In the Matter of:

BALI EXPRESS SERVICES, INC.,

Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to Bali Express Services, Inc.'s ("Employer") request for review of the Certifying Officer’s ("CO") October 7, 2021 Final Determination in the above-captioned H-2B temporary labor certification matter.¹ The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 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 U.S. Department of Labor ("Department" or "DOL"). 8 C.F.R. § 214.2(h)(6)(iii). Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration ("ETA").

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On June 3, 2021, Employer filed an H-2B Application for Temporary Employment Certification ("Form 9142B" or "Application"), seeking certification to hire 25³ Heavy and Tractor-Trailer Truck Drivers, Standard Occupational Classification Code 53-3032.00. Appeal

³ It is not clear to me how many employees the Employer is seeking. The Application indicates a request for 10 workers. Appeal File ("AF") 474. The Employer’s Job Order indicates there is one “position”, and 25 “referrals.” AF 484. In the Notice of Deficiency ("NOD"), the CO states the Employer requested 25 Truck Drivers. AF 463. In its response to the NOD, the Employer does not refute the CO’s interpretation that there is a request for 25 Truck Drivers. AF 312-439. Thus, although the AF states the Employer’s Application requested 10 Heavy and Tractor-Trailer Truck Drivers, I will adopt the CO’s and Employer’s view that there is a request for 25 employees.
The Application stated that the period of temporary need begins on August 23, 2021, and ends on June 17, 2022. AF 474. On June 11, 2021, the CO issued a Notice of Deficiency (“NOD”) stating that the Application could not be accepted because there were nine deficiencies in the Employer’s application.\(^4\) AF 463 – 473.

**Summary of the NOD**

The first deficiency noted by the CO stated the Application failed to establish the job opportunity as temporary in nature. AF 463. More specifically, the CO acknowledged the Employer is a trucking company that handles cargo from San Diego, California, to Los Angeles, California, and that the Employer requested 25 Truck Drivers due to an unusual increment of shipment demands. See AF 463. The Employer stated it needs foreign drivers on a one-time basis to help “accomplish customer needs for this peakload season that is estimated to last 6-10 months.” AF 463. The CO stated this was an insufficient explanation, because “the Employer did not submit documentation to support a peakload temporary need.” AF 463. The CO also stated that the “employer has not explained what events cause the seasonal or short-term demand that leads to its peakload need.” AF 463. The Employer was requested to submit additional information including: payroll reports; number/pattern of deliveries over the previous two years that “identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Truck Drivers, the total number of workers or staff employed, total hours worked, and total earnings received”; and “contracts signed with the employer’s clients and a summarized report from these clients that supports the temporary need that occurs from August 23, 2021 through June 17, 2022, as part of the need for seasonal truck driving by Bali Express Services” among other pieces of information. AF 464.

The second deficiency noted by the CO was that the Employer failed to establish a temporary need for the number of works requested. AF 464. The CO stated the Employer violated 20 C.F.R. § 655.11(e)(3) and (4). AF 464. More specifically, the CO stated that “in accordance with 20 CFR § 655.11(e)(3) and (4), an employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity.” AF 464. The CO stated that the Employer failed to “indicate how it determined that it needs 25 Truck Drivers during the requested period of need.” AF 464. The Employer was requested to submit additional information including: an explanation clarifying how many workers the employer requests in the application\(^5\); how the Employer determined the number of workers requested; why the Employer is requesting the requested number of workers; “payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Truck Drivers, the total number of workers or staff employed, the total hours worked, and total earnings received.” AF 464-465.

\(^4\) Although nine deficiencies were indicated in the original NOD, the final determination only mentioned five. See AF 312 (the final determination ends the discussion after reviewing five deficiencies). As such, I will limit my discussion to the five deficiencies indicated in the final determination letter.

\(^5\) Parts of the Employer’s application indicated it needed “one” truck driver, and so the CO requested clarification of how many Truck Drivers the Employer is actually requesting. AF 464.
The third deficiency noted by the CO was that the Employer’s Application violated 20 C.F.R. §§ 655.15, 655.5, 655.18. AF 465. Specifically, the CO stated:

In accordance with Departmental regulations at 20 C.F.R. § 655.15(e), certification of more than one position may be requested on the Application for Temporary Employment Certification as long as all H-2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment. In accordance with Departmental regulations at 20 C.F.R. § 655.15(f), only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment. In accordance with Departmental regulations at 20 C.F.R. § 655.5, an area of intended employment is defined as “the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which certification is sought.”

Further, Departmental regulations at 20 C.F.R. § 655.18(b)(4) require the job order to indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements will likely have [to] perform the services or labor.

The employer indicated that work will be performed at multiple worksites in San Diego, CA of the ETA Form 9142. Specifically, in the employer’s submitted application at Section F. a, Item 4, Job Duties, the employer indicated that “Truck Drivers will pickup domestic cargo or empty loads from San Diego yard and take them to Long Beach Port or Santa Fe Rail Ramp using tractor-trailers to move 53’ dry box or containers.”

Based on this statement, it is clear that the workers will perform services or labor at multiple worksite locations. However, the information is insufficient to determine whether all of the workers sought will perform the services or labor at worksites in the same area of intended employment, as required. In addition, the information provided is insufficient to apprise prospective applicants of the geographic area of intended employment with enough specificity. Specifically, it remains unclear where the Santa Fe Rail Ramp is located.

AF 465-466.

The NOD stated that modifications were required such as:

The employer must specify the location of the “Santa Fe Rail Ramp.” In addition, the employer must submit instruction to the CNPC to modify its Appendix A so that Appendix A indicates all locations where the duties will be performed. If the work to be performed covers multiple cities and towns, then ‘Multiple Cities and Towns,’ may be listed in the City field of Appendix A for that county. Because
the employer cannot amend appending application itself, we require your written permission, as well as specific instructions regarding corrections to be made to the application on your behalf.

AND

The employer must provide evidence that any additional worksite locations are within normal commuting distance and are in the same area of intended employment, as defined by 20 C.F.R. § 655.5.

AND

The employer must provide additional information about the driving routes/schedules, including whether all workers begin and end each workday at the same location.

_The employer cannot make modifications to the form itself. We require your written permission to make any corrections to the application on your behalf._

AF 466 (emphasis in original).

The fourth deficiency noted by the CO was that the Employer failed to satisfy the obligations of H-2B employers. AF 466. The CO stated this was a violation of 20 C.F.R. § 655.20(e). AF 466. Specifically, the NOD stated;

In accordance with 20 C.F.R. § 655.20(e), each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

The employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H2B employers in the same occupation and area of intended employment.

Specifically, the employer indicated in Section F. a. Items 8 and 9. that it requires employees to have 24 months of training and 24 months of experience, which exceeds the standardized descriptor for this occupation in O*Net. Furthermore, in Section F.a, Item 11 of the ETA Form 9142, the employer indicates “Minimum 2 years of experience.” O*Net indicates that up to 12 months of experience, training, and education is normal and accepted for the occupation of Heavy and Tractor-Trailer Truck Drivers.

AF 466.

The NOD requested additional information that establishes the “job opportunity is a full-time temporary position with required qualifications that are bona fide and consistent with the
normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.”  AF 466-467. The NOD specifically requested “Documentation which demonstrates that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment; and…A letter detailing the reasons why 24 months of training and 24 months of experience\(^6\) is required by the employer.”  AF 467. Alternatively, the Employer “many amend its experience and training requirement throughout its application to be no more than 12 months of experience and training.”  AF 467.

The fifth deficiency noticed by the CO was that the employer failed “to satisfy the obligations of H-2B employers.”  AF 467. The CO stated

in accordance with … 20 C.F.R. § 655.20(e), each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation of intended employment.

The employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

The job order the employer submitted indicates a minimum age requirement of ‘26 years old’. The employer did not indicate the age requirement on the ETA Form 9142.

The requirement does not appear to be normal and accepted for the occupation of Truck Drivers and is potentially unlawful. The employer did not provide any supporting documentation to establish that the age requirement is consistent with the normal and accepted qualifications for the position requested.

AF 467.

The NOD requested additional material including “documentation which demonstrates that the employer’s requirement for the job opportunity is consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment”; and a “letter detailing the reasons why the requirements listed above indicated on the employer’s job order and that employees must speak, read, understand and write perfect Spanish are bona fide and consistent with normal and accepted requirements for the specific occupation listed on the employer’s ETA Form 9142.”  AF 468.

\(^6\) This is inconsistent with what was stated on the Application. The Employer stated 24 months of “work experience” is required, but 0 months of training is required.  AF 476.
Summary of the Employer’s Response to the NOD

On August 12, 2021, Employer submitted a response to the NOD. AF 312-439.

In reference to first deficiency, “failure to establish the job opportunity as temporary in nature”, the Employer states it needs “to hire new Truck Drivers in a ‘temporary’ basis to help us transport loaded/empty trailers in order to accomplish new and current customer needs for peakload season, estimated to last 6-10 months.” AF 313. The Employer continues “this will be a ‘temporary’ employment only and these workers won’t be part of our regular staff, as we regularly employ permanent workers in the USA to perform such duties, but due to an increment in our operations, we are in the need of to employ at least 10 more new Truck Drivers.” AF 313. The Employer also included information that is intended to support this statement.7 AF 313-394.

In response to the second deficiency, “failure to establish temporary need for the number of workers requested”, the Employer stated it wanted to adjust the number of workers requested to 10 foreign truck drivers instead of the 25 previously requested. AF 395.

In regards to the third deficiency, “area of intended employment”, the Employer stated the “location of the Santa Fe Rail Ramp is 4341 E. Washington Blvd., Commerce, CA. 90023” and then provided a list of locations where duties would be performed. AF 423. The Employer requested the Chicago NPC to amend/modify Appendix A of the Application to include this list of work locations. AF 423.

In regards to the fourth deficiency, “failure to satisfy the obligations of H-2B employers”, the Employer “would like to confirm that it requires employees to have 24 months of training or experience. The justification for the required experience is that our current liability and full coverage commercial insurance8 requires that the insured employees have at least 24 months of experience as truck drivers.” AF 424.

In regards to the fifth deficiency, “failure to satisfy the obligations of H-2B employers”, the Employer stated it “would like to amend the minimum age requirement to 25 years old and 2 years of experience as a truck driver” due to the Employer’s obligations for its insurance contract. AF 426. The Employer also stated it would like to remove the Spanish language requirement, and gave permission to the Chicago NPC to amend the experience requirements to reflect that change. AF 426.

Summary of the Final Determination

On October 7, 2021, the CO issued a Final Determination denying the Application. AF 299-311.

7 These documents include payroll reports for the “last two years and a report of the number of deliveries made over the course of this two years.”; “a report of the number/pattern of deliveries over the course of two previous calendar years”; and a “summarized monthly list from Bali Express Services of the previous calendar year and up-to date of current year that indicates the number of truck loads that leave the main worksite for deliveries to other locations for this temporary seasonal truck driving need.” AF 314.

8 The Employer’s insurance states “all drivers must be at least 25 years of age and must have at least 2 years of verifiable commercial driving experience.” AF 425.
In regards to the first deficiency, “failure to establish the job opportunity as temporary in nature”, the CO stated:

The employer’s submitted Payroll Reports summarize the employer’s quarterly wages. However, it does not summarize the employer’s permanent versus temporary workers in the requested occupation of Truck Driver. The employer was requested to provide summarized payroll reports and the number/pattern of deliveries over the course of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Truck Drivers, the total number of workers or staff employed, total hours worked, and total earnings received.

The employer’s submitted Delivery Report does not indicate a peak period within the employer’s requested months of need from August through June. According to the Delivery Report, September of 2019 and January through March of 2020 indicate a decrease in deliveries whereas July 2020, which is outside of the employer’s requested dates of need, indicate a significant increase in deliveries. In addition, May, June, and August of 2021 indicate a significant decrease in deliveries.

The Employer’s shipment agreements with Thermofisher, and Baxter (Gambro) and US MOKA Limited do not include any delivery schedules; therefore, the department cannot determine where the employer has a peak need based on the shipment agreements.

AF 304.

The CO determined that the employer’s explanation and documentation of its temporary need did not overcome the deficiency. AF 304.

In regards to the second deficiency, “failure to establish temporary need for the number of workers requested”, the CO stated that

In response to the NOD, the employer submitted several emails and a Payroll Report from August 2019 through August 2021. The employer’s emails dated in July and August address the lack of available drivers; however, the dates and the number of additional drivers needed is not addressed in the emails.

The employer’s submitted Payroll Report from August 2019 through August 2021 summarize the employer’s quarterly wages. However, it does not summarize the employer’s permanent versus temporary workers in the requested occupation, Truck Driver. The employer was requested to provide summarized payroll reports and the number/pattern of deliveries over the course of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Truck
Drivers, the total number of workers or staff employed, total hours worked, and total earnings received.

AF 306.

In regards to the third deficiency, “area of intended employment”, the CO stated:

In response to the NOD, the employer provided the address for the Santa Fe Rail Ramp and permission to update Appendix A. In addition to the address for the Santa Fe Rail Ramp and permission to update Appendix A, the employer was requested to provide additional information about the driving routes/schedules, including whether all workers begin and end each workday at the same location. The employer did not address this in the NOD response; therefore, the employer did not overcome the deficiency.

AF 307.

In regards to the fourth deficiency, “failure to satisfy the obligations of H-2B employers”, the CO stated:

In response to the NOD, the employer stated that it was confirming its employees to have 24 months of training or experience. However, as mentioned in the deficiency, no more than 12 months is normal and accepted for the occupation of Truck Driver. The employer failed to provide documentation which demonstrates that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Therefore, the employer did not overcome the deficiency.

AF 309.

In regards to the fifth deficiency, “failure to satisfy the obligations of H-2B employers”, the CO stated:

In response to the NOD, the employer requested the Department amend its age requirement to 25 years old, instead of 26 years old; however, there was no documentation which demonstrates that the employer’s requirement for the job opportunity is consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Therefore, the employer failed to overcome the deficiency.

AF 310.

Consequently, the CO determined that according to the Departmental regulations at 20 C.F.R. § 655.51, Subpart A, the Employer’s application must be denied. AF 311.
On October 21, 2021, Employer submitted a Request for Administrative Review Pursuant to 20 C.F.R. § 655.61. AF 1. This matter was docketed in the Office of Administrative Law Judges (“OALJ”) that same day and was assigned to me on October 28, 2021. On October 27, 2021, OALJ received the Appeal File. On October 29, 2021, I issued a Notice of Docketing and Expedited Briefing Schedule (the “Notice”). Neither party submitted a brief.  

Scope of Review

The scope of the Board’s review is limited to the Appeal File prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

In this matter, it is appropriate to take official notice of the OES codes and O*Net descriptions. See 29 C.F.R. § 18.201; A B Controls & Technology, Inc., 2013-TLN-00022, slip op. at 5 (Jan. 17, 2013) (citing The Cherokee Group, 1991 INA-00280 (Nov. 4, 1992)). Additionally, as the CO specifically relied on this information in making his determination, it does not undermine the Board’s limited scope of review to take official notice of the O*Net database.

Accordingly, my review of the denial is based solely on the evidence that the CO considered in denying the Application.

Employer’s Failure to Comply with 20 C.F.R. § 655.20(e)

As noted, the fourth deficiency noted by the CO was that the Employer failed to satisfy the obligations of H-2B employers. AF 466. The NOD stated this was a violation of 20 C.F.R. § 655.20(e).

Specifically, the NOD stated:

In accordance with 20 C.F.R. § 655.20(e), each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.

The employer did not include qualifications for its job opportunity that are normal and accepted qualifications and requirements imposed by non-H2B employers in the same occupation and area of intended employment.

Specifically, the employer indicated in Section F. a. Items 8 and 9. that it requires employees to have 24 months of training and 24 months of experience, which exceeds the standardized descriptor for this occupation in O*Net. Furthermore, in

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9 I apologize to the parties for the delay in issuing this order.
Section F.a, Item 11 of the ETA Form 9142, the employer indicates “Minimum 2 years of experience.” O*Net indicates that up to 12 months of experience, training, and education is normal and accepted for the occupation of Heavy and Tractor-Trailer Truck Drivers. 10

AF 466.

The NOD requested additional information that establishes the “job opportunity is a full-time temporary position with required qualifications that are bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” AF 466-467. The NOD specifically requested “Documentation which demonstrates that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment; and…A letter detailing the reasons why 24 months of training and 24 months of experience is required by the employer.” AF 467.

In response to this deficiency, the Employer argued that it requires 24 months of training or experience because the Employer’s “current liability and full coverage commercial insurance requires that the insured employees have at least 24 months of experience as truck drivers.” AF 424.

The CO affirmed the denial, stating:

as mentioned in the deficiency, no more than 12 months is normal and accepted for the occupation of Truck Driver. The employer failed to provide documentation which demonstrates that the employer’s requirements for the job opportunity are consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. Therefore, the employer did not overcome the deficiency.

AF 309.

I agree with the CO, and find that the Employer has not overcome this deficiency. The Employer was required to provide documentation that “each job qualification and requirement must be … consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” 20 C.F.R. § 655.20(e). The Employer provided no documentation that this training or experience requirement is “consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” The Employer stated that this training or experience requirement exists, because its “current11 liability and full coverage commercial insurance requires that the insured employees have at least

11 Note that the Employer is not arguing that the requirement of 24 months of training or experience is the normal and accepted requirement among relevant insurance companies, but is only stating that the Employer’s current insurance and liability company requires it.
24 months of experience as truck drivers.” AF 424. That explanation, however, does nothing to satisfy the obligations of 20 C.F.R. 655.20(e). Simply put, the fact that Employer’s current insurance company requires a particular job qualification or requirement does not establish that job qualification or requirement is “consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment.” Accordingly, the Employer has failed to overcome this deficiency.¹²

For the same reason, I find the Employer has failed to overcome the fifth deficiency. As mentioned, 20 C.F.R. § 655.20(e) states that job qualifications and requirements must be consistent with “the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation of intended employment.” In this matter, the Employer’s job order indicates a minimum age requirement of 26 years old. AF 467. In response to the NOD, the Employer stated the reason for this age requirement (reduced to 25 years old) is due to the Employer’s obligations pursuant to its insurance contract. AF 426. Like the deficiency just noted, the obligations imposed on Employer pursuant to its insurance contract do not establish that the Employer has complied with 20 C.F.R. § 655.20(e). Accordingly, the Employer has failed to overcome this deficiency.

Having determined that the Employer failed to demonstrate that it complied with 20 C.F.R. § 655.20(e) (by requiring applicants to be at least 25 years old with 24 months of experience or training, when there is no documentation that these requirements are normal and accepted among non-H-2B employers in the same occupation and area of intended employment), I need not reach the remaining deficiencies addressed by the CO.

Accordingly, the CO did not err in denying certification in this matter.

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s decision is AFFIRMED.

SO ORDERED.

For the Board:

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

¹² Note that the CO gave the Employer an alternative route to overcome this deficiency. Specifically, the CO gave the Employer a chance to “amend its experience and training requirement throughout its application to be no more than 12 months of experience and training.” AF 467. Had the Employer taken this alternative route, which may have required it to find a different insurance carrier, it would have overcome this deficiency.