In the Matter of:

TRUCO SERVICES, INC.,
Employer

Appearances: Kevin Lashus, Esq.
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S
DENIAL OF TEMPORARY LABOR CERTIFICATION


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

BACKGROUND

On January 1, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 100 landscape laborers for the period of April 1, 2021, to November 15, 2021. AF 58-299. Employer indicated that the nature of its temporary need was “peakload.” The worksite address was listed as 2225 S. 400 West, Salt Lake City, Utah 84115. AF 61. Employer attached a statement regarding its temporary need and its schedule of business operations. Employer stated:

This letter is submitted to support the labor certification application and I-129 petition of Truco Services, Inc. on behalf of 100 foreign workers. Our company is engaged in the landscaping business in the Utah County, Utah area. Our services include landscaping. The dates during which most of our business activity occurs, and during which we have the most need for temporary peak load workers is April 1st 2021 to November 15th, 2021.

Our company currently requires the services of laborers to perform manual labor associated with mow, pull weeds, edge landscape, trim bushes, pick up garbage, blow all walks and driveways, pick up tools, load and unload materials. Must be able to lift 50 lbs. No education required. No experience required. Transportation is provided to and from area work sites at employer’s expense from centralized Utah County pick up location. Our company has a temporary peak load need for persons with these skills because our busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to November 15th, during which time we need to substantially supplement the number of workers for our labor force for these positions. Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force.

This is a new application. Since no previous supporting documentation exists to refer to from prior applications, the additional supporting documentation is attached.

Our company has extensively recruited U.S. workers to fill these positions without success. Specifically, our company has engaged in newspaper ad without receiving any adequate response or being able to hire sufficient numbers of U.S. workers to meet our demand for this number of workers as quickly as they are needed once the

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3 References to the appeal file will be abbreviated with an “AF” followed by the page number.
weather changes. We have found the local labor market to be completely inadequate and unable to meet our need for these peak load workers during our busiest seasons. Most of our work is done on a year to year basis, and the number of temporary workers can only be estimated about a year or so in advance. Based on present business, we do have a temporary peak load need for the H-2B workers we are asking for in 2021, but cannot anticipate, at this time, that we will need H-2B workers in 2022 due to fluctuations in the economy.

AF 63.

The CO issued a Notice of Deficiency on February 22, 2021, listing four deficiencies in the Employer’s temporary labor certification application. AF 48-57. The first deficiency listed was the Employer’s failure to comply with application filing requirements at 20 C.F.R. § 655.15(f). This regulation requires that only one application for temporary employment certification may be filed for one area of intended employment for each job opportunity with an employer for each period of employment. The CO noted that, in violation of this regulatory requirement, the Employer’s current application is for the same position in the same area of intended employment, and for an overlapping period of need as a prior, still valid, certification. The overlapping filings are summarized in the chart below:

<table>
<thead>
<tr>
<th>Case #</th>
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<th>Occupational Title</th>
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<th>Status</th>
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<tbody>
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<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>03/1/2021 to 11/15/2021</td>
<td>Certification</td>
</tr>
<tr>
<td>H-400-21001-989968</td>
<td>100</td>
<td>2225 S. 400 West Salt Lake City, Utah 84115 Salt Lake</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>04/1/2021 to 11/15/2021</td>
<td>Pending</td>
</tr>
</tbody>
</table>

AF 52.

The CO determined that in order to receive the requested certification, Employer must demonstrate that the job opportunities presented in each application are not the same. The CO directed the Employer to provide a detailed explanation that demonstrates that the work described in the certified application is not the same as that covered by the newly filed application. In the alternative the CO stated that the Employer must provide support to show that it has a need for additional workers totaling 250 landscape laborers and demonstrate that this need was not present at the time the employer’s prior application was filed. (Emphasis in the original). The CO’s request for information and documentation included contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized
monthly payroll reports for a minimum of one previous calendar year that identify temporary and permanent employment in the requested occupation, in addition to other information supporting the total number of workers requested. AF 52-53.

Alternatively, the CO stated that if the Employer was not able to utilize its prior certification at all due to the H-2B cap, it must notify the Department of its intent to return the certification due to the H-2B cap being met, and also notify the Department of its intent to not pursue workers under that certification. The CO notified the Employer of the process by which the USCIS (United States Citizenship and Immigration Services) would be notified that the certification had been “withdrawn” and could not then be used. If the Employer elected to proceed in this manner it would also need to respond to the NOD notifying the Chicago NPC (National Processing Center). AF 53.

The CO also notified the Employer of the following:

If the employer is seeking to use a portion of slots from a certification for cap-exempt workers, while at the same time filing a new application under a new cap, for cap-subject workers, this is not permitted. The employer must notify the Department that it wishes to withdraw the current application.

Id.

The CO noted a second deficiency in Employer’s application as a violation in the offered wage, pursuant to 20 C.F.R. § 655.10(a), which requires that an employer advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC or the Federal, State or local minimum wage, whichever is higher. AF 54. The CO noted that the Employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment.

The CO noted that Employer’s application, ETA Form 9142, as well as its job order list the wage as $15.31 per hour as the basic rate of pay, and $22.97 per hour as the overtime wage rate. The CO observed that the listed wage was not equal to the highest of the prevailing wage and applicable minimum wages, which is $15.70 per hour, according the Employer’s ETA Form 9141, Prevailing Wage Determination (P-400-20171-668202).

Therefore the CO instructed the Employer to modify its application by amending Form 9142 to indicate that it will pay the highest of the applicable wages, which is $15.70 per hour, and will also pay an overtime wage that is one and one-half times higher, or $23.55, for the overtime wage. Employer was also directed to submit amended job order language which includes the correct rate of pay and correct overtime wage rate, or submit an already amended job order that contains all of the required language concerning the correct wage rate.

The CO noted a third deficiency regarding the Employer’s application involving the “Job order assurances and contents” under 20 C.F.R. § 655.18(a)(1). AF 54. This regulation provides that an employer’s job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. The CO noted four inconsistencies or errors in the application terms and those
listed in the job order, as well as one omissions of required information. These inconsistencies included information regarding the availability of weekend work, worksites noted in Provo, Utah on the job order, which is inconsistent with the worksite address in Salt Lake City noted on the application, availability of on the job training, and the number of hours of work that Employer is guaranteeing to workers.

The CO directed the Employer to submit amended job order language correcting the inconsistencies between the H-2B application and the job order so that the Chicago NPC (National Processing Center) could provide the information to the SWA (State Workforce Agency), or in the alternative, Employer was directed to submit an already amended job order that contains all of the required language. AF 56-57.

A fourth deficiency was noted by the CO regarding the information listed on Employer’s application for the Employer’s point of contact, which the CO noted must be different than that which is connected with the Employer’s attorney or agent. AF 57.

Employer responded to the Notice of Deficiency on March 8, 2021. AF 30-47. In regard to the first deficiency, Employer asserted that the two applications referred to by the CO, and listed in the chart above, are different applications with different addresses. Employer states that the current application, Case # H-400-21001-989968 should correctly note the address as 1515 Riverside Avenue, Provo, UT 84604, which is approximately 45 miles south of Salt Lake City and which has a different prevailing wage and a completely different demographic than the Salt Lake City application. The workers requested in Case # 400-20446-932736 are for work in Salt Lake and Davis County, whereas the workers in the current application are for Utah and Nebo County, only. Employer asserts that the employee demographic and customer demographic are completely different in the two cases.

In regard to the second deficiency pertaining to the offered wage, Employer attached the prevailing wage statement for Provo, Utah, which is noted as $15.31.

In regard to the third and fourth deficiencies Employer gave permission to make the requested amendments to its application and also stated that it was submitting an amended job order which included the requested changes. AF 40.

A prevailing wage determination for the 1515 Riverside Avenue, Provo, Utah 84604 address was attached to Employer’s response, which indicated the wage for the Provo, Utah area as $15.31. An amended job order, however, is not included in the Administrative File.

On March 31, 2021, the CO issued a Final Determination Denial to the Employer, noting that the deficiencies previously noted still remained. AF 16-29. In regard to the first deficiency the CO acknowledged that the Employer provided a letter of explanation regarding its primary worksite address which it alleged was Provo, Utah, and a copy of the Prevailing Wage Determination for Provo, Utah. However, the CO stated that Employer failed to “provide summarized monthly payroll for a minimum of one calendar year, contracts, letters of intent, etc. that specify the number of workers and dates of need.” AF 22. The CO determined that Employer’s explanation and documentation of temporary need did not overcome the deficiency. Specifically, the CO determined:
The employer did not submit a Provo, Utah address for case H-400-21001-989968. As indicated in [See AF 61] Section F.b., Items 1-6 of the employer’s ETA Form 9142, [this form] clearly indicate a worksite address in Salt Lake City. Further, Section F.b., Item 7 and Appendix A items 4 both, indicate an MSA of Salt Lake City, UT. The employer may not change the location of its original filing. The filing, at the time of filing, must contain the details concerning the job opportunity for which certification is sought.

AF 22-23.

The CO also pointed out that Employer has already been certified for workers in the Provo, Utah area in 2021 which the CO summarized in the following chart:

<table>
<thead>
<tr>
<th>Case #</th>
<th>Workers Requested</th>
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</table>

AF 24.

The CO also determined that Employer had made conflicting statements regarding whether its current application is a “new application,” or whether it was a second application related to one of its previous filings. The CO determined that the current filing is for the same position in the same area of intended employment, and for an overlapping period of need as a prior, still valid, certification.

In regard to the second deficiency noted regarding the offered wage, the CO acknowledged that Employer had submitted a Prevailing Wage Determination showing a wage of $15.31 per hour. However the CO observed that the wage determination pertained to the Provo, Utah area and not the Salt Lake City, Utah area, which is the main worksite location, in the current application. Accordingly, the Employer did not overcome the deficiency. AF 25.

The CO also found that Employer failed to remedy the third deficiency regarding job order assurances and contents. The CO noted that Employer had given permission to make amendments to its application which partially cured the third deficiency, and completely cured the fourth deficiency. However, the CO determined that Employer failed to upload an updated job order with the corrections requested, despite Employer’s representation that it had done so. Therefore, the deficiency regarding the job order assurances and contents still remained. AF 29.

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4 It appears the date shown is a typographical error and should be listed as 11/1/2020.
As Employer failed to cure three of the four deficiencies noted in the Notice of Deficiency, Employer’s application was denied.

An undated request for administrative review from the Employer was received on April 20, 2021. AF I-15. A mailing label attached to the request for review indicates that it was sent on April 16, 2021.

By order dated April 26, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before May 5, 2021. Neither party submitted a brief in this matter.

**SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO’s determination; or
2. Reverse or modify the CO’s determination; or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e).

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO’s determination in H-2B temporary labor certification cases. See Brook Ledge Inc., 2016 TLN 00033 at 5 (May 10, 2016); see also J and V Farms, LLC, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

**ISSUES**

1) Whether the Certifying Officer properly denied the Employer’s H-2B application as an impermissible second application involving the same job opportunity, area of intended employment, and period of need, in violation of the regulation at 20 CFR § 655.15(f);

2) Whether the Certifying Officer properly denied the Employer’s H-2B application on the basis that Employer failed to comply with the regulation at 20 C.F.R. § 655.10(a) pertaining to the offered wage rate; and

3) Whether the Certifying Officer properly denied the Employer’s H-2B application on the basis that Employer failed to comply with 20 C.F.R. § 655.18 (a)(1) pertaining to job order assurances and contents.
DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. § 214.2(h)(6)(ii). This regulation states:

Temporary services or labor under the H-2B classification 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.


The DHS regulation further states in regard to the nature of petitioner’s need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.


The employer bears the burden of proving that it is entitled to temporary labor certification under the H-2B program. See, e.g., Alter and Son General Engineering, 2013-TLN-3 (Nov. 9, 2012) (affirming denial where the employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need). Other requirements imposed on employers seeking temporary labor certification for H-2B workers are found in the regulations found at 20 C.F.R. Part 655, Subpart A.

In the current case, the Employer applied for temporary labor certification for 100 landscape laborers for the period of April 1, 2021, to November 15, 2021, on a “peak load” basis.

As noted by the CO in the NOD and the Final Denial, Employer was already certified in the current year for 150 landscape laborers for the period of March 1, 2021, to November 15, 2021. In the Notice of Deficiency, the CO determined that Employer’s current application is for the same position in the same area of intended employment and for an overlapping period of need as its prior, still valid certification. AF 52. Accordingly, the CO determined Employer was in violation of the regulation at 20 C.F.R. §655.15(f) which states, in pertinent part:

Except as otherwise permitted by this paragraph (f), [exceptions applicable to seafood workers] only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment (emphasis added) …
The CO determined that in order to receive the requested certification Employer must demonstrate that the job opportunities presented in each application are not the same. The CO directed the Employer to provide a detailed explanation that demonstrates that the work described in the certified application is not the same as that covered by the newly filed application. The applications are summarized in the chart below.

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AF 52.

In the alternative, the CO stated that the Employer must provide support to show that it has a need for additional workers totaling 250 landscape laborers and demonstrate that this need was not present at the time the employer’s prior application was filed. (Emphasis in the original). The CO’s request for information and documentation included a request for contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year that identify temporary and permanent employment in the requested occupation in addition to other information supporting the total number of workers requested. AF 52-53.

Alternatively, the CO stated that if the Employer was not able to utilize its prior certification at all due to the H-2B cap, it must notify the Department of its intent to return the certification due to the H-2B cap being met, and also notify the Department of its intent to not pursue workers under that certification. AF 35.

The CO also found deficiencies in the Employer’s application regarding the offered wage rate which was not consistent with the prevailing wage statement for the Salt Lake City area, as well as other deficiencies in the “job order assurances and contents.” AF 35-37.

Employer responded to the Notice of Deficiency claiming that the CO incorrectly noted that its application was for the Salt Lake City, Utah location, where the worksites were located for its previous application. To the contrary, Employer asserted that its worksites for the current application are located in the Provo, Utah area, and that the address of 1515 Riverside Avenue,
Provo, UT 84604, should be noted on this application. Employer also claimed that the correct wage and prevailing wage determination for this case should be the one that pertains to the Provo, Utah area, a copy of which it attached to its response.

In its response to the Notice of Deficiency, Employer did not provide any of the other supporting documentation requested by the CO including contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year that identify temporary and permanent employment in the requested occupation in addition to other information supporting the total number of workers requested in its current application.

In the Final Determination-Denial, the CO acknowledged the Employer’s response and its representation that the primary worksite in the current case is Provo, Utah, and that the correct address for the case is 1515 Riverside Avenue, Provo, UT 84604. The CO addressed this allegation noting that Employer had not submitted a Provo, Utah address for the current case. The CO specifically cited the Administrative File in this case, and noted that the worksite address listed on Employer’s application (Form 9142B) at “Section F.b., Item 7 is 2225 S. 400 West, Salt Lake City, Utah, and the place of employment listed on Appendix A item 4 also indicates an MSA of Salt Lake City, UT.” See AF 61, 64 and 22. The CO stated, “The employer may not change the location of its original filing. The filing, at the time of filing, must contain the details concerning the job opportunity for which certification is sought.” AF 22.

The record in this case supports the CO’s finding. Employer listed the Salt Lake City address as the address for the current application, and also listed it as the primary worksite and MSA for this case. See AF 61, 64. A copy of the prevailing determination for the Salt Lake City Utah area (Form ETA-9141) is also attached to Employer’s original application, which shows a prevailing wage of $15.70 per hour. See AF 293-299.

A review of the entire record, including the documentation submitted with the Employer’s application, show many inconsistencies in the documentation provided by the Employer, especially in regard to whether the application is for work in the Salt Lake City area or the Provo, Utah area. As the CO noted in the Final Determination, Employer’s application for temporary labor certification (Form 9142B) shows a Salt Lake City address, and lists Salt Lake City as the worksite, and MSA, where the work will occur. See AF 61, 64. However, Employer’s statement of temporary need refers to Utah County, which is where Provo, Utah is located. Further, Employer attached a Prevailing Wage Determination for the Salt Lake City area to its application, but then submitted a prevailing wage determination for the Provo, Utah area with its response to the Notice of Deficiency. The record also reflects inconsistent statements regarding whether this is a “new application”, or whether Employer had been certified for the Provo Utah area previously. The CO notes in the Final Determination that Employer had received a certification in the current year for Provo, Utah, for the period of November 1, 2020, to March 31, 2021, in addition to its certification for the Salt Lake City area for the period of March 1, 2021, to November 15, 2021.

Because of these unexplained inconsistencies in its applications, the undersigned finds the CO did not act arbitrarily in denying Employer’s application. It is Employer’s burden to prove its temporary need and that it has complied with the H-2B regulations for certification. It should also
be noted that Employer provided no argument, explanation, or supporting authority, in either its request for review, or in a brief, to support its position.

The CO reasonably determined that the Employer’s application for temporary labor was a second application, in violation of 20 C.F.R. § 655.15(f), for the Salt Lake City area. See KDE Equine, LLC d/b/a Steve Asmussen Racing Stable, 2020-TLN-00043, slip. op. at 9 (May 20, 2020) (holding that the employer’s application sought H-2B workers for the same job opportunity and period of employment as a previous certification, even though the start dates of employment differed). Crystal Springs Ranch, Inc., dba Shooting Star, 2020-TLN-00054 (Aug. 25, 2020)(a second application for workers for the same job opportunity is an impermissible application under 20 C.F.R. § 655.15(f) even though the second application indicates a truncated period of need, or subset of the original period of need listed in the original application); Nature Group Inc., dba Nature’s Partner, 2020-TLN-00056 (Aug. 21, 2021)(affirming denial of certification where CO determined a second application for certification for the same job opportunity was impermissible under the regulation at 20 C.F.R. § 655.15(f)).

The record supports the CO’s finding that the application lists a Salt Lake City worksite address and lists the MSA for the worksites as the Salt Lake City area. The CO reasonably determined that Employer may not change the address and worksites that are listed in its application.

Further, if one were to accept the Employer’s argument that its application should be processed for the Provo Utah area, and not the Salt Lake City area, Employer has failed to explain why this application constitutes a temporary need as Employer has an application that was certified in the Provo, Utah area for the period of November 1, 2020, through March 31, 2021, which if considered in conjunction with the current application, would indicate a year-round need for labor. Therefore, in either case, the CO reasonably determined that the Employer failed to meet its burden of proving its peakload need for the 100 landscape laborers requested in the current application.

In addition, the CO reasonably determined that the Employer failed to provide the payroll records, or other documentation including letters of intent contracts, etc., to support its temporary need in the current application. Employer did not provide the requested documentation or other documentation to meet its burden of proving its temporary need for the workers requested. See Roadrunner Drywall Corp. 2017-TLN-00035 (May 4, 2017)(affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need). See also North Country Wreaths, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word”).

CONCLUSION

Accordingly, for the above stated reasons, the CO did not act arbitrarily and capriciously in denying Employer’s application for 100 landscape laborers between April 1, 2021, and November 15, 2021, as Employer failed to establish its peakload need for the requested dates and that its application is not a second application for the same period of employment, in violation of 20 C.F.R. § 655.15(f). Employer has also failed to provide sufficient documentation or explanation
to prove that the current application is for a different area of intended employment and that the current application has met the applicable regulatory requirements for certification due to the multiple inconsistencies in the Employer’s application.\(^5\)

**ORDER**

Accordingly, it is hereby ORDERED that the CO’s denial of Employer’s application for temporary labor certification, is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY  
Administrative Law Judge

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\(^5\) Employer has also failed to cure the second and third deficiencies noted by the CO, as it has failed to prove that it has complied with the applicable wage rate, and did it submit an acceptable revised job order as requested by the CO. Therefore, the CO’s denial is also affirmed on these bases.