BALCA CASE NO.: 2021-TLN-00031
ETA CASE NO.: H-400-21001-991006

In the Matter of:

Craghead Building Company, Inc.,
Employer.

DECISION AND ORDER REVERSING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This appeal is before the Board of Alien Labor Certification Appeals on Craghead Building Company, Inc.’s application for a certification under the H-2B nonimmigrant alien worker program.\(^1\) After a review of the application, a certifying officer at the Department of Labor’s Employment and Training Administration notified Employer of deficiencies in its application. Employer filed supplemental information. The certifying officer found the supplements insufficient and denied the application. Employer timely requested BALCA administrative review.

BALCA review of denials of H-2B applications is limited to “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e).\(^2\) I will REVERSE the certifying officer’s denial of the labor certification application and find the application sufficient to continue processing accordingly.

Findings of Fact

Craghead Building Company is a concrete contracting company in the Salt Lake City, Utah area. AF 96.\(^3\) The company primarily works on roads. Given the climate, they perform the work with a seasonal peakload beginning in the spring and continuing through the fall. Craghead states that this is typical for the industry.\(^4\) Id. They rely on temporary, seasonal workers every year when

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\(^1\) See Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

\(^2\) The request for review may contain only legal arguments and evidence that was submitted to the certifying officer prior to issuance of the final determination; no new evidence is permitted. 20 C.F.R. § 655.61(a)(5).

\(^3\) “AF” refers to the Appeal File.

\(^4\) Employer explained in their application that this is because during the winter months, freezing temperatures prevent them from being able to pour concrete. AF 96.
the weather permits the higher volume of work than in the cold months. In the late fall or early winter, they routinely lay off about a third of their staff. *Id.*

Employer applied for 20 CONCRETE FINISHING(s), SOC Occupational Title, Cement Masons and Concrete Finishers, under the H-2B nonimmigrant alien worker program. *AF 8; 91.* In their initial application, among other things, they included their payroll data for 2018 and 2019. *AF 115-129.* They also included a payroll summary from January 1, 2020 through June 30, 2020, which included gross wage data. *AF 112-113.*

In the application, Employer described its peakload need from April 1, 2021 through November 15, 2021, as follows:

> Our business has doubled during the peak season from 2019 to 2020 (Q2 2019 payroll reported $433,722 with Q2 2020 payroll reporting $717,503). For the 2020 Season, we requested 10 H-2B workers. For 2021 we are projected to not only maintain our current business, but to also continue growing. Our current full-time and temporary, seasonal staff are unable to assume the workload that we expect for the 2021 fiscal year. Based upon recent, current and projected business volume, we anticipate needing 20 temporary workers to perform concrete construction for the upcoming season. (AF 96, ETA Form 9142B.)

Employer also described its recruitment efforts and stated that, despite those efforts, it was unable to take on available workload because of being short-staffed in the peak season. *Id.* Employer confirmed that the requested workers would not become part of its year-round operation, as their peak season winds down in November, and the permanent staff handles the maintenance calls during the winter months. *Id.*

*Notice of Deficiency.* The certifying officer issued a Notice of Deficiency on February 10, 2021. *AF 84.* The Notice identifies three deficiencies. *AF 87-90.* Two are clerical, and the certifying officer permitted Employer to provide “written permission to make any corrections to the application on [their] behalf.” *AF 87-90.* Employer provided the written permission, and these deficiencies are not at issue on appeal.

The remaining deficiency was that Employer failed to establish the temporary need for the number of workers requested, citing 20 CFR § 655.11(e)(3) and (4). The certifying officer explained that in the current application, Employer requested 20 concrete finishers, while in the previous year’s application (2019), Employer requested only 10 for a similar time period. The certifying officer stated that the Employer did not sufficiently explain why it needed twice as many H-2B workers. *AF 87.*

The certifying officer required that Employer submit supporting evidence to establish that the number of worker positions and period of need were justified and that the request represented a “bona fide job opportunity.” *Id.* In particular, the certifying officer required Employer to provide (along with any other material it chose to supply):
1. An explanation with supporting documentation of why the employer was requesting 20 Concrete Finishers for Riverton, UT during the dates of need requested, including supporting documentation and an explanation of why employer was requesting an additional 10 workers this season. Id.

2. If applicable, documentation supporting the need for these 20 workers, such as contracts and letter of intent, etc., that specify the number of workers and the dates needed. Id.

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. This documentation was to be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system. Id.

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

5. Any other evidence or documentation that would justify the number of workers requested, if any. Id.

**Employer’s response.** On March 1, 2021, Employer replied. AF 66. It stated that, “Since [its] last filing in for fiscal year 2020, Employer has gained substantial contracts that require the help of an additional 10 temporary workers.” Id. [sic]. Employer provided the following documentation:

- A contract with Mountain View Corridor Constructors, which they believed showed an additional $7.5 million of work through three change orders signed in the fall of 2020. Employer stated that this work would be employer’s primary focus in the 2021 season. Id.

- Employer’s gross income and net income for 2019 and for 2020, which Employer stated showed a “growth rate of three-fold.” Employer explained that given the expected sales in 2021, employer was “modestly” requesting 20 workers. Id.

- Clarification that employer’s end date of need is 11/15/21. Id.

**Contract with Mountain View Corridor Constructors.** Employer submitted copies of subcontracts it was awarded with the Utah Department of Transportation and with Mountain View Corridor Constructors. The subcontract with Mountain View Corridor Constructors was first entered into on April 16, 2020, and totals $1,814,692.00. AF 69-70. Change orders added, respectively: $17,500 (Aug. 10, 2020); $550,229 (Oct. 9, 2020); $465,612 (Oct. 29, 2020). With the change orders, the total value of the subcontract was $2,848,033.20. (AF 72, 74, 76.)

**Profit data for 2019 and 2020.** Employer submitted a Profit & Loss summary for calendar 2019. It shows a gross profit of $4,137,682.94, and a net income of $527,783.05. AF 77-78. An
income statement for calendar 2020 shows total contract income of $10,778,823.19; gross profit of $3,632,857.77; and net income of $1,550,048.48.⁵ AF 79, 81.

Denial of application. On March 5, 2021, the certifying officer denied the application, finding that Employer failed to establish a temporary need for the number of workers requested, and citing 20 C.F.R. § 655.11(e)(3) and (4). AF 54, 57. In particular, the certifying officer found (1) that Employer did not adequately explain the need for 20 workers this season, when in the previous season, 10 were enough, and (2) that Employer did not provide the documentation requested in the notice of deficiency. AF 57-58.

Looking to the evidence Employer submitted, the certifying officer noted that Employer’s contract with Mountain View Corridor Constructors “did not include start and end dates and [did] not [include] estimates of how many Cement Masons and Concrete Finishers will be needed for each project.” AF 59. The certifying officer also found that the income data was insufficiently tied to the amount of work Employer needed the requested workers to perform.

Appeal. Employer timely appealed. AF 1. It argues that the certifying officer failed to consider the payroll records submitted with their initial application that show that their payroll increased by 19 workers during the peak season in 2018 and by 20 workers during the peak season in 2019, “justifying a need of at least 20 temporary workers in 2019 alone…” AF 2-3. They also stated that a review of the payroll records demonstrates that their payroll “doubled” from 2019 to 2020 during the peak season, demonstrating their growth and anticipated need for at least twice as many workers for the 2021 peak season. Id. Employer observed that the written contracts in the industry “rarely dictate the number of workers” to be involved in performing the contracted work. AF 3. Finally, Employer minimizes the certifying officer’s reliance on the income data reflecting Employer’s entire operation and not being limited to income derived from work done by the requested temporary workers. Instead, Employer emphasizes that the income data shows a “three-fold increase in sales from 2019 to 2020” explains the need for additional workers.” Id.⁶

Discussion

Standard of review. The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord a certifying officer’s determination. When the certifying officer’s determination turns on the Department’s (through ETA) long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (describing deference courts give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer’s determination unless it is arbitrary, capricious, or inconsistent with the ETA’s established policy interpretation. But, absent ETA’s long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer’s denial de novo. On the present record, I will review this application de novo.

⁵ These calculations appear to be pre-tax; federal and state taxes are shown for both years as $0.00.

⁶ Employer also explained that, while it submitted payroll records for 2020, its accountants were unable to break down the data by number of workers; rather, only the total amount paid per quarter was reflected. AF 1.
**H-2B program requirements.** An employer seeking certification under the H-2B program must “establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a); 8 C.F.R. § 214.2(h)(6)(ii)(B). The employer’s need is temporary if it is: “a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.” 20 C.F.R. § 655.6(b).

**Peakload need.** An employer establishes a “peakload need” if it shows 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 a part of the petitioner’s regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

Here, Employer is a concrete contracting company. AF 96. There is no dispute that it has a recurring seasonal peakload during the months that the Utah climate allows outdoor work with concrete and that this constitutes the majority of Employer’s work. AF 96. The question is not the need for workers under the program; it is the number of workers needed. 7

**Number of H-2B worker positions.** An employer must demonstrate that the number of positions and period of need are justified and that the request represents a *bona fide* job opportunity. 20 C.F.R. § 655.11(e)(3)-(4).

In its initial application, Employer submitted payroll records from 2018 and 2019. The records show a seasonal peakload need for significantly more workers than needed during the off-season. Considering the Mountain View Corridor contract (including the change orders), together with Employer’s statement that the work performed on that contract would be the focus of Employer’s work in 2021, Employer has offered reasonable evidence to support an expectation that 10 more

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7 I find from the payroll data that, during its 2018 and 2019 peak seasons, Employer needed more than 20 additional workers than it usually employed outside the peak season. Though Employer’s accountant was unable to provide an equivalently detailed breakdown for 2020, Employer’s gross wage records show that its second quarter gross wages for 2020 were almost 1.7 times its first quarter gross wages. This suggests that the number of workers employed in the second quarter of 2020 was significantly greater than that of the first quarter of 2020.

Employer’s payroll records, based on my analysis, demonstrate the following:

- **January 1-March 31, 2018:** 46 workers; $424,911.19 gross wages
- **April 1, 2018-June 30, 2018:** 66 workers; $775,368.01 gross wages
- **July 1, 2018-September 30, 2018:** 58 workers; $762,424.85 gross wages
- **October 1, 2018-December 31, 2018:** 51 workers; $676,648.96 gross wages

- **January 1-March 31, 2019:** 36 workers; $408,401.99 gross wages
- **April 1, 2019-June 30, 2019:** 56 workers; $433,722.12 gross wages
- **July 1, 2019-September 30, 2019:** 52 workers; $711,474.65 gross wages
- **October 1, 2019-December 31, 2019:** 48 workers; $685,123.66 gross wages

- **January 1, 2020-March 31, 2020:** Gross wages: $422,267.54
- **April 1, 2020-June 30, 2020:** Gross wages: $717,503.94

AF 112-113, 115-129.

I therefore conclude from the record evidence that Employer demonstrated that its business consistently experiences a seasonal peakload need for workers in the category sought.
H-2B workers will be needed in 2021 than Employer needed in the preceding year. The need for future work always involves, to some extent, a prediction; no effort to produce exactitude likely will succeed. The increase in gross and net income also supports this conclusion. Net income nearly tripled in 2020 over 2019, indicating the need for more workers as the company grows. I am persuaded, given this evidence, that Employer has a need for 20—rather than 10—H-2B workers for this coming season and that it seeks to fill *bona fide* job opportunities for that season.

Accordingly, while it was entirely appropriate for the certifying officer to demand additional specific information from the Employer, the Employer’s response addressed the issues presented in the best way that Employer could. Employer’s application—as supplemented—remedied the deficiency the certifying officer noted, and the application should have been accepted, not denied.

**Order**

For the foregoing reasons, the Certifying Officer’s final determination that the Employer failed to establish a temporary need for the number of workers requested is REVERSED. This matter is REMANDED for further processing consistent with this Decision and Order.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge