



**Issue Date: 07 April 2020**

**BALCA Case No.:** 2020-TLN-00032  
**ETA Case No.:** H-400-20002-227373  
*In the Matter of:*

SPEEDY PAVING, LLC  
*Employer.*

Before: Scott R. Morris  
Administrative Law Judge

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

This case arises from Romulo Speedy Paving, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2B nonimmigrant program.

The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup> Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

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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). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<sup>2</sup> On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. *See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that ha[ve] a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

## BACKGROUND

On January 3, 2020, the Department of Labor's Employment and Training Administration ("ETA") received Employer's application for temporary labor. AF 15-37.<sup>3</sup> Employer requested certification of 14 construction workers for an alleged period of peakload need from April 1, 2020 to December 1, 2020. *Id.*

On February 11, 2020, the CO issued a Notice of Deficiency (NOD) explaining that Employer's application contained several deficiencies. AF at 10-14.

The NOD mentioned that Employer had 10 business days from the date this NOD was issued to submit a modified application. *Id.* The NOD also stated that Employer fails to "submit requested modifications to the application or, in the alternative, does not request Administrative Review within 10 business days from the date this NOD is issued in accordance with 20 CFR 655.31(b)(4), the CO will deny the application." AF 11.

On March 3, 2020, the CO denied Employer's application because Employer did not submit "a modified application within 10 business days from the date the NOD was issued nor requested Administrative Review before an Administrative Law Judge under 20 CFR § 655.61." AF 5-7. The CO informed Employer that the denial was final and that the Department of Labor will no longer consider Employer's application.

On March 17, 2020, the CO received Employer's appeal request letter. AF 1-4. Employer stated in the letter that the CO erroneously determined that Employer "failed to establish that its peakload job opportunity is and will be temporary in nature." *Id.* at 1.

On March 26, 2020, this Tribunal received the CO's Motion to Dismiss. In the Motion to Dismiss, the CO indicated that Employer failed to take the necessary action in the required timeframe after the NOD was issued. Due to Employer's failure to take the requisite steps, the CO denied Employer's application, and that denial is final. The CO asked the undersigned to dismiss Employer's Appeal as the CO's denial of Employer's Appeal is final.

## DISCUSSION

### A. Legal Standards

The H-2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 20 C.F.R. § 655.20.

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<sup>3</sup> References to the Appeal File will be abbreviated with an "AF" followed by the page number.

The scope and standard of review in the H-2B program is limited. When an employer requests a review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 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.” 20 C.F.R. § 655.61(e). The Board must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. *Id.* While 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 the CO’s determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017).

The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; *Eagle Indus. Prof’l Servs.*, 2009-TLN-00073 (July 28, 2009); *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry the employer’s burden of proof. *AB Controls & Tech., Inc.*, 2013-TLN-00022 (Jan. 17, 2013).

A Notice of Deficiency will “offer the employer an opportunity to submit a modified Application for Temporary Employment Certification or job order within 10 business days from the date of the Notice of Deficiency.” 20 C.F.R. § 655.31. An employer also may request administrative review of the CO’s determination “within 10 business days from the date of determination.” 20 C.F.R. § 655.61. “If the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the Application for Temporary Employment Certification.” 20 C.F.R. § 655.31(b)(4). Such a denial is final and cannot be appealed. *Id.*

## B. Analysis

Here, the CO issued the NOD on February 11, 2020. According to the filing deadlines set forth in the regulations, Employer’s modified application must have been filed with the CO no later than 10 business days from the date of the NOD, thus no later than February 25, 2020.

The CO issued a denial on March 3, 2020. In its appeal request, Employer argued that the CO erroneously found that Employer had failed to establish its peakload job opportunity was temporary in nature. Here however, the basis of the CO’s denial was not substantive. The denial rested on a finding that Employer failed to either submit a modified application or request ALJ review within ten days of its receipt of the CO’s February 11, 2020 NOD.

If a CO determines that an Application for Temporary Employment Certification is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO may issue a Notice of Deficiency (NOD) to the employer, as was done in this case. 20 C.F.R. § 655.31(a). By regulation, the NOD must include certain elements. First, the NOD must note the deficiencies identified. 20 C.F.R. § 655.31(a) & (b)(1). The NOD must give the employer an opportunity to submit a modified Application within 10 business days from the

date of the NOD. 20 C.F.R. § 655.31(b)(2). The NOD must also offer the employer an opportunity to request, within 10 business days, an administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61, and the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's decision. 20 C.F.R. § 655.31(b)(3). Finally, the NOD must State that if the employer does not comply with the requirements of this section by either submitting a modified application or requesting administrative review before an ALJ under § 655.61 within 10 business days, the CO will deny the application. Such a denial is final, and cannot be appealed. 20 CFR § 655.31(b)(4).

Upon review of the Appeal File, this Tribunal finds that the CO issued a NOD that contained all of the requisite elements. The record does not contain any response to the NOD prior to or on the February 25, 2020 deadline. The record does not show that Employer submitted an amended application nor did it submit new evidence within the timeframe set forth in the regulations. Also Employer did not timely request administrative review or furnish any legal argument as to why the CO's decision was incorrect.

### **CONCLUSION AND ORDER**

For the reasons explained above, the CO's denial of labor certification in this matter is **AFFIRMED**.

**SO ORDERED.**

For the Board:

**SCOTT R. MORRIS**  
Administrative Law Judge