In the Matter of:

THE DÉCOR GROUP OF NORTHERN KY
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)¹ and 20 C.F.R. Part 655, Subpart A.

Employer submitted two applications for temporary labor certification (Application for Temporary Employment Certification (Form 9142B)) to the Employment and Training Administration (ETA) seeking certification for six groundskeeping helpers.² Employer eventually withdrew its first application (case number ending in “128”), and its second application (case number ending in “842”) was later denied. Employer now seeks administrative review of the denial of its second application (case number ending in “842”) pursuant to 20 C.F.R. § 655, Subpart A.³

² For reference and to avoid confusion, the first application number is H-400-21357-784128 (ending in “128”) and the second application number is H-400-21365-794842 (ending in “842”).
2. **Procedural History and Findings of Fact.**

   **a.** On December 22, 2021, Employer filed an Application for Temporary Employment Certification (Form ETA-9142B).\(^4\) The application sought temporary labor certification for six “groundkeeping [sic] helper[s]” from February 1, 2022 to November 30, 2022.\(^5\) An ETA number of H-400-21357-784128 was assigned to the application.\(^6\) (This application was withdrawn on January 20, 2022 and is not at issue on appeal.\(^7\))

   **b.** On December 31, 2021, Laura Elizabeth Buckley of the Conley Law Group, PLLC, filed on behalf of Employer a second Application for Temporary Employment Certification (Form ETA-9142B).\(^8\) Like the first application, this second application also sought temporary labor certification for six “groundkeeping [sic] helper[s];” however, the listed dates of need were from March 16, 2022 to November 30, 2022.\(^9\) An ETA number of H-400-21365-794842 was assigned to the application.\(^10\)

   **c.** On January 6, 2022, the Certifying Officer (CO) assigned to process the second application issued a Notice of Deficiency (NOD), identifying two deficiencies in the second application.\(^11\)

   Regarding **Deficiency 1,** the CO determined that Employer filed two applications for temporary labor certification.\(^12\) The table below illustrates the nature and status of the two applications:

<table>
<thead>
<tr>
<th>ETA Case Number</th>
<th>Workers Requested</th>
<th>Location</th>
<th>Occupation Code</th>
<th>Occupation Title</th>
<th>Dates of Need</th>
<th>Application Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-400-21365-794842</td>
<td>6</td>
<td>4086 Limaburg Rd, Hebron KY 41048</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>3/16/22 – 11/30/22</td>
<td>12/31/2021</td>
</tr>
<tr>
<td>H-400-21357-784128</td>
<td>6</td>
<td>4086 Limaburg Rd, Hebron KY 41048</td>
<td>37-3011.00</td>
<td>Landscaping and Groundskeeping Workers</td>
<td>2/1/22 – 11/30/22</td>
<td>12/22/2021</td>
</tr>
</tbody>
</table>

*Table 1, AF 51.*

\(^4\) AF 51. The original application was not included as part of the Appeal File. All references to the Appeal File are abbreviated “AF” followed by the applicable page number(s).

\(^5\) AF 51.

\(^6\) AF 51.

\(^7\) AF 39-46.

\(^8\) AF 55-97.

\(^9\) AF 55.

\(^10\) AF 1.

\(^11\) AF 47-54.

\(^12\) AF 51.
Noting that “employer may not submit more than one application for the same job opportunity within the same area of intended employment for the same dates of need,” the CO provided two options for curing the deficiency: (1) withdraw one of the applications or (2) provide information that demonstrates the two applications are for two separate job opportunities.\(^{13}\)

With respect to Deficiency 2, the CO identified a discrepancy between the dates of need shown in Employer’s application and the dates of need shown in the job order that Employer sent to the State Workforce Agency (SWA) serving Employer’s area of intended employment. The dates of need listed in the job order were February 1, 2022 to November 30, 2022, whereas the application listed the dates of need as March 16, 2022 to November 30, 2022. To cure this deficiency, Employer was required to submit an amended job order using the dates of need shown in Employer’s application.\(^{14}\)

Employer was provided ten business days (i.e., until January 21, 2022) to cure the two deficiencies.\(^{15}\)

d. On January 20, 2022, a representative with Conley Law Group sent email correspondence to the Chicago National Processing Center (NPC) seeking to withdraw application number H-400-21357-794128 (the first application).\(^{16}\)

e. On January 21, 2022, a representative with Conley Law Group emailed Employer’s response to the CO’s NOD. However, the response was postdated as “February 16, 2022.”\(^{17}\)

In its response with respect to Deficiency 1, Employer provided formal, written permission to withdraw its first application (ETA case number H-400-21357-794128).\(^{18}\)

Regarding Deficiency 2, Employer’s response stated that an amended job order was attached;\(^{19}\) however, no job order was included in the response.

f. On January 24, 2022, the Chicago NPC sent email correspondence to the Conley Law Group advising that Employer’s response had not been filed by the deadline of ten

\(^{13}\) AF 51-52.
\(^{14}\) AF 52-54.
\(^{15}\) AF 48.
\(^{16}\) AF 39–46.
\(^{17}\) While this letter was dated “February 16, 2022,” it was clearly drafted on or before January 21, 2022 because the letter was attached to an email sent on Friday, January 21, 2022, at 1:23 a.m. It cannot be determined from the Appeal File whether the document was post-dated in error or for a particular purpose.
\(^{18}\) Application number H-400-21357-794128 was filed under 20 C.F.R. § 655.17—an emergency-based Application for Temporary Employment Certification that provides a waiver of the standard application time periods based on “good and substantial” cause. See AF 44. That application was marked as deficient on January 4, 2022 on the basis that “the release of supplemental H-2B visas does not constitute good and substantial cause necessitating a waiver of the application timeframe filing requirements.” AF 44. The denial allowed Employer to authorize the CO to modify the application or to withdraw the application altogether. AF 45.
\(^{19}\) AF 29.
business days.\textsuperscript{20} The Chicago NPC provided a courtesy extension (until January 26, 2022) to respond to the NOD.\textsuperscript{21}

g. Also on January 24, 2022, a representative with Conley Law Group re-submitted Employer’s response letter (still postdated as “February 16, 2022”).\textsuperscript{22} The NOD response contained the same information as the January 21, 2022 submission and did not include an amended job order.\textsuperscript{23}

h. On January 27, 2022, the Chicago NPC sent email correspondence to the Conley Law Group stating that Employer indicated in its NOD response that an amended job order was attached, but that no such attachment was included.\textsuperscript{24} The Chicago NPC provided Employer with a second courtesy extension (until January 31, 2022) to submit an amended job order.\textsuperscript{25}

i. On February 2, 2022, the CO issued a final determination denying certification on the ground that Employer failed to overcome Deficiency 2 by not submitting an amended job order either by email or by electronic upload into the Foreign Labor Application Gateway (FLAG) module.\textsuperscript{26}

j. On February 12, 2022, Laura Elizabeth Buckley of the Conley Law Group, PLLC, filed a request for administrative review.\textsuperscript{27} Ms. Buckley’s appeal email stated, “Neither my firm nor my client received an NOD for this case . . . .”\textsuperscript{28} In support of Employer’s appeal, Ms. Buckley added that the “extraordinarily brief denial is clearly erroneous.”\textsuperscript{29} The appeal also contended that “an established past precedent for Department approval for the same job duties for the same period of intended employment” supported approval of Employer’s application for temporary labor certification.\textsuperscript{30}

\textsuperscript{20} After comparing the Chicago NPC’s emails sent on January 24, 2022 and January 27, 2022, the undersigned finds the CO’s assertion that no NOD response had been received was not intended to mean that no response at all had been received. Rather, read together the emails indicate that Employer’s response was incomplete in that the required amended job order was not included in the response. Compare AF 15 (stating that a response to the NOD “has yet to be received”) with AF 27 (stating that a response to the NOD “has yet to be received,” but which also states, “Specifically, the employer indicates that an amended [job order] is attached to the NOD response, however, a thorough review of the response received indicates that there is no amended [job order] attached).

\textsuperscript{21} AF 27.

\textsuperscript{22} While this letter was dated “February 16, 2022,” it was clearly drafted on or before January 21, 2022 because the letter was attached to an email sent on Friday, January 21, 2022, at 1:23 a.m. It cannot be determined from the Appeal File whether the document was post-dated in error or for a particular purpose.

\textsuperscript{23} AF 16-26.

\textsuperscript{24} AF 15.

\textsuperscript{25} AF 15.

\textsuperscript{26} AF 14.

\textsuperscript{27} AF 1.

\textsuperscript{28} AF 1.

\textsuperscript{29} AF 1.

\textsuperscript{30} AF 1.
k. On February 22, 2022, the Board of Alien Labor Certification Appeals (BALCA) docketed Employer’s appeal. (The Appeal File was included in the docketing.)

l. On February 24, 2022, this matter was assigned to the undersigned Administrative Law Judge (ALJ). A Notice of Case Assignment and Order Establishing Brief Filing Deadline was issued on February 24, 2022. The Solicitor’s Office was provided until March 7, 2022 to file an optional brief in support of the denial of certification.

m. On March 1, 2022, Edward Waldman, Esq., of the Solicitor’s Office, filed correspondence stating that his office did not intend to file a brief on the matter. Rather, the Solicitor’s Office stated it would stand on the reasoning stated in the final denial letter. Mr. Waldman asserted that Employer’s appeal contained only one argument: that neither Employer nor its attorney received the CO’s NOD. Mr. Waldman further asserted that the argument was erroneous.

3. 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.31 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).32

b. Regulations at Issue. When an employer files an application for temporary labor certification with the NPC, it must file with its application a “copy of the job order being submitted concurrently to the [State Workforce Agency (SWA)] serving the area of intended employment.”33

A job order must include information relating to the nature of the employment. As it relates to this matter, such information includes the requirement that an employer’s job order

. . . Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity . . . .34

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32 See 20 C.F.R. § 655.20.
33 20 C.F.R. § 655.15(a) (emphasis added); see 20 C.F.R. § 655.16.
34 20 C.F.R. § 655.18.
c. Scope and Standard of Review.

i. Scope of Review. 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.  

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.

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. Conversely, in other decisions, either a quasi-hybrid deference standard or a de novo standard have been used.

In 2011, a BALCA panel closely reviewed and considered the regulatory history regarding the proper standard of review. The panel’s decision noted that “neither the regulations nor the regulatory history expressly state BALCA’s standard of review.” 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. 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.” 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. 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].”

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.

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35 20 C.F.R. § 655.61(a).
36 20 C.F.R. § 655.61(e).
37 Brook Ledge, Inc., 2016-TLN-00033 (May 10, 2016).
38 See Best Solutions USA, LLC, 2018-TLN-00117 (May 22, 2018).
40 Id. at 28.
41 See id. at 25.
43 Id. at 27.
44 Id. at 28.
Beginning in 2016, however, an “arbitrary and capricious” standard began to appear more prominently in BALCA decisions.\textsuperscript{45} 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.”\textsuperscript{46} 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 \textit{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.\textsuperscript{47} Here, as in \textit{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 \textit{Best Solutions USA, LLC},\textsuperscript{48} 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.”\textsuperscript{49} 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.”\textsuperscript{50}

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 undersigned adopts the standard of review defined in \textit{Best Solutions USA, LLC} for the reasons stated therein.\textsuperscript{51}

\textbf{d. Discussion.} Taking Employer’s last argument first, Employer’s appeal contended that “an established past precedent for Department approval for the same job duties for the same period of intended employment” supported approval of Employer’s application for temporary labor

\textsuperscript{45} See, e.g., \textit{Brook Ledge}, 2016-TLN-00033 (May 10, 2016) (per curium); see also \textit{Three Seasons Landscape Contracting Servs.}, 2016-TLN-00045 (ALJ Rosen Jun. 15, 2016).
\textsuperscript{46} See 5 U.S.C § 706(2)(A).
\textsuperscript{47} \textit{Albert Einstein Med. Ctr.}, 2009-PER-00379; see also \textit{U.S. Postal Serv. v. Gregory}, 534 U.S. 1, 6-7 (2001); \textit{Marsh v. Oregon Natural Res. Council}, 490 U.S. 360, 376 (1989). Exhaustive research regarding the proper standard of review failed to establish an authoritative basis for applying the “arbitrary and capricious” standard in the context of intra-agency administrative appeals.
\textsuperscript{48} 2018-TLN-00117 (ALJ Barto May 22, 2018).
\textsuperscript{49} \textit{Id.} at 3.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} See \textit{Best Solutions USA, LLC}, 2018-TLN-00117, 3 n. 2 (ALJ Barto May 22, 2018).
certification. This argument fails on two grounds. First, it is a bare assertion without citation to any statutory, regulatory, or case law establishing the claimed “past precedent.” Second, temporary labor certification applications are evaluated on a case-by-case basis and a history of similar approvals (assuming it exists) does not establish a precedent that guarantees or supports approval in subsequent applications.

Employer’s appeal next asserted, “Neither my firm nor my client received a NOD for this case . . . .” The record establishes that this assertion is incorrect. Employer responded to the CO’s NOD on two occasions—first on January 21, 2022 and again on January 24, 2022. Both of Employer’s responses included a copy of the NOD it contends it did not receive.

Employer’s third argument contended that the CO’s denial of certification was “clearly erroneous.” No further explication of the “clearly erroneous” assertion was provided. The burden of proof to establish eligibility for a temporary alien labor certification falls squarely on the petitioning employer. Employer’s conclusory contention provides insufficient insight as to how it established its eligibility for temporary labor certification or what makes the CO’s denial “clearly erroneous.” However, for the sake of completeness, the remainder of this Decision and Order addresses the substance of the CO’s reason for denial and whether that reason was legally and factually sufficient.

The CO’s NOD raised two issues, one of which identified that the dates listed in Employer’s application did not match the job order concurrently submitted to the SWA. The dates of need listed in the job order were February 1, 2022 to November 30, 2022, whereas the application listed the dates of need as March 16, 2022 to November 30, 2022. The CO provided Employer with an opportunity to amend its job order so that the filings would match.

Employer’s first response to the NOD, submitted on January 21, 2022, represented that an amended job order was included in the response; however, no amended job order was included in the submission. The CO provided Employer with an extension in order to resubmit it response to include the missing amended job order. Employer’s next response was identical to its initial NOD response, and again failed to include a copy of the amended job order. The CO provided Employer with a second extension to resubmit its response, specifically noting that Employer’s response did not include the purportedly attached amended job order. This time,
Employer failed to either respond or provide an amended job order.64

It appears the discrepancy between the dates of need listed on the job order and the dates of need listed on the application arose from the filing of two different applications. Employer’s first application (ending in 128) listed its dates of need as February 1, 2022 to November 30, 2022. That application was later withdrawn. Employer’s second application (ending in 842) listed its dates of need as March 16, 2022 to November 30, 2022. That is the application being appealed; however, its corresponding job order listed the dates of need from the first application (i.e., February 1, 2022 to November 30, 2022). The CO unsuccessfully endeavored to have Employer correct this discrepancy on three separate occasions.

The applicable regulation provides that “[t]he 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.”65 Moreover, BALCA has repeatedly affirmed denial of certification when an employer fails to submit a proper copy of a job order.66 “[I]gnorance of the regulatory requirement or necessary procedures that must be followed in order to obtain temporary labor certification is not an excuse for noncompliance, nor is carelessness in submitting the necessary documents.”67

Employer failed to follow a fundamental step in the certification process: providing a valid job order with consistent dates of need. Employer’s two responses to the CO’s NOD failed to include an amended job order. Nevertheless, the CO provided Employer with a third opportunity to correct the deficiency. Employer did not respond to the CO’s third request and failed to submit an amended job order. BALCA has held that failing to respond to questions posed in a notice of deficiency is sufficient grounds to support a CO’s denial.68 The same result must occur here.

e. Conclusion. The regulations clearly and unambiguously require an employer seeking certification to comply with a CO’s NOD and to produce all required documentation. Employer was provided sufficient opportunity to comply with the NOD by submitting an amended job order to the SWA and the CO. Employer failed to do so on three occasions, on the last of which Employer did not respond to the CO at all. Therefore, the CO’s denial of certification was legally and factually sufficient.

64 AF 8-14. Because the Final Determination lacks any discussion of Deficiency 1 regarding potentially overlapping applications, it is presumed that the CO determined Employer’s withdrawal of its earlier application in its initial NOD response sufficiently resolved that issue.
65 20 C.F.R. § 655.32(a); Kudar Enterprises, Inc., 2018-TLN-00130, p. 8 (May 31, 2018) (noting that discrepancies between the job order and the application for temporary labor certification that are not corrected in later submissions constitute sufficient grounds for denial of certification); see also Ridgebury Management LLC, 2014-TLN-00020 (Apr. 7, 2014) (agreeing that deficiencies in job order contents and posting requirements are sufficient grounds for denial).
67 Id. at 8.
4. **Ruling.** The CO’s denial of Employer’s *Application for Temporary Employment Certification* in case number H-400-21365-794842 is **AFFIRMED**.

**SO ORDERED** this day at Covington, Louisiana.

JOHN M. HERKE
ADMINISTRATIVE LAW JUDGE