In the Matter of:

IRONSURE PROPERTIES, LLC

Employer

DECISION AND ORDER AFFIRMING CERTIFYING OFFICER’S DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655, Subpart A.

Employer submitted an Application for Temporary Employment Certification (Form 9142B) to the Employment and Training Administration (ETA) seeking certification for sixty housekeepers. Certification was denied, and Employer now seeks administrative review of the denial pursuant to 20 C.F.R. § 655, Subpart A.

2. Procedural History and Background.

a. On October 29, 2021, the Employment and Training Administration’s Chicago National Processing Center (Chicago NPC) received an ETA Form 9142B (Application for Temporary Labor Certification) (hereafter “Application”) from Labor Consultants International on behalf of Ironsure Properties, LLC (Employer). The application sought certification for sixty housekeepers (Occupational Title: “Maids and Housekeeping Cleaners”) to perform work from January 12,


b. On November 4, 2021, the Certifying Officer (CO) for the Office of Foreign Labor Certification (OFLC) issued a Notice of Deficiency (NOD #1), which identified four deficiencies with Employer’s Application.4

i. Definition of Employer – The CO advised that their office was unable to verify the existence of the business associated with the filing. The CO requested documentary evidence of the existence of Ironsure Properties LLC.

ii. Failure to establish the job opportunity as temporary in nature – The CO explained that Employer did not sufficiently demonstrate that it had a temporary peak load need for supplemental labor. The CO asked Employer to supplement its application to establish that nonimmigrant labor was needed to supplement permanent workers for a seasonal or short-term period.

iii. Failure to establish temporary need for the number of workers requested – The CO requested information on how Employer determined it needed sixty maids and housekeeping cleaners during the stated period of need.

iv. Failure to submit an acceptable job order – the CO noted that while Employer submitted a copy of its job order with its application, it failed to file the job order with the Florida State Workforce Agency (SWA). The CO directed Employer to submit its job order to the SWA serving the area of intended employment.

c. On November 19, 2021, Employer responded to NOD #1 and provided supplemental information and responsive attachments.5

d. On November 24, 2021, the CO issued a second NOD (NOD #2), which identified two additional deficiencies with Employer’s Application.6

i. Confirmation of job contractor status – The CO advised that it appeared as though Employer may meet the regulatory definition of a job contractor. The CO asked Employer to confirm whether it is a job contractor. To accomplish this, the CO required Employer to answer a number of questions and, if it met the definition of a job contactor, to amend its application so the filing would “consist[] of a single joint employer relationship with one

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3 AF 71. References to the Appeal File are denoted by the abbreviation “AF” followed by the applicable page numbers.
4 AF 57-61.
5 AF 39-61.
6 AF 36-38.
employer-client in a single area of intended employment.”\(^7\) The questions that the CO required Employer to answer are listed below.

<table>
<thead>
<tr>
<th>(1)</th>
<th>Does the applicant intend to have an employer relationship with respect to H-2B employees or related U.S. workers hired pursuant to this Application for Temporary Employment Certification? An employer, as defined in the Department’s regulations at 20 CFR 655.5, is an entity that meets the following criteria:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>Has a place of business (physical location) in the U.S. and a means by which it may be contacted;</td>
</tr>
<tr>
<td>(b)</td>
<td>Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H–2B worker or a worker in corresponding employment; and</td>
</tr>
<tr>
<td>(c)</td>
<td>Possesses, for purposes of filing an application, a valid Federal Employer Identification Number (FEIN).</td>
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</tbody>
</table>

| (2) | Has the applicant contracted or does it intend to contract on a temporary basis to one or more employers the services or labor of the H-2B workers covered by this Application for Temporary Employment Certification? |

<table>
<thead>
<tr>
<th>(3)</th>
<th>If the applicant responded yes to question 2, the applicant must provide the following information for each client employer:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>Name and business location;</td>
</tr>
<tr>
<td>(b)</td>
<td>Indication as to whether the employer client is an affiliate, branch, or subsidiary of your business (Yes/No);</td>
</tr>
<tr>
<td>(c)</td>
<td>Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control or supervise the manner and means by which the work will be performed (Yes/No);</td>
</tr>
<tr>
<td>(d)</td>
<td>Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any responsibility for determining the skills and/or training required to perform the activities in the job opportunity (Yes/No);</td>
</tr>
<tr>
<td>(e)</td>
<td>Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control the source of the instrumentalities and tools required for accomplishing the work (Yes/No);</td>
</tr>
<tr>
<td>(f)</td>
<td>Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority to control the location of the work to be performed (Yes/No);</td>
</tr>
<tr>
<td>(g)</td>
<td>Indication as to whether the client employer or any person employed by the client employer who is not your employee will have any authority over when and how long to perform the work (Yes/No); and</td>
</tr>
<tr>
<td>(h)</td>
<td>Indication as to whether the work to be performed is a part of the</td>
</tr>
</tbody>
</table>

\(^7\) AF 37.
regular business of the client employer or any person employed by the client employer who is not your employee (Yes/No).

Table 1 - Appeal File, pp. 36-37.

ii. Failure to submit a complete and accurate ETA Form 9142 – the CO asked Employer to submit a legible client contract due to the originally submitted contract being illegible.

e. On December 8, 2021, Employer responded to NOD #2. Included in the response were (1) a response letter, (2) a 2021 Florida Annual Resale Certificate for Sales Tax, (3) a copy of the client agreement, and (4) a copy of NOD #2.8

f. On December 10, 2021, the CO made a Final Determination, denying Employer’s application for temporary labor certification.9 The CO initially explained that it was unclear from Employer’s response to NOD #2 whether Employer was a job contractor.10 Specifically, the CO found that Employer submitted its contract with Carver Hotel Group LLC (CHG) and a copy of its 2021 Florida Annual Resale Certificate for Sales Tax, but failed to answer any of the questions posed to it in NOD #2. Instead of answering the specific questions, Employer wrote only, “Confirmation of job contractor status: Please see attached letter, containing the report to work address in Orlando, FL. The client has a valid Federal Employer Identification Number (FEIN).”11

The CO next contended that the contract between Employer and CHG indicates CHG, not Employer, would have an employer-employee relationship with hired H-2B workers (i.e., Employer would not have the ability to hire, pay, fire, supervise, or otherwise control the work of H-2B workers). Thus, the CO concluded that Employer “is in fact a job contractor.”12 The CO added that Employer “did not amend the current application so that the filing consists of a single joint employer relationship with one employer-client in a single area of intended employment.”13

g. Pursuant to 20 C.F.R. § 655.61, a Request for Administrative Review was filed on December 16, 2021.14 The request stated that Employer is a job contractor and that Employer’s classification as an individual employer on the application was incorrect due to a clerical error.15 The request included a concession that it failed to provide the CO with written permission to amend the application.16

h. On December 28, 2021, the Board of Alien Labor Certification Appeals (BALCA) docketed Employer’s appeal. (The Appeal File was included in the docketing.) On January 6, 8 AF 21-31.
9 AF 14. The notice was sent on December 14, 2021. AF 13.
10 AF 17-20.
11 AF 19-20.
12 AF 20.
13 AF 20.
14 AF 1-12.
15 AF 1.
16 AF 1.
2022, this matter was assigned to the undersigned Administrative Law Judge (ALJ). A Notice of Case Assignment and Order Establishing Brief Filing Deadlines was issued on January 7, 2022. The Solicitor’s Office was provided seven (7) business days from January 7, 2022, to file an optional brief in support of the denial of certification.

i. No brief was filed by the Solicitor’s Office.

3. **Findings of Fact.**

   a. Employer applied for temporary labor certification for sixty maids and housekeeping cleaners.\(^{17}\)

   b. Employer and CHG entered a contractual relationship, in which Employer was CHG’s client.\(^ {18}\)

   c. For the purposes of the H-2B Application for Temporary Employment Certification (Form ETA-9142B), Employer is a job contractor.\(^ {19}\)

   d. Employer identified itself as an “Individual Employer” rather than a “Job Contractor – Joint Employer” on its application.\(^ {20}\)

   e. In response to NOD #1, Employer provided the CO with “written permission to make the necessary changes to the [application].”\(^ {21}\)

   f. As of November 23, 2021, the CO determined based on Employer’s contract with CHG that Employer may be contractor and not an employer.\(^ {22}\)

   g. In NOD #2, the CO provided Employer with an opportunity to confirm whether it is a job contractor.\(^ {23}\) NOD #2 provided Employer with the option to amend its application or provide the CO with written permission to make the corrections to the application on their behalf.\(^ {24}\)

   h. Employer did not answer the questions the CO posed in NOD #2.\(^ {25}\)

   i. In response to NOD #2, Employer provided the

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\(^{17}\) AF 71.

\(^{18}\) AF 9.

\(^{19}\) AF 1 (acknowledging “[t]he employer is in fact a job contractor”).

\(^{20}\) AF 75.

\(^{21}\) AF 41.

\(^{22}\) AF 36.

\(^{23}\) AF 36-37.

\(^{24}\) AF 37.

\(^{25}\) See Table 1.
4. **Applicable Law and Analysis.**

   **a. H-2B Program.** The applicable section of the H–2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department of Labor (DOL or Department).

   **b. Regulations at Issue.**

   i. **Employer** means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that (1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment; (2) has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H-2B worker or a worker in corresponding employment; and (3) possesses, for purposes of filing an Application for Temporary Employment Certification, a valid Federal Employer Identification Number (FEIN).

   ii. In contrast, a **job contractor** is defined as

   a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor, and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

   iii. “Provided that a job contractor and any employer-client are joint employers, a job contractor may submit an Application for Temporary Employment Certification on behalf of itself and that employer-client.”

   **c. Scope and Standard of Review.**

   i. **Scope of Review.**

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26 AF 21.
28 See 20 C.F.R. § 655.20.
29 20 C.F.R. § 655.5.
30 20 C.F.R. § 655.5.
31 20 C.F.R. § 655.19(a).
BALCA’s scope of review for H-2B cases appealed under 20 C.F.R. Part 655, Subpart A is limited. Specifically, 20 C.F.R. § 655.61 provides that BALCA may only consider the Appeal File prepared by the CO, the employer’s request for administrative review, and any legal briefs submitted. The employer’s request for administrative review may contain only its legal arguments and such evidence as was submitted to the CO in support of the employer’s application.\(^{32}\)

After considering the evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action.\(^{33}\)

**ii. Standard of Review.**

Neither the Immigration and Nationality Act (INA) nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review to be applied to an employer’s request for administrative review. BALCA has often applied an “arbitrary and capricious” standard to its review of a CO’s determination in a labor certification case.\(^{34}\) Conversely, in other decisions, either a quasi-hybrid deference standard or a *de novo* standard have been used.\(^{35}\)

In 2011, a BALCA panel closely reviewed and considered the regulatory history regarding the proper standard of review.\(^{36}\) The panel’s decision noted that “neither the regulations nor the regulatory history expressly state BALCA’s standard of review.”\(^{37}\) The decision further noted that as a matter of practice, BALCA routinely applied a *de novo* standard of review without any explanation regarding the authority for such a standard.\(^{38}\) The panel looked to Section 8 of the Administrative Procedure Act (APA) for clarification. That section of the APA stated that “[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”\(^{39}\) The panel regarded this language as implicitly indicating that *de novo* would be the proper standard of review, at least when a hearing was conducted.\(^{40}\) Thus, the decision ultimately held that “BALCA’s review of the CO’s legal and factual determinations when denying an application for permanent alien labor certification is *de novo*, limited in scope by [the applicable regulations relating to permanent labor certification].”\(^{41}\)

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\(^{32}\) 20 C.F.R. § 655.61(a).

\(^{33}\) 20 C.F.R. § 655.61(e).

\(^{34}\) *Brook Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016).

\(^{35}\) *See Best Solutions USA, LLC*, 2018-TLN-00117 (May 22, 2018).


\(^{37}\) *Id.* at 28.

\(^{38}\) *See id.* at 25.

\(^{39}\) 5 U.S.C. § 557(b).

\(^{40}\) *Id.* at 27.

\(^{41}\) *Id.* at 28.
Essentially, then, the panel decision in *Albert Einstein Med. Ctr., et al.* concluded after consulting the APA that *de novo* review of the CO’s legal and factual determinations is proper in an appeal of denial of an application for permanent alien labor certification.

Beginning in 2016, however, an “arbitrary and capricious” standard began to appear more prominently in BALCA decisions. The “arbitrary and capricious” standard that was applied in many of those decisions apparently also stems from the APA. Judicial review under the APA provides that an agency’s actions, findings, and conclusions shall be set aside when they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” This standard of review operates to prevent a reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. As the panel decision in *Albert Einstein Med. Ctr., et al.* noted, however, these concerns are not implicated during an intra-agency tribunal’s administrative review of another adjudicator’s decision within the same agency. Here, as in *Albert Einstein Med. Ctr., et al.*, the undersigned ALJ is conducting an intra-agency administrative review of the decision made by another adjudicator (the CO) within the same agency (DOL).

Additionally, in *Best Solutions USA, LLC,* Judge William T. Barto reconsidered the correctness of applying an “arbitrary and capricious” standard to temporary labor certification appeals. Judge Barto interpreted the regulation at issue here—20 C.F.R. § 655.61(e)—to mean BALCA should consider a denial of certification by determining whether “the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.” Judge Barto acknowledged that other decisions have adopted a more deferential standard of review (i.e., “arbitrary, capricious, or otherwise not in accordance with applicable law”); however, he declined to apply that standard on the basis that an arbitrary and capricious “standard of review is not appropriate for administrative review under Part 655.”

Moreover, exhaustive research failed to uncover any binding authority on the applicability of the “arbitrary and capricious” standard as it relates to administrative review. As such, the judicial “arbitrary and capricious” standard will not be applied in this administrative review.

Based on the above analysis, the undersigned will determine whether the CO’s stated basis for denying Employer’s application is legally and factually sufficient. In so doing, the

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42 See, e.g., *Brook Ledge*, 2016-TLN-00033 (May 10, 2016) (per curiam); see also *Three Seasons Landscape Contracting Servs.*, 2016-TLN-00045 (ALJ Rosen Jun. 15, 2016).
43 See 5 U.S.C § 706(2)(A).
46 Id. at 3.
47 Id.
undersigned adopts the standard of review defined in *Best Solutions USA, LLC* for the reasons stated therein.48

**d. Discussion.**

1. **Job Contractor Status.** The burden of proof to establish eligibility for a temporary alien labor certification falls squarely on the petitioning employer.49 The first issue is whether Employer sufficiently demonstrated that it was a job contractor.

The CO’s assertion that he or she could not determine whether Employer was a job contractor was inconsistent. The CO stated in the final determination letter that it was “not clear from the NOD response if the employer is a job contractor.”50 Later in the final determination letter, however, the CO stated that a review of the filings indicated that Employer “is in fact a job contractor” and that Employer would “not have an employer relationship with respect to H-2B employees” or U.S. workers.51 Such findings demonstrate that the CO concluded Employer was a job contractor;

Employer provided sufficient information to the CO to confirm its status as a job contractor, albeit in a disorganized, confusing, and incomplete manner. In response to Deficiency 2 in NOD #2, Employer provided a more legible contract between Employer and CHG. A reading of the contract provides a clear indication of Employer’s contractual relationship with CHG, as evidenced by section three of the contract, titled “Independent Contractor.”52 The section reads, “CHG shall be an independent contractor to [Employer/Ironsure Properties] and nothing in this agreement shall be construed to give [Employer/Ironsure Properties] the power to direct or control the day-to-day activities of CHG.”53 Section one explains that the purpose of the contract is for Employer to engage CHG as its exclusive representative to procure H-2B visa candidate contact leads for hotel employment in the United States.

While flatly refusing to respond to questions posed in a notice of deficiency is sufficient to support a CO’s denial,54 providing sufficient documentation to support certification can overcome an Employer’s mistake in not fully responding to a notice of deficiency. In *Squaw Valley Ski Holdings LLC*, the CO sent the employer a notice of deficiency requesting summarized payroll reports to make clear how many permanent or temporary workers were utilized each month.55 The employer did not provide a summarized payroll report as requested, but instead sent an un-summarized document that the CO believed to be non-responsive to the

48 See *Best Solutions USA, LLC*, 2018-TLN-00117, 3 n. 2 (ALJ Barto May 22, 2018).
50 AF 18.
51 AF 20.
52 AF 9.
53 AF 9.
55 In re *Squaw Valley Ski Holdings, LLC*, 2020-TLN-00001 (Judge Applewhite Nov. 13, 2019).
question. BALCA remanded the matter after determining that the submitted documents provided clear information that sufficiently answered the CO’s question.

Here, Employer’s response to NOD #2 neglected to answer the specific questions posed by the CO. Such unresponsiveness may justify a denial; however, Employer provided sufficient documentation responsive to the CO’s inquiry regarding its status as a job contractor by providing a legible copy of the contract between Employer and CHG. The CO’s review of the contract itself resulted in the conclusion that Employer was, in fact, a job contractor. As BALCA determined in *Squaw Valley Ski Holdings LLC*, Employer’s submission of its contract with CHG sufficiently demonstrated its status as a job contractor.

In its application, Employer erroneously indicated it was an “Individual Employer” and not a “Job Contractor – Joint Employer.” Because Employer was, in fact, a job contractor, the application required amendment. NOD #2 provides two options for amending an application: the employer may (1) amend the application itself or (2) provide written permission to make corrections to the application on Employer’s behalf. Employer’s response to NOD #2 provided the CO with written permission to amend the application on its behalf. Nevertheless, part of the CO’s reason for the denial was that Employer “did not amend its current application.” This basis for denying certification is not legal or factually sufficient; the CO had explicit, written permission to make the amendment on behalf of Employer.

ii. Separate Contract for Each Application. Although the CO determined that Employer is, in fact, a job contractor, Employer’s application and its responses to the two NODS do not explain to whom Employer would be providing workers. The contract appears to demonstrate how Employer would identify potential H-2B workers, but it does not establish where these workers would be placed. Consequently, the contract does not reflect compliance with 20 C.F.R. § 655.19(b), which provides, “A job contractor must have separate contracts with each different employer-client. Each contract or agreement may support only one Application for Temporary Employment Certification for each employer-client job opportunity within a single area of intended employment.” To put it succinctly, if there are multiple employer-clients, multiple applications must be filed.

Here, the information provided by Employer neglects—and seemingly refuses—to reveal its employer-client(s). Employer’s application provides insufficient information regarding how it determined sixty temporary, supplemental maids and housekeeping cleaners were needed for a single employer-client. The CO addressed this concern in NOD #1 and asked Employer to demonstrate how such a number was reached. Employer’s response to NOD #1 provided no clarification; rather, it raised more questions than the single question that was posed. Employer’s response was,

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56 AF 30.
57 Compare AF 20 with AF 21.
58 AF 8.
59 Because it has no substantive effect on the outcome of the decision, the undersigned makes no determination as to the intent of the contract.
The employer is requesting 60 Maids and Housekeeping Cleaners for Orlando, Florida during the requested dates with their best business judgment. Please see attached document that is a contract between Ironsure Properties and one of their clients. This doesn't show for all of Ironsure Properties [sic] clients but it is one of their bigger clients. Please also see the written explanation of the business & the business' activities throughout the year.  

Employer’s response indicated sixty workers were needed for “Orlando, Florida.” This vague explanation suggests a lack of compliance with the regulatory requirement that only one application may be submitted for each employer-client. Employer elaborated that the contract it submitted applied to only one of their many clients, explaining “[t]his doesn’t show for all of Ironsure Properties [sic] clients but it is one of their bigger clients.” The relevance of discussing Employer’s other clients is unclear, but one reasonable interpretation is that Employer requested certification for sixty H-2B visa workers to provide to multiple clients throughout the Orlando region. Additionally, the fact that Employer requested sixty workers according to “their best business judgment” offers no explanation as to how the number was determined.

The contract between Employer and CHG offers little guidance on whether Employer complied with the regulatory requirement of filing one application per employer-client. The contract states that Employer would engage CHG as its “exclusive representative to procure H-2B visa candidate contact leads for prospective hotel industry H-2B visa employment in the United States.” The contract goes on to explain that Employer would pay CHG thirty percent of the “agreed wage for each contract executed between [Employer] and the H-2B visa employment candidate procured by CHG.” This contractual language suggests that, while Employer is engaged in a contractual relationship with CHG, its relationship appears to involve CHG providing leads for potential nonimmigrant laborers to Employer and Employer then furnishing those trained nonimmigrant laborers to another employer with whom Employer may contracted. Stated differently, the contract appears to show how Employer would receive workers that would be provided to prospective hotels, but not to whom these sixty workers would be sent. Employer did little to elaborate on the nature of its contract with CHG or how it would deploy H-2B workers to entities with which it may be contracted.

Missing from Employer’s submissions are contracts with hotels throughout Orlando, Florida to which Employer would dispatch trained H-2B workers for temporary employment. “The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.” The CO had insufficient information to determine whether Employer improperly attempted to file one application for multiple employer-client job opportunities. Because Employer failed to provide all the required documentation requested in both notices of deficiency, its application must be denied.

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60 AF 40 (emphasis added).
61 AF 23.
62 AF 23.
63 20 C.F.R. § 655.32(a).
e. Conclusion. According to the final determination, among the CO’s reasons for denying certification was the CO’s purported inability to determine whether Employer was a job contractor. While this reason for denial was improper, such reasoning simultaneously showcases the confusing and incomplete nature of Employer’s application and its NOD responses. Because Employer failed to provide sufficient evidence that it applied for temporary labor certification for one employer-client job opportunity in one area of intended employment, the CO’s denial of certification was legally and factually sufficient.

5. Ruling. The CO’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED this day at Covington, Louisiana.

JOHN M. HERKE
ADMINISTRATIVE LAW JUDGE