In the Matter of:

PENINSULA PAINTERS,
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This appeal is before the Board of Alien Labor Certification Appeals on Peninsula Painters’ application under the H-2B nonimmigrant alien work program. After a review of the application, a certifying officer at the Department of Labor’s Employment and Training Administration denied Employer’s 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). I will AFFIRM the certifying officer’s denial of the labor certification.

Findings of Fact

Peninsula Painters is a painting business based in Port Angeles, Washington. AF 62-63. The company primarily does painting, which includes caulking, sanding, priming, and the painting of ceilings, walls and trimming on interiors. AF 65.


Employer stated:

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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. 20 C.F.R. § 655.61(a)(5).

3 “AF” refers to the Appeal File.
I own and operate a painting business. Since Covid restrictions have lifted, I am receiving more work than I can handle. That is why I’m in desperate need of help. If I do not receive help, I will lose[sic] many of these jobs and money, and I will not get the chance to serve these customers again.

AF 63. Employer based its request on an asserted temporary seasonal need. AF 71.

Notice of Deficiency. On July 23, 2021, the certifying officer issued a notice of deficiency. AF 53-62. The notice identified six deficiencies, citing the applicable regulations. Four of the deficiencies were clerical, and Employer timely remedied them; they are not at issue on appeal. I discuss the two remaining deficiencies below.

First, the certifying officer found that Employer failed to establish the job as temporary within the meaning of 20 C.F.R. § 655.6(a) and (b). The certifying officer found that Employer did not explain “how the need for the requested workers is traditionally tied to a season of the year by an event or pattern.” AF 57. The certifying officer noted that, “the employer has established that there’s an increase in work due to lifted COVID restrictions” and that it “has not been able to hire adequate help.” But the certifying officer found that “a labor shortage alone does not determine a seasonal temporary need.” Id.

Second, the certifying officer found that Employer failed to establish the temporary need for the number of workers requested, citing 20 C.F.R. § 655.11(e)(3) and (4). AF 58. The certifying officer noted that Employer did not explain how it determined that its need was for one more painter rather than some other number. Id.

The certifying officer required Employer to submit additional evidence to address these two deficiencies. AF 57-58.

Employer’s response to Notice of Deficiency. On July 27, 21 Employer responded. AF 33-37. It stated:

Deficiency 1 Correction…My business is year-round. Therefore, I am always busy. I found that my business is growing substantially. Every season has work incoming… Painting is year-round, inside and out. Winter is considerably slower. Spring and summer are the busiest times of the year. Since covid restrictions have lifted, and [sic] am continuously getting calls for jobs. That I will be unable to accept without receiving help… In the recent years my influx of incoming jobs has increased. And I am unable to get to a large majority of them, as I do not have enough time. My request for a worker will help me reach many more clients, and finish more incoming jobs. I just need a worker for the time being. And when my jobs have been completed, I will no longer require their services.

AF 34.
Deficiency 2 Correction… I need someone to help me do the tasks I am unable to do currently, because of health reasons. I do not need more than one person; I just need an extra hand. I am still able to accomplish a majority of the job, without the need of multiple workers. I need this worker during my dates requested, because I have a backup of clients I want to get to before winter. So, my dates are needed for the soonest time to complete them… I currently have someone lined up and ready to hire. Her name is Marvie, and she is my sons [sic] fiancé. She has a great track record for her work, and would be a great asset to my company. I have known her for many years, and she is trustworthy. As stated before, I do not need multiple workers. I have chosen her to help me with things I can no longer do.

AF 35-36.

Final Determination. On September 1, 2021, the certifying officer denied the application based on both deficiencies. AF 22-31. On the failure to show that the job was temporary in nature, the certifying officer noted that Employer admitted that the work could be performed year-round, inside and outside. From this, the certifying officer concluded that the employer “had not detailed [how] the service or labor [was] tied to a season of the year by an event or pattern…” AF 26-27. As Employer had asserted that the need for the worker was temporary because it was seasonal but stated facts inconsistent with this, the certifying officer found that Employer had not cured the deficiency.

On the failure to establish the number of workers needed, the certifying officer found inadequate the Employer’s simple, unsupported statement that he only needed one worker. AF 30.

Appeal. Employer timely appealed. AF 1-6. In its request for review, Employer explained that it only needs one painter because it cannot afford multiple employees and that the work it needs done is suitable for one extra person. With respect to the seasonal nature of its work, it stated:

The seasons that my work are tied to are year round, but the times I need the most help are around summer and spring. Fall is slower, and winter is usually the slowest. However, i [sic] have a backlog of jobs still waiting for me this year. So fall and winter will be my busiest times of this year. I currently do not need help for the next summer, if i [sic] can get to all of my jobs this year. So i [sic] need help this fall and winter, and i [sic] need my worker here during these times. I currently do not plan on having them continue past next summer.

AF 3.

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4 The certifying officer also found that Employer had already hired someone for the job. AF 29.

5 The certifying officer found that Employer adequately explained not submitting payroll records because Employer has no employees. But Employer offered no other documentation—payroll or otherwise—to establish the temporary need. AF 28.
Employer disputed that it had already hired someone for the position. AF 4-5. It pointed to its previous submission as stating only that it had someone in mind who could be hired if the H-2B qualification process was successful. AF 5. Employer reiterated that it has a backlog of jobs and that this fall and winter will be its busiest time of year. It stated that it will not need help next summer. AF 5-6.

Discussion

Standard of review. The regulations are silent about the deference the Board of Alien Labor Certification Appeals should accord to 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) (addressing deference courts must 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 need not determine the deference owed the certifying officer, for I would affirm the denial of the application even on the less deferential, de novo review.

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).

Seasonal need. To qualify as a seasonal need, the employer “must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

Here, Employer is a painting business. Employer applied for an H-2B worker based on a seasonal need, but in its initial application, it mentions nothing about the seasons. It attributes the need for an additional worker to an increase of work following the relaxation of COVID restrictions.

Responding to the CO’s notice of deficiency, Employer added that it would like to complete certain jobs before the winter. But that does not tie the work “to a season of the year by an event or pattern,” nor is it “of a recurring nature.” It does nothing to explain Employer’s admission that its work is “year-round, inside and out”—diametrically the opposite of seasonal.

Employer adds that winter is “considerably slower” and fall is the next slowest. But, to the extent this ties the need for workers to the seasons, it does not help Employer because Employer is requesting an extra worker for the fall and winter seasons, when it should have the least need for another worker. Finally, given that Employer now states a desire to finish the work before winter,
why is it that Employer states a need an extra worker for all of the winter months of 2021-22? The project should be complete before those months arrive.

I find that the certifying officer correctly found that Employer has not established a seasonal need. Nonetheless, I consider the possibility that Employer might have a temporary, one-time need related to the relaxation of COVID-related restriction.

One-time occurrence. To establish a temporary, one-time need, “The petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

An increase in demand for painting because of a relaxation of COVID restrictions conceivably could be shown as a one-time need. But, here, Employer has not shown a one-time need within the regulatory definition. First, Employer seems to hope it won’t need the additional worker after April 1, 2022, but a hope falls short of showing that the need in fact is of short duration. As COVID variants have appeared, restrictions have again tightened. In time, restrictions might be relaxed again. This could recur any number of times.6

I am unpersuaded that Employer has a need for an extra worker for the period for which it makes the request. The particular months Employer requests coincide with the times it ordinarily is least busy. Employer might well be able to do the work without another worker because, during the requested months, Employer’s current workforce will not be busy with routine projects (as it will be in the spring and summer). Employer does not submit documentation to establish its monthly (or quarterly) workloads in ordinary years (such as 2018 or 2019), along with documentation of the extra work it has been offered this coming fall and winter.7 From this information, it could be determined whether the added work this fall and winter would increase Employer’s workload beyond what the owner routinely does in summer and, if so, by about how much. I therefore find that the relaxation of COVID restrictions does not establish a temporary need based on a one-time occurrence.

Health concerns. Finally, Employer mentions that it needs someone to help with tasks that it is unable to currently do because of the owner’s health. This too might establish a one-time occurrence. But Employer does not specify whether the health reasons are temporary or permanent or whether they are one-time and of short duration or are chronic (remitting and recurring). Thus,

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6 Also, Employer states that its business is growing substantially. This suggests that the business might need more permanent employees for ordinary business reasons irrespective of COVID. It makes less likely that the hire of one additional worker would address a need that is temporary.

7 Employer states that it does not have information or documentation showing payroll for workers because it does not have employees; the owners are the workers. But the notice of deficiency specifically invited Employer to submit “other evidence and documentation that similarly serves to justify the dates of need being requested.” AF 58. Employer submitted nothing more.
if the owner’s health creates a temporary need, Employer failed to establish it.

Order

For the foregoing reasons, the Certifying Officer’s final determination that the Employer failed to establish the temporary, seasonal nature of the work for One Painter, SOC Occupational Title, Painters, Construction and Maintenance under the H-2B nonimmigrant alien worker program is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge