In the Matter of:

NEXGEN-US LBM LLC
dba PRECISION WALL SYSTEMS INC.,

Employer.

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF EMERGENCY WAIVER REQUEST

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial of Employer’s request for emergency processing in the above-captioned H-2B temporary labor certification matter. 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 “if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform such services or labor.” 8 CFR § 214.2(h)(1)(ii)(D); see also 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 CFR § 214.2(h)(6)(ii)(B); 20 CFR § 655.1(a). Employers who seek to hire foreign workers under this program must apply for and receive a “labor certification” from the U.S. Department of Labor (“DOL”). 8 CFR § 214.2(h)(6)(iii). Applications for temporary labor certifications are reviewed by a Certifying Officer (“CO”) of the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration (“ETA”). 20 CFR § 655.50. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 CFR § 655.53.

Here, Employer argues it sought a waiver of the time periods for filing its Application for Temporary Employment Certification under 20 C.F.R. § 655.17. The CO issued a final determination, denying the waiver and returning the application without review. Employer appeals from the Final Determination setting forth that denial.
STATEMENT OF THE CASE

On August 12, 2021, the ETA received an H-2B Application for Temporary Employment Certification (ETA Form 9142B or “Application”) from Nex Gen-US LBM LLC (“Employer”) for 2 Woodworking Machine Operators to be employed from October 24, 2021, through December 31, 2021, to meet a temporary peakload need in Rogers, Minnesota. (AF\textsuperscript{1} at 37.)

Employer’s application was accompanied by a letter, arguing that the Prevailing Wage Determination (“PWD”) included in its application should be accepted. While the PWD was facially expired, Employer argued it was valid as the PWD must only be valid at the time the job order is posted and not at the time of application. As Employer began recruitment on or before June 30, 2021, it asserted that its PWD was valid. Employer argued this was consistent with comparable regulations regarding PWDs, namely those used for permanent labor certifications. Employer also referenced an uncited PWD Policy Guidance letter issued by DOL in 2005 in support of its argument. Employer expressed that in the guidance letter, “DOL stated that the new version of 20 CFR 656.40 would govern the H-2B program.” (AF at 93-94.) News articles on COVID-19, supply chain problems, and visa services were also submitted with the application.

On August 23, 2021, the CO issued a Final Determination on Emergency Waiver Request. (AF at 32-36). The CO stated:

In accordance with 20 Code of Federal Regulations (CFR) § 655.17, the CO may waive the time period(s) for filing an H-2B Registration and/or an H-2B Application for Temporary Employment Certification for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by 20 CFR § 655.50. An employer requesting a waiver of the required time period(s) must submit to the Chicago National Processing Center (Chicago NPC) a request for a waiver of the time period requirement, a completed H-2B Application for Temporary Employment Certification and the proposed job order identifying the State Workforce Agency (SWA) serving the area of intended employment, and must otherwise meet the requirements of 20 CFR § 655.15. (AF at 33). The CO noted that Employer filed its Application on August 12, 2021, which is less than 75 days before its start date of need of October 24, 2021. Thus, “[t]he employer’s application was filed outside the accepted time frame for filing an application. As required in 20 CFR § 655.15(b), a completed Application for Temporary Employment Certification must be filed no more than 90 calendar days, and no less than 75 calendar days before the employer’s date of need.” (AF at 33). Employer urged its application to be approved outside of the required timeline, arguing that its PWD must be valid only when posting the job order and not at the time of filing its application. Employer stated it complied with this purported requirement by

\textsuperscript{1} The Appeal File will be cited as “AF” followed by the relevant page number.
beginning its recruitment and posting the job order within the valid period of the PWD. (AF at 33.)

The CO found that Employer’s argument had no merit, as recruitment is not conducted prior to the filing of an application and the PWD was not valid when Employer submitted its application. The CO stated, “the H-2B program recruitment may only commence after an H-2B application has been accepted for processing.” (AF at 33-34.) The CO determined that Employer’s argument that the PWD need only be valid at the time the job order is posted had no merit and therefore did not constitute good and substantial cause for a waiver of the filing time periods. Consequently, Employer’s request for a waiver of the filing period was denied, and its application was returned without review for failing to include a valid PWD as required by the regulations. (AF at 33-34.)

On September 3, 2021, Employer filed a Notice of Appeal (AF at 2-6), in which Employer requested administrative review of the Certifying Officer’s Final Determination on H-2B Application for Temporary Employment Certification. Employer reiterated the arguments laid out in its previous letter, explaining why it believed the PWD remained valid despite it expiring on June 30, 2021. Employer also asserted that DOL has not acted consistently on applications with similar issues:

This argument was based on comparable treatment of prevailing wage determinations in the permanent labor certification context. The Department of Labor rejected our applications but then after receiving some emails acted in a contradictory manner. We were unaware of the Department of Labor’s clear position on this issue.

In the meantime, two applications for the same parent company, USLBM, were moved from rejected to processing on flag.gov and we received two NODs related to duplicate applications after we re-filed after receiving the same notice. See attached.

We filed this application with that knowledge at the time. That application has been returned without review on the same basis that the prevailing wage was not valid at the time of filing. The DOL has not acted in a consistent matter in a way that would appease attorneys and clients of how the various deadlines will be applied, what notice is to be expected, and what extensions can be anticipated. The communication from the DOL was scarce and unclear.

(AF 3.)

Employer contended that the CO “arbitrarily and capriciously denied the Appellant’s request for a waiver of the time period(s) for filing despite the Appellant having good cause and having more than enough time to thoroughly test the domestic labor market on an expedited basis.” (AF at 3.) Employer set forth the process for testing the labor market “on a normal basis,” and asserted it can be completed through normal processing within 15 business days after issuance of a Notice of Acceptance. Employer argued that there was more than enough time to
thoroughly test the labor market on an expedited basis and that the CO “arbitrarily and capriciously decided the present application’s time period was too short with no explanation or justification.” Employer argued that the only difference between a non-emergency application and an emergency application is a PWD. Employer included prevailing wage information for Forklift Operators, which should have provided the CO with the information necessary to thoroughly test the labor market. In this particular case, Employer argued that it is facing an emergency due to unforeseeable market conditions including the effects on construction supply, lumber shortages throughout the United States, and lack of personnel due to social distancing requirements and COVID-19 outbreaks. Employer noted that its argument regarding unforeseeable market conditions had been accepted in at least seven occasions of emergency waivers by DOL. Employer was “baffled” as to why this case was different, as in all seven referenced cases the industry and logic behind the emergency petition was the same as Employer’s here.

Employer reiterated that the CO “did not provide any justification or explanation” as to how she determined that there was insufficient time to thoroughly test the labor market. Further, as the CO determined that Employer’s explanation was a good and substantial cause for a waiver of the time period, the CO used her discretion “to mask a decision that is arbitrary and a pretext to the substantial cause analysis.” Employer contended that the CO’s Final Determination was therefore arbitrary and capricious, and the request for a waiver of the time period for processing should have been granted.

The CO (through counsel) filed her brief in support of the CO’s Final Determination on September 27, 2021. The CO argued that Employer’s appeal was untimely, as it was not docketed until September 20, 2021. Additionally, the CO argued that the CO properly returned Employer’s H-2B Application without review, as it was filed less than 75 days before the start date and the PWD had expired. The CO stated that it is not disputed that the PWD expired on June 30, 2021; instead, Employer argues that the exception to the valid PWD requirement for employers who qualify for emergency procedures applies in this case. Regarding the emergency procedures, the CO stated:

Section 655.17 … permits the CO “to waive the time period for filing . . . an Application for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis . . . .” 20 C.F.R. § 655.17(a). An employer requesting such a waiver “must submit to the [CO] a request for a waiver of the time period requirement,” including “detailed information describing the good and substantial cause that has necessitated the waiver request.” 20 C.F.R. § 655.17(b). Section 655.17(b) defines “good and substantial cause” as, in essence, an unforeseeable catastrophic event wholly outside the employer’s control.

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2 The pertinent regulation provides that a request for administrative review “must be sent to the BALCA, with a copy simultaneously sent to the CO who issued the determination, within 10 business days from the date of determination.” 20 CFR § 655.61(a)(1). The record reflects that Employer sent its Notice of Appeal to BALCA and the CO on September 3, 2021. (AF 5-6; see also AF 1). While that request was not received and docketed by BALCA until September 20, 2021 (for reasons that are not clear on this record), Employer complied with the regulation by sending its request for review in a timely manner.
The CO argued that in this case, Employer failed to request an emergency waiver, acknowledge that its filing was late, or provide the detailed information necessary for establishing a good and substantial cause. “Nevertheless, the CO found that employer did not qualify for the emergency procedure under section 655.17, because it failed to establish ‘good and substantial cause.’” As Employer failed to request an emergency waiver, Employer cannot fault the CO for finding that it did not qualify for the waiver. Additionally, she argued that Employer mistakenly contended that the CO found “good and substantial cause,” and incorrectly challenged a finding that the CO did not make: that there would be insufficient time to thoroughly test the domestic labor market. “[T]he CO, having found that Employer failed to establish ‘good and substantial cause,’ simply did not reach the issue of whether there would be insufficient time to test the domestic labor market.” The CO argued that while Employer included information on why it believes it had “good and substantial cause” for an emergency waiver request in its Notice of Appeal, only the evidence that was submitted to the CO before the date of the CO’s determination may be considered.

The CO additionally argued that Employer’s two paragraphs addressing the issues behind its emergency waiver request in its Notice of Appeal are insufficient to meet the level of detailed information necessary for a finding of “good and substantial cause.” The documentation cited by Employer dates back to April 2020, more than a year before the application was filed, and fails to support an application filed in August 2021. Further, this documentation was not submitted to support a request for emergency waiver but was instead included to explain Employer’s “Temporary Peakload Need.”

Lastly, the CO noted that this case, as compared to the seven referenced by Employer, was treated differently because Employer failed to make arguments regarding emergency waiver. “Having failed to request – much less establish – ‘good and substantial cause’ for an emergency waiver, Employer’s failure to include a valid PWD in its late application justified the CO’s return of the application without review.” The CO requested that her determination be affirmed.

On September 30, 2021, the CO submitted a letter and supplemental authority in support of her position in this case.

**LEGAL STANDARD**

The standard of review in H-2B cases is limited. A reviewing judge may consider only “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). The request for review may contain only legal arguments and evidence which was actually submitted to the CO prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5). The evidence is reviewed de novo, and a reviewing judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action. 20 C.F.R. § 655.61(e). An employer seeking to hire employees under the H-2B program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361.
DISCUSSION

A CO may only grant an employer’s H-2B application if there are not enough available domestic workers in the United States who are capable of performing the temporary labor at the time the employer files its application for certification. 8 U.S.C. § 1101(a)(15)(H)(ii)(b); Burnham Companies, 2014-TLN-00029 (May 19, 2014). Consequently, before a temporary labor certification may issue, employers must conduct certain recruitment steps designed to inform U.S. workers about the job opportunity. See 20 C.F.R. § 655.40-§ 655.47. In order to show that it has complied with the regulations and conducted these affirmative recruitment efforts, an employer must file a recruitment report addressing the regulatory requirements. 20 C.F.R. § 655.48. “The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.” 20 C.F.R. § 655.50(b). The recruitment process “ensure[s] that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification.” 20 C.F.R. § 655.40(a).

In a typical case, an “employer seeking H-2B workers must file a completed Application for Temporary Employment Certification (ETA Form 9142B and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunities and all information required, as specified in §§ 655.8 and 655.9,” no less than 75 days and no more than 90 days before the employer’s date of need. 20 C.F.R. § 655.15. An employer may request a waiver of the required time periods by submitting “a request for a waiver of the time period requirement, a completed Application for Temporary Employment Certification and the proposed job order identifying the SWA serving the area of intended employment,” among other requirements. 20 C.F.R. § 655.17(b). “The CO may waive the time period(s) for filing an H-2B Registration and/or an Application for Temporary Employment Certification for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.” Id. § 655.17(a). “If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.” Id. § 655.17(c).

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3 20 C.F.R. § 655.40(a) provides: “Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the Application for Temporary Employment Certification.” The regulation further provides: “Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.43 through 655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.” 20 C.F.R. § 655.40(b).
Here, Employer filed its Application 73 days before its starting date of need. Upon review of the letter Employer submitted with its application, it is clear that the Employer failed to expressly ask for a waiver in this case. Employer’s letter does not address that its application is late or acknowledge the time periods in any way. Instead, Employer exclusively focused on why the PWD included with its application should be considered valid even if facially expired. However, while Employer failed to expressly request a waiver in this case, it is equally clear that the CO proceeded as if Employer had made such a request. This is apparent in the title of the CO’s determination, Final Determination of Emergency Waiver Request, and in her discussion of whether Employer established “good and substantial cause.” As set forth above, the CO found that Employer’s belief that the PWD need only be valid at the time the job order is posted does not constitute good and substantial cause to waive the time requirements, and Employer challenged that denial as arbitrary and capricious. Because the CO treated Employer’s application as if waiver had been requested, before arguing in her brief that no such request had been made, I will consider the waiver request to have been made and denied.

Turning to whether the CO improperly denied the waiver request, the regulations make waiver of the time periods discretionary. Section 655.17 provides that the CO may (not shall) waive the time periods for filing an Application where both good and substantial cause exists, and “the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination.” Thus, a CO’s discretion is not boundless; the regulation sets forth two determinations to guide the CO’s exercise of discretion. The CO must determine whether good and substantial cause exists to waive the time periods, and the CO must determine whether she has sufficient time to thoroughly test the domestic labor market on an expedited basis. A CO who deviates from these grounds would commit error; it would be an abuse of discretion to grant or deny waiver on some other ground outside of those set forth in the regulation. However, where “the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51,” certification cannot be granted. 20 C.F.R. § 655.17(c).

Here, the CO denied waiver based explicitly on her determination that the arguments laid out by Employer regarding the validity of its PWD did not constitute “good and substantial cause.” This determination falls within the CO’s authority to make under the regulations. The regulation provides that the “employer’s waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer’s control, unforeseeable changes in market conditions, or pandemic health issues.” 20 CFR § 655.17(b). Here, Employer did not provide detailed information describing a “good and substantial cause that has necessitated the waiver request.” Although the CO construed Employer’s Application to have made such a request, and I thus treat the Application to have done so as well, Employer’s failure to expressly discuss a waiver request results in materials that do not present “detailed information” describing the underlying cause of its (implied) waiver request. Instead, as the CO argued in her brief, Employer presented detailed information about why supply chain issues and lumber prices in 2020 have led to an increased demand in 2021—thereby (Employer contends) justifying its peakload need for temporary labor—but did not present detailed information as to why the time
requirements must be waived. *(See AF 62-65.)* In the absence of such information, the CO did not err in finding that the showing had not been made.

Employer presented no other direct argument that could form the basis of “good and substantial cause” for a waiver. While Employer did submit articles related to COVID-19, supply chain issues, and visas with its initial application, these articles were submitted as exhibits in support of its contention that the requested workers were needed to meet Employer’s temporary peakload need. These articles were not cited in support of any argument to establish “good and substantial cause” to waive the time periods. Further, as the CO pointed out in her brief, even if they were submitted or considered for that purpose, the articles are not recent enough to establish an emergency need for this Application in August 2021. Review of the articles shows most are dated between March and May 2020, and these articles from mid-2020 fall short of showing problems related to Employer’s specific industry at the time of the Application in August 2021 which would justify waiving the time periods. The articles submitted to the CO prior to the issuance of the final determination do not establish that the CO’s denial of waiver of the time periods was improper.

Regarding Employer’s argument that the CO found there was insufficient time to thoroughly test the domestic labor market on an expedited basis, I find that the CO did not make such a finding. The CO did not address whether there was or was not time to test the domestic labor market, as she ended her analysis when she found there was not “good and substantial cause.” As such, I do not consider this argument further.

Because the CO exercised her discretion in full compliance with the regulations, I find no basis on which to vacate or reverse her Final Determination denying waiver of the time periods in this matter. The Final Determination is not arbitrary or capricious, and the CO acted within her discretion in denying the Employer’s request for a waiver of the time periods for filing its *H-2B Application for Temporary Employment Certification*. 

**ORDER**

It is hereby ORDERED that the Certifying Officer’s *Final Determination on Emergency Waiver Request* denying Employer’s request for a waiver is AFFIRMED.

For the Board:

MONICA MARKLEY
Administrative Law Judge

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4 One article is dated in September 2020 and one was published in May 2020 and updated in November 2020.