BALCA Case No.: 2021-TLN-00051

ETA Case No.: H-400-21001-986690

In the Matter of:

Rapid Pallet Incorporated

Employer

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from Rapid Pallet Incorporated’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); 20 C.F.R. § 655.6(b). 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).

PROCEDURAL BACKGROUND


On January 1, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received Employer’s application for temporary labor certification. (AF 34-48.) Employer requested certification of 16 Wooden Pallet Repairmen for an alleged period of peakload need from April 1, 2021 to December 31, 2021. (AF 34.)

On February 9, 2021, the CO issued a Notice of Deficiency (“NOD”). (AF 27-33.) According to the NOD, Employer:

(1) failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a)-(b); and
(2) failed to establish temporary need for the number of workers requested under 20 CFR § 655.11(e)(3) & (4).

(AF 30-33.) In the NOD, the CO explained that Employer failed to “sufficiently demonstrate the requested standard of temporary need.” (AF 31.) Per the CO, Employer presented its 2014 monthly sales data to demonstrate that 2014 was the only year it was able to employ temporary workers for the entire peak period. However, the CO found the 2014 monthly sales data was not representative of Employer’s 2021 operations. The CO noted that Employer also provided its 2019 monthly sales report. The CO noted that according to Employer, the “2019 monthly sales reflect a similar pattern; however, the workforce was not obtained. The peakload sales were not met. The small increases in sales during the peakload was obtain by our full-time staff working overtime.” (AF 31.) The CO did not find the 2019 data supported Employer’s statement that it has a peakload need from April through December because Employer’s sales data showed consistent sales throughout each month of the year. The CO further added Employer did not explain the “events that cause the seasonal or short-term demand that leads to its peakload need.” (AF 32.) The CO requested additional information and documentation. (Id.)

The CO additionally found Employer did not sufficiently demonstrate that the number of workers it requested was “true and accurate and represents bona fide job opportunities.” (AF 33.) Employer also did not explain how it determined it needed 16 Wooden Pallet Repairmen during the requested period of need. In the NOD, the CO requested further explanation and documentation from Employer to establish its need for 16 Wooden Pallet Repairmen. (AF 33.)

On February 23, 2021, Employer submitted to the CO a document entitled “Response to Notice of Deficiency (NOD)” (“Employer’s Response”). (AF 25-26.) Employer’s Response was directed to the “Chief Administrative Law Judge” and explained that Employer’s 2014 sales data showed a peakload period from April through December. Employer’s Response noted that the 2019 monthly sales figures were provided to illustrate how the lack of temporary workforce resulted in Employer’s inability to “capture more volume in the market.” (AF 25.)

On March 25, 2021, the CO issued a Minor Deficiency Email (“MDE”). (AF 24.) The MDE noted that Employer’s February 23, 2021 submission, while entitled a response to the NOD, was addressed to the Chief Administrative Law Judge for the Office of Administrative Law Judges (“OALJ”) (Id.) The MDE stated that it was unclear whether Employer’s “document was intended as an appeal of the NOD or as a response to the NOD.” (Id.) The MDE further stated that, if

3 References to the Appeal File will be abbreviated “AF” followed by the page number.
Employer’s Response was an appeal of the NOD, then Employer must also submit the appeal request to the OALJ. In the MDE, the CO requested Employer clarify if Employer’s Response was intended as a NOD response or as an appeal to the OALJ. The MDE advised that if Employer’s Response constituted an appeal, then Employer needed to inform the CO if it had been submitted to the OALJ. The MDE additionally instructed Employer to submit its response by e-mail, fax, or “upload to FLAG,” by not later than 2:00 PM on April 2, 2021.

On March 31, 2021, the CO sent another MDE. (AF 23.) This later MDE provided that further information was needed to continue processing Employer’s temporary labor application at issue. It also stated Employer was contacted on March 25, 2021 about clarifying the intent of Employer’s Response received on February 23, 2021. (Id.) The MDE indicated that it remained unclear if Employer’s Response “was intended as an appeal of the NOD or as a response to the NOD.” The CO again explained that if Employer’s Response was an appeal of the NOD, then the appeal request must also be submitted to the OALJ. The later MDE requested Employer explain the intent of Employer’s Response, noting that if Employer’s Response constituted an appeal, then Employer should indicate if it were timely submitted to the OALJ. The later MDE advised Employer to submit a response not later than 2:00 PM on April 2, 2021, provided the means for submission, and added that should no response be received, Employer’s temporary labor application could be denied.

On April 7, 2021, the CO issued its final determination denying Employer’s temporary application as deficient. (AF 13-22.) Specifically, the CO determined Employer (1) failed to establish the job opportunity was temporary in nature and (2) failed to establish temporary need for the number of workers requested. (AF 20-21.) The CO referred to Employer’s Response received on February 23, 2021. The CO explained that, while employers may request “Administrative Review of the NOD before the Chief Administrative Law Judge within 10 business days from the date the NOD is issued,” Employer “did not confirm whether and when it submitted its request to the [OALJ].” Additionally, the CO noted Employer had failed to provide the documentation requested in the NOD. (Id.)

On April 30, 2021, the CO received Employer’s request for administrative review of the CO’s final determination (“Employer’s Review Request”), (AF 1-12.) Employer’s Review Request was dated March 26, 2021, and addressed to the Chief Administrative Law Judge. In its March 26, 2021 letter to the Chief Administrative Law Judge which is part of the Employer’s Review Request, Employer stated its “packet” was sent out in the proper timeframe, but was returned. Employer’s March 26, 2021 letter further stated that Employer had been advised that its temporary labor application was not being processed and it was therefore “resubmitting it” along with its request for review of the CO’s determination. (AF 1.)

Employer’s Review Request included copies of three mailing labels — one mailing label is addressed to the Chief Administrative Law Judge for the Department of Labor and appears to have been shipped “overnight” on Wednesday, February 24. (AF 10.) The second mailing label is addressed to Employer and was shipped “express saver” on Thursday, March 11. (AF 11.) The

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4 Employer’s Review Request consisted of Employer’s letter to the Chief Administrative Law Judge dated March 26, 2021, a copy of Employer’s Response, and a copy of the NOD, along with copies of these mailing labels. (AF 1-12.)
STANDARD OF REVIEW

The scope and standard of review in the H-2B program are 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).

DISCUSSION

A. Legal Standard

An employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; BMGR Harvesting, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017); Alter and Son Gen. Eng’g, 2013-TLN-3, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peakload, or intermittent need. Temporary service or labor “refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.” 8 C.F.R. § 214.2(h)(6)(ii)(A).

To qualify for 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 a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); see, e.g., Masse Contracting, 2015-TLN-00026 (Apr. 2, 2015); Natron Wood Prods., 2014- TLN-00015 (Mar. 11, 2014); Jamaican Me Clean, 2014-TLN-00008 (Feb. 5, 2014).

B. Analysis

The CO’s denial rested on a finding that Employer failed to substantiate its request for a peakload need of temporary workers from April 1, 2021 to December 31, 2021. Upon review of

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5 Because the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively use the DHS regulatory definition of temporary need. Consolidated Appropriations Act of 2017, P.L. 115-31, Division H.
the Appeal File, the CO’s denial of Employer’s application was not arbitrary and capricious. For the reasons that follow, the undersigned affirms the CO’s denial of Employer’s application.

1. Employer’s Response to the NOD.

The CO issued the NOD on February 9, 2021, and Employer’s Response was submitted on February 23, 2021. The CO emailed Employer twice asking if Employer’s Response was intended as an appeal of the NOD or a response to the NOD. In the final determination, the CO stated pursuant to 20 CFR 655.61, employers may request Administrative Review of the NOD before the Chief Administrative Law Judge. Such request must be submitted within 10 business days from the date the NOD is issued. The CO found Employer did not confirm whether and when it submitted its request to the OALJ. Employer argues its “packet” was submitted within the proper timeframe but was returned.

As noted, the NOD was issued on February 9, 2021. The NOD informed Employer that in accordance with 20 CFR 655.31(b)(2), Employer could submit a modified application within 10 business days from the date the NOD was issued. (AF 28.) The NOD also provided that Employer’s “written response to [the] NOD and all requested documents must be submitted . . . within 10 business days from the date this NOD is issued.” (Id.) The NOD additionally set forth that Employer could request Administrative Review of the NOD before the Chief Administrative Law Judge within 10 business days from the date the NOD was issued. (AF 29.) The NOD contained information on where Employer’s appeal was to be mailed and instructed Employer to simultaneously send a copy of the appeal request to the CO. The NOD cautioned that should Employer neglect to “submit requested modifications to the application” or “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. Such denial was final and could not be appealed. (Id.)

Per the regulations, the CO is obligated to include the following information in the NOD:

(1) State the reason(s) why the Application for Temporary Employment Certification or job order fails to meet the criteria for acceptance and state the modification needed for the CO to issue a Notice of Acceptance;

(2) 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. The Notice will state the modification needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The Notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery, and that the employer must simultaneously serve a copy on the CO. The Notice will also state that the employer may
submit any legal arguments that the employer believes will rebut the basis of the CO’s action; and

(4) State that 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. The Notice will inform the employer that the denial of the Application for Temporary Employment Certification is final, and cannot be appealed. The Department of Labor will not further consider that Application for Temporary Employment Certification.

20 CFR § 655.31 (b). The NOD complied with the regulations. (See AF 28-30.) Pursuant to the regulations, Employer can either (1) submit a modified application within 10 business days or (2) request administrative review before an ALJ. See 20 CFR § 655.31 (b). The CO found Employer’s Response was ambiguous as the document could have been construed as a response to the NOD or an appeal of the NOD.

Here, the record shows the CO emailed Employer twice, seeking clarification of the purpose of Employer’s Response. The CO’s final determination indicates Employer did not provide clarification. Employer however argues that though it timely submitted its packet the packet was returned.

Ten business days from February 9, 2021, results in a due date of February 23, 2021. Employer filed its response to the NOD on February 23, 2021. Nonetheless, Employer does not explain “packet” or state to whom the packet was submitted. The CO’s email clearly sought clarification from Employer regarding the intent of its Response — whether Employer’s Response was an appeal of or a response to the NOD. Other than Employer’s assertion of timely submission, nothing in the record shows that Employer responded to the CO’s MDEs.

The CO sent MDEs to Employer on March 25, 2021 and on March 31, 2021. Employer’s Review Request includes copies of mailing labels showing that, on Monday, March 29, 2021, Employer mailed an item overnight to the Department of Labor. However, the contents of the item mailed are not apparent from the shipping label upon which Employer relies. Therefore, Employer has provided insufficient evidence to support finding it provided any additional information as requested by the CO’s March 25, 2021 MDE. Moreover, the CO’s MDEs provided the means by which Employer was to respond. None of the methods authorized overnight or express mail. The CO’s March 31, 2021 MDE advised that further information or documentation was required to continue processing Employer’s temporary labor application. This email also specified Employer’s application will not be processed any further until Employer’s response was received and that if no response was received by 2:00 PM CST on 4/2/2021, the application could be denied.

Though Employer’s Response was received by the February 23, 2021 deadline, Employer has not demonstrated that it responded to the CO’s MDEs requesting additional information. Regardless of Employer’s failure to provide additional information to the CO as requested prior to
the CO’s final determination, Employer has not met its burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program.  

2. Temporary Need

Employer asserts its need is temporary. (See AF 2.) Employer maintains its 2014 monthly sales report illustrates it has a peakload need from April to December. Per Employer, it averaged over 25% in increased sales from April 2014 to December 2014 because of its temporary labor force. Employer posited that its lack of a temporary labor force in 2019 made it was unable to “capture more volume in the market.” (AF 2.) Thus, according to Employer, the difference between its 2014 and 2019 sales report illustrates its need for a temporary workforce.

For the following reasons, the undersigned finds Employer has failed to prove it has a peakload need.

To establish a peakload need, Employer must demonstrate “that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). To demonstrate that its job opportunity was temporary in nature, the CO instructed Employer to submit the following documentation and information when responding to the NOD:

1. A statement describing the employer’s business history and activities (i.e. primary products or services);
2. Schedule of operations through the year;
3. A statement explaining how the employer determined it has a peakload need from April through December;
4. A statement explaining what events cause the seasonal or short-term demand that leads to its peakload need;
5. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Wooden Pallet Repairman, 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;
6. An explanation of the data in submitted payroll documentation;
7. Summarized monthly production numbers for two calendar years that clearly show the number of pallets being repaired each month by workers in the requested occupation at the employer’s worksite location; and
8. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business,

6 It should be noted that the CO did not base the determination to deny Employer’s temporary labor application on the procedural ground of Employer’s failure to comply with the CO’s MDE seeking additional information and clarification: the CO addressed the merits of Employer’s application based on the information it did receive from Employer. (AF 13 – 22.)
without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In 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 32.) The record shows Employer failed to comply with the CO’s instruction. In Employer’s Response, Employer explained why it submitted its 2014 and 2019 sales reports. However, Employer’s Response did not contain any documentation or information the CO requested in the NOD. Moreover, as the CO noted, Employer’s 2014 sales report does not represent Employer’s operational needs in 2021. Furthermore, the figures from the 2019 sales report do not aid Employer in meeting its burden to demonstrate peakload need. Employer argues the 2019 monthly sales report was submitted to explain how a lack of a temporary workforce in 2019 resulted in its inability to “capture more volume in the market.”

Even if a lack of temporary workers in 2019 explains why Employer’s 2019 sales report do not show peak sales for Employer’s purported period of need in 2019, Employer’s argument is not compelling. The regulations require Employer to show it has permanent staff and that it needs to supplement its permanent staff with temporary workers. Employer’s sales reports do not contain information about its permanent employees. There is also no document in the record that offers that type of information.7 Accordingly, the CO could not verify whether Employer actually needed to supplement its permanent staff on a temporary basis throughout the Employer’s alleged period of need.

The undersigned has found the Appeal File does not support Employer’s temporary peakload need. Accordingly, the CO’s determination that Employer failed to establish its need was temporary is affirmed. See D & R Supply, 2013-TLN-00029 (Feb. 22, 2013) (affirming denial where the employer failed to sufficiently explain how its request for temporary labor certification met the regulatory criteria for a peakload need).

3. Number of Workers

The CO stated Employer did “not sufficiently demonstrate[] that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” (AF 33). Employer was instructed to submit supporting evidence and documentation. Employer’s response was to include:

1. An explanation with supporting documentation of why the employer is requesting 16 Wooden Pallet Repairmen for Jermyn, Pennsylvania during the dates of need requested;
2. A statement explaining how the employer determined it has a need for 16 Wooden Pallet Repairmen during the period of need requested;

7 Employer’s 2018 monthly sales report is also in the record. (AF 31.) This report is minimally probative as it shows consistent sales throughout 2018 and provides no information about Employer’s staff.
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Wooden Pallet Repairman*, 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;

4. An explanation of the data in submitted payroll documentation;

5. If applicable, documentation supporting the employer’s need for 16 Wooden Pallet Repairmen such as contracts, letters of intent, etc. that specify the number of workers and dates of need; and

6. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF 33.) After reviewing the record, the undersigned finds no reason to disturb the CO’s determination. Employer has not explained how it concluded it needed 16 Wooden Pallet Repairmen. The Appeal File does not demonstrate that there is a clear need for 16 workers.

Accordingly, the CO’s determination that Employer failed to establish its need for 16 workers is affirmed.

**CONCLUSION**

It is Employer’s burden to establish why the job opportunity and number of workers requested reflect a temporary need within the meaning of the H-2B program. After reviewing all of the documentation provided in this matter and for the reasons discussed above, Employer has not met its burden of establishing it has a peakload need for 16 Wooden Pallet Repairmen from April 1, 2021 to December 31, 2021.

**ORDER**

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

**SO ORDERED.**

For the Board:

**LYSTRA A. HARRIS**  
Administrative Law Judge