

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
COASTAL PIPELINE PRODUCTION OF
NEW YORK, et al., :
:
Plaintiffs, : 04 Civ. 8252 (DF)
:
-against- : **MEMORANDUM**
:
ALBERTO GONZALES, et al., : **AND ORDER**
:
Defendants. :
:
-----X

DEBRA FREEMAN, United States Magistrate Judge:

In this action, before me on consent pursuant to 28 U.S.C. § 636(c), plaintiffs Coastal Pipeline Production of New York (“Coastal”) and Melvin Orlando Castillo-Leon (“Castillo-Leon”) (collectively, “Plaintiffs”) challenge a decision by the United States Department of Labor (the “DOL”), which denied Coastal’s Application for Alien Employment Certification on behalf of Castillo-Leon (“Application”). Plaintiffs have moved for summary judgment against the DOL, as well as against United States Attorney General Alberto R. Gonzales and DOL Certifying Officer Delores DeHaan (collectively, “Defendants”), claiming that the DOL’s decision was arbitrary and capricious, and that the Board of Alien Labor Certification Appeals (“BALCA”) abused its discretion in affirming that decision. According to Plaintiffs, the undisputed evidence shows that Coastal satisfied all of the requirements needed in order to receive alien employment certification and that its Application should have therefore been granted. Defendants have filed a cross-motion for summary judgment dismissing the

Complaint on the ground that there is no basis, on the administrative record, for this Court to disturb the ruling of either the DOL or BALCA.

For the reasons set forth below, Plaintiffs' motion for summary judgment is denied, and Defendants cross-motion for summary judgment in their favor is granted.

BACKGROUND

The facts summarized herein, including the history of the administrative proceedings, are taken primarily from the parties' respective statements of undisputed material facts, submitted pursuant to Local Rule 56.1, and supporting documentation.

Coastal is a New York Corporation with its principal place of business in Calverton, New York. (*See* Plaintiffs' Statement of Material Facts on Motion for Summary Judgment Under Local Rule 56.1 ("Plaintiffs' 56.1 Stmt.") (Dkt. 14), ¶ 1.) Castillo-Leon is an individual who resides in Calverton, New York. (*Id.*) On June 17, 1998, Coastal filed the Application, so that Castillo-Leon could work for Coastal as a "Heavy Equipment Operator." (*Id.* ¶ 2; *see also* Affidavit of Mario DeMarco, Esq., dated July 29, 2005 ("DeMarco Aff."), at Ex. A.)¹ In the application, Coastal described, as follows, the position in which Castillo-Leon was to be employed:

Drives forklift to locate and distribute materials to specified production area. Unloads and stacks material, may inventory materials and supply workers with materials as needed. May load and unload materials onto lifting device.

¹ Although Plaintiffs now state that certification was sought for Castillo-Leon to work as a "Fork Lift Operator" (*see* Plaintiffs' 56.1 Stmt. ¶ 2), the position actually listed on the Application was "Heavy Machine Operator" (*see id.* at Ex. A).

(*See* DeMarco Aff. at Ex. A.) Coastal also stated on the Application that, in order to perform the above-described duties satisfactorily, a prospective employee was required to have a minimum of two years of “education, training and experience.” (*See id.*)

On or about May 11, 2002, the DOL served upon Coastal a Notice of Findings (“NOF”), which stated the DOL’s intention to deny the Application. (*See* Plaintiffs’ 56.1 Stmt. ¶ 3; *see also* DeMarco Aff. at Ex. B.) The NOF, which was signed by Certifying Officer Delores DeHaan (“DeHaan”), stated, *inter alia*, that the position as described on the Application was actually for an “Industrial Truck Operator”; that, “[p]ursuant to the Supplement to the Dictionary of Occupational Titles [“DOT”], the normal requirements for this occupation [are] one to three months of combined, education, training and/or experience”; and that Coastal’s “requirement of 2 years exceeds the Specific Vocational Preparation (SVP) for this occupation.” (*See* DeMarco Aff., Ex. B at 2.) The NOF then stated that Coastal could rebut the DOL’s initial finding by submitting evidence that the two-year requirement arose “from a business necessity,” which would require Coastal to demonstrate that the job requirements bore a “reasonable relationship to the occupation” in the context of Coastal’s business and were essential to reasonably perform the duties described by Coastal. (*Id.*) In addition, the NOF stated that Coastal would be required to establish that the job position and its requirements, as described by Coastal in the Application, existed before the Application was filed (which Coastal could substantiate by submitting items “includ[ing], but [not] limited to, position descriptions, organizational charts, payroll records, resumes of former incumbents, etc.”), or that a major change in business operation caused the job to be created before the Application was filed. (*Id.*) The NOF further stated that, in the alternative, Coastal could rebut the DOL’s finding by

reducing the two-year requirement and submitting an amended Application that reflected the reduced requirement. (*See id.*) Finally, the NOF informed Coastal that it had until June 14, 2002 to rebut the DOL's findings or "remedy the defects" in the Application. (*Id.*)

On May 17, 2002, Coastal responded to the NOF by submitting a rebuttal letter to the DOL ("Rebuttal Letter"), which the DOL received on May 29, 2002. (*See* Plaintiffs' 56.1 Stmt. ¶ 4; DeMarco Aff. at Ex. B; *see also* Defendants' Response to Plaintiffs' Rule 56.1 Statement and Counter-Rule 56.1 Statement in Support of Defendants' Cross-Motion for Summary Judgment ("Defendants' 56.1 Stmt.") (Dkt. 19), ¶ 4.) In the Rebuttal Letter, Coastal put forth purported "evidence that [its two-year requirement] [arose] from a business necessity." (*See* DeMarco Aff. at Ex. B.) Specifically, Coastal stated that the forklift to be operated weighed over 56,000 pounds, and would be used to move concrete structures weighing in excess of 25,000 pounds. (*See id.*) Coastal also stated that the operator would be required to work in tandem with another operator to move heavy structures, including one weighing 36,000 pounds. (*Id.*) Accordingly, in Coastal's view, without two years of prior experience as a forklift operator, the operator could "easily injure himself or another employee." (*Id.*) Coastal also noted that the operator would need to have a thorough knowledge of Coastal's product line, as well as "a complete understanding of how a construction job is run," and that, according to Coastal, such knowledge "requires at least 2 years of experience." (*Id.*) In an effort to satisfy the DOL's requirements, Coastal further stated that the job existed before the Application was filed. (*Id.*) In support, Coastal enclosed a 1998 Form W-2 for an individual employed by Coastal as a forklift operator, as well as an organizational chart setting forth various job titles at Coastal, including forklift operators. (*See id.*)

On June 4, 2002, the DOL issued a Final Determination denying the Application. (*See* Plaintiffs' 56.1 Stmt. ¶ 5; *see also* DeMarco Aff. at Ex. C.) The DOL reasoned, *inter alia*, that Coastal had failed to establish that the operation of heavy machinery necessarily required more experience "beyond the DOT standard." (*See* DeMarco Aff. at Ex. C.) In addition, the DOL found that the requirement of a thorough knowledge of Coastal's product line could not be satisfied by requiring more experience, but rather, could only be satisfied by requiring more experience with Coastal in particular, and that, in any event, knowledge of the employer's product line was not "intrinsic to the job duties" listed on the Application. (*Id.*) Further, the DOL held that the evidence Coastal submitted with respect to its hiring of other forklift operators did not demonstrate that the other operators were required to have had two years of similar experience before Coastal hired them in such a capacity. (*See id.*) Accordingly, the DOL concluded that, in the Rebuttal Letter, Coastal had failed to demonstrate that the job and its requirements existed in Coastal's business prior to the filing of the Application, and that Coastal had also failed to demonstrate that the two-year requirement was based on business necessity. (*Id.*)

On June 28, 2002, Coastal wrote a letter to the Chief Administrative Law Judge at the DOL to request a review of the Final Determination ("Request for Review"). (*See* DeMarco Aff. at Ex. F.) In the Request for Review, Coastal stated that it had "proved that for this job it is necessary to have the amount of experience that we are requiring and that it is a business necessity" and that Coastal could "prove that the job as currently described existed" before Coastal filed the Application. (*See id.*) In addition to reiterating the information included in the Rebuttal Letter, the Request for Review set forth new details in support of Coastal's assertion

that the job as described in the Application existed before Coastal filed the Application. (*See id.*) Specifically, Coastal named two individuals employed by Coastal as forklift operators since 1990, each of whom had worked as a forklift operator for over ten years before being hired by Coastal. (*See id.*)

On September 8, 2003, BALCA, without considering the newly submitted material, affirmed the DOL's Final Determination. (*See* Plaintiffs' 56.1 Stmt. ¶ 6; *see also* DeMarco Aff. at Ex. D.) In its Decision and Order, BALCA held that Coastal had "done no more than make bald assertions that it is essential for an employee to have two years of experience as a forklift operator before hire." (*See* DeMarco Aff., Ex. D at 4.) Additionally, BALCA held that Coastal had "failed to document that any of its prior hires had the two years of experience required." (*Id.* at 4.) BALCA also noted that Coastal had not challenged "the DOT listing of one to three months of combined education training and/or experience for an Industrial Truck Operator" as incorrect, but that Coastal had instead claimed a need for an employee with two years of experience because "its forklift is not comparable to others." (*Id.* at 4-5.) Despite this argument, however, BALCA found that Coastal had "fail[ed] to establish the business necessity for the two years of experience," and that, as a result, the two-year requirement was "unduly restrictive." (*Id.* at 5.) Accordingly, BALCA concluded that the Application had been properly denied. (*Id.*)

Subsequently, Plaintiffs filed a petition for review with the Second Circuit, and the parties thereafter agreed to transfer the case to this Court. (*See* Plaintiffs' 56.1 Stmt. ¶ 7; *see also* Defendants' 56.1 Stmt. ¶ 7.) On February 18, 2005, Plaintiffs filed their Complaint with this Court, alleging two grounds for relief: that the DOL's decision was arbitrary and capricious,

and that BALCA abused its discretion and erred by affirming the DOL's denial of the Application. (*See* Complaint, filed February 18, 2005) (Dkt. 4).)

On April 9, 2005, Defendants filed their Answer to the Complaint. (*See* Dkt. 9.) Thereafter, on August 2, 2005, Plaintiffs filed the instant motion for summary judgment on both counts in their Complaint, supporting the motion with their Rule 56.1 Statement, the accompanying Affidavit of Mario DeMarco, Esq. and exhibits thereto, the Affidavit of Alexander G. Koke, and a Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Pl. Mem."). (*See* Dkt. 14.) Defendants responded by filing a cross-motion for summary judgment on November 1, 2005, supported by their Rule 56.1 Statement (which also includes correspondingly numbered paragraphs in response to each paragraph of Plaintiffs' 56.1 Statement, as required by Local Rule 56.1) and a Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of their Cross-Motion for Summary Judgment ("Def. Mem."). (*See* Dkt. 17-19.) In their cross-motion, Defendants argue that the Final Determination was not arbitrary and capricious, and that, because BALCA did not abuse its discretion in affirming the Final Determination, this Court should uphold both rulings. (*See* Def. Mem. at 2.)

On January 2, 2006, Plaintiffs filed a Reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment and Response to Defendants' Cross-Motion for Summary Judgment ("Pl. Reply") (Dkt. 22). On January 24, 2006, Defendants filed a Reply Memorandum of Law in Further Support of Their Cross-Motion for Summary Judgment ("Def. Reply") (Dkt. 23). _____

DISCUSSION

I. APPLICABLE LEGAL STANDARDS

A. Fed. R. Civ. P. 56

This Court may grant a motion for summary judgment under Federal Rule of Civil Procedure 56 when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 128-29 (2d Cir. 1996). The moving party “always bears the initial responsibility of informing the district court of the basis for its motion . . . [and] demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323-24. When confronted with evidence of facts that would support judgment in the moving party’s favor as a matter of law, the opposing party cannot rest on the allegations made in his pleadings, but must set forth specific facts, evidence of which would be admissible at trial, that show the Court whether “there are any genuine factual issues that properly can be resolved only by a finder of fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

In considering a summary judgment motion, this Court must “view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in his favor.” *L.B. Foster Co. v. Am. Piles, Inc.*, 138 F.3d 81, 87 (2d Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *see also Anderson*, 477 U.S. at 255. The Court, however, “cannot try issues of fact; it can only determine whether there are issues to be tried.” *American Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967); *accord Sutera v. Schering Corp.*,

73 F.3d 13, 15-16 (2d Cir. 1995). Summary judgment is appropriate when the parties' sworn submissions show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 128-29 (2d Cir. 1996).

When deciding cross-motions for summary judgment, "the court applies the same standard as that for individual motions and treats the facts in the light most favorable to the non-moving party." *Am. Ins. Co. v. N.Y. City Health & Hosps. Corp.*, 265 F. Supp. 2d 434, 438 (S.D.N.Y. 2003).

B. The Alien Labor Certification Process

"United States Department of Labor regulations govern the application process for aliens seeking permanent employment in the United States." *E.J.'s Luncheonette v. DeHaan*, No. 01 Civ. 5603, 2002 U.S. Dist. LEXIS 105, at *2 (S.D.N.Y. Jan. 4, 2002) (citations omitted). Under these regulations, certain aliens may not obtain visas to work in the United States unless "there are not sufficient United States workers who are able, willing, qualified, and available" to do the job that the alien seeks to perform, and as long as "the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed." *See id.* (citing 20 C.F.R. § 656.1; 8 U.S.C. § 1182(a)(5)(A) (2001)). To ensure that these two prerequisites are satisfied before an alien is certified to work in the United States, the DOL's regulations require, *inter alia*, that an employer file an application for alien labor certification, such as the Application in this case, with a local office of the state employment service. *See id.*

Pursuant to 20 C.F.R. § 656.21, entitled “Basic labor certification process,”² such an application must include, *inter alia*, a description of the alien’s qualifications and the position to be filled. An employer must provide documentation that the job opportunity offered by the employer “has been and is being described without unduly restrictive job requirements,” *i.e.*, that the job’s requirements are those “normally required for the job in the United States” and are in accordance with those set forth in the definition for the job position in the DOT, unless the employer’s requirements are “adequately documented as arising from business necessity.” *See* 20 C.F.R. § 656.21(b). An employer must also provide documentation that the job requirements, as described in the application, represent the employer’s actual minimum requirements for the job opportunity, and that “the employer has not hired workers with less training or experience for [similar] jobs . . . or that it is not feasible to hire workers with less training or experience than that required by the employer’s job offer.” *See id.*

Following the filing of an application for alien labor certification, the employer must recruit United States workers for the position in issue for a set period of time.³ *See E.J.’s Luncheonette*, 2002 U.S. Dist. LEXIS 105, at *3. If the recruitment is unsuccessful, a regional

² Subsequent to the filing of the Application in this case, the DOL amended its regulations governing the permanent employment of aliens in the United States, and implemented a new system for the filing and processing of labor certification applications. *See* 69 Fed. Reg. 77326. These amendments, which apparently altered the numbering of various regulations, became effective on March 28, 2005 and only apply to applications filed on or after that date. *See id.* Accordingly, because the Application here was filed in 1998, any citations to DOL regulations in this opinion refer to the regulations and procedures in effect before the March 28, 2005 amendments. The old regulations are available at www.dol.gov.

³ Under the new regulations, which do not apply to the Application at issue here, employers are now required to conduct recruitment of United States citizens *before* filing applications for alien labor certification. *See* 69 Fed. Reg. 77326.

Certifying Officer, such as DeHaan, then reviews the application and decides either to grant the labor certification or to issue a Notice of Findings, which specifies the DOL's basis for its intent to deny the application. *Id.* at *3-4.

In the event that a Notice of Findings is issued, an employer has 35 calendar days in which to submit evidence to rebut the proposed denial of an application. *See* 20 C.F.R. § 656.25(c)(3). If such rebuttal evidence is timely submitted, the Certifying Officer reviews it, and if it is determined that denial of the application is still appropriate, a Final Determination is issued. *Id.* § 656.25(f) and (g). The Final Determination must set forth the reasons for denial of the application, as well as give notice to the employer of its right to seek review of the decision before BALCA. *Id.* § 656.25(g).

Although this Court may review a denial of an alien labor certification, its review is “limited to a determination under section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982), as to whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Pancho Villa Restaurant, Inc. v. United States Dep’t of Labor*, 796 F.2d 596, 597 (2d Cir. 1986) (citations omitted). Moreover, in making this determination, the Court may only examine the administrative record. *Id.* (citations omitted).

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT IN THEIR FAVOR.

A. The DOL’S Decision To Deny the Application Was Not Arbitrary or Capricious.

In support of their motion for summary judgment on the Complaint, Plaintiffs first argue that the DOL’s decision was arbitrary and capricious because, even though Coastal’s requirement that a forklift operator have two years of experience exceeded the one-to-three months listed in the DOT, Coastal adequately demonstrated that its two-year requirement arose from a business necessity, entitling it to the certification it sought. (*See* Pl. Mem. at 3-5.) Plaintiffs further argue that Coastal provided information to the DOL demonstrating that, prior to the filing of the Application, Coastal had hired two forklift operators, each of whom had worked as a forklift operator for more than a decade before working at Coastal. Thus, according to Plaintiffs, the DOL had no legitimate basis for concluding that Coastal had failed to establish that the position and its two-year experience requirement had previously existed in Coastal’s business. (*Id.* at 4-6.) As is evident from Plaintiffs’ briefs, and as Defendants point out, Plaintiffs do not challenge the legal standards used by the DOL in making its decision, but argue only that, applying those standards to the evidence presented, the Application should have been granted as a matter of law. (*See* Def. Mem. at 10-11.)

Defendants, on the other hand, argue that summary judgment must be granted in Defendants’ favor, because Plaintiffs rely on “information and statements that were never before [DeHaan] at the time of her final determination, but which Coastal submitted to the DOL only after a final determination was issued,” and because Coastal failed to establish business

necessity. (*See* Def. Mem. at 11-14.) Specifically, Defendants argue that the material submitted by Coastal for consideration prior to the DOL's Final Determination did not establish that Coastal's forklift was not comparable to other forklifts, or that previous hires for the position at issue had at least two years of prior experience. (*See id.* at 2.) Defendants also argue that BALCA properly considered only the evidence on which the DOL's Final Determination was based, and urge this Court to do the same in determining whether the DOL's decision should be disturbed. (*See id.*)

In the NOF, the DOL notified Coastal that it could rebut the DOL's initial adverse findings by submitting evidence that Coastal's two-year requirement arose from a business necessity, *i.e.*, that the required level of experience bore a reasonable relationship to the occupation of forklift operator in the context of Coastal's business and was essential to performing, in a reasonable manner, the job duties for forklift operator as described by Coastal. (*See* DeMarco Aff. at Ex. B.) In addition, the NOF notified Coastal that, in order to rebut the DOL's findings in the NOF, Coastal would need to submit evidence that the job described and the requirements as stated in the Application existed before Coastal filed the Application. (*See id.*) The standards described in the DOL's notice appear to have comported with the relevant DOL regulations. *See, e.g., Bernstein*, Nos. 2005-INA-00013, 2004-NJ-02501766, 2006 BALCA LEXIS 11 (BALCA Jan. 25, 2006) (citations omitted) (stating standard for business necessity); *Kestenbaum*, No 2003-INA-301, 2004 BALCA LEXIS 226 (BALCA Oct. 18, 2004) (affirming Final Determination that required employer to show that the job as described in

application existed before the employer filed the application); *Schlesinger*, No. 2002-INA-52, 2002 BALCA LEXIS 133 (BALCA Oct. 24, 2002) (same).

Based on these standards and the evidence before DeHaan at the time the Final Determination was issued, the Court cannot conclude that the DOL's decision to deny the Application was arbitrary or capricious. In determining that Coastal failed to establish that the two-year requirement was based on business necessity, the DOL reasoned that the mere fact that the prospective employee would be operating heavy machinery did not necessarily establish that experience beyond the DOT standard of one-to-three months of "combined education, training and/or experience" was necessary to operate Coastal's forklift. (*See DeMarco Aff. at Ex. C.*) Indeed, as Defendants note (*see Def. Mem. at 2*), Coastal did not set forth any evidence or statements that its own forklift was not comparable to other forklifts; rather, the Rebuttal Letter only contained statements regarding the weight of Coastal's own machinery and the objects to be moved. (*See DeMarco Aff. at Ex. B.*) As a result, it was reasonable for the DOL to conclude that Coastal had fallen short of proving that an employee with more experience than that mandated by the DOT was essential to performing, in a reasonable manner, the job duties for forklift operator as described by Coastal.

Further, the DOL had a reasonable basis for rejecting Coastal's argument that the position as described in the Application required an employee to have a thorough knowledge of Coastal's product line, and that such knowledge could only be obtained through "at least 2 years of experience." (*See DeMarco Aff. at Exs. B, C.*) The DOL highlighted the flaws of this argument by noting that a thorough knowledge of Coastal's product line could not be satisfied by

requiring a candidate to have two years of work experience or training with another employer, but rather, that such specific knowledge could only be acquired by working or training with Coastal in particular. (*See id.*) Nonetheless, as the DOL correctly observed, the requirement of knowledge of Coastal's product line was not listed as a requirement in the job description on the Application. (*See id.* at Exs. A and C.)

In addition, after considering the Rebuttal Letter and its enclosures – namely, statements that the machinery to be operated and items to be moved by the forklift at issue were heavy, statements that the operator must have a thorough knowledge of Coastal's product line, a W-2 form for an employee who Coastal named as a forklift operator, and an organizational chart of Coastal's employee structure – the DOL also concluded that Coastal had still failed to demonstrate that the position described in the Application and the two-year requirement for that position existed in Coastal's business prior to the filing of the Application. (*See DeMarco Aff.* at Ex. C.) Although the DOL concluded that the single W-2 form and the organizational chart submitted by Plaintiffs supported Coastal's contention that it had employed other individuals in the same capacity, the evidence did not demonstrate that such individuals were required to have two years of experience in the job prior to hire. (*See id.*) Despite Plaintiffs' assertion that the DOL's finding was in error because Plaintiffs "demonstrated that the job requirements did exist before filing the application" (*see Pl. Mem.* at 6), the record clearly establishes that Coastal did not include in the Rebuttal Letter the information regarding the prior experience of the two forklift operators it claimed to employ and, in fact, did not provide the DOL with such information until after the Final Determination had already been issued, when Coastal included

the information for the first time in the Request for Review. (*See DeMarco Aff. at Ex. F.*)

Thus, before issuing the Final Determination, the DOL had no evidence before it with respect to the work experience of these two individuals. As a result, the DOL did not err in finding that Coastal failed to prove that the two-year requirement existed before Coastal filed the Application.⁴

Coastal's claim challenging the determination of the DOL is appropriate for summary resolution by this Court because the content of the administrative record is undisputed. Given that there is no basis for the Court to find that the DOL disregarded established legal standards in evaluating Coastal's Application, and given that Coastal only presented limited evidentiary support for its Application to the DOL prior to its Final Determination, this Court finds that, in light of that limited evidence, the DOL's decision was not arbitrary and capricious.

Accordingly, Plaintiffs' motion for summary judgment with respect to their first claim is denied, and Defendants' motion for summary judgment dismissing Plaintiffs' first claim is granted.

⁴ Plaintiffs also appear to argue that Coastal only needed to prove that the job – but not the job's requirements – existed at Coastal before the Application was filed, which it did by submitting the W-2 and the organizational chart as part of the Rebuttal Letter. (*See Pl. Reply at 4.*) Such an argument is unavailing, as the very text of the NOF shows that, in fact, Coastal was required to show that the "position and its present requirements existed before the alien was sponsored." (*See DeMarco Aff. at Ex. B.*) The Application listed two years of experience as a requirement of the job, and thus, in order to satisfy its burden, Coastal was required to demonstrate that those person(s) who worked for Coastal in the same position prior to the filing of the Application had at least two years of experience as a forklift operator prior to working at Coastal. (*See id. at Ex. A.*)

B. BALCA Did Not Abuse its Discretion in Affirming the DOL's Denial of the Application.

_____ Plaintiffs have also moved for summary judgment on the second count of their Complaint, which challenges, as an abuse of discretion, BALCA's affirmance of the DOL decision. In support of this portion of their motion, however, Plaintiffs do not cite any case law and do little to develop their claim. In their moving brief, Plaintiffs assert only that BALCA "abused its discretion because in its decision [it] provided no rational explanation and inexplicably departed from established policies." (Pl. Mem. at 6.) Plaintiffs do not challenge any particular statement in BALCA's Decision and Order, nor do Plaintiffs describe what "established policies" BALCA departed from, nor how BALCA departed from these policies. Moreover, in their reply brief, Plaintiffs offer little more to elucidate their claim. There, Plaintiffs take issue only with BALCA's statement that Coastal did no more than make "bald assertions." (See Pl. Reply at 3.) According to Plaintiffs, this statement by BALCA was "incorrect" because, according to Coastal, Coastal "was very specific" in describing the type of forklift at issue. (*Id.*) In response, Defendants, citing relevant case law, assert that summary judgment should be granted in their favor because, in affirming the DOL's denial of the Application, BALCA properly exercised its discretion by (1) considering only the evidence on which the Final Determination was based, and (2) determining, based on that evidence, that Coastal had failed to establish business necessity. (See Def. Mem. at 11-14.)

As Defendants correctly argue, it is well-settled that BALCA cannot consider material submitted by Coastal for the first time in its Request for Review. *See, e.g., Exterior Professional, Inc.*, 2006 BALCA LEXIS 24 (BALCA Feb. 1, 2006). Rather, BALCA's review is limited to the record that was previously presented to DeHaan, and upon which the denial of

the Application was made. *See id.* (citing 20 C.F.R. § 656.27(c); 20 C.F.R. § 656.26(b)(4)). Thus, “where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, [BALCA] will not consider that argument.” *Id.* (quoting *Huron Aviation*, 1988-INA-431 (July 27, 1989)). Here, BALCA explicitly adhered to this precedent and refused to consider the evidence submitted by Coastal, in its Request for Review, as to the work experience of the two employees who were employed by Coastal as forklift operators. (*See DeMarco Aff.*, Ex. D at 4.) Nothing about BALCA’s approach in this regard was improper, and BALCA was fully justified in concluding that, based on the evidence before DeHaan, Coastal had “failed to document that any of its prior hires had the two years of experience required herein” (*see id.*).

Moreover, based on the record before DeHaan, BALCA concluded that Coastal failed to establish the business necessity for the two-year requirement for the same reasons stated in the Final Determination. (*See id.*) As that determination was itself reasonable, as discussed above, BALCA cannot be said to have abused its discretion in affirming the DOL’s ruling.

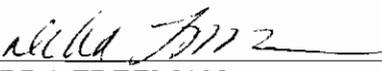
Accordingly, on the undisputed record, Plaintiffs’ motion for summary judgment on their second claim is denied, and Defendants’ cross-motion for summary judgment dismissing the claim is granted.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for summary judgment is denied in its entirety, and Defendants' cross-motion for summary judgment to dismiss the Complaint is granted in its entirety. The Clerk of the Court is respectfully requested to close this case on the docket.

Dated: New York, New York
February 27, 2006

SO ORDERED



DEBRA FREEMAN
United States Magistrate Judge

Copies to:

Mario DeMarco, Esq.
8 South Main Street
Port Chester, NY 10573

Richard E. Rosberger, Esq.
Assistant U.S. Attorney
86 Chambers Street, 6th Floor
New York, NY 10007