

UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, DC

Issue Date: 06 December 2023

In the Matter of:

**HELPING HANDS OF NORTH
CAROLINA, LLC,**
Employer.

BALCA Case No. 2024-TLN-00066
ETA Case No. H-400-23202-208191

**DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION AND
REMANDING TO THE OFFICE OF FOREIGN LABOR CERTIFICATION**

This matter arises under the labor certification process for temporary nonagricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the implementing regulations promulgated by the Department of Labor (“Department”) at 20 C.F.R. Part 655, Subpart A.

Helping Hands of North Carolina, LLC (“Helping Hands” or “Employer”) filed an *Application for Temporary Employment Certification* (“Application”). The Certifying Officer (“CO”) of the Department’s Office of Foreign Labor Certification (“OFLC”) denied the Application. Employer timely sought review by the Board of Alien Labor Certification Appeals (“Board”).¹ For the reasons that follow, the CO’s denial is reversed and this case is remanded to the OFLC for certification.

STATEMENT OF THE CASE

On July 21, 2023, Employer filed the Application to hire two Home Health Aides for the period October 15, 2023 to June 1, 2026 based on a one-time occurrence need.² In its “Statement of Temporary Need,” Employer explained:

Helping Hands of North Carolina, LLC (Employer) previously known as Pioneers in Special Needs, LLC was founded in 2002 by Cecilia Frederic,

¹ Amended Appeal File (“AF”) at P1-104.

² AF at P60-104.

now a 76-year-old single mother, as a service provider for individuals with developmental disabilities. Abigail Frederic, 36 years old, is Cecilia's daughter. The company was downsized in 2021 due to the increase in Abigail's care and medical needs and the impact of Covid 19. The company will not provide present nor future services to any other recipient. If Abigail passes the company will be terminated.

The core of the company was and is to provide services for Abigail Frederic. Abigail was born with a genetic condition called Trisomy 18, also known as Edward's Syndrome. Abigail is a profoundly disabled young woman. This condition conveys multiple disabilities including severe mental retardation, epilepsy, and sleep apnea. She is also non-ambulatory (wheelchair bound) and non-verbal. Abigail is medically fragile and completely dependent for all activities of daily living twenty-four-seven. For this reason, she cannot be left alone. Abigail has a total left hip replacement which causes a lot of pain and discomfort, especially when she is having seizures. Also, her left kneecap dislocates easily due to poor muscle tone.

Since 2020 Abigail's medical needs have increased, as she entered an advanced period of aging. Her digestive system is not functioning well, causing severe incontinence. Constipation also became a chronic problem at this point. She could no longer urinate regularly during the day, only around every 24 hours, causing great pain and distress. Her epilepsy also increased, mainly around her ovulation and menstrual period. Abigail began to wear a hip and knee brace to keep the kneecap in place. The impact of Covid 19 and the increase of Abigail's medical and care needs created greater hardship on her and her mother. Cecilia began at this time to care for Abigail every night. She assisted with helping to find the proper position that will encourage her to fall asleep, medicating and caring when seizures and vomiting occurred (they come together), changing diapers due to incontinence, and the follow-up of cleaning her up and doing laundry. It also became important around this time to apply and keep on a heating pad for bladder and abdominal distress, as long as necessary.

In 2022, this situation entered a new period. Abigail's doctors began to say she was entering end-of-life, as more of her vital functions began to deteriorate. Due to the increase in care for Abigail and her mother's

physical limitations as a 76-year-old, a decision was made to find Home Health Aides through the H-2B visa program that will provide stability and continuity of 24 hours care for Abigail. Abigail's doctors agreed that her medical needs were not going to decrease, to the contrary. Her primary physician, who comes to visit Abigail at home, advised in January 2023 to enjoy her daily, as her condition is making it more demanding to keep her safe, happy, and well cared for.

Abigail's condition is unambiguously end-of-life. The included June 23, 2023 letter from Blue Ridge Health, from Dr. Yoder provides a clear diagnosis: Abigail is "at the end of her course", with "a life expectancy of 1-3 years." Abigail has also been referred to palliative care, which is designed to mitigate pain and suffering for those with a terminal illness.

History of filing and appeal:

Employer is submitting this application for the second time in the one-time need category. They first applied in the April 2023 cycle, under application H-400-23002-675648. At that time, the application was denied by the DOL, and ultimately that determination was upheld on appeal to the Board of Alien Certification Appeals (BALCA) in . . . *Helping Hands of North Carolina, LLC*, 2023-TLN-00059.

In that case, the court held that Helping Hands of North Carolina, LLC had not submitted evidence to properly support a defined end-of-need in the one-time occurrence category. BALCA, in upholding the denial, explained that an approval based on end-of-life need would need "medical documentation to support its period of need or that the patient's expected end of life is estimated to be within the three-year period" otherwise the application would effectively be requesting an open-ended certification under one-time occurrence.

BALCA also found that Helping Hands of North Carolina, LLC had otherwise met the other requirements of one-time occurrence need, including the fact that it had not before employed fulltime caregivers (it had only used part-time caregivers in the past, in combination with the care of Abigail's mother), and that it successfully demonstrated a triggering event for the one-time occurrence (Abigail entering a terminal, end-of-life phase).

In this application, which must be considered in light of the Employer's past applications, Helping Hands of North Carolina, LLC is presenting new evidence, in the form of a medical record and a letter from Abigail's care team, that clearly establishes a definable term for Abigail's end-of-life. In so doing, the application fulfills the requirement set out by the BALCA court in 2023-TLN-00059, and this application, therefore, ought to be certified.

(iii.) The employer's need is temporary one-time occurrence:

Summary: In this case, the start of need is October 15, 2023, because the need is immediate and ongoing for two (2) caregivers, and the end date is June 01, 2026, which is three years from the date of the letter from Abigail's physician, which gives an end-of-life date of one to three years from the date of the letter, dated June 23, 2023.

As explained above, Abigail has survived past all expectations for those with the Trisomy 18 condition, and her current state is one that indicates end-of-life is at hand. Cecilia Frederic has exhausted what she can do. She needs a different kind of help, in the form of two full-time home health aides. Between these two home health aides and Abigail's mother, Cecilia, care can be provided 24 hours per day. Not only does Abigail need this sort of care as she has entered her end-of-life phase, but Cecilia herself, being 76 and having increased health complications, can no longer provide the constant help her daughter needs. For this to be possible, two home health aides are needed.³

Employer proceeded to reference other certifications of temporary need applications that it alleges arose out of similar facts.⁴ Employer also appended a list of supporting attachments, including a signed 9142, Appendix B; letter from Abigail Frederic's ("Abigail") primary care physician, Dr. Daniel Yoder, dated June 23, 2023; the Board's decision *Helping Hands of North Carolina LLC* ("*Helping Hands I*"),

³ AF at P75-78 (footnote omitted).

⁴ AF at P80-81.

2023-TLN-00059 (Mar. 31, 2023); and a medical letter stating that palliative care has been ordered for Abigail.⁵

On September 11, 2023, the CO issued a *Notice of Deficiency* (“NOD”) identifying three deficiencies: (1) failure to establish the job opportunity as temporary in nature (“Deficiency 1”); (2) failure to submit an acceptable job order (“Deficiency 2”), and (3) failure to submit a complete and accurate ETA Form 9142 (“Deficiency 3”).⁶ The CO requested that Employer provide additional explanation and supplementary documentation to remedy Deficiency 1.⁷ For Deficiency 2, the CO requested that Employer either submit an amended job order or grant the CO authorization to amend ETA Form 9142 on its behalf.⁸ For Deficiency 3, the CO requested that Employer authorize the CO to amend Section F.d., Item 2 to indicate “Yes” to overtime being available.⁹

On September 13, 2023, Employer submitted a *Response to Notice of Deficiency* (“NOD Response”).¹⁰ The NOD Response consisted of an explanatory letter from Employer, an amended job order, and express permission to amend ETA Form 9142 Section F.d. Item 2 to indicate “Yes.”¹¹

On October 30, 2023, the CO issued a *Final Determination* denying the Application (“Denial”).¹² The CO concluded that Employer did not overcome Deficiency 1, stating:

In response to the NOD, the employer provided a statement explaining the circumstances surrounding its one time need request for a Home Health Aid from October 15, 2023, through June 1, 2026.

The employer’s explanation and documentation of its temporary need did not overcome the deficiency. The employer has explained that it’s request for Home Health Aids is based on the needs of an individual who

⁵ AF at P81-83.

⁶ AF at P42-49.

⁷ AF at P46-47.

⁸ AF at P47-49.

⁹ AF at P49.

¹⁰ AF at P33-41.

¹¹ *Id.*

¹² AF at P17-24.

had been diagnosed with a terminal medical condition causing the need for full time assisted care due to the increase in care for individual and her mother's physical limitations in being able to assist. Throughout the application and NOD response the employer has attested that the end of life is imminent causing a onetime need for home health aides; however, the terminal aspect of the diagnosis end of life has been imminent since birth according to the employer's description of the diagnosis and supporting medical letters and articles. Moreover, the employer has also stated that the patient has outlived life expectancy of the described diagnosis for several years; therefore, given the circumstances, it is reasonable to assume that the need for a home health aid is permanent and ongoing.

Additionally, the employer's explanation and supplemental documentation submitted with the application indicated that the employer has employed part time patient care health aids throughout the life span of the patient. This is further demonstrated by the letter from Daniel Yoder, MD which states the patient has needed full time care since birth and while the diagnosis described is a terminal condition, life expectancy of the individual identified has surpassed such expectancies and continued life expectancy is uncertain. Considering that the patient has already outlived life expectancy, surpassing all expectations for the condition described the end date in which care is no longer needed cannot be established. Moreover, due to the uncertainty of the life span may need to employ them again for future needs. Therefore, it remains unclear how its need meets the regulatory standard of a one-time need.

The employer's response to the NOD also described details that recent decisions issued by the Department for previously certified applications requesting health care needs in support of its request on the current application; however, details and circumstances of each application are evaluated separately and individually. Therefore, the certification of one-time occurrence applications not associated with the employer is not a baseline to establish a one-time need for the employer's current request.

Also, the employer has stated in its NOD response how it determined its requested dates of need based:

Since end-of-life has been established as being within 1-3 years, which in turn defines the definitive end of need, and a start of need has been identified as the downturn in Abigail's condition, and previous employment of caregivers in a part-time capacity has already been found by the OALJ to not be of a type that makes the Employer ineligible for a one-time-need occurrence, it is apparent that the start and end dates of need are already definable independent of the allowable timeframe of the H2B program.

The employer provided no not provided [*sic*] medical documentation or other supporting documentation which clearly establishes that the current case is an "end of life" case, or that provides support for the requested three-year period of need on the basis of a onetime occurrence.

The employer's explanation nor supporting documentation was sufficient in establishing a one-time need for the period of need requested. Therefore, the employer did not overcome the deficiency.¹³

On November 13, 2023, the Board received and docketed the Appeal. On November 20, 2023, the CO filed the Appeal File. Missing from the Appeal File was a letter the CO referenced in the Denial. On November 28, 2023, I issued an *Order to Show Cause Directed to Certifying Officer* as to why the denial should not be reversed and remanded for the failure to timely submit a complete Appeal File in accordance with 20 C.F.R. § 655.61(b). On November 30, 2023, the CO, through the Associate Solicitor for Employment and Training Legal Services, replied that the letter was "inadvertently omitted" and included the letter in the Amended Appeal File filed on the previous day.¹⁴ Employer objected to the CO's response, essentially arguing that the § 655.61(b) deadline for the filing of an appeal file should be strictly enforced since "DOL's stance is strict against Employers" and "regularly punishes inadvertent omissions and missed deadlines."¹⁵ Employer's broad generalization is without

¹³ AF at P23-24.

¹⁴ The Associate Solicitor also informed the undersigned that the "CO will rest upon the already submitted denial, in the amended appeal file for this case, and not file an additional briefing." *Certifying Officer's Response to Show Cause Order*, at 1 (filed Nov. 30, 2023).

¹⁵ *Reply to Government's Response to Show Cause Order*, at 1 (filed Nov. 30, 2023).

merit.¹⁶ The Associate Solicitor’s representation that the letter was inadvertently omitted from the Appeal File is sufficient to establish good cause for the late submission. The error is harmless and not prejudicial to Employer since the letter was filed in advance of the regulatory deadline for the decision and does not otherwise adversely affect my ability to timely issue a decision under 20 C.F.R. § 655.61(f).

SCOPE AND STANDARD OF REVIEW

The Board’s review is limited to the written record, which consists of the Appeal File, legal briefs, and the employer’s request for administrative review.¹⁷ A CO’s decision must be upheld unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁸ The Board may affirm, reverse, or modify the CO’s determination, or remand the case for further action.¹⁹

DISCUSSION

An employer bears the burden of demonstrating “that its need for non-agricultural services or labor is temporary.”²⁰ A “need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS [Department of Homeland Security] regulations.”²¹ The relevant DHS regulations provide:

(A) Definition. 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.

¹⁶ See, e.g., *Antonella Aronne*, 2023-TLN-00117, slip op. at 2 (Sept. 18, 2023) (“In the particular circumstances presented, the service requirements of 20 C.F.R. § 655.61(a) should not be strictly construed. Employer did everything required by the regulation except to send a copy of the appeal to the CO.”).

¹⁷ 20 C.F.R. § 655.61(a), (e).

¹⁸ *Jose Uribe Concrete Const.*, 2019-TLN-00025, slip op. at 4 (Feb. 21, 2019). See also *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 Fed. Reg. 24042, 24081 (Apr. 29, 2015) (20 C.F.R. § 655.61 “does not provide for de novo review”).

¹⁹ 20 C.F.R. § 655.61(e).

²⁰ *Id.* § 655.6(a). See also *D & R Supply*, 2013-TLN-00029 (Feb. 22, 2013) (citing 8 U.S.C. § 1361).

²¹ *Id.* § 655.6(b).

(B) 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 peak load need, or an intermittent need.

(1) One-time occurrence. The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.²²

Employer argues that the CO improperly relied on its prior employment of part-time aides in finding that it failed to establish that it has not employed workers to perform the requested services or labor in the past. Employer also argues that the CO ignored medical documentation and substituted her own opinion for that of a treating physician in finding that Employer failed to establish that it will not need workers to perform the services or labor in the future.²³ Employer’s arguments have merit.

The CO relied, in part, on the fact that “employer has employed part time patient care health aids throughout the life span of the patient.”²⁴ The Board has held that the prior or current employment of a part-time worker to perform the same service or labor that is now needed on a full-time basis is not a bar to establishing a one-time occurrence need.²⁵ Indeed, this very issue was addressed in *Helping Hands I*, where Employer similarly sought to hire two home health aides under a one-time

²² 8 C.F.R. § 214.2(h)(6)(ii).

²³ AF at P4.

²⁴ AF at P24.

²⁵ *Compare MysticAngels, LLC*, 2023-TLN-00122, slip op. at 6 (Sept. 21, 2023) (change in need from part-time childcare to full-time childcare met the requirement that employer had not employed workers to perform the services or labor in the past), *and Selmara R. Rydell*, 2018-TLN-00018, slip op. at 6 (Dec. 13, 2017) (same), *with Stickle Family*, 2018-TLN-00154, slip op. at 9 (July 13, 2018) (employer failed to show one-time occurrence need for the requested in-home childcare because it employed four live-in childcare workers over the last four years).

occurrence need.²⁶ In recognizing “that a change in need from partial to full time can support a finding that Employer has not employed workers to perform the service or labor in the past,” the Board concluded that Employer “met the first requirement of a one-time occurrence as the record supports that there is a change in need from part time help to full time help from caregivers.”²⁷ Despite *Helping Hands I* and the entire administrative record from those proceedings being in the current Appeal File,²⁸ the CO did not discuss or even acknowledge the Board’s decision in the Denial.²⁹ The record here as it relates to Employer’s part-time caregivers is effectively the same as the record in *Helping Hands I*, and thus the result should be no different.³⁰ The CO’s finding to the contrary was not in accordance with Board precedent.

The Board in *Helping Hands I* ultimately affirmed the CO’s denial because Employer failed to establish that it will not need workers to perform the services or labor in the future. The Board reasoned that Employer’s request essentially constituted an open-ended period of need because the submitted medical evidence offered no estimate as to the patient’s life expectancy, and therefore Employer failed to support the three-year period of need it requested.³¹

Employer has since rectified that deficiency in the form of a letter from Abigail’s primary care physician, Dr. Yoder, who stated that she “is at the end of her course with a life expectancy of 1-3 years.”³² However, while the CO acknowledged the “supplemental letter from Daniel Yoder, MD,” she nonetheless concluded that “employer provided no not provided [*sic*] medical documentation or other supporting documentation which clearly establishes that the current case is an ‘end of life’ case, or that provides support for the requested three-year period of need on the basis of a onetime occurrence.”³³ It is unclear how the CO reached that conclusion as the Denial lacks both an examination of Dr. Yoder’s letter and an explanation as to why it is insufficient to meet Employer’s burden. The CO’s failure in that regard renders the

²⁶ *Helping Hands I*, 2023-TLN-00059, slip op. at 2.

²⁷ *Id.*, slip op. at 11.

²⁸ See AF at P105-258.

²⁹ AF at P17-24.

³⁰ Compare AF at P1-104 (*Helping Hands II* record), with AF at P105-258 (*Helping Hands I* record).

³¹ *Helping Hands I*, 2023-TLN-00059, slip op. at 12-14.

³² AF at P83.

³³ AF at P22, P24.

finding arbitrary and capricious.³⁴ Dr. Yoder’s letter clearly shows a period of need of no more than 3 years and is sufficient to establish that Employer will not need workers to perform the services or labor in the future.

ORDER

For the reasons stated, the CO’s decision was arbitrary, capricious, and not in accordance with law. Employer has met its burden of establishing a one-time, temporary need. Accordingly, the Denial is **REVERSED** and this case is **REMANDED** to the OFLC for further action that may be necessary to effectuate Employer’s certification for two Home Health Aides for a period beginning immediately and ending June 1, 2026.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge

³⁴ See *Napoli Painting Servs. LLC*, 2023-TLN-00098, slip op. at 4 (July 18, 2023) (“Under the arbitrary and capricious standard,” the Board “looks to see” if the CO “examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” If the CO “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency experience, then it is arbitrary and capricious.”) (quoting *Jose Uribe Concrete Const.*, 2019-TLN-00025, slip op. at 4).