DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h)\(^1\) and 20 C.F.R. Part 655 Subpart A. Employer filed a timely request for administrative review of the denial of its Employment and Training Administration (ETA) Form 9142B application for temporary labor certification for four temporary nonagricultural workers.\(^2\)

2. Procedural History and Findings of Fact.

   a. On January 3, 2021, Employer filed a Form ETA-9142B application for temporary labor certification with the Certifying Officer (CO) at the Chicago National Processing Center (CNPC) for four temporary Concrete Form Setter/Laborers to perform work from April 1, 2021, through November 30, 2021, based on Employer’s seasonal need. Employer indicated on its application that it was represented by Sheila Gray at Labor Made Easy (“Agent”). (AF 35-52)\(^3\)

   b. On February 10, 2021 and February 18, 2021, the CO issued Notices of Deficiency

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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 to replace the regulations at 20 C.F.R. Part 655, Subpart A established by the “2008 Rule” found at 73 Fed. Reg. 78020. See 80 Fed. Reg. 24042, 24109 (2015 IFR). The procedures outlined in the 2015 IFR, and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR, and apply to this appeal.

\(^3\) References to the Appeal File are by the abbreviation AF and page numbers.
c. On March 2, 2021, the CO issued a Notice of Acceptance (NOA) of Employer’s application seeking temporary labor certification. The NOA provided instructions for recruitment of U.S. workers and specified that “the employer must prepare, sign, date and submit a written recruitment report to our office by March 26, 2021.” (AF 13-19)

d. On March 29, 2021, the CO issued an email titled “Notice of Intent to Respond” to Employer and Employer’s Agent noting a deficiency in Employer’s application which prevented further processing as follows: “The Notice of Acceptance (NOA) letter for the above named employer indicated that a recruitment report was due by March 26, 2021 but has yet to be received. Please submit the recruitment report not later than April 5, 2021.” (AF 11-12)

e. On April 6, 2021, the CO issued its final determination letter denying Employer’s application because it had not received Employer’s recruitment report required by 20 C.F.R. § 655.48(a). The final determination letter noted that Employer’s recruitment report was due March 26, 2021, an email was sent on March 29, 2021 requesting that Employer submit its recruitment report, and to date no recruitment report had been received. (AF 8-10)

f. On April 20, 2021, Employer’s Agent filed a timely request for administrative review and attached supporting documentation on behalf of Employer. In its response, Employer’s Agent admits that the CO’s NOA issued on March 2, 2021 required Employer’s recruitment report be filed on March 26, 2021. However, Employer’s Agent states that she has been in the hospital on a recurrent basis and was in the hospital during this period of time. Employer’s Agent further asserts that Employer received the CO’s March 29, 2021 email requesting the recruitment report be submitted no later than April 5, 2021 and forwarded its “tear sheets” to Employer’s Agent on April 2, 2021. However, Employer’s Agent represents that it did not receive the “tear sheets” until they were resent by Employer after receiving the CO's final determination letter denying its application. Finally, Employer’s Agent asserts that Employer has not received nonimmigrant workers for the last couple of years and is behind on its contractual obligations because it has been unable to find temporary workers during its dates of need. (AF 1-7)

g. On April 23, 2021, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. On this same date, the CO filed the Appeal File. On April 27, 2021, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines. On April 28, 2021, counsel for the Solicitor notified the undersigned that the Solicitor’s Office would not file an appeal brief on behalf of the CO and would rely on the CO’s Notice of Denial in this matter.

3. **Applicable Law and Analysis.**

   a. **H-2B Program and the Recruitment Report.** The H–2B nonimmigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Employers who seek to hire foreign workers through this program must first apply for and receive a “labor
A temporary labor certification reflects a determination that there are not sufficient qualified and available U.S. workers to perform the temporary labor and that employment of the H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Id. at 655.1(a).

If the CO determines the employer’s application for temporary labor certification is complete, the CO will issue a Notice of Acceptance to the employer, directing the employer to engage in recruitment of U.S. workers and requiring the employer to submit to the CO a report of its recruitment efforts. Id. at 655.33. “The recruitment report must be submitted by a date specified by the CO in the Notice of Acceptance” and must include certain detailed information concerning the employer’s recruitment efforts. Id. at 655.48(a).

b. Standard of Review. BALCA’s standard of review in H-2B cases is limited. Specifically, 20 C.F.R. § 655.61 provides that 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 was actually submitted to the CO in support of the employer’s application. After considering the evidence of record, BALCA must: (1) affirm the CO’s decision to deny temporary labor certification; (2) direct the CO to grant certification; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e)(1)-(3). BALCA may overturn a CO’s decision if it finds the decision is arbitrary or capricious. See Brook Ledge, Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016); J and V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016). Burden of Proof. The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361; Eagle Indus. Prof’l Servs., 2009-TLN-00073 (July 28, 2009); D & R Supply, 2013-TLN-00029 (Feb. 22, 2013) (employer bears burden of proof to establish its eligibility to employ foreign workers under the H-2B program). A bare assertion without supporting evidence is insufficient to carry an employer’s burden of proof. AB Controls & Tech., Inc., 2013-TLN-00022 (Jan. 17, 2013).

d. Analysis. Here, Employer admits it did not submit the required recruitment report to the CO prior to the CO issuing the final determination denying Employer’s application. In failing to file the recruitment report, Employer failed to comply with the applicable regulations requiring this filing by the deadline established in the NOA. See 20 C.F.R. § 655.33 and 655.48. Without Employer’s recruitment report, the CO could not evaluate Employer’s recruitment efforts and determine if there were insufficient U.S. workers available to perform the temporary labor. Consequently, the CO properly denied the Employer’s application.

With its request for administrative review, Employer’s Agent submitted documentation not submitted to the CO prior to the date of its determination, including Employer’s recruitment report. Employer’s Agent asks that Employer’s recruitment report be accepted and application granted. The regulations governing BALCA’s administrative review are clear. The employer’s request for review “[m]ay only contain legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued.” And in reviewing the CO’s determination, BALCA may only consider the appeal file, the request for review and any legal briefs submitted. See 20 C.F.R. § 655.61. Accordingly, the undersigned cannot consider the documentation
submitted with Employer’s request for review as such was not submitted to the CO before the date of the determination letter.

Employer’s Agent also provided as explanation for its failure that Employer’s Agent was hospitalized during the time period the recruitment report was due and did not receive Employer’s email transmission of its “tear sheets” until after the CO denied Employer’s application. Although the undersigned is sympathetic to those unfortunate circumstances, the explanation does not qualify as an exemption to the requirement or justify Employer’s failure to follow the clear regulatory requirements necessary to obtain temporary employment certification. The explanation also does not warrant a finding that the CO acted arbitrary or capricious.

4. **Ruling.** Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED this day.

TRACY A. DALY
Administrative Law Judge