



Issue Date: 25 March 2020

BALCA Case No.: 2020-TLN-00026
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 once again 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”) February 10, 2020 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”).

PROCEDURAL HISTORY

On December 27, 2019, Employer filed a Request for Administrative Review, dated December 26, 2019, of the CO’s first final determination denying Employer’s H-2B Application for Temporary Employment Certification (“Application”). This matter was originally assigned

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).

to me on December 27, 2019, and was assigned case number 2020-TLN-00021. On December 31, 2019, I issued a Notice of Assignment and Expedited Briefing Schedule in Case No. 2020-TLN-00021 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 in Case No. 2020-TLN-00021 on January 2, 2020. On January 15, 2020, I issued a Decision and Order Affirming Denial of Certification in Case No. 2020-TLN-00021.

On January 23, 2020, I issued a Decision and Order Granting Motion for Reconsideration, Vacating Decision and Order Affirming Denial of Certification, and Remanding Matter to the Certifying Officer in Case No. 2020-TLN-00021. On January 24, 2020, Employer submitted to the CO a letter with attachments entitled, “**Remand & Reconsider – H-2B ETA 9142 Application for Temporary Employment Certification**” (the “Supplemental Response”). AF 68-286 (emphasis in original).

On February 10, 2020, the CO issued a Final Determination again denying Employer’s Application. Appeal File (“AF”) 44-64. On February 25, 2020, Employer submitted a Request for Administrative Review, dated February 24, 2020, of the February 10, 2020 Final Determination. This appeal was assigned to me on February 26, 2020, and was assigned Case No. 2020-TLN-00026. I issued a Notice of Docketing and Expedited Briefing Schedule on March 3, 2020 (the “Notice”), stating in relevant part that “the Employer and the Solicitor may file briefs in time to reach the undersigned by the close of business (4:30 p.m. Eastern time) **within seven business days of receiving the Appeal File.** 20 C.F.R. § 655.61(c).” Notice at 1 (emphasis in original).

On March 5, 2020, OALJ received the Appeal File in this case.³ Seven business days after March 5, 2020, was March 16, 2020. Pursuant to the Notice, briefs were due by 4:30 p.m. Eastern time on that date.

Employer’s counsel submitted Employer’s Brief to the OALJ-Filings@dol.gov mailbox. The email to which Employer’s Brief was attached had the following header information:

From: Office Legalnets
Sent: Tuesday, March 17, 2020 3:15:49 AM (UTC+00:00) Monrovia, Reykjavik
To: OALJ-Filings
Cc: . . . ; ETL5-OALJ-Litigation
Subject: Employer's Appeal Brief - 2020-TLN-00026

I take official notice of the fact that 3:15 a.m. in Reykjavik, Iceland, is 11:15 p.m. in the U.S. Eastern time zone. Accordingly, the above header information indicates that counsel for Employer submitted Employer’s Brief by e-mail on or about 11:15 p.m. Eastern time on March 16, 2020. As briefs were due by 4:30 p.m. Eastern time on March 16, 2020, Employer’s Brief was untimely. Although Employer’s Brief was untimely, I have nevertheless decided to consider it.

³ The 635 page Appeal File in this case includes over three hundred pages that constituted the Appeal File in Case No. 2020-TLN-00021. See AF 298-635. As explained below, the first 297 pages of the Appeal File in this case includes many documents that were previously submitted to the CO.

I note that many of the references in Employer's Brief to evidence provided by the Employer are difficult to follow. Specifically, Employer summarized the Exhibits it provided at pages 4-7 of Employer's Brief, grouping the exhibits as Exhibit A through Exhibit H. The relevant text appears identical to text in the Supplemental Response, which also refers to Exhibit A through Exhibit H. *See* AF 70-74. Employer does not appear to provide information clearly indicating which pages of the Appeal File correspond to which Exhibit Employer cites (an exception is the reference to "*See Exhibit H: 2020 Schedule of Operations & Staffing Levels, AF 282-286*", Employer's Brief at 8). Moreover, nowhere in the Appeal File do I see any indications that a given document submitted by Employer is part of a given Exhibit, such as markings on the document or spacer pages between Exhibits indicating what Exhibit follows (for example, an otherwise blank page reading, "Exhibit B" following Exhibit A and preceding Exhibit B). Accordingly, while I have reviewed all of the documents Employer submitted as part of the Supplemental Response and will refer to those documents when necessary by their page numbers in the Appeal File (as Employer has also done, *see, e.g.*, Employer's Brief at 2), I disregard Employer's references to Exhibit A-H in Employer's Brief.

STATEMENT OF THE CASE

H-2B Application

Employer provides concrete work for construction projects in central Texas, and has done so for 30 years. AF 412. Employer's concrete business works in the area of Gatesville, Texas. AF 351. On November 14, 2019, Employer submitted its Application seeking fifteen temporary construction laborers to work from February 10, 2020, to November 20, 2020. AF 393-95. In the Application, Employer stated it had a peakload temporary need. AF 393. 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 395.

Notice of Deficiency

On November 21, 2019, the CO issued a Notice of Deficiency ("NOD"). AF 384-92. 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 387-90.⁴

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

⁴ 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 390-92. 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 302. Moreover, Employer has noted in its brief that these two deficiencies were resolved. Employer's Brief at 8. Accordingly, I need not further address the third and fourth deficiencies listed in the NOD.

Need Support Letter submitted as part of the Application (*see* AF 399). AF 387. 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 388.

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 411], which indicates that the employer will be needed to complete about 100 home projects in 2020. *However, there was no documentation provided, such as 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 412, 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 387-89 (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 389. 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 389 (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 390. 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 390 (emphasis omitted).

Employer's Response to the NOD

On December 6, 2019, Employer submitted its Response to the NOD ("Response"). AF 330-76. Employer's Response included a letter from its counsel (AF 332-335), its application for a prevailing wage determination (AF 336-49), a letter from Employer titled, "Explanation of Temporary Peak Load Need" including weather data for Gatesville, Texas (AF 350-353), a letter from the Associated Builders and Contractors, Inc., Central Texas Chapter (AF 354), Employer's federal tax information and payroll reports for 2018 and 2019 (AF 355-68), Employer's Schedule of Operations for 2020 (AF 369-73), and three pictures illustrating Employer's work (AF 374-76).

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 include “its contracts and work agreements for its construction projects specified in the employer’s statement of temporary need....” *See* AF 330-76.

CO’s December 18, 2019 Final Determination

On December 18, 2019, the CO issued a Final Determination denying the Application. AF 319-329. 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 326-27.

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 327.

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 327. Accordingly, the CO stated, “the payroll reports provided are insufficient to determine the employer[’s] true peakload need.” AF 327.

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 329.

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 329. 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 329.

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 329 (emphasis added).

Remand and Supplemental Response

Following an appeal and remand, discussed above, on January 24, 2020, the Employer submitted its Supplemental Response to the NOD. Many of the documents in the Supplemental Response had been previously submitted. The newly-submitted documents are described in the table below, at 11-12.

CO’s February 10, 2020 Final Determination

After considering the information Employer submitted in the Supplemental Response, on February 10, 2020, the CO issued a Final Determination again denying the Application. AF 44-64. The CO again 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 the following reasons. First, Employer’s information was inconsistent with its stated peakload period of need. The 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 53-54.

Additionally, the CO found that the information provided in the Supplemental Response indicates that Employer can perform tasks throughout the year, again inconsistent with the stated peakload period of need: “Per the employer’s own description, there are activities that can be performed in non-peak months of December, January and February. The job duties of mixing, pouring and spreading concrete may be limited by the outdoor temperat[ure], but the majority of

the job duties described in the application, such as prepping and preparing the sites for concrete work can be performed when temperatures are below 40 degrees Fahrenheit.” AF 54. Moreover, the CO stated: “The employer has also provided work invoices from January 11, 2019 through January 10, 2020. However, the invoices illustrate that the employer’s business activities, including concrete work, are able to be conducted through the span of a calendar year.” AF 58.

Second, the CO stated that it had asked the Employer to submit payroll information for the previous two calendar years but that “the payroll data submitted was insufficient to support that the employer has a peakload period of need from February 10 through November 20.” AF 55.

Third, 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.” AF 57. The CO stated that “[i]n response, the employer provided letters of intent from Carothers Homes, LLC, and Pharr Construction Co.,” AF 57, as well as a subcontract with R.D. Howard LLC and an independent contractor agreement with D.R. Horton Homes “as proof of proposed work to be fulfilled throughout the employer’s requested period of need.” AF 58 (similar quote at AF 57). The CO concluded that the Employer’s contract agreements with Carothers Homes, LLC, and Pharr Construction Co. “exceed the scope of the employer[’]s requested period of need, February 10th through November 20th, 2020.” AF 57. The CO stated the following concerning the contracts with R.D. Howard LLC and D.R. Horton Homes: “In sum, the work contracts submitted do not specify the actual dates when work will commence and end during each year of service. Moreover, the work contracts do not show work will be performed for each month during the requested period of need as specified in Item 5 of the Additional Information Requested section in the NOD. AF 58.

The CO also stated that:

the employer provided a summary of proposed projects in 2020 indicating the anticipated job duties to be fulfilled for each month. However, the employer was requested to provide a summary listing of all projects in the area of intended employment for the previous two calendar years. The documentation requested in the NOD was not submitted.

AF 58. The CO then concluded that:

The employer provided explanations and supporting documentation which do not establish the job opportunity as temporary in nature. Furthermore, the documentation submitted does not support that the employer has a peakload period of temporary need from February 10 through November 20.

AF 58. The CO then stated:

The employer also states in its temporary need statement that it is experiencing difficulties finding laborers to work during its peak season, however, the

employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need.

AF 58.

The CO also found the Employer did not overcome the second deficiency. 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 62.

Second, the CO stated that the Employer was requested to provide summarized monthly payroll reports for two calendar years, signed by the Employer to attest the information was compiled from its accounting records or system. AF 62. The CO stated the Employer submitted a summarized payroll report for the first 11 months of calendar year 2019 and quarterly payroll reports for 2018 and 2019, “but this information did not show monthly data or separate the payroll information for permanent and temporary workers as requested in the NOD.” AF 62. The CO stated, “[a]s a result, the payroll data submitted was insufficient to support that the employer has a peakload period of need from February 10 through November 20.” AF 62.

The CO summarized the information provided in Employer’s 2019 payroll summary, AF 62-63, and discussed the Employer’s Schedule of Operations for 2020, AF 63, stating that “the information requested in the NOD was not submitted in the NOD response.” AF 63. The CO thus concluded:

Therefore, the tax forms, payroll reports, and schedule of operations for 2020 are insufficient to establish that the employer has a temporary need for the number of workers requested during the period of need requested. Furthermore, the documentation submitted is insufficient to establish that the employer has bona fide job opportunities for the 15 Construction Laborers during the period from February 10 through November 20.

AF 63. The CO then again cited Employer’s statement that it was having difficulty finding laborers to work, and reminded Employer “that a labor shortage, no matter how severe, does not justify a temporary need.” AF 64.

STANDARD 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*”).⁵ 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.⁶

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 301; AF 350-53; AF 393. 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.

⁵ *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. Employer cites the *Best Solutions* decision, among others, in support of its argument that I should apply a *de novo* standard of review. Employer’s Brief at 12. I find the Preamble to the 2015 IFR’s categorical statement that “[t]his provision [20 C.F.R. § 655.61] does not provide for de novo review” definitively answers this question. 80 Fed. Reg. 24081. I thus decline to apply a *de novo* standard of review.

⁶ 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.

Before turning to the merits of the two deficiencies at issue, I must address the following statement in Employer’s Brief, which implies that its Supplemental Response consisted of hundreds of pages of new information that had not been previously provided:

In addition, in compliance with the agreed terms of the “Certifying Officer’s Motion for Reconsideration and Remand” and the Board’s “Decision and Order” issued January 23, 2020, the Employer provided an additional 234 page packet, consisting of Exhibits A-H, directly addressing the issues raised in the initial NOD, which the Certifying Officer fails to analyze in a “searching and careful” manner in the context of the Employer’s temporary peak load need.

Employer’s Brief at 15.

A review of the Appeal File indicates that the Supplemental Response is found at AF 68-286, and thus consists of 218 pages, not 234. That aside, the more significant point is that most of the documents submitted as part of the Supplemental Response had been previously submitted.⁷ Indeed, my review of the Supplemental Response and the remainder of the Appeal File indicates that only the following documents were newly submitted as part of the Supplemental Response:

AF Pages	Description	Notes
68-74	Supplemental Response letter	
81-82	Summary of 2020 Projects: Explanation of Need for Additional Construction Laborers	This is a summary of the previously-provided Schedule of Operations for 2020. <i>See</i> AF 282-286.
84-90	Slides and article on cold weather contracting	Similar to information that was already provided. <i>See</i> AF 525-26.
90	Employer’s Explanation of Concrete Foundation and Slab Work, 1/21/20	Three images referenced in this document were already provided. <i>See</i> AF 374-76, 548-50.
95	Undated Pharr Construction Co. 2019-2020 Project Plans Support Letter	
97-102	D.R. Horton Texas Independent Contractor Agreement, 2/10/15	
124	Signature page of contract with R.D. Howard for Amtrak Temple, Texas Station Project	The remainder of this contract was already provided. <i>See</i> AF 608-28.
125-56	Purchase orders from D.R. Horton from 1/11/19 to 5/21/19 and 1/10/20	
189-96	Purchase orders and invoices from CNL and	

⁷ Rather than provide repetitive cites to the Appeal File when a document was submitted more than once, in most cases I simply will provide one cite to the Appeal File.

	R.D. Howard from 11/20/19 to 12/12/19	
197-99	Explanation for Delay in H-2B Temporary Worker Arrival in 2018, 4/11/18 Notice of Certification, and 6/14/18 Notice of Action	
200-02	Explanation for Delay in H-2B Temporary Worker Arrival in 2019, 1/14/19 Notice of Certification, and 5/22/19 Notice of Action	
209-271	Monthly Payroll Summaries, January to November 2019	
272-273	Staffing and Payroll 2019	This document only covers the first 11 months of 2019.

In deciding this matter, I have considered the documents newly submitted as part of the Supplemental Response in addition to the documents previously submitted, whether or not they were again submitted as part of the Supplemental Response. Although the Employer had two opportunities – in the Response and in the Supplemental Response – to submit all the information and documentation the CO requested in the NOD, the Employer did not provide all of the information and documentation requested. As outlined below, given Employer’s failure to submit all of the requested information and documentation, the record in this matter is sufficient to support a conclusion that the CO did not act arbitrarily or capriciously in denying certification in this matter.

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,⁸ the CO carefully considered the data Employer provided. See AF 351-52. 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 53-54.

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 the protection period.” AF 351. 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

⁸ 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 352.

months of December and January....” AF 351, 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 352.

In the Supplemental Response, Employer provided additional information concerning cold weather concreting and what can be done during the non-peak months of December and January. AF 72, 84-89, 90. The CO considered this information, and concluded that “[t]he job duties of mixing, pouring, and spreading concrete may be limited by the outdoor temperature [sic], but the majority of the job duties described in the application, such as prepping and preparing the sites for concrete work can be performed when temperatures are below 40 degrees Fahrenheit.” AF 54. This conclusion is consistent with what Employer argues on appeal: “Employer’s records show that it has an ongoing year around workload and permanent workers....” Employer’s Brief at 13.

Employer argues that the CO has impermissibly “create[d] a hybrid classification where employers seeking temporary peakload certification have to also meet seasonal requirements.” Employer’s Brief at 13. This argument is not persuasive, as Employer’s own explanation for its peakload need, Employer’s Peak Load & Temporary Need Support Letter, establishes that its peakload need is inextricably intertwined with the seasonal nature of the construction business:

Since our business functions within the project plans and schedules of our customer’s [sic] construction needs, *our peak load is tied to the seasonal nature of the other construction businesses.*

...

Due to a natural seasonal slowdown of work given to us by our customers, there is a regular reduction in our workload, and therefore, a reduction in our workforce. However, each year when the workload demands from our customers increase[], we experience a peak load period of need, directly tied to customer and market demands. Therefore, we need additional workers for this peak-seasonal period.

For our company, there are times during the year when there is much more work. *Due to the natural climate changes, weather conditions, and the customer needs for our services our needs are peak load and seasonal. But, this peak load seasonal period is recurrent each year, based on the Company’s past history of customer demand and work load. Our Company is chosen by customers to perform services. There is a peak period during the year (seasonal) when there is more work to be performed in this type of work.*

AF 570 (emphasis added). Given Employer’s own characterization of its peakload need, the CO did not act arbitrarily or capriciously in determining that Employer’s peakload need was affected by climactic conditions impacting the construction industry in the area of intended employment during the cold-weather months.

In submitting its Application, Employer first argued that its peakload need was affected by cold weather. For example, the Employer stated,

We wish to make it clear that as with any trade there are many factors that impact the workload of ongoing and upcoming work. In the concrete construction trade, the most significant factor for our temporary peak load need is customer and market demand for our services, which is in fact impacted by the climate, specifically cold weather temperature and its effect on concrete curing and strength.

AF 525. The CO then considered the information that Employer provided indicating that temperatures below 40°F negatively impact concrete construction and applied 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. The CO concluded that the Employer "can actual[ly] perform work in climates below 40°F, and the basis for cold weather concreting [is] not valid." AF 327.

As the CO's conclusion called into question Employer's peakload need period, which included the month of February, the Employer then provided information showing that there is, in fact, work that can be done in February:

Most residential and commercial builders and contractors avoid pouring concrete during months that temperatures are descending or below 40°F - such as December and January, when the probability of cold temperatures below 40°F degrees are more likely, which can reduce the strength of concrete. (*See AC/ Guidelines for Cold Concreting in Exhibits D & E*) In [sic] February, the temporary peak workload increases, since there is an increase in demand for land preparation, such as excavation, trenching, in order to be able to pour concrete slabs and foundations as temperatures are rising in February. We need additional Construction Laborers at this time in order to do the excavation, leveling and grading, and manual construction labor.

AF 90. The problem for Employer is that this new information further calls into question its requested peakload need period, because this information indicates there is plenty of work that can be done in December and January, as well as in February. The D.R. Horton purchase orders dating from January 11, 2019, to May 21, 2019, and on January 10, 2020, that Employer newly submitted as part of the Supplemental Response, AF 125-156, compound this problem. The CO considered this information, and stated the following:

The employer has also provided work invoices from January 11, 2019 through January 10, 2020. However, the invoices illustrate that the employer's business activities, including concrete work, are able to be conducted throughout the span of a calendar year.

AF 58. I decline to find that the CO acted arbitrarily or capriciously in reaching this conclusion.

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 556-57. Specifically, the CO informed the Employer that the submissions in its Application supporting its workload need (including a letter from Carothers Homes, LLC (AF 411), Employer's 2020 Project Plans Support Letter (AF 412), work invoices from 2019 (AF 414-439), and a contract with R.D. Howard Construction (AF 440-460)) were insufficient. In the Response, the Employer provided a Schedule of Operations for 2020 (AF 369-73) as well as tax information. The CO concluded that this information did not substantiate the Employer's 2020 peakload need. AF 313.

In the Supplemental Response, the Employer provided additional information. Given the procedural history of this case, Employer essentially got two opportunities to respond to the NOD – first in the Response, and then in the Supplemental Response. Nevertheless, in the Supplemental Response the Employer again failed to provide all of the requested information. Specifically, among other categories of information and documentation, the NOD asked Employer to provide the following:

4. Summarized monthly payroll reports for a minimum of **two** calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Construction Laborer*, 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;
5. Annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6. Specifically, the employer must submit its contracts and work agreements for its construction projects specified in the employer's statement of temporary need; ...

AF 557 (emphasis in original).

With respect to the request for two calendar years' worth of monthly payroll reports, the Employer submitted in its Supplemental Response only payroll summaries for the months from January to November 2019, AF 209-271, and a Staffing & Payroll 2019 summary, AF 272-73. These documents covered neither the month of December 2019 nor any part of calendar year 2018, and thus did not fully respond to the request in the NOD. Moreover, neither of these documents was signed by the Employer attesting that the information presented was compiled from the Employer's actual accounting records or system as required. On these facts, the CO did not act arbitrarily or capriciously in concluding that "the payroll data submitted was insufficient to support that the employer has a peakload period of need from February 10 through November 20." AF 55.

With respect to the request for annualized and/or multiyear work contracts or work agreements, the NOD specifies that such multiyear contracts shall be “supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need....” In other words, it is not enough for Employer to have submitted the multiyear contracts with D.R. Horton and with R.D. Howard – what was required was additional documentation indicating that work under those contracts would be performed during the requested period of need. The CO thus did not act arbitrarily or capriciously in stating that “the work contracts submitted do not specify the actual dates when work will commence and end during each year of service” and “the work contracts do not show work will be performed for each month during the requested period of need....” AF 58.

In the absence of the requested multiyear work contracts with supplementing information, customer letters of intent may support the requested peakload period of need. Before Employer submitted the Supplemental Response, the record contained many statements by Employer that it would 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 369-73); 2020 Project Plans Support Letter (AF 412).

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 369 (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).

Before Employer submitted the Supplemental Response, the only information Employer had submitted directly from Employer’s customers substantiating their need for Employer’s work during the requested 2020 peakload period of need consisted of: (1) a letter dated October 16, 2019, from Carothers Homes, LLC (AF 411); and (2) a Subcontract Agreement with R.D. Howard Construction concerning the Amtrak Temple, Texas, station project (AF 440-460, missing the signature page).

While the Employer provided a Schedule of Operations for 2020 in its Response, the Employer did not “submit its contracts and work agreements for its construction projects specified in the employer’s statement of temporary need” (AF 389) 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 389. 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 389. 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 389 (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.

In its Supplemental Response, Employer submitted the following three additional documents from its customers: (1) an undated letter from Pharr Construction Co. (AF 95); (2) a D.R. Horton Texas Independent Contractor Agreement dated February 10, 2015 (AF 97-102); and (3) the signature page for the previously-provided R.D. Howard subcontract (AF 124).

None of these documents leads me to conclude that the CO erred in denying certification in this matter. First, the undated letter from Pharr Construction Co. provides no specificity as to when in 2020 it will need Employer to work: “Pharr Construction Co. of Waco, LLC will need ... [Employer] to complete the projects that will be in progress throughout 2019 and we will be needing this companies [sic] services for additional projects in 2020.” AF 95. While the Pharr Construction Co. letter references “our peak load season,” that peak load season is Pharr Construction Co.’s, not Employer’s, and in any event the beginning and end dates of that peak load season are not specified.

Employer asks me to take official notice of a Department of Labor stakeholder briefing slide from 2007 on Acceptable Documentation for Letters of Intent and Monthly Invoices. Employer’s Brief at 10. While I decline to take official notice of this slide, I note that the Pharr Construction Co. letter fails two of the slide’s four bulleted requirements for letters of intent. Specifically, the Pharr Construction Co. letter is undated, thus failing the first bulleted requirement, and does not include dates of services clearly correlating to Employer’s period of need, thus failing the fourth bulleted requirement. This slide thus demonstrates that the Pharr Construction Co. letter of intent is inadequate. Accordingly, Employer’s citation to this slide in support of its argument that it provided adequate letters of intent is unavailing with respect to the Pharr Construction Co. letter of intent.⁹

Second, neither the R.D. Howard subcontract, including the newly-submitted signature page, nor the D.R. Horton Texas Independent Contractor Agreement specify that the Employer will perform work during the requested period of need. Accordingly, these documents do not substantiate Employer’s statements that it will be working for these customers during the requested period of need.¹⁰

⁹ Employer states, “[p]er the guidance from DOL, each of the customer intent letters submitted on behalf of URIBE CONCRETE were on ‘letterhead’ and identified the Employer. (AF pp 94-96).” Employer’s Brief at 11. Employer also states that it “submitted customer intent letters from *Carothers Homes, LLC, Pharr Construction Co., Mark Reuter and D.R. Horton*, as examples of businesses that hire URIBE CONCRETE to perform concrete construction services, and which set out their increased demand for the Employer[’]s services from February to November 2020. (AF pp 94-96).” Employer’s Brief at 9. In fact, the Appeal File shows that Employer only provided two customer letters of intent: one from Carothers Homes, LLC, AF 94, and one from Pharr Construction Co., AF 95. The document at AF 96, characterized by Employer as a customer letter of intent, in fact is a purchase order from Mark Reuter Remodeling Co., Inc., dated June 21, 2019. The 635 page Appeal File does not appear to contain a customer letter of intent from D.R. Horton.

¹⁰ Employer had the opportunity in the Supplemental Response to include letters of intent from these customers showing that Employer would perform work for them under these multiyear contracts during the requested peakload period of need, but did not do so.

This leaves the Carothers Homes, LLC, letter of intent. AF 94. This letter indicates that Employer will be working on approximately 100 projects for Carothers Homes, LLC, from early February to mid-November 2020. AF 94. Employer's Summary of 2020 Projects specifically discusses work for Carothers Homes in the entries for July, October, and November 2020, and notes in the July entry that Employer will be working for Carothers Homes between February and November 2020 and "[w]hen we install concrete for Carothers Homes, we typically need about 4-5 construction laborers for the job." AF 82; *see also* Schedule of Operations for 2020, AF 282-286.

In 2019, Employer had 5 permanent construction laborers in January, October, and November, 6 permanent construction laborers in February, March, April, May, August, and September, and 7 in June and July. AF 272. This information indicates that Employer's permanent construction laborers can handle the 2020 workload substantiated by the Carothers Homes, LLC, letter of intent without any need for temporary construction laborers. Accordingly, the Carothers Homes, LLC letter of intent is not sufficient, in and of itself, to establish the Employer's requested period of peakload need.

Turning to the tax and payroll information Employer submitted, Employer makes the following statement:

[T]he DOL Denial #2 [the February 10, 2020 Final Determination, *see* AF 44, 55-57] provided detailed staffing and hours worked charts, by month and quarterly, based on the evidence submitted by the Employer. (See DOL Denial #2). Therefore, it is inaccurate to state that the Employer did not submit the requested information, when in fact the CO used the information to create its own charts in the DOL Denial #2.

Employer's Brief at 17 (emphasis in original). The first quoted sentence is consistent with the record. The charts in the February 10, 2020 Final Determination were limited to the first eleven months of calendar year 2019 and were based on the Employer's 2019 Payroll Summary. AF 55-57. The second quoted sentence would be consistent with the record if it read, "it is inaccurate to state that the Employer did not submit *all of* the requested information...." This is because the record shows that Employer did, in fact, provide some of the requested information. For example, Employer submitted quarterly Federal and Texas tax reports for the first three quarters of 2019, AF 203-208, and for all four quarters of 2018, AF 274-81,¹¹ as well as monthly payroll summaries for the months of January through November 2019, AF 209-271, and a summarized staffing and payroll report for 2019, AF 272-73.¹² But Employer was requested to

¹¹ Employer states it provided "signed Texas and Federal Quarterly Payroll Reports...." Employer's Brief at 15. I have reviewed AF 203-08, the 2019 quarterly tax reports (first three quarters), and AF 274-81, the 2018 quarterly tax reports (all four quarters). In fact, these documents in the Appeal File were not signed.

¹² The CO stated that "[i]n its NOD response submitted on January 24, 2020, the employer submitted a summarized payroll report for calendar year 2019. This documentation did not include any data for December 2019. The employer did [not?] submit any additional summarized payroll information. The employer submitted quarterly payroll reports for 2018 and 2019, but this information did not show monthly data or separate the payroll information for permanent and temporary workers and requested in the NOD. As a result, the payroll data submitted was insufficient to support that the employer has a peakload period of need from February 10 through November 20." AF 54-55, 62. I inserted the "[not?]" in the quoted language because from the context, it appears the CO

submit summarized monthly payroll reports for a minimum of two calendar years providing specified information, and to sign those documents attesting that the information presented was compiled from Employer's accounting reports or system. AF 557. Employer did not provide all of the requested information. Accordingly, I decline to find that the CO acted arbitrarily or capriciously in concluding that "the payroll data submitted was insufficient to support that the employer has a peakload period of need from February 10 through November 20." AF 55.

The CO considered the payroll data drawn from the 2019 payroll summary Employer submitted. AF 55-57. The CO stated:

The Department notes that 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, that it needs to *temporarily supplement its permanent staff* at the place of employment due to a seasonal or short-term demand, and that the temporary additions to staff will not become part of the employer's regular operation.

The employer employed seven permanent workers in June 2019. In the months of July through November 2019, the employer employed seven permanent workers and 11 temporary workers. The increase from seven to 18 workers is an increase of 157%. Therefore, the employer does not appear to be temporarily *supplementing* its permanent staff at the place of employment in accordance with the regulatory definition of a peakload standard of need.

AF 57 (emphasis in original). Employer argues that the 2019 data is skewed because its temporary workers arrived late. Employer's Brief at 15. In order to remove the issue of late arrival of temporary workers in 2019, one can consider only the Employer's application for the temporary peakload period from February 10, 2020, to November 20, 2020. During this requested peakload period, Employer planned to have 5 permanent construction laborers for the months of January and December 2020, and 5 permanent construction laborers and 15 temporary construction laborers for the months of February through November 2020. AF 81-21; AF 543-547.

Had the CO considered Employer's plans for the requested 2020 peakload period of need, instead of the 2019 payroll summary data, the CO may have written something like, "[t]he increase from five to 20 workers is an increase of 300%."¹³ That observation aside, I need not, and do not, make a finding as to whether the size of the increase between Employer's permanent construction laborer workforce and its requested total construction laborer workforce including both permanent and temporary staff indicates that the Employer is "*supplementing* its permanent staff" or not. I simply find that, on this record, the CO's conclusion that "the employer does not

intended to state that the Employer did not submit additional summaries of payroll information. However, at AF 209-71 the Employer provided monthly payroll summaries for the months of January to November 2019. The Employer did not, however, provide monthly payroll summaries for a minimum of two calendar years, as requested. Accordingly, to the extent the CO may have erred in not considering the monthly payroll summaries for January to November 2019 at AF 209-71, I conclude any such error was harmless.

¹³ $5 + 300\% = 20$.

appear to be temporarily *supplementing* its permanent staff” is neither arbitrary nor capricious.¹⁴ Moreover, I find that on this record, this conclusion by the CO was not essential to the CO’s finding that Employer did not overcome the first deficiency. I thus find that, even if one were to disregard this conclusion, the CO did not act arbitrarily or capriciously in finding that the Employer did not overcome the first deficiency.

In sum, the CO explained in the NOD why the Application was deficient and explained what information and documentation the Employer had to provide to overcome the deficiency. The Employer had two opportunities to provide responsive information and documentation – first in its Response, and then in its Supplemental Response. Despite having had two opportunities to provide the requested information and documentation, the Employer did not provide all of the requested information and documentation. The Employer argues that the CO erred in concluding that the information and documentation it provided did not overcome the deficiency. On this record, where the Employer did not provide all of the information and documentation requested, I decline to find that the CO acted arbitrarily or capriciously in concluding that the information and documentation provided by the Employer did not adequately establish the job opportunity as temporary in nature. AF 58.

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

While my finding that the CO did not act arbitrarily or capriciously in concluding that the Employer did not establish the job opportunity as temporary in nature is a sufficient basis on its own to affirm the denial of certification, on this record it is appropriate briefly to discuss why the CO also did not act arbitrarily or capriciously in concluding that the Employer failed to establish a temporary need for the number of workers requested. Simply put, 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 temporary construction laborers for the requested period of peakload need from February 10, 2020, through November 11, 2020.

Although the CO asked for evidence and documentation substantiating Employer’s need for 15 temporary construction laborers during the requested period of peakload need, 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 390), the CO concluded the Employer failed to do so. The CO recognized that the Employer provided a Schedule of Operations for 2020. AF 63. The CO stated:

The employer also provided a schedule of operations or 2020. The schedule of operations consist[s] of several projects indicated in the NOD letter, which further

¹⁴ Employer states it has had applications certified for temporary construction laborers from 2014 through 2019, ranging from a low of 5 temporary construction laborers in 2014 to a high of 16 construction laborers in 2018. Employer’s Brief at 3. I do not know if the CO considered this information in issuing the February 10, 2020 Final Determination. Accordingly, I have not considered this information in determining whether the CO acted arbitrarily or capriciously in issuing the February 10, 2020 Final Determination.

documentation was requested in order to justify the project as legitimate. However, the NOD requested the employer to submit annualized and/or multi-year work contracts or 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. The documentation requested in the NOD was not submitted in the NOD response.

AF 63.

With one exception, the CO did not err in any of these statements. The one exception is that the Employer provided a letter of intent from Carothers Homes, LLC, that showed work would be performed for this customer for each month during the requested period of need.¹⁵ AF 94. A review of the Appeal File indicates that the documentation requested – specifically, “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” was not provided with respect to the other work Employer identified in its Schedule of Operations for 2020, AF 543-547, and its Summary of 2020 Projects, AF 81-82. Accordingly, with the exception of the Carothers Homes, LLC, letter of intent, the documentation requested in the NOD was neither submitted in the NOD response nor in the Supplemental Response.

I recognize that Employer makes several assertions in the record that would tend to indicate it had sufficient work during the requested period of peakload need to justify its request for 15 temporary 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 543-547); 2020 Project Plans Support Letter (AF 412); and Summary of 2020 Projects (AF 82-82).

The problem is that Employer did not support its own statements as to its need for temporary construction laborers with documentation from its customers supporting that need. The exception, of course, is the letter of intent from Carothers Homes, LLC. AF 94. 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 282 (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, the

¹⁵ While Employer also provided an undated letter of intent from Pharr Construction Co., AF 95, for the reasons discussed above, that second letter of intent is inadequate.

2020 Project Plans Support Letter, and the Summary of 2020 Projects 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 that period.

I have discussed above in detail the documentation Employer submitted directly from its customers that would tend to substantiate its requested 2020 peakload period of need (and thus would tend to substantiate Employer's request for 15 temporary construction laborers during that period). Briefly, the contracts with D.R. Horton and R.D. Howard were not sufficient because they needed to be supplemented with documentation showing work would be performed during the requested period of need. Even though Employer was on notice as a result of the December 18, 2019 Final Determination that the CO considered insufficient the documentation it had provided in its Response to the NOD (including Employer's Statements in the Schedule of Operations for 2020), AF 329, Employer's Supplemental Response did not provide "supporting documentation to substantiate the projects as legitimate work projects to be fulfilled during the 2020 peak load period." AF 329. Specifically, the Pharr Construction Co. letter of intent was inadequate, the D.R Horton Texas Independent Contractor Agreement did not show work would be performed in the requested 2020 peakload period of need, and the signature page to the R.D. Howard subcontract also did not show that work would be performed during the requested period of need.

Employer did not submit in its Supplemental Response documentation, such as letters of intent covering the requested peakload period of need, from its customers such as All Star Homes/CNL, D.R. Horton, and R.D. Howard showing that Employer would perform work for these customers during the requested peakload period of need. This documentation, had it been provided, may have established the need for 15 temporary construction laborers (and it may have established the temporary peakload period of need). Be that as it may, Employer did not submit this documentation, even though it had two opportunities – in the Response to the NOD and in the Supplemental Response – to do so.

Employer was also asked to provide summarized monthly payroll reports for a minimum of two calendar years. As discussed above, Employer provided a summary payroll report for the first 11 months of 2019 and summarized monthly payroll reports for the first 11 months of 2019, and did not sign those documents as requested attesting that the information presented was compiled from Employer's accounting records or system. While it appears the CO may not have considered the summarized monthly payroll reports for the first 11 months of 2019, *see* footnote 12 above, given that the employer did not provide summarized monthly payroll reports for a minimum of two calendar years as requested, I conclude that to the extent the CO may have erred in this regard, any such error was harmless.

Accordingly, I find that the CO did not act arbitrarily or capriciously in concluding that the Employer did not overcome the second deficiency.

Conclusion

As explained above, although the Employer had two opportunities to submit all of the information and documentation the CO requested in the NOD, it did not do so. I find that on this record, 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 and to counsel for the Certifying Officer 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.

For the Board:

PAUL R. ALMANZA
Associate Chief Administrative Law Judge