In the Matter of:

AG&P Americas Inc.
Employer

Certifying Officer: Leslie Abella
Chicago National Processing Center

Before: Judge Francine L. Applewhite

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

These cases are before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to AG&P Americas Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determinations regarding the Employer’s H-2B temporary labor certifications. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. Employers that seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“DOL”). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

H-2B Applications

The Employer is a global company that provides supervised subcontracted work teams for construction projects. In July 2021, the Employer filed these two ETA 9142B, Application

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3 8 C.F.R. §214.2(h)(6)(iii).
4 AF(76) 38, 62. Citations to the Appeal File are abbreviated as “AF.” Appeal File 2021-TLN-00076 will be abbreviated as “AF(76).” Appeal File 2021-TLN-00077 will be abbreviated “AF(77).” For purposes of clarity, the “P” prefix on each page number of AF(77) has been omitted. In both applications, the Employer submitted its
for Temporary Employment Certification (“Applications”), with the CO. The Employer requested certification of 20 “Pipe Welders” in H-400-21209-488309 and 30 “Pipe Fitters” in H-400-21209-488264 from October 21, 2021 to July 1, 2022 based on a seasonal need. The Employer supported its applications with a Statement of Temporary Need, written by Kiewit Offshore Services (“KOS”), describing KOS’s “booked backlog of new projects that will significantly increase [its] skilled workforce needs by the third quarter of 2021.”

**Notices of Deficiency**

On August 5, 2021, the CO issued a Notice of Deficiency (“NOD”) for each case. The CO listed six deficiency grounds: 1) Failure to establish the job opportunity as temporary in nature (20 C.F.R. § 655.6(a) and (b)); 2) Failure to establish temporary need for the number of workers requested (20 C.F.R. § 655.11(e)(3) and (4)); 3) Failure to justify the dates of need requested (20 C.F.R. § 655.6(a) and (b)); 4) Confirmation of job contractor status (20 C.F.R. § 655.19(a) and (b), 655.5); 5) Failure to submit an acceptable job order (20 C.F.R. § 655.16, 655.18); and 6) Failure to submit a complete and accurate ETA Form 9142 (20 C.F.R. § 655.15(a)).

**Employer’s Responses to NODs**

On August 17, 2021, the Employer submitted its responses to the NODs. In each response, the Employer submitted a letter with narrative responses to each deficiency, a job order, a letter of support from Bay, Ltd., describing the number of workers it hopes to subcontract from the Employer, regional labor analyses from the Gulf Coast and Greater Corpus Christi areas describing labor shortages by trade, and a bar graph representing the Employer’s staffing plan for Bay, Ltd. The Employer gave the CO permission to revise its applications from 20 to 25 Pipe Welders and from 30 to 25 Pipe Fitters, for intermittent rather than seasonal need, and from the original proposed dates to October 21, 2021 through March 1, 2024.

**CO’s Final Determinations**

On September 9, 2021, the CO issued a Final Determination for both applications denying the temporary labor certification. The CO found that two deficiencies remained unsatisfied by the Employer’s responses: 1) Failure to establish the job opportunity as temporary in nature; and 2) Failure to establish temporary need for the number of workers requested. 

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5 The Employer filed six applications in total. The two at issue were consolidated for judicial efficiency.
6 AF(76) 87.
7 AF(77) 4. The NOD noted that the Employer asked for 30 Pipe Fitters from October 21, 2021 to July 1, 2022 based on a seasonal need. In its Response to the NOD, the Employer gave the CO permission to amend the application to 25 Pipe Fitters for an intermittent need from October 21, 2021 to March 1, 2024. AF(77) 6. The Employer’s Application in AF(77) at 103 reflects these later amendments, not the original request. The Employer’s Application in AF(76) reflects the original request.
8 AF(76) 92, AF(77) 108.
9 AF(76) 75, AF(77) 90.
10 AF(76) 62, AF(77) 71.
For the first deficiency ground, the NOD had required that the Employer submit the following additional information:

1. A detailed explanation that describes why the statement of temporary need in Section B.8 of the ETA Form 9142 appears to belong to an employer other than the petitioning employer;
2. A statement describing the employer's business history and activities (i.e. primary products or services);
3. Schedule of operations throughout the year. The employer must state the time period each year when it does not need the services or labor;
4. A summary listing of all projects in the area of intended employment for its previous calendar year. The list should include start and end dates of each project and worksite addresses;
5. Summarized monthly payroll reports for the 2018, 2019 and 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation [Pipe Welders / Pipe Fitters], the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
6. An explanation of the data in submitted payroll documentation; and
7. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.\textsuperscript{11}

In the Final Determinations, the CO stated that the Employer’s response did not explain why its need was now intermittent and not seasonal, nor did it show that it has hired laborers on an intermittent basis in the past. The CO also noted that the requested time period greatly exceeded 10 months, the period beyond which the Department of Labor no longer considers “temporary” under 8 CFR § 214.2(h)(6)(ii)(B). The periods for which workers are needed were not clear. Moreover, the CO found that the Employer failed to demonstrate that the “need” on which the application was based was its own, not that of Bay, Ltd. Finally, regarding the documentation of labor shortages in the project area, the CO noted that a labor shortage does not justify temporary need.

For the second deficiency ground, the NODs required that the Employer submit the following additional information:

1. An explanation with supporting documentation of why the employer is requesting [20 Pipe Welders / 30 Pipe Fitters] for Corpus Christi, TX during the dates of need requested;

\textsuperscript{11} AF(76) 79, AF(77) 94.
2. If applicable, documentation supporting the employer’s need for [20 Pipe Welders / 30 Pipe Fitters] such as contracts, letters of intent, etc. that specify the number of workers and dates of need;

3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;

4. An explanation of the data in submitted payroll documentation; and

5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.12

In the Final Determination, the CO stated that the Employer failed to address why it is changing the number of workers required. The CO noted that while the Employer referred to attached payroll documents and its contract with the client, it failed to submit these documents.

Based on these deficiencies, the CO denied the Employer’s application for temporary foreign workers.

**Procedural History**

On September 24, 2021, the Employer filed a Notice of Appeal appealing the CO’s final determinations in case numbers H-400-21209-488309 and H-400-21209-488264. On September 28, 2021, I issued a Notice of Docketing and Order Establishing Briefing Schedule for the consolidated cases. The Appeal Files were received on October 1, 2021.

**Applicable Law**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. *See Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016). BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; *see also Cajun Constructors, Inc.*, 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); *Andy and Ed. Inc., dba Great Chow*, 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); *Eagle Industrial Professional Services*, 2009-TLN-00073, slip op. at 5 (July 28, 2009). The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified

12 AF(76) 80, AF(77) 95.
U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.1(a).

The Employer is required to establish that its need for the workers requested is “temporary.” Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

(A) Definition. Temporary services or labor under the H-2B classifications 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.

(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.


Additionally, the Employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; Alter & Son Gen. Eng’g, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); BMGR Harvesting, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peak-load, or intermittent need. An employer establishes an “intermittent need” if it shows it “has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.” 8 CFR 214.2(h)(6)(ii)(4).

The Employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3)-(4); North Country Wreaths, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); Roadrunner Drywall, 2017-TLN-00035 (May 4, 2017).

Discussion

An employer’s failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.13

13 20 C.F.R. §655.32(a).
In each NOD, the CO clearly identified information and evidence that would provide a reasonable basis upon which to analyze the application. According to the CO, the Employer did not provide information and documentation sufficient to overcome its noted deficiencies.

Specifically, for Deficiency 1, the Employer’s statement that “Bay’s backlog is increasing and thus their subcontracted services with [the Employer] will also increase” is not a “detailed explanation” that describes why the statement of temporary need belongs to the petitioning Employer, not another employer. The Employer did provide a statement describing the Employer's business history and activities. However, the Employer did not provide a schedule of operations throughout the year, including periods when it would not need laborers, nor did it provide a summary listing of all projects or summarized monthly payroll reports for the 2018, 2019, or 2020 calendar years.

As to Deficiency 2, the Employer failed to provide summarized monthly payroll reports for a minimum of one previous calendar year or any other documentation such as contracts or letters of intent that could explain why it needed the number of workers it requested in each application.

The Employer has not met its burden of showing that it is entitled to temporary labor certifications for the requested laborers. The Employer was provided with a NOD and in response, the Employer submitted additional evidence. However, the CO determined that the responsive evidence did not cure the deficiencies. After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer did not provide sufficient information and documentation to overcome its deficiencies. Accordingly, for the foregoing reasons, I find that the Denials issued by the CO were proper. Therefore, the Denials are AFFIRMED.

ORDER

Wherefore, the Denials of Temporary Labor Certification issued by the Certifying Officer in this consolidated matter are AFFIRMED.

SO ORDERED.