DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from a request for review filed by Eastern Lubrication Systems, Inc. (“Employer”) of the Certifying Officer’s (“CO”) decision to deny its application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security (DHS). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);¹ 20 C.F.R. § 655.6(b).² Employers who seek to hire foreign workers under

this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, *Application for Temporary Employment Certification* (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

**BACKGROUND**

On May 3, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an amended application for temporary labor certification from Employer requesting certification for two laborers under the SOC code “Helpers-Installation, Maintenance, and Repair Workers,” for the period of July 20, 2021 to March 7, 2022. AF 413-430. Employer indicated that the nature of its temporary need was “peakload.” In regard to the nature of its temporary need Employer stated:

Eastern Lubrication Systems, Inc. is a company founded on 1992, our type of [ ] services are industrial services, which includes: install and handle replacement parts for lubrication[] equipment from several name brand manufacture[r]s, as Graco, Balcrank, Lincoln, Reelcraft and others, also lubrication system; machinery lubricators for automobile dealerships and services stations; portable and handheld lubricators: oil and grease pumps, pumps exchange, diaphragm pump and quick tank delivery. The president of the company has been the same while entire period of the company exists.

Schedule of operations throughout year: January to December except: New Year, Memorial Day, Labor Day, Good Friday and Christmas. From Monday-Friday (non weekends) …

The company actually has 3 permanent workers (including a secretary). The 2 permanent workers have been working for the company for a long 20 years. They have specific duties as permanent workers as: master mechanics and other one master installer.

The permanent workers activities differ from the activities that the 2 temporary workers (H-2B) will develop. The temporary work[er]s (2) that have [been] requested is for support [of] the permanent workforce that the company already

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2 On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security (“DHS”) jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

3 References to the appeal file will be abbreviated with an “AF” followed by the page number.
has, because there is a peak load need, which is not possible to attend with just the 2 permanent workers that the company already has, because they have specified duties and is necessary (2) temporary helpers for installation, and repair activities due the demand for short term, which will [ ] start on July 20, 2021 to March 7, 2022. This period of short demand is justified because the company has an increase in the demand of services that had not been presented in previous periods or in previous years …

The nature of our job[] is outside. The job sites ha[ve] been delaying due to many issues as weather, materials not being available and understaffed[.] Those circumstances have impeded our schedule to be on time, which was initially established for July 7, 2021[.] In consequence the start period of the employment is for July 20, 2021.

AF 418.

Employer also asserted that it had never requested H-2B workers previously in its 29 year existence, and that the temporary workers will not become part of its regular operations. *Id.*

The CO issued a Notice of Deficiency (“NOD”) on May 11, 2021, listing four deficiencies in the Employer’s application. AF 402-411. For the purposes of this appeal, only the first two deficiencies will be addressed.4 First, the CO found that Employer failed to “establish the job opportunity as temporary in nature.” 20 C.F.R. §§ 656.6(a) and (b). The CO explained that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” AF 406. The CO noted that an employer’s need is considered temporary if it is justified to the CO as one of the following: (1) a one-time occurrence; (2) a seasonal need; (3) a peak load need; or (4) an intermittent need as defined by DHS (Department of Homeland Security) regulations. The CO explained that “[i]n order to establish a peakload need the employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short term demand, and that the temporary additions to staff will not become part of the employer’s regular operation.”

The CO pointed out that the Employer’s application asserted that the temporary workers would perform different duties than the two permanent workers, one of whom was a master mechanic and one of whom was a master installer. As the duties of the requested temporary workers, “two helpers—installation, maintenance, and repair workers” differed from that of the permanent workers, the CO determined the Employer’s description of the job did not establish a peakload need. In addition, the CO stated the Employer had not explained what events cause the seasonal or short term demand that leads to its peakload need. AF 406-407.

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4 The two additional deficiencies pertain to Employer’s job order and Section F.a, Item 11 of the Application. (AF 408-411). The CO requested in the NOD that Employer modify the job order and Section F.a, Item 11 of its application. Although it is not clear whether Employer cured these two deficiencies, as they are not listed in the CO’s Final Determination-Denial, they are not relevant for the purposes of this appeal and will not be addressed further in this decision.
Accordingly, the CO requested that the Employer submit additional information and documentation including a statement describing Employer’s business history, activities, and schedule of operations throughout the year; an explanation regarding why the nature of the employer’s job opportunity and number of foreign workers reflect a temporary need and how the request meets one of the regulatory standards of need; a summary of all projects in the area of intended employment for years 2018, 2019 and 2020 calendar years which includes start and end dates of each project, worksite addresses and the number of workers used for each project as well as a list of all projects that contribute to the requested dates of need from July 20, 2021 to March 7, 2022; summarized monthly payroll reports for 2018, 2019 and 2020 and for January through April 2021 that identify the number of workers or staff employed, the total hours worked, and the total earnings received for both full-time permanent and temporary employees including an explanation of the data in the payroll records; as well as any other evidence and documentation that similarly serves to justify the dates of need being requested for certification. AF 407.

The CO noted the second deficiency as the Employer’s “[f]ailure to establish temporary need for the number of workers requested.” In regard to this deficiency, the CO stated that the employer had not established that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity, as required by 20 C.F.R. § 655.11(e)(3) and (4). The CO noted that the Employer was requesting certification for two helpers—installation, maintenance, and repair workers during the requested period of need. The CO determined that further explanation and documentation was necessary to establish Employer’s need for the requested workers. AF 408.

The CO directed the employer to submit further documentation including an explanation with supporting documentation as to why the employer is requesting two helpers—installation, maintenance, and repair workers for Glen Burnie, Maryland during the dates of need requested including contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for 2018, 2019 and 2020 and for January through April 2021 that identify the number of workers or staff employed, the total hours worked, and the total earnings received for both full-time permanent and temporary employees including an explanation of the data in the payroll records, as well as any other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

Employer responded to the Notice of Deficiency on May 24, 2021 submitting multiple documents along with a cover letter explaining the submitted documentation. AF 39-399. Documentation included a summary of projects for years 2018-2021, letters of intent and multiple proposals for upcoming projects, payroll records for 2018 through March of 2021 and photographs of the type of work the Employer performs.

On June 17, 2021, the CO issued a Final Determination Denial to the Employer, stating that the noted deficiencies remained. AF 26-38. In regard to the first deficiency, the CO acknowledged the information submitted by the Employer but determined that the information did not overcome the deficiency. The CO noted that Employer’s application indicated that the requested workers were for a position it had not needed before and that the Employer’s response to the NOD confirmed that this application is for a new position for the employer. As the CO
determined that the Employer did not establish that it regularly employs permanent workers to perform the services or labor of “ Helpers—Installation, Maintenance, and Repair Workers,” it did not meet the definition of a peakload temporary need. The CO also determined that Employer’s statements proved that its need is based on work contracts received from its clients anytime during the year rather than for a peakload period.

The CO also noted that the summary listing of projects failed to include the start and end dates of each project or how many workers were required and therefore it did not establish a peakload period. Further, the CO determined that the information regarding the letters of intent for the requested dates of need from July 20, 2021 to March 7, 2022 did not contain information such as start and end dates necessary to establish the employer’s attested peakload period. Also the CO determined that the payroll records did not indicate the hours of work performed by the employees and also were not compiled in a monthly format as requested. The CO also noted that there were no records for the requested position of Helpers—Installation, Maintenance, and Repair Workers, as this was a new position, while observing that the positions of the permanent workers appeared to be year round positions. The CO also acknowledged the 31 photos submitted by the Employer but determined they were not useful in establishing its attested peakload period of need.

In regard to the second noted deficiency regarding Employer’s failure to establish the number of workers requested, the CO again acknowledged the information submitted but determined that the Employer’s explanation and documentation did not establish that the number of worker positions and period of need are justified and therefore did not overcome the deficiency. AF 36-38.

As Employer failed to overcome the noted deficiencies, the CO denied the Employer’s application for temporary labor certification.

On June 29, 2021, Employer made a timely request for administrative review of the CO’s determination. AF 1-25.

By Order issued on July 21, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before July 30, 2021. Neither the Employer nor the CO submitted a brief in this matter.

**SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:
(1) Affirm the CO’s determination; or
(2) Reverse or modify the CO’s determination; or
(3) Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

STANDARD OF REVIEW

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard\(^5\) to its review of the CO’s determination in H-2B temporary labor certification cases. See Brook Ledge Inc., 2016 TLN 00033 at 5 (May 10, 2016); see also J and V Farms, LLC, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the CO properly denied the Employer’s temporary labor certification application due to:
1) Employer’s failure to meet its burden of establishing its temporary need for “Helpers—Installation, Maintenance, and Repair Workers” on the basis of a “peak load” standard of need; and

2) Employer’s failure to meet its burden of establishing a bona fide need for the number of workers requested.

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii). This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

\(^5\)Similarly, judicial review under the Administrative Procedure Act provides that an agency’s actions, findings and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2).
(8 C.F.R. §214.2(h)(6)(ii)(A)).

The DHS regulation further states in regard to the 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 peakload need, or an intermittent need.

(8 C.F.R. §214.2(h)(6)(ii)(B)).

The Employer bears the burden of establishing why the job opportunity and number of workers requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). See, e.g., Alter and Son General Engineering, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need). An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §655.11(e)(3) and (4). See Roadrunner Drywall, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need).

In this case the Employer is alleging that it has a temporary need for two workers under the SOC job title of “Helpers—Installation, Maintenance, and Repair Workers” for the period of July 20, 2021 to March 7, 2021 based upon a peakload need. To establish a peakload need the applicable DHS regulation provides:

[t]he petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short term demand, and that the temporary additions to staff will not become part of the petitioner’s regular operation.


After reviewing the Employer’s supporting information the CO determined that based on the documentation submitted the Employer had not proven a peakload temporary need. Specifically, the CO cited the regulatory provision noted above which requires that the Employer “must establish that it regularly employs permanent workers to perform the services or labor.”

The CO noted in the NOD that Employer stated in its application that the temporary workers would perform different job duties than those of its two permanent workers who were a master mechanic and a master installer. The CO cited Employer’s application at Section B, Item 8 of ETA Form 9142 which indicates the following:
The company actually has 3 permanent workers (including a secretary). The 2 permanent workers have been working for the company for a long 20 years. They have specific duties as permanent workers as: master mechanics and other one master installer.

The permanent workers activities differ from the activities that the 2 temporary workers (H2B) will develop. The temporary works [sic] (2) that have been requested is for support of the permanent workforce that the company already has, because there is a PEAK LOAD need, which is not possible to attend with just the 2 permanent workers that the company already has, because they have specified duties and is necessary (2) temporary helpers for installation, and repair activities due the demand for short term, which will be … July 20, 2021 to March 7, 2022.

AF 406 quoting ETA Form 9142B at AF 418.

The CO noted in the Final Determination that the Employer confirmed in its letter responding to the Notice of Deficiency that the job duties of Employer’s current workforce are different than those of the two requested temporary workers. Employer stated, “The company has not hired any provisional workers in any of the periods indicated as helpers-maintenance and repair workers, nor in previous years. The workers that the company already has had been permanent full-time workers for a long 20 years.” AF 20. The CO determined that the payroll documentation submitted by the Employer supported this statement.

BALCA case law interpreting the H-2B regulations supports that in order to prove a peakload temporary need, the Employer must prove that it has employed permanent workers in the occupation that it seeks temporary workers. D & R Supply 2013-TLN-00029 (Feb. 22, 2013) (Employer failed to establish its peakload need when it did not address whether it had previously employed permanent workers in the position of stock clerk, the position for which it requested temporary H-2B workers on a peakload basis). Thus the CO properly determined that Employer failed to establish its peakload need because it had not met the regulatory requirement that “it regularly employs permanent workers to perform the services or labor” for which the workers are requested which in this case is for the SOC job title of “Helpers—Installation, Maintenance, and Repair Workers.”

The CO also determined that the Employer had not explained what events cause the seasonal or short term demand that has caused its alleged “peakload need.” In its response to the NOD the Employer stated:

Our activities do not depend on a particular season of the year, the company provides the services described above depending on the demand, which means another company requires our services for a special purpose according with the company’s services described above. Each service varies depending on the magnitude of the contract, the type of the services required, and the size of the
work to be carried out, for example a service can be completed in days or weeks and others in months…”

AF 49.

The CO concluded that Employer’s statement did not meet the definition of a peakload temporary need but rather, shows that its need is based on work contracts received from its clients anytime during the year. The CO also determined that the documentation submitted by the Employer in the form of a summary listing of projects for years 2018-2020 failed to show start and end dates of projects, worksite addresses and numbers of workers used for each project. Therefore the CO determined the documentation failed to establish or support a peakload need. In regard to the submitted project chart for the Employer’s upcoming work during the alleged period of peakload need, the requested information was also missing. The CO reasonably concluded that “providing the end date of each project as instructed is required in order to document the amount of work occurring throughout the year to establish the employer’s attested peakload period of need.” AF 34.

A review of the documentation provided by the Employer supports the CO’s determination that Employer failed to document its temporary peakload need. Although the Employer attempted to provide documentation requested by the CO, the information and explanation submitted does not support a peakload need during the requested period of need of July 20, 2021 to March 7, 2022. Employer has not shown that its alleged period of need is based on a temporary peak load period as opposed to an ongoing need for labor. In addition, Employer has not made any legal argument in either its request for review, or in a brief, as to why the undersigned should find that it has met its burden of proof in establishing its temporary need. Therefore Employer has failed to prove a temporary peakload need.

The CO’s determination that Employer has failed to support a bona fide need for the number of workers requested is also supported by the record. The undersigned finds that the Employer has failed to provide the documentation and explanation requested by the CO, which would have allowed the CO to reasonably determine whether the request for two temporary workers represents a “bona fide job opportunity” as required by 20 C.F.R.§ 655.11(e) (3) and (4). See Roadrunner Drywall Corp. 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need). See also North Country Wreaths, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word”); and Empire Roofing, 2016-TLN-00065 (Sept. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of document-on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers”). Accordingly, the CO’s denial of the Employer’s application for failure to establish its temporary need for the number of workers requested is supported by the record.
For the reasons stated above, Employer has failed to meet its burden of establishing its temporary peakload need for workers during the requested period of need nor has it proven a bona fide need for the number of workers requested.

CONCLUSION

Employer has failed to meet its burden of establishing its temporary peakload need for two “Helpers-Installation, Maintenance, and Repair Workers,” for the period of July 20, 2021 to March 7, 2022. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge