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Issue Date: 01 November 2018

OALJ Case No.: 2018-TLC-00029

ETA Case No.: H-300-18257-894188

In the Matter of:

LITTLE WICOMICO OYSTER, LLC,

Employer

Certifying Officer: John T. Rotterman
Chicago National Processing Center

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For the Employer

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For the Certifying Officer

Before: LAUREN C. BOUCHER
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Naturalization Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655.

BACKGROUND

On August 31, 2018, Little Wicomico Oyster, LLC ("Employer"), through its agent USA FarmLabor, filed a Form ETA-790 with the Virginia Employment Commission. (AF 79.)[1] On September 10, 2018, the Virginia Employment Commission issued a notice of deficiency ("NOD") based on its determination that Employer did not have a seasonal or temporary need for labor. (DX 6.) Employer's application was denied on September 13, 2018. (DX 7.)

On September 14, 2018, Employer filed an emergency H-2A Application for Temporary Employment Certification on Form ETA-9142A with the Office of Foreign Labor Certification ("OFLC") in the U.S. Department of Labor's Employment and Training Administration. (AF 68.) Employer's application requested H-2A temporary alien labor certification for eight "Farmworker-Oysters" positions based on a seasonal need. *Id.* Employer indicated that it had a need for workers beginning on November 4, 2018, and ending February 28, 2019. *Id.*

On September 21, 2010, the OFLC Certifying Officer ("CO") issued a Notice of Deficiency, which identified "temporary need" as a deficiency in Employer's application.[2] (AF 4, 6.) The CO explained that Employer previously applied for (and received) certification to hire five temporary H-2A workers from February 19, 2018, through November 15, 2018. (AF 6, 129.) Thus, when reviewing Employer's prior application (hereinafter the "summer application") in conjunction with its current application (hereinafter the "winter application"), the CO concluded Employer has an "ongoing, year round need for workers." *Id.*

The CO also observed that Employer's summer and winter applications requested workers under the same Standard Occupational Classification (SOC) code, at the same job site, requiring the same work experience, and with similar job duties. (AF 7.) Accordingly, the CO concluded Employer "failed to demonstrate a temporary or seasonal need for farmworkers." (AF 8.) Thus, the CO instructed Employer to provide a written explanation showing why this job opportunity is seasonal or temporary. (AF 4-9.)

On September 27, 2018, Employer requested a *de novo* hearing before an administrative law judge. (AF 1.) I received the administrative file on October 11, 2018. With the consent of the parties, I held a telephonic hearing on October 22, 2018. Three witnesses testified: Ms. Cynthia Webb, agricultural and foreign labor program manager for the Virginia Employment Commission, Mr. John Rotterman, the OFLC CO in this matter, and Mr. Myles Cockrell, Employer's co-founder and co-owner. I admitted EX 1-31 and CX 1-7 to the record without objection. (Hearing Tr. 7-8.)

The only issue before me is whether Employer established a temporary or seasonal need for the positions listed in its winter application, as defined by 20 C.F.R. § 655.103(d). (Hearing

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[1] This Decision uses the following abbreviations: "EX" refers to Employer's Exhibits; "CX" refers to CO's Exhibits; and "Hearing Tr." refers to the transcript of the hearing, held on October 22, 2018. Citations to the Administrative File will appear as "AF" followed by the pertinent page number.

[2] The CO identified two additional deficiencies. Those deficiencies are not at issue here, as Employer indicated it was willing to acquiesce to the CO's requested changes. (AF 1; Hearing Tr. 6.)

Tr. 6.) This decision is based on the administrative file, the evidence and arguments presented by the parties, and the applicable laws and regulations. This decision is issued within ten calendar days of the hearing, as required by 20 C.F.R. § 655.171(b)(1)(iii).

EVIDENCE AND ARGUMENTS

I have reviewed the entire record in this matter. Below, I have summarized the most salient points of the evidence and arguments before me.

Testimony

Mr. Myles Cockrell, who owns the business with his father, testified on behalf of Employer. (Hearing Tr. 57.) Employer operates an oyster farm in Heathsville, Virginia, on the shores of the Little Wicomico River. (Hearing Tr. 57; *see also* AF 130.) Employer raises oysters from very small larvae to market-ready size. (Hearing Tr. 57-59.) Once the oysters grow large enough, Employer packages and ships them for sale. (Hearing Tr. 96.)

Mr. Cockrell explained the nature of his business and described the tasks that he and his employees perform throughout the year. During the summer months, Employer obtains oyster larvae, and employees focus on growing the oysters. (Hearing Tr. 57, 59, 83-84.) At this time, the oysters are very small and must be handled carefully. (Hearing Tr. 63, 70.) They are housed in silos and periodically size-sorted by hand using sieves and screens. (Hearing Tr. 61-64, 76, 83; EX 4, EX 5.) The screens and silos and other equipment must be cleaned daily to remove grass and marine fouling and to keep water circulating. (Hearing Tr. 62, 71-72, 77-78.)

As the oysters grow, they are sized and sorted into different cages using a tumbler. (Hearing Tr. 64, 86, 96-97; EX 18.) Once the oysters are market-size, they are transferred to cages and placed in the river until they are harvested for sale. (Hearing Tr. 64-65.)

Oysters only grow in the summer months. When the water temperature drops, the oysters become dormant. (Hearing Tr. 60.) Small oysters (those not yet large enough for sale), are moved to deeper waters to prevent freezing. (Hearing Tr. 80, 88.) Employees do not handle small oysters in the winter because there is a risk of damaging the oysters. (Hearing Tr. 60-61, 90.)

Harvesting oysters involves hoisting cages with market-ready oysters out of the river and onto a boat and transporting the oysters to the dock. (Hearing Tr. 65-66, 92.) Employees machine-wash and count the oysters, cull out any dead oysters, and refrigerate the live oysters, if necessary. (Hearing Tr. 66, 74, 95.) The oysters are then sorted, packaged, and driven to market. (Hearing Tr. 66-68.) Oysters that are too small for market are returned to cages in the river. (Hearing Tr. 68.) Mr. Cockrell testified that workers perform harvesting duties primarily in the winter because that is when market demand is greatest. (Hearing Tr. 68-69.) On cross-examination, Mr. Cockrell acknowledged that some oysters are harvested in the summer if Employer receives an order. (Hearing Tr. 95-96.)

Throughout the summer months, some of Employer's equipment (silos, cages, boats, etc.) becomes damaged or worn out. (Hearing Tr. 72-82, 99-100.) Mr. Cockrell explained that his

employees make extra screens and silos in the winter time so that old or dirty equipment can be replaced with new, clean equipment in the summer. (Hearing Tr. 72-73, 102.) During the summer, because his employees are too busy to stop working and repair the equipment (and because some types of equipment, like boats, are in constant use), Employer sets aside damaged equipment until the winter months. (Hearing Tr. 59, 81, 99-101.) During the winter, Mr. Cockrell testified that his workers focus on harvesting oysters and building or repairing equipment. (Hearing Tr. 59, 61-62, 99-100.)

Upon my questioning regarding Respondent's Exhibit 3, Mr. Cockrell testified that the following tasks and percentages accurately represent the work performed in the summer and in the winter, respectively:

Summer Duties	**Winter Duties**
Clean buckets (15%)	Fabricate upwellers, equipment, baskets, cages (27%)
Sieve oysters (15%)	Maintain equipment/vessel (43%)
Transfer oysters from silos to float/baskets depending on size (20%)	Place cages with oysters in deeper waters (8%)
Clean/tumble oysters (20%)	Harvest/cull oysters (10%)
Place oysters in cages (15%)	Build/label boxes (6%)
Hand scrubbing cages (15%)	

(EX 3[3]; Hearing Tr. 106-08.)[4]

Mr. Cockrell stated that he employs between fifteen and seventeen employees,[5] depending on the time of year, or even depending on the day. (Hearing Tr. 57, 109.) He also stated that Employer is "always shorthanded" and tries to "hire everybody we can, any time we can." (Hearing Tr. 74, 109.) On questioning, Mr. Cockrell indicated that Employer has "a bunch" of permanent year-round oyster workers, one of whom he specifically identified and described as an "oysterman." (Hearing Tr. 104-06.) The year-round employees perform both the summer and winter oyster working duties. (Hearing Tr. 105.) Mr. Cockrell suggested that the work of an oyster worker in the summer requires more skill than the winter. (Hearing Tr. 108.)

[3] The duties and percentages listed here are copied from EX 3. Based on Mr. Cockrell's testimony, I changed the headings to reflect which duties are performed in the summer and which are performed in the winter.

[4] EX 3 itself does not identify who created this chart. At the hearing, Mr. Cockrell indicated that he helped prepare this chart, and he believed it was prepared by the Department of Labor. (Hearing Tr. 107.) There is no other indication in the record that the Department prepared this chart. Claimant's counsel sent a letter in response to the Virginia Employment Commission's NOD indicating "we prepared a spreadsheet comparing the specific job duties." (AF 42.) Although EX 3 is not attached to the letter in the Administrative File, it appears most likely that EX 3 was prepared as part of Employer's response to the Virginia Employment Commission's NOD. In any case, Mr. Cockrell testified that the chart accurately represents the duties and proportional time requirements of summer and winter oyster workers. (Hearing Tr. 107.)

[5] Specifically, Mr. Cockrell said: "Little Wicomico Oyster Company, me and my father started. We own 50 percent, each of us. We're here in Northumberland County, Virginia. We employ about, depending on the time of year, 15 to 17 people. We have a couple different companies that work out of here that -- you know, we have a marine construction company, we have an oyster company. What we're dealing with here is the oyster company." (Hearing Tr. 57.) Thus, it is not entirely unclear whether or how many of Mr. Cockrell's employees work for Employer versus his marine construction company.

Cynthia Webb, the agricultural and foreign labor program manager for the Virginia Employment Commission and John Rotterman, the CO, also testified at hearing. Each witness reviewed Employer's winter application for H-2A workers and issued a NOD. (CX 7; AF 4-9.) Ms. Webb and Mr. Rotterman both explained their positions and their rationale for finding Employer's application deficient. (Hearing Tr. 12-54, 111-123.)

Winter Application

In the winter application at issue, Employer describes the nature of its need for temporary labor as seasonal and requests certification for eight foreign workers. (AF 68.) Employer indicates that the basis for the requested visas is "new employment" and that it does not have any non-family, full-time equivalent employees.[6] (AF 68-69.) The application reflects that the requested employees' duties would fall within SOC code 45-2093 ("farmworkers, farm, ranch, and aquacultural animals") and potential employees would be required to work forty-eight hours per week for $11.46 per hour. (AF 68, 70, 72.)

No education or training is required, but three months experience working in "oysters" is required. (AF 71.) Employer also requires potential employees to be able to work in all kinds of weather, swim, lift up to sixty pounds repeatedly, and obtain a driver's license. *Id.*

Employer requests H-2A workers for the period of November 4, 2018, through February 28, 2019. (AF 68.) The following job duties are included on the application: fabricate/build cages for oysters and silos; bend, cut, staple, clip wire; cut and tie lines to cages and rigs; stack cages; cut and fabricate bags; fabricate and repair silos for nursery upwellers and large floating upwellers; transplant bottom cages onto winter lines of 6' to 8' water depth, where ice and subfreezing temperatures cannot affect the oysters; harvest/pull cages by pulling and stacking cages in boat; transport to docks and unload from the boat; transplant cages to winter ground by hoisting up cages; move from 3' foot of water to 6'-8' water; cull oysters; staple, label, and load boxes on a pallet; wrap pallet with shrink wrap; drive oysters to market; perform maintenance on vessel and equipment including fiberglass repair; replace hydraulic lines; inspect/replace rigging and wenches; wooden vessel repair; paint with antifoulant; paint with hull sides and deck; and mechanical repair to boats and equipment. (AF 70, 74.)

To support its seasonal need for labor, Employer further explains that labor-intensive building, moving, and maintenance duties must be completed in the winter. Employer indicates that it must build cages and silos (used in the spring to house new larvae) in the winter. Specifically, the silos that are used in upwellers must be fabricated in the winter "because they never stop running during the summer." (AF 93.) Employer also explains that caged oysters must be moved from shallow cold waters to deeper warm waters in the winter months to prevent freezing. *Id.*

Finally, Employer explains that its employees perform maintenance on twelve boats during the winter months "to keep them safe and operational for the season." (AF 94.) Employer

[6] This appears inconsistent with Mr. Cockrell's testimony that Employer has "a bunch" of permanent year-round oyster workers. (Hearing Tr. 104-06.)

indicates that "[d]uring the summer, the boats are prone to getting lots of dings," and workers perform maintenance "while oyster related activities are slower" because, during the summer, "the vessels and equipment are in constant use which doesn't allow time to maintain/service them." *Id.* Employer concludes that its winter operations are focused on building cages and maintaining equipment, and it requires "mechanically-minded workers" to complete such work. *Id.*

Summer Application

As noted above, Employer was certified to hire five H-2A workers for the position of "Farmworker-Oysters" in the spring and summer months of 2018. (AF 101, 129.) The summer application covered the period of February 19, 2018, through November 15, 2018. (AF 129.) Similar to its current application: Employer indicated that the basis for these workers was "new employment;" it had no non-family, full-time equivalent employees; the position fell within SOC code 45-2093; and employees would work forty-eight hours per week for $11.46 per hour. (AF 129-131, 133.) The education and employment experience requirements listed on the summer application were identical to those in the instant winter application. (AF 132, 136.)

Employer included the following job duties on its summer application: clean buckets or silos daily; sieve the oysters frequently; move larger oysters to appropriate silos; clean sieves; move oysters into floats or baskets; clean and tumble oysters from floats/baskets; separate and transfer oysters based on size; place larger oysters in cages and transport down river; retrieve cages monthly to clean and tumble the oysters and sort based on size; visually inspect market-ready oysters; count, pack, and refrigerate oysters; and hand scrub and pressure wash cages and silos. (AF 131, 135.)

Positions of the Parties

Employer emphasizes that its business operations revolve around the annual life cycle of oysters, which is influenced by seasonal changes—specifically, changes in weather and water temperature. Employer asserts it has demonstrated that such seasonal changes create a need for workers in the winter that differs from its need in the summer. (Employer Brief at 2-4.) Employer thus contends it has established that its need is temporary or seasonal. Employer relies on *Vermillion Ranch Ltd. P'ship*, 2014-TLC-00002 (Dec. 5, 2013), and argues that the CO erroneously determined that its need is not temporary or seasonal because its summer and winter positions are not distinct occupations. (Employer Brief at 3.) Employer also asserts its winter need for labor "leads to a 30% increase in its workforce" (from 17 to 22 employees).

In contrast, the CO argues that the Employer has failed to establish that its need for H-2A workers in the winter months is temporary or seasonal. Specifically, the CO argues that similarities between the instant winter application and Employer's previous summer application establishes that Employer's need for workers is not temporary, but rather year round. (CO Brief at 3-5.) The CO also argues that Employer's need is not seasonal because the re quested labor is not tied to a certain time of the year. Rather, the CO contends that Employer's summer and winter applications seek workers for the same position with only minor seasonal variations in

duties. (CO Brief at 5-11.) Finally, the CO asserts Employer's need for workers does not far exceed that which it needs to continue ongoing operations. (CO Brief at 11.)

ANALYSIS

Legal Standard

Employer requested a *de novo* hearing pursuant to 20 C.F.R. § 655.171(b). Accordingly, I must "independently determine if the employer has established eligibility for temporary labor certification." *David Stock*, 2016-TLC-00040 (May 6, 2016). Employer bears the burden of establishing its eligibility. *See Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).

The criteria for certification under the H-2A program include "whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis." § 655.161(a) (emphasis added). The applicable regulation provides:

> [E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

§ 655.103(d) (emphasis added).

The relevant question is "'whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.'" *William Staley*, 2009-TLC-00060 (Aug. 28, 2009) (quoting *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982) (BIA Nov. 24, 1982)). In analyzing seasonal need, an ALJ must determine "if the employer's needs are seasonal, not whether the duties are seasonal." *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999). To meet its burden to show a seasonal need, Employer must "establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year." *Altendorf Transport*, 2011-TLC-00158 (Feb. 15, 2011).

> Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either:
> (1) that an employer's need to have the job duties performed is "temporary"—of a set duration and not anticipated to be recurring in nature; or
> (2) that the employment is seasonal in nature—that is, employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.

William Staley, 2009-TLC-00060 (Aug. 28, 2009). The overarching question is "whether the employer's need is truly temporary." *Id.* (citing 52 Fed. Reg. 16,770, 20,497-98 (1987)).

In sum, to establish its eligibility for temporary agricultural labor certification under the H-2A program, employer must prove that its need for labor is either: (1) non-recurring and less than one year (absent extraordinary circumstances); or (2) far above usual levels and potentially recurring, but necessary only at a certain time of year because of annual patterns.

Seasonal Need

Employer has established that its operations are subject to seasonal cycles. The record, in particular Mr. Cockrell's testimony, reflects that Employer's business is directly affected by the drop in water temperatures during the winter months. This drop in temperature affects the growth of oysters and necessitates the movement of small oysters to deeper waters. Additionally, market demands necessitate that Employer harvest the majority of its large oysters in the winter months.

Nonetheless, Employer has not shown that its *need* for labor differs during the winter months. As Employer emphasizes, the relevant question is not whether the *duties* to be performed in the winter are different, but whether Employer's *need* for labor is different in the winter than at other times of the year.

Thus, although Employer's applications do show that the primary duties performed in the winter months (maintenance and harvesting) differ from the primary duties performed in the summer months (growing, sorting, and cleaning), the applications do not demonstrate that Employer's need for labor differs in each period. Instead, when viewed together, Employer's winter and summer applications establish that it has a year-round and ongoing need for oyster workers. In other words, Employer has not shown that its need for labor in the winter months is based on anything but its continued need for labor to sustain its ongoing year-round operations.

Employer argues that it has two distinct and non-overlapping seasonal needs for employment: one in the winter and one in the summer. However, the record belies this view of Employer's labor needs. The required qualifications for winter oyster workers are the same as those of summer oyster workers. (*Compare* AF 71, 75 *with* AF 132, 136.) No education or training is necessary. Three months experience in "oysters" is required. The job title and SOC code listed on each application are the same. Both applications list the same job location, required working hours, and rate of pay. (AF 70-75, 132-136.) As the CO points out, there are some similarities in the job duties performed in both the winter and summer months. For instance, workers in both seasons sort oysters, move cages from one location to another in the river, and harvest and package oysters (even if not on the same scale in both seasons).

Employer's reliance on *Vermillion Ranch* is misplaced. In that case, the employer applied for H-2A workers to tend to its cattle in three different seasons. *Vermillion Ranch*, 2014-TLC-00002, slip op. at 2 (Dec. 5, 2013). Although the applications listed the same SOC code, the employer demonstrated that the positions were sufficiently distinct to establish differing seasonal needs. Specifically, the winter position at issue required experience specific to the winter season,

required more advanced skills and knowledge, and involved substantially different and more complex duties. *Id.* at 8-10.

In contrast, Employer has not demonstrated that the winter oyster worker position requires different experience or special skills and knowledge that are not required for the summer work. Employer's applications show that the same experience, skills, and knowledge are required for both positions.[7] Mr. Cockrell acknowledged that Employer currently has employees that perform both the winter and summer work. (Hearing Tr. 105-06.) Thus, the record reflects that Employer has a continuing and permanent need for year-round oyster workers with the same skillset.

Additionally, the record reflects that the primary duties performed by oyster workers in the winter are maintenance and fabrication. According to the chart set forth above, these duties make up seventy percent of the winter work. (EX 3; Hearing Tr. 107.) As the CO points out, although these duties are performed in the winter, the Employer's need for maintenance and fabrication work actually arises in the summer and is not tied to the winter season.

As set forth above, Mr. Cockrell testified that Employer's equipment (screens, silos, cages, etc.) is used heavily in the summer and can become damaged or worn out. The damaged equipment must be replaced with new equipment at that time to avoid any disruption in operations. Because its employees are busy with oyster-growing duties, Employer waits for winter to perform all fabrication and maintenance duties. Similarly, Mr. Cockrell testified that Employer cannot take its vessels out of service in the summer because they are in constant use. Thus, although the vessels become damaged during the summer, Employer waits for winter to make repairs. Presumably, Employer does this because it is a more economical allocation of man hours. Employer's ability to shift the repair and fabrication work to the winter months reveals that it is not, in fact, tied to the change in seasons but rather to economic concerns. *See Southside Nursery*, 2010-TLC-00157 (Oct. 15, 2010) (shifting need based on economics cannot properly be classified as "seasonal").

Finally, Employer has not established that it requires "labor levels far above those necessary for ongoing operations." § 655.103(d). Mr. Cockrell testified that Employer usually has between fifteen and seventeen employees, and he currently has five H-2A oyster-workers. (Hearing Tr. 57, 93.) The application at issue requests eight H-2A oyster workers. (AF 68.) Assuming Employer's current H-2A workers are included in the estimate of fifteen to seventeen workers, the current application (if certified) would increase Employer's labor force from between fifteen and seventeen to between eighteen and twenty employees (approximately 15-17%).[8]

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[7] If anything, Mr. Cockrell suggested that the position of summer oyster worker may require additional skills and knowledge because these workers must handle oyster larvae. (Hearing Tr. 69-70, 108.)

[8] It is not entirely clear whether the five H-2A workers are included in Mr. Cockrell's estimation of fifteen to seventeen employees generally. If not, Employer's workforce would increase from between twenty and twenty-two employees to between twenty-three and twenty-five employees (approximately 12-13%) based on the current application.

Mr. Cockrell also testified that his business is usually understaffed, and he tries "to hire everybody we can." (Hearing Tr. 74, 109.) Therefore, it appears that Employer needs additional workers to *maintain* ongoing operations rather than to support a brief seasonal increase in work requirements. Under these circumstances I cannot conclude that Employer established a need for labor far above that necessary for ongoing operations.

For these reasons, I conclude Employer has not established a need for labor that is different in the winter season. Instead, the record reflects that Employer has a need for year-round oyster workers, with some seasonal variations in the duties those workers perform. Accordingly, Employer has not established a seasonal need for labor, as defined in § 655.103(d).

Temporary Need

Similarly, Employer has not demonstrated a "temporary" need for labor. Examples of regulatory temporary need are replacing a sick worker or obtaining help with one unusually large agricultural contract. *William Staley*, 2009-TLC-00060 (Aug. 28, 2009) (citing 52 Fed. Reg. at 20,497-98). The record reflects that Employer's need is not such a non-recurring need of set duration, nor does Employer make such an argument. For the reasons set forth above, I find Employer's need for oyster workers is year-round and ongoing and thus exceeds one year. Therefore, Employer has not established a temporary need for labor, as defined in § 655.103(d).

CONCLUSION

Based on the foregoing analysis, Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). Therefore, the CO's issuance of a Notice of Deficiency regarding Employer's winter application for temporary agricultural labor certification under the H-2A program was in accordance with the facts and the law.

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer's determination is AFFIRMED. *See* 20 C.F.R. § 655.171(b)(2).

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey