore directed in the NOD to amend its Form ETA-9142B. (AF 24.) In response to the NOD, Employer “provided a list of primary responsibilities and requirements, which includes language indicating that the worker must be able to lift and carry 45 pounds or more.” (AF 25.) However, Employer did not grant the CO permission to amend its Form ETA-9142B. (AF 25.) Therefore, the CO concluded that Employer did not overcome this deficiency and failed to submit a complete and accurate Form ETA-9142B. (AF 25.)

### Employer’s Appeal

On February 21, 2020, Employer submitted a formal request for administrative review. (AF 1-13.) Employer asserted that the CO erroneously determined that Employer “failed to establish that its peakload job opportunity is and will be temporary in nature.” (AF 1.) Employer did not offer any particular argument or specific grounds for its assertion. *See* 20 C.F.R. § 655.61(a)(3).

The Office of Administrative Law Judges received the appeal file on February 28, 2020. I issued a Notice of Assignment and Expedited Briefing Schedule on March 2, 2020. The Solicitor’s Office (appearing on behalf of the CO) notified this office on March 3, 2020, that it did not intend submit a brief. This decision is issued within ten business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

### **STANDARD OF REVIEW**

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board “must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” § 655.61(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. *Id.*

Although neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing a CO’s determinations. *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (Mar. 6, 2019); *The Yard Experts, Inc.*, 2017-TLN-00024 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

Under the “arbitrary and capricious” standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S.

42, 53 (2011). Thus, the Board must be satisfied that the CO 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 CO’s explanation, the Board must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Id.*

A determination is considered arbitrary and capricious if the CO “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence.” *Id.* Inquiry into factual issues “is to be searching and careful,” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board “may not supply a reasoned basis” that the CO has not provided. *State Farm*, 463 U.S. at 43; *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that “an agency provide reasoned explanation for its action”).

## ANALYSIS

### Temporary Need

As set forth above, the CO concluded that Employer failed to establish a temporary peakload need, which requires a showing that Employer:

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).

In its application, Employer indicated that its temporary workers “do not become a part of our permanent labor force,” though Employer does “continue to employ some year round workers.” (AF 44, 50.) In its response to the NOD, Employer specified that its permanent workers “perform the same activities during the non-peak period,” such as loading and unloading materials, cleaning and preparing job sites, form setting, grading, digging, and pouring concrete. (AF. 27.) These statements generally support that Employer regularly employs permanent workers to perform the same labor and that its requested temporary laborers would not become part of its permanent work force, as required under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In order to establish temporary peakload need, though, Employer *also* must demonstrate 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added). Employer offered two separate rationales for its alleged peakload need: annual weather-related concerns and yearly residential home sale patterns. However, Employer utterly failed to substantiate its seasonal need for labor based on these patterns, even after the CO specifically requested documentation to justify the alleged temporary need.

First, the 2020 contract and work order lists<sup>5</sup> provide absolutely no information concerning Employer's alleged temporary need for labor from April to December. The lists simply identify upcoming projects with two separate companies and set forth the total contract amount, total number of hours, and size in square feet for each project. (AF 52-54.) There is no information regarding in what months the work on these projects will begin or will be completed. Therefore, I agree with the CO that these contract lists do not support Employer's alleged period of temporary peakload need. They only demonstrate that Employer is scheduled to perform work in 2020.<sup>6</sup>

Likewise, the 2017 and 2018 payroll charts do not support Employer's alleged peakload need. It is not at all clear what information is compiled in these charts. On each chart, there are simply twelve columns ranging in amounts from approximately 300,000 to approximately 700,000. There is no indication what those numbers represent, whether it be hours worked, contract values, or something else entirely. Even assuming these charts somehow represent Employer's business activities over the course of the year, there is no clear peakload from April to December. For instance, in both the 2017 and 2018 charts, the eleventh and twelfth columns (presumably representing November and December, months within the alleged period of peakload need) are equal to or lower than the third column (presumably representing March, a month outside the alleged period of peakload need). In other words, March, a non-peak month, is as busy as November and December, which are both peak months. The best that can be said based on these charts, in terms of identifying an annual pattern, is that there seems to have been a decrease in activity in January and February in both 2017 and 2018. (AF 29-30.)

Additionally, Employer's response to the NOD was largely unresponsive to the concerns and requests of the CO. As the CO points out, Employer failed to submit a summary listing of all projects in the area of intended employment for the previous two calendar years. Employer submitted monthly "payroll charts" for 2017 and 2018, despite being directed to submit them for 2018 and 2019. These payroll records: do not distinguish between permanent and full-time employees; fail to show (or identify) the total number of workers employed, total hours worked, or total earnings received; are unaccompanied by any explanation of the payroll data; and in fact fail to even identify in any manner what data is reflected on the charts. As noted above, Employer carries the burden to provide information to the CO and to present the information in such a way that enables the CO to determine whether Employer has established a legitimate temporary need for the number of workers requested. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016). Employer did not do so here.

Employer also failed to submit documentation supporting its contention that its construction labor work cannot be performed under certain weather conditions in Texas. Employer simply explained that it is "unable to pour concrete on rainy days, concrete takes much longer to dry in low temperatures, and last daylight [h]ours limit the time we are able to work."

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<sup>5</sup> Contrary to Employer's assertion, there are no invoices in the record.

<sup>6</sup> I reject Employer's assertion that the information it submitted "is the most concrete evidence that can be provided in response to the Department's request for additional information." (AF 26.) The CO asked for specific information in order to assess the sufficiency of Employer's application. Employer should have provided either the information the CO requested or a detailed explanation of why such information could not be provided.

(AF 27.) Because Employer offered no documentation to verify these claims, the CO reasonably determined that it “remains unsubstantiated whether or how weather conditions ... limit the employer’s ability to perform concrete work” during the period of April through December. (AF 20.) Likewise, Employer’s unsupported contentions regarding residential construction patterns—that “[m]arket indicators have shown that there will be another increase in residential permits for 2020 and that the workflow for stucco will follow historical patterns, with a peak running from early spring to winter”(AF 26)—cannot alone demonstrate a peakload need for labor. As noted above, bare assertions without supporting evidence are insufficient to carry an employer’s burden to prove its temporary need. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013).

It is conceivable that weather patterns (or possibly even real estate market patterns) could justify a finding of temporary peakload need. In this case, however, Employer provided no information or documentation to corroborate its claim that it has a temporary peakload need for labor on these bases, even after the CO specifically requested such documentation. The fact that the Department may have previously granted a labor certification under similar circumstances does not compel the conclusion that this deficient application should be certified. For all these reasons, I conclude the CO’s determination that Employer did not establish its alleged peakload need under 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) was reasonable and was not arbitrary or capricious.

#### Number of Workers Requested

Pursuant to the applicable regulation, an employer also must demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §§ 655.11(e)(3), (4). According to the CO, Employer failed to explain how it determined that it needs forty construction laborers during the requested period of need. (AF 22.) In the NOD, Employer was directed to submit, among other things, documentation such as such contracts, letters of intent, and payroll records to support the number of workers requested. (AF 37.) Employer submitted only payroll records from 2017 and 2018. (AF 29-30.) As set forth above, these payroll records do not conform to the requested specifications of the CO because they do not distinguish between permanent and temporary employees.

I agree with the CO that Employer’s documentation fails to establish why it has a specific need for forty construction laborers. Neither Employer’s application nor its response to the NOD offers any explanation whatsoever of how Employer calculated that it needs forty laborers. The documentation Employer did submit does not indicate how many workers have been needed to meet peakloads in the past, nor does it demonstrate what that actual need for workers will be this year as a result of future contracts. The 2020 contract and work order lists undoubtedly show that Employer has work to perform this year, but there is no information regarding how many people will be required to perform the work or when it will be performed. (AF 52-54.)

The payroll charts also fail to demonstrate a specific need for forty laborers. Based on the very high numbers reflected on the chart, it does not appear that these charts list the number of workers employed by Employer in each month. (AF 29-30.) Even if I were to assume that more workers were employed in the months that reflect higher values on the chart, there is no way to correlate between the values on the chart and the number of workers Employer may need in those months. Moreover, there is no way to distinguish between temporary and permanent

workers employed in each month. Employer's application and response to the NOD lack any specificity or detailed explanation about why it needs forty temporary construction laborers (as opposed to five or fifty laborers) to supplement its permanent staff. Therefore, the CO's determination that Employer did not establish a need for forty construction laborers, as required by 20 C.F.R. § 655.11(e)(3), was reasonable and was not arbitrary or capricious.

#### Complete and Accurate ETA Form 9142

The final deficiency in Employer's application was a failure to submit a complete and accurate ETA Form 9142. Under 20 C.F.R. § 655.15(a), Employer must file a "completed Application for Temporary Employment Certification."

In the NOD, the CO notified Employer that its job order contained a requirement that a worker be able to lift forty-five pounds. (AF 37-38.) However, this lifting requirement was not included in Employer's application. Employer was therefore directed to amend "Section F.a., Item 11, Special Requirements" to include this lifting requirement. In response to the NOD, Employer did not provide the CO with permission to amend its application. Therefore, the CO concluded that Employer did not overcome this deficiency. Because Employer's job order contains the lifting requirement and its application does not (compare AF 41 with AF 51), I conclude the CO reasonably determined that Employer failed to submit a complete and accurate Form ETA-9142B, as it is required to do under 20 C.F.R. § 655.15(a).

Based on my review of the entire record and the foregoing analysis, I find that the CO considered the relevant evidence and rationally concluded that Employer failed to establish its temporary peakload need for forty construction laborers and also failed to submit a complete and accurate ETA Form 9142B. Therefore, I conclude the CO's Final Determination denying Employer's application for temporary labor certification was not arbitrary and capricious.

#### CONCLUSION AND ORDER

The Certifying Officer did not act in an arbitrary and capricious manner in denying Employer's Application for Temporary Employment Certification (Form ETA-9142B). Accordingly, the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

**LAUREN C. BOUCHER**  
Administrative Law Judge

Cherry Hill, New Jersey