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

This case is 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 Determination regarding the Employer’s H-2B temporary labor certification.1 The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States.2 Employers who 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 Application

The Employer is a global company that provides supervised subcontracted work teams for construction projects.3 On July 28, 2021, the Employer filed ETA 9142B, Application for Temporary Employment Certification (“Application”), with the CO.4 The Employer requested

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3 Appeal File 2021-TLN-00080 (AF) 37, 70. Citations to the Appeal Files are abbreviated as “AF.” For purposes of clarity, the “P” prefix on each page number of the Appeal File has been omitted. Furthermore, the Employer submitted its response to the NOD twice. Accordingly, references to the Employer’s response will include citations to both submissions.
4 AF 104-141.
certification of 50 Structural Fitters from October 21, 2021 to July 1, 2022 based on seasonal temporary need. According to the Employer’s Statement of Temporary Need, the Employer’s need is based on an increase in Kiewit Offshore Services’ (“KOS”) backlog, as it would affect its subcontracted services with the Employer.

**Notice of Deficiency**

On August 5, 2021, the CO issued a Notice of Deficiency (“NOD”). The CO listed five deficiencies:

1. Failure to establish the job opportunity as temporary in nature (20 CFR §655.6(a) and (b));
2. Failure to establish that the nature of the employer’s need is temporary (20 CFR § 655.11 and 655.6(c));
3. Failure to establish temporary need for the number of workers requested (20 CFR §655.11(e)(3) and (4));
4. Failure to submit an acceptable job order (20 CFR § 655.16 and 655.18); and
5. Failure to submit a complete and accurate ETA Form 9142 (20 CFR § 655.15(a)).

**Employer’s Response to the NOD**

On August 17, 2021, the Employer submitted its response to the NOD. In the response, the Employer submitted a revised statement of temporary need. The Employer gave the CO permission to revise its request from 50 to 100 Structural Fitters based on an intermittent rather than seasonal need. In addition, the Employer requested that the period of need be extended until December 1, 2022. The Employer also submitted monthly payroll summaries for 2018, 2019, 2020, and 2021. In support of its response, the Employer submitted the job order associated with the Application, a statement of support from KOS, and its project staffing plan for Structural Fitters contracted for the KOS project.

**CO’s Final Determination**

On September 9, 2021, following the Employer’s response, the CO issued a Final Determination denying temporary labor certification. Therein, the CO determined that the Employer failed to overcome three deficiencies: 1) failure to establish the job opportunity as temporary in nature; 2) failure to establish temporary need for the number of workers requested; and 3) failure to justify the dates of need requested.

The CO’s Final Determination was to deny temporary labor certification because the Employer’s response was inadequate on grounds that the Employer did not provide the specific

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5 The Application currently reflects the Employer’s amendments to the Application as requested in its response to the NOD.
6 AF 109.
7 AF 93-103.
8 AF 26-59, 60-92.
9 AF 14-25.
10 The CO did not raise the third deficiency in the NOD and, as such, cannot/should not be cited or considered in the Final Determination. Accordingly, it will not be addressed or herein.
information or documentation required by the NOD. For the first deficiency, failure to establish the job opportunity as temporary in nature, the NOD required that the Employer submit the following additional information:

1. A detailed explanation that describes why the statement of temporary need in Section B, Item 8, on 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 Fitter,\(^{11}\) 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.\(^{12}\)

In the Final Determination, the CO concluded that the Employer’s explanation and documentation of its temporary need did not overcome the deficiency.\(^{13}\) The CO noted that in its revised statement of temporary need, the Employer amended its Application to an intermittent temporary need standard. In addition, the CO noted that while the Employer did submit summary monthly payroll records for the requested years, the payroll records were not “in the requested format” and were not “specific to the occupation for with the Certification is being sought.”\(^{14}\) The CO also noted that the “the regional labor analysis and craft skill labor analysis submitted by the Employer” indicate a labor shortage rather than a need for intermittent temporary workers.\(^{15}\)

\(^{11}\) The CO erroneously referenced an inapplicable job category.
\(^{12}\) AF 98.
\(^{13}\) AF 21.
\(^{14}\) Id.
\(^{15}\) Id.
For the second deficiency, failure to establish temporary need for the number of workers requested, the NOD required that the Employer submit the following additional information:

1. An explanation with supporting documentation of why the employer is requesting 50 Plumbers, Pipefitters, and Steamfitters\textsuperscript{16} for Ingleside, Texas during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for 50 Plumbers, Pipefitters, and Steamfitters\textsuperscript{17} such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. 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 Plumbers, Pipefitters, and Steamfitters,\textsuperscript{18} 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.\textsuperscript{19}

In the Final Determination, the CO stated that the Employer failed to overcome the second deficiency because the Employer’s submitted documentation did not explain how it determined 100 temporary workers were required to “perform its welding services.”\textsuperscript{20} The CO noted that the Employer “originally requested 100 temporary Structural Fitters in its application” without explaining how it determined it required as many workers or providing “adequate supporting documentation” establishing its need for as many workers.\textsuperscript{21} Additionally, the CO concluded that the Employer “did not submit payroll records for previous years” and, as a result, the CO could not determine how many workers engaged in “welding” had been previously staffed by the Employer or how many workers would be “augmenting” KOS’s “welding” workers.\textsuperscript{22} The CO also noted that the Employer’s submitted documentation such as “the regional labor analysis, craft skill analysis, [and the Employer’s] project staffing plan” “does not explain the number of needed workers.”\textsuperscript{23}

**Procedural History**

The Employer filed a Notice of Appeal appealing the CO’s final determination, which BALCA received on September 24, 2021. On September 28, 2021, I issued a Notice of

\textsuperscript{16} The CO erroneously referenced inapplicable job categories.
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\textsuperscript{18} The CO erroneously referenced inapplicable job categories.
\textsuperscript{19} AF 100.
\textsuperscript{20} AF 23.
\textsuperscript{21} AF 22. The CO erroneously characterized the initial request as a request for 100 temporary Structural Fitters. The Employer originally requested 50 Structural Fitters.
\textsuperscript{22} AF 23. The CO erroneously referenced an inapplicable job category.
\textsuperscript{23} Id.
Docketing and Order Establishing Briefing Schedule. Thereafter, BALCA received, on October 1, 2021, the Appeal File. Neither the CO nor the Employer filed a brief.

**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 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.


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
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, peakload, 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. In the 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.

As to the first deficiency, the Employer provided a history of its business practice and services. However, the Employer did not submit a “detailed explanation” as to why its statement of temporary need appears to belong to KOS as opposed to the Employer. Although the Employer did submit payroll records, they did not include the requested information, such as temporary employment data and data specific to Structural Fitters. There was no explanation of the submitted payroll reports. Similarly, the Employer did submit analyses concerning regional labor and craft skill labor, the project staffing plan for Structural Fitters, and summarized monthly payroll reports. However, the Employer did not submit a schedule of operation for the year or summary listings of projects involving Structural Fitters for the previous year.

Concerning the second deficiency, the Employer amended its initial request of 50 Structural Fitters to 100 Structural Fitters. However, the Employer did not provide documentation to support the amended need. Although the Employer did submit payroll records for the appropriate years, the records did not include the required information, such as temporary employment data and data specific to Structural Fitters. Additionally, the Employer did not provide an explanation of the submitted payroll reports. It is noted that the Employer did provide regional labor and craft skill labor analyses, its project staffing plan for Structural Fitters, and a letter from KOS supporting its Application.

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24 20 C.F.R. §655.32(a).
25 As previously discussed, the NOD did not raise the third deficiency listed in the Final Determination, failure to justify the dates of need requested and, as such, could not be included in the Final Determination or discussed in the decision. However, the Application is still deniable on grounds that the Employer did not overcome two deficiencies properly raised in the NOD.
The Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested Structural Fitters. 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 Denial issued by the CO was proper. Therefore, the Denial is AFFIRMED.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is AFFIRMED.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge
Washington, D.C.