



Issue Date: 15 January 2020

BALCA Case No: 2020-TLN-00021

ETA Case No: H-400-19318-146405

In the Matter of:

JOSE URIBE d/b/a JOSE URIBE CONCRETE CONSTRUCTION,
Employer.

Appearance: Sam Haddad, Esq.
Austin, Texas

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Jose Uribe d/b/a Jose Uribe Concrete Construction’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department” or “DOL”). 8 C.F.R. § 214.2(h)(6)(iii). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

¹ On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly published an Interim Final Rule (“2015 IFR”) to replace the regulations at 20 C.F.R. Part 655, Subpart A, established by the “2008 Rule” found at 73 Fed. Reg. 78,020 (Dec. 19, 2008). *See* 80 Fed. Reg. 24,042, 24,109 (Apr. 29, 2015). The process outlined in the 2015 IFR applies to applications filed after April 29, 2015, whose period of need begins after October 1, 2015. Accordingly, the 2015 IFR applies to this matter.

² The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through subsequent appropriations legislation, including the current legislation. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Division A, Title I, § 111 (2019).

STATEMENT OF THE CASE

H-2B Application

Employer provides concrete work for construction projects in central Texas, and has done so for 30 years. Appeal File (“AF”) 113. Employer’s concrete business works in the area of Gatesville, Texas. AF 52. On November 14, 2019, Employer submitted an H-2B Application for Temporary Employment Certification (“Form ETA-9142B” or “Application”) seeking fifteen temporary construction laborers to work from February 10, 2020, to November 20, 2020. AF 94-96. In the Application, Employer stated it had a peakload temporary need. AF 94. Employer also stated that the construction laborers would be responsible for duties such as loading and unloading materials, tools, and equipment; cleaning and preparing construction sites; digging trenches; setting and removing braces; mixing, pouring, and spreading concrete; and related laborer tasks. AF 96.

Notice of Deficiency

On November 21, 2019, the CO issued a Notice of Deficiency (“NOD”). AF 85-93. The CO listed four deficiencies, only two of which are at issue in this appeal: (1) failure to establish the job opportunity as temporary in nature, in violation of 20 C.F.R. § 655.6(a) and (b); and (2) failure to establish temporary need for the number of workers requested, in violation of 20 C.F.R. § 655.11(e)(3) and (4). AF 88-91.³

As to the first deficiency, after stating the standard for peakload need pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), the CO quoted portions of Employer’s Peakload & Temporary Need Support Letter submitted as part of the Application (*see* AF 100). AF 88. The CO stated that “[t]he Employer did not sufficiently demonstrate how its peakload temporary need meets the regulatory standard,” and then went on to state that the Employer had not provided information concerning how the weather in Gatesville, Texas, affected the Employer’s ability to work during part of the year and also had not provided documentation to substantiate the work that Employer stated it would be performing in 2020. AF 89.

Of particular note, the CO recognized that the Employer had provided some information about its expected work in 2020, but pointed out why the information provided was insufficient to substantiate Employer’s claimed period of peakload need in 2020:

The employer submitted a letter of intent from Carothers Homes, LLC [AF 112], which indicates that the employer will be needed to complete about 100 home projects in 2020. *However, there was no documentation provided, such as*

³ The third and fourth deficiencies listed in the NOD were failure to submit an acceptable job order, in violation of 20 C.F.R. §§ 655.16 and 655.18, and failure to submit a complete and accurate ETA Form 9142, in violation of 20 C.F.R. § 655.15(a). AF 91-93. As counsel for Employer has noted, “the DOL Final Determination does not address the deficiencies that the employer clearly resolved in its response” to the NOD. AF 3. Accordingly, I need not further address the third and fourth deficiencies listed in the NOD as they were not listed in the Final Determination. *Compare* AF 88-93 and AF 20-30.

proposed work invoices, or contract agreements to substantiate the projects as legitimate work projects to be fulfilled during the 2020 peak load period.

The employer submitted another letter of intent [AF 113, a letter from Employer] which stated the following ... [the CO then quoted directly from this letter, in which Employer stated that it would require temporary workers from February through November 2020 and listed six customers for whom it worked in 2019 and expected to work in 2020, and stated that it was providing copies of invoices, signed contracts, and work agreements.]

However, there are no contract agreements provided between the above-listed contractors and the employer detailing proposed work for 2020 during the requested period of need February 10, 2020 through November 20, 2020.

The employer submitted a contract agreement from R.D. Howard LLC, as proof of proposed work to be fulfilled throughout the employer[']s requested period of need. *However, the contract agreement does not specifically indicate that the employer's services would be rendered during February 10, 2020 through November 20, 2020. ...*

Lastly, the employer provided work invoices for the 2019 work year for ... [eight contractors with invoices covering a period from May 21, 2019, through October 22, 2019] as proof of its peak load period of February through November.... *However, the Department cannot assess the Employer's true peak load need with work invoices from the period of May 21, 2019 through October 22, 2019. In order to assess the employer's true peak load need, documentation must be provided through the entire year showing the employer's non-peak period, as well as when their peak load period starts.*

AF 88-90 (emphasis added).

The CO then required Employer to provide additional information including, but not limited to: documentation supporting its argument that weather conditions in Gatesville, Texas, prevented it from working for part of the year; a listing of all of Employer's projects in the area of intended employment for the previous two calendar years (with start and end dates of each project and worksite addresses); summarized monthly payroll reports for a minimum of two calendar years separately covering temporary and permanent construction laborers; and annualized and/or multi-year work contracts or work agreements with documentation showing when work would commence and end each year "and clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142.... Specifically, the employer must submit its contracts and work agreements for its construction projects specified in the employer's statement of temporary need...." AF 90. The CO noted that if the Employer did not have any of the requested documents, it "must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification." AF 90 (emphasis omitted).

As to the second deficiency, the CO stated that the Employer “did not indicate how it determined that it would need 15 Construction Laborers during the requested period of need.” AF 91. To overcome this deficiency, the CO requested that Employer provide additional information including: “[a]n explanation with supporting documentation of why the Employer is requesting 15 construction laborers for Gatesville, Texas during the dates of need requested”; “[a]nnualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the number of workers needed ... and clearly showing work would be performed during each month of the requested period of need”; “[s]ummarized monthly payroll reports for a minimum of two previous calendar year[s]” separately covering temporary and permanent construction laborers; and “[o]ther evidence and documentation that similarly serves to justify the number of workers requested, if any.” AF 91 (emphasis omitted).

Employer’s Response to the NOD

On December 6, 2019, Employer submitted its Response to the NOD (“Response”). AF 31-77. Employer’s Response included a letter from its counsel (AF 33-36), its application for a prevailing wage determination (AF 37-50), a letter from Employer titled, “Explanation of Temporary Peak Load Need” including weather data for Gatesville, Texas (AF 51-54), a letter from the Associated Builders and Contractors, Inc., Central Texas Chapter (AF 55), Employer’s federal tax information and payroll reports for 2018 and 2019 (AF 56-69), Employer’s Schedule of Operations for 2020 (AF 70-74), and three pictures illustrating Employer’s work (AF 75-77).

The Employer’s Response did not include a listing of all of Employer’s projects in the area of intended employment for the previous two calendar years (with start and end dates of each project and worksite addresses), nor did it include summarized monthly payroll reports for a minimum of two calendar years separately covering temporary and permanent construction laborers, nor did it include annualized and/or multi-year work contracts or work agreements with documentation showing when work would commence and end each year “and clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142,” nor did it include “its contracts and work agreements for its construction projects specified in the employer’s statement of temporary need....” *See* AF 31-77.

CO’s Final Determination

On December 18, 2019, the CO issued a Final Determination denying the Application. AF 20-30. The CO determined that Employer did not overcome either of the deficiencies identified in the NOD.

The CO found the Employer did not overcome the first deficiency for three reasons. First, Employer’s information concerning the impact of the weather in Gatesville, Texas, was inconsistent with Employer’s stated period of need because the data shows that February, a month within the stated period of need, is actually too cold for concrete operations: “If the employer’s period of need was based on climate conditions being above 40°F, then its true period of need would have been from March through November. February is included in its period of need. Therefore, it is safe to conclude that the employer can actual[ly] perform work in climates below 40°F, and the basis for cold weather concreting not valid.” AF 27-28.

Second, the CO stated that it had asked the Employer “to provide further documentation regarding the letters of intent, contract agreements, and work invoices provided in the initial application” but that “the employer did not provide the requested documentation to substantiate the projects as legitimate work projects to be completed during the 2020 peak load period.” AF 28.

Third, the CO stated that the Employer’s quarterly federal tax returns “do not clearly support the employer[’]s requested peakload need of February through November” and that the Employer’s payroll reports “are not summarized as requested in the NOD letter” because they “do not indicate the total hours worked, and total earnings received” and “only gave that [sic] total amount of wages reported quarterly, and not monthly as requested.” AF 28. Accordingly, the CO stated, “the payroll reports provided are insufficient to determine the employer[’s] true peakload need.” AF 28.

The CO also found the Employer did not overcome the second deficiency for three reasons. First, the CO found that “[w]hile the tax returns provided [the Employer’s quarterly tax returns for 2018 and 2019] demonstrate that the employer, in fact, does employ permanent workers year round, they do not clearly support the employer[’]s request for 15 workers during the requested period of need, February through November, but only from July through September.” AF 30.

Second, the CO found that the payroll reports for 2018 and 2019 that Employer provided “are not summarized as requested in the NOD letter” because they “do not indicate the total hours worked, and total earnings received” and “only gave that [sic] total amount of wages reported quarterly, and not monthly as requested.” AF 30. The CO also found that “the payroll reports do not clearly support the employer[’]s request for 15 workers during the requested period of need, February through November, but only from July through September” and thus “are insufficient to determine the number of workers requested for employer’s requested period of need.” AF 30.

Third, the CO found that the Employer’s Schedule of Operations for 2020 was insufficient to determine the number of workers needed. The CO stated:

Lastly, the employer also provided a schedule of operations for 2020. The schedule of operations consist[s] of several projects indicated in the NOD letter, which further documentation was requested in order to justify the project as legitimate. *However, when requested to provide supporting documentation to substantiate the projects as legitimate work projects to be fulfilled during the 2020 peak load period, the employer failed to do so.* Therefore, the tax forms, payroll reports, and schedule for operations for 2020 is [sic] inadequate in determining the number of workers requested.

AF 30 (emphasis added).

PROCEDURAL HISTORY

On December 27, 2019, Employer filed a Request for Administrative Review, dated December 26, 2019, of the CO's final determination in this matter. This matter was assigned to me on December 27, 2019. On December 31, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule ("Notice") that granted the parties seven business days from receipt of the Appeal File to submit briefs in this matter. The Office of Administrative Law Judges ("OALJ") received the Appeal File on January 2, 2020. Accordingly, briefs were due seven business days after that date, or by January 13, 2020. A review of OALJ's Case Tracking System and the case file indicates that no briefs were received by that date.

I recognize that Employer's Request for Administrative Review contains legal argument and a statement that Employer intended to supplement it "with a legal brief and evidence in support of" Employer's case. AF 4. As of 4:00 p.m. EST on January 14, 2020, I have received no additional brief on behalf of Employer. As the time set for submission of briefs has run, I conclude that Employer has had the opportunity to file a brief but has elected not to do so.

SCOPE OF REVIEW

BALCA's standard of review is limited in H-2B cases. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for administrative review, which may only contain legal arguments and evidence actually submitted before the CO. 20 C.F.R. § 655.61(a)(5). Upon considering the evidence of record, BALCA must: (1) affirm the CO's determination; (2) reverse or modify the CO's determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

Two administrative law judges who have recently considered Employer's applications for temporary labor certification under the H-2B program have concluded that BALCA should apply an arbitrary and capricious standard when reviewing the CO's determination in these cases. *Jose Uribe Concrete Construction*, 2018-TLN-00044, slip op. at 5-6 (ALJ Feb. 2, 2018, clarified by order of Feb. 12, 2018) (footnote and citations omitted) ("*Jose Uribe I*"). See also *Jose Uribe Concrete Construction*, 2019-TLN-00025, slip op. at 4 and n. 6 (ALJ Feb. 21, 2019, orders denying reconsideration dated April 1, 2019, and April 16, 2019) (noting that the Preamble to the 2015 IFR, 80 Fed. Reg. 24042, 24081, states that 20 C.F.R. § 655.61 "does not provide for de novo review") ("*Jose Uribe II*").⁴ Following their reasoning and the cases they have cited in their decisions, I similarly conclude that BALCA reviews the CO's determination in an H-2B temporary labor certification matter under the arbitrary and capricious standard.⁵

⁴ *Jose Uribe II* also acknowledges that an administrative law judge has concluded that de novo review is appropriate in these matters in *Best Solutions USA, LLC*, 2018-TLC-00117, slip op. at 3 and note 2 (ALJ May 22, 2018). *Jose Uribe II*, slip op. at 4.

⁵ I am aware that the administrative law judges in *Jose Uribe I* and *Jose Uribe II* reached different conclusions on whether the CO erred in denying certification in those matters. While I have read the decisions and orders in *Jose Uribe I* and *Jose Uribe II*, in deciding this matter I have only considered the facts presented in the Appeal File in this matter.

DISCUSSION

Employers seeking certification under the H-2B program “must establish that [their] 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). Need is considered temporary if justified as “a one-time occurrence[,] a seasonal need[,] a peakload need[,] or an intermittent need.” 20 C.F.R. § 655.6(b); *see also* 8 U.S.C. § 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B).

Of the four kinds of temporary need, Employer asserts a peakload need based on a seasonal or short-term demand. AF 2; AF 51-54; AF 94. To qualify for a peakload need, an 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 seasonal or short-term demand and the temporary additions to staff will not become part of the employer’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The 2015 IFR contains the following statement: “Except where the employer’s need is based on a one-time occurrence, the CO will deny a request for an *H-2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.” 20 C.F.R. § 655.6(b). As noted above, Congress has stated that the definition of “temporary need” is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Accordingly, in deciding this matter I am disregarding any definition of “temporary need” that is inconsistent with 8 C.F.R. § 214.2(h)(6)(ii)(B), including the portion of 20 C.F.R. § 655.6(b) quoted above.

The First Deficiency – Failure to Establish the Job Opportunity as Temporary in Nature

The CO had adequate support for a finding that the Employer’s Response did not cure the first deficiency. With respect to the Employer’s claim that the weather in Gatesville, Texas, affects its ability to work during part of the year because concrete poured in cold weather is weak,⁶ the CO carefully considered the data Employer provided. *See* AF 52-53. That data shows that the average low temperature in Gatesville, Texas, in February is below 40 degrees Fahrenheit. On this data, the CO found that: “If the employer’s period of need was based on climate conditions being over 40°F, then its true period of need would have been from March through November. February is included in its period of need. Therefore, it is safe to conclude that the employer can actual[ly] perform work in climates below 40°F, and the basis for cold weather concreting not valid.” AF 27.

Employer stated that “general contractors reduce their workload demand for our concrete work from December through January, because the conditions of ‘cold weather’ concreting exist, when the air temperature has fallen to, or is expected to fall below, 40°Fahrenheit (4°C) during

⁶ Specifically, Employer stated: “The objective of the ACI [American Concrete Institute] 306 specification is to keep concrete warm, over 40 degrees Fahrenheit (or 5 degrees Celsius) for the first 48 hours, where concrete strength development is critical. However, during the months of December through January, low temperatures at or around freezing are more prevalent during the critical concrete ‘protection’ period. If concrete does not develop sufficient strength during its curing period, then it is both a safety hazard and likely will not pass necessary inspections by general contractors and local inspectors.” AF 53.

the protection period.” AF 52. While the Employer also stated that “[i]n the area where our concrete business operates, the typical temperatures drop below 40°F more regularly in the months of December and January....” AF 52, the average climate data Employer provided shows that the average low temperature in Gatesville, Texas, is 35°F in December, 33°F in January, and 38°F in February. AF 53. I cannot find the CO acted arbitrarily and capriciously in considering the information that Employer provided indicating that temperatures below 40°F negatively impact concrete construction and then applying that information to the weather data that Employer provided establishing that February, a month within Employer’s requested period of need, has an average low temperature below 40°F. Simply put, on this record there is adequate support – not least, *Employer’s requested period of need for temporary workers in February 2020, a month in which the data submitted by Employer indicates the average temperature is below 40°F* – for the CO’s conclusion that the Employer “can actual[ly] perform work in climates below 40°F....” AF 28.

With respect to whether the Employer provided sufficient information to establish its true peakload need period, the CO had adequate support for a conclusion that the Employer failed to do so. In the NOD, the CO clearly stated what information the Employer was requested to provide and why. AF 89-90. While I recognize the Employer provided a Schedule of Operations for 2020 in its Response (AF 70-74), the CO informed the Employer that the submissions in its Application supporting its workload need (including a letter from Corothers Homes, LLC (AF 112), Employer’s 2020 Project Plans Support Letter (AF 113), work invoices from 2019 (AF 114-140), and a contract with R.D. Howard Construction (AF 141-161)) were insufficient, and the CO clearly explained in the NOD what documentation the Employer was requested to provide. The CO concluded that the Employer’s Response did not provide the additional information the CO requested substantiating the Employer’s 2020 peakload need.

I cannot find that the CO acted arbitrarily or capriciously in reaching this conclusion. While the Employer provided a Schedule of Operations for 2020, the Employer did not “submit its contracts and work agreements for its construction projects specified in the employer’s statement of temporary need” (AF 90) and its Schedule of Operations for 2020 did not “specify[] the actual dates when work will commence and end” during the requested period of peak load need. AF 90. Additionally, the Schedule of Operations did not provide “[a] summary listing of all projects in the area of intended employment for the previous two calendar years” with “start and end dates of each project and worksite addresses”. AF 90. I recognize that the NOD stated that “[i]n lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.” AF 90 (emphasis omitted). By concluding that the Employer failed to overcome the deficiency, the CO implicitly found that the documentation the Employer actually provided was not sufficiently similar to the documentation requested so as to justify the dates of peakload need. I decline to find that the CO acted arbitrarily or capriciously in doing so.⁷

With respect to whether the tax and payroll information provided substantiated the requested peakload need period, the CO concluded they did not. Specifically, the CO concluded

⁷ See below at 10-11 for a discussion of the statements the Employer makes in the Schedule of Operations for 2020 about its work in the 2020 peakload period and Employer’s failure to substantiate those statements with the documentation the CO requested in the NOD. That discussion applies equally here.

that the tax information showed only that the Employer had a peakload need in the third quarter of the year (July, August, and September). Employer argues in its Request for Administrative Review that the reason for this is that delays in obtaining certification for temporary workers in 2018 and 2019 meant that the workers arrived in the “June-July time period.” AF 3. Be that as it may, on this record I cannot find that the CO acted arbitrarily or capriciously in reviewing the tax return information showing that in the first and second quarters of 2018 and 2019 and in the fourth quarter of 2018 the Employer had between 11 and 14 employees, and had 30 employees in the third quarter of 2018 and 23 in the third quarter of 2019, and then concluding that “[w]hile the tax returns provided demonstrate that the employer, in fact, does employ permanent workers year round, they do not clearly support the employer[’]s requested peakload need of February through November.” AF 28.

The CO reached a similar conclusion with the payroll records provided, which were not summarized as requested in the NOD letter as they were not broken down by temporary or permanent employee and did not indicate the total hours worked, nor did they break down the wages by month. *See, e.g.* AF 63. These payroll records, which are difficult to read due to their small type, appear to indicate a peak in employment from July to November (in 2018: July, 21; August, 25; September, 28; October, 31; November, 28 – AF 62-63; in 2019: July, 22; August, 21; September, 21 – AF 69). Even if the reason for the peak in July were due to delays in Employer obtaining temporary workers in 2018 and 2019, I cannot find that the CO acted arbitrarily or capriciously in finding that “the payroll reports provided are insufficient to determine the employer[’]s true peakload need.” AF 28.

Simply put, the CO explained in the NOD why the Application was deficient and explained what information the Employer had to provide to overcome the deficiency. The Employer chose what information it provided in response to the NOD, and in so doing chose not to provide some of the documentation requested. The Employer argues that the CO erred in concluding that the information it provided did not overcome the deficiency. On these facts, I decline to find that the CO acted arbitrarily or capriciously in concluding that the information the Employer provided undercut its assertions concerning the impact of the weather on its requested peakload period of need. I similarly decline to find that the CO acted arbitrarily or capriciously in concluding that the information provided by the Employer was insufficient to substantiate its 2020 workload during the requested peakload period of need.

The Second Deficiency – Failure to Establish Temporary Need for the Number of Workers Requested

Just as the CO had adequate support for a finding that the Employer did not overcome the first deficiency, so too did the CO have adequate support for a finding that the Employer did not overcome the second deficiency. For the same reasons outlined above with respect to the first deficiency, the CO did not act arbitrarily or capriciously in concluding that the tax return and payroll information the Employer submitted in response to the NOD did not support the Employer’s need for 15 construction laborers for the period from February 10, 2020, through November 11, 2020.

Although the CO asked for documentation substantiating Employer's work during the peakload period, such as contracts and work agreements "supplemented with documentation specifying the number of workers needed for the project and clearly showing work will be performed for each month during the requested period of need" (AF 91), the CO concluded the Employer failed to do so. The CO recognized that the Employer provided a Schedule of Operations for 2020. AF 30. The CO noted that the Employer failed to provide the requested "supporting documentation to substantiate the projects as legitimate work projects to be fulfilled during the 2020 peak load period." AF 30.

I recognize that Employer makes several assertions in the record that would tend to indicate it had sufficient work during the peakload period to justify the requested 15 construction laborers (and to justify its requested period of peakload need). Specifically, the record contains Employer's statements that it will be engaged by many customers to provide concrete construction work during the requested 2020 peakload period. *See, e.g.*, Schedule of Operations for 2020 (AF 70-74); 2020 Project Plans Support Letter (AF 113).

For example, in the Schedule of Operations for 2020, Employer states, "All Star Homes has indicated that they plan to hire us to do all their concrete construction work in 2020, and that they currently have 50 homes for which they intend to use us to install the concrete slabs, garages and patios, with the majority of the work being done between February and November." AF 70 (Employer also refers to this contractor as "All Star Homes/CNL Construction," *see id.*). A review of the Appeal File, however, indicates that Employer did not submit *any* contracts or work agreements with All Star Homes for the 2020 peakload period (although the Employer did submit 2019 invoices it sent to CNL). Had Employer submitted such contracts or work agreements (or even had it submitted a letter of intent from All Star Homes in the event it did not have such contracts or work agreements), arguably Employer could have substantiated its claims as to the work it would perform for All Star Homes during the requested peakload period of need. Similarly, had Employer submitted such documents concerning its other customers, arguably it could have substantiated its statements in the Schedule of Operations for 2020 concerning the projects it would perform during the requested peakload period of need. This information, in turn, arguably could have substantiated its need for 15 construction laborers during the requested peakload period of need.

But the Employer did not provide these documents, and I must consider the record as it is, not the record as it could have been. A review of the Appeal File indicates that the only information directly from Employer's customers substantiating in any way these customers' need for Employer's work during the requested 2020 peakload period of need (and thus, Employer's need for 15 construction laborers during that period) consists of: (1) a letter dated October 16, 2019, from Carothers Homes, LLC (AF 112); and (2) a Subcontract Agreement with R.D. Howard Construction concerning the Amtrak Temple, Texas, station project (AF 141-161).

In the NOD, the CO asked Employer to provide documentation such as contracts and work agreements along with information showing how many workers would be needed for the various projects Employer would perform during the requested period of need. In the Schedule of Operations for 2020 (AF 70-74), Employer generally explained how many construction laborers it would need for each month of the requested period of peak load need, and specified

how many construction laborers would be required for each project for the months of March, April, June, and July. AF 72-73. However, with the exception of the Amtrak Temple, Texas, station project, Employer failed to provide contracts or work agreements substantiating its 2020 work, and with the exception of the letter from Carothers Homes, LLC, Employer failed to provide letters of intent from its other customers substantiating its 2020 work. Because Employer failed to provide documentation the CO requested substantiating its 2020 projects, I cannot conclude the CO acted arbitrarily or capriciously in concluding that Employer failed to overcome the second deficiency.

For the foregoing reasons, I find that the CO did not act arbitrarily or capriciously in denying certification in this matter.

I am requesting that this decision and order be served by email to counsel for Employer (office@legalnets.com) and by email to counsel for the Certifying Officer (ETLS-OALJ-Litigation@dol.gov) in addition to service on the parties by regular mail.

ORDER

Based on the foregoing, the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge