In the Matter of:

EXPRESS LINE TRUCKING, LLC.,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Express Line Trucking, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) December 20, 2021, Final Determination in the above-captioned H-2B temporary labor certification matter. 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). 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


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issued a *Notice of Deficiency* ("NOD") stating that the Application could not be accepted because there were ten deficiencies in the Employer’s Application.³ 

*Summary of the Deficiencies*

The first deficiency noted by the CO stated the Application failed to establish the job opportunity as temporary in nature, in violation of 20 C.F.R. §§ 655.6(a) and (b). AF 4. The CO acknowledged that the Employer is requesting 10 CDL drivers on an intermittent need. AF 4, 258. The CO found that the Employer did not adequately explain why there was a need for 10 CDL drivers, or what caused the intermittent need. AF 5. The Employer was instructed to submit additional information including: payroll reports; number/pattern of deliveries over the previous three years; and “contracts signed with the employer’s clients and a summarized report from these clients that supports the temporary need [during the requested dates,]” among other pieces of information. AF 5. The CO found the Employer’s response to the NOD inadequate to explain a temporary need between the requested dates. AF 6-7, 179-80. At most, the CO notes, the additional information states the Employer has a “partnership” with a client known as 3 Rivers Logistics, Inc., but that partnership does not show the Employer has a temporary need during the requested time period.⁴ 

³ The NOD listed ten deficiencies; however, the final determination letter only listed five. I will limit my discussion to the five deficiencies noted in the final determination letter.

⁴ The Employer’s Brief, submitted on January 26, 2022, states the Employer has a “contract with broker 3 River Logistics for transportation of frozen food . . . beginning March 1, 2022 and ending March 1, 2023.” However, the CO was right to describe it as a “partnership,” based on the material the Employer submitted in the Application and in response to the NOD. As such, I cannot find the Employer had a “contract” with 3 River Logistics, Inc. 20 C.F.R. § 655.61(a)(5).
work will be performed in the lower 48 states.”  AF 8-9, 260. The CO stated that travelling to all 48 states clearly indicates that the worksites are not within the same area of intended employment. AF 9. The CO stated that “the employer may not submit one application for multiple worksites which are not within the same area of intended employment.” AF 9. The CO requested the Employer provide more information and allow the CO to amend the application. AF 9. The CO found the Employer’s response inadequate. AF 9-10, 192. More specifically, the CO found that the foreign workers would start and end their workday at the same location, South Dakota, but would travel to states well outside the starting location, such as New Jersey, Maryland, Georgia, Florida, Colorado, and Texas. AF 10. The CO found that these locations are not within the normal commuting distance and/or in the same area of intended employment, as defined by 20 C.F.R. § 655.5. AF 10.

The fourth deficiency noted that the Employer “must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State, or local minimum wage, whichever is highest[, in accordance with 20 C.F.R. § 655.10(a).]” AF 183. The CO stated that the Employer’s Application indicates an hourly wage ranging from $22.00 to $22.48. AF 183, 261. The CO continued that this “is not equal to the highest of the prevailing wage and applicable minimum wages, which is $22.48 per hour according to the Employer’s ETA Form 9141, Prevailing Wage Determination (P-400-21263-592784).” AF 183, 273. The CO requested the Employer allow the CO to modify the Application so that it would indicate the Employer would pay the highest of the applicable wages, which is $22.48 per hour. AF 184. In response, the Employer “granted the [CO] permission to amend [the Application] to reflect varying cents per mile among U.S. workers, Canadian, and European workers.” AF 184, 227. Thus, the CO finalized the denial because the Employer was instructed to amend the Application to indicate that it will pay the highest of the applicable wages and did not do so. AF 184.

The fifth deficiency stated the Employer violated 20 C.F.R. § 655.20(e). AF 11. The Employer indicated that applicants must possess a European CDL. AF 184. The CO noted that this requirement “does not appear to be normal and accepted for the occupation of CDL Drivers.” AF 184. The Employer was instructed to provide additional material that shows the 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 [and] a letter detailing the reasons why a European CDL is a bona fide requirement for the specific occupation listed on the Employer’s ETA Form 9142.” AF 184-85. The CO also stated that in the alternative, the Employer can approve the CO to amend the experience requirement. AF 185. In that case, the Employer “must also amend the job order and submit the amended job order to both the Chicago NPC and the SWA serving the area of intended employment.” AF 185. In response to the NOD, the Employer granted the CO permission to amend Section F.a.11 of the Application to state “CDL license, or valid Commercial Vehicle license in the country of current residency[.]” AF 185. The CO replied that “rather than address the deficiency, the Employer elected to completely change the special requirements in Section F.a.11 of the ETA Form 9142.” AF 185. Therefore, the CO found that the Employer did not overcome this deficiency. AF 185.
DISCUSSION

On December 31, 2021, Employer submitted a Request for Administrative Review Pursuant to 20 C.F.R. § 655.61. AF 13. This matter was docketed by the Board of Alien Labor Certification Appeals (“Board” or “BALCA”) on January 13, 2022, and was assigned to me on the same day. On January 19, 2022, BALCA received the Appeal File. On January 19, 2022, I issued an Errata Expedited Briefing Schedule (the “Notice”).<sup>5</sup> The CO did not submit a brief, but the Employer submitted a brief on January 26, 2022.<sup>6</sup> As this Decision and Order is issued within ten business days of the receipt of the AF, it is timely. 20 C.F.R. § 655.61(f).

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 as was actually submitted to the CO in support of the application. 20 C.F.R. § 655.61(a)(5).

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. §§ 655.11(e)(3) and (4)

The relevant sections state the Employer must demonstrate the number of worker positions and period of need are justified and the request represents a bona fide job opportunity. The CO found the Employer failed to demonstrate the number of workers and period of need are justified. AF 7 (the CO stating the Employer failed to indicate how it determined that it needs 10 CDL drivers during the requested period of need). The CO requested the Employer provide additional information, including an explanation of why it is requesting 10 CDL drivers, and monthly payroll records from the previous calendar year, among other things. AF 7-8. In response to the NOD, the Employer simply stated it wished to reduce the number of requested drivers from 10 to 6. AF 218. The Employer did not provide payroll records for the previous calendar year, nor any documentation showing how it determined the number of drivers it needs during the requested period. In short, by failing to provide the requested information concerning its request for 10 CDL drivers, the Employer also failed to provide information that could have established a need for 6 CDL drivers. The Employer thus failed to satisfy 20 C.F.R. § 655.11(e)(3).

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<sup>5</sup> I issued a Notice of Docketing and Expedited Briefing Schedule on January 14, 2022.
<sup>6</sup> The Employer’s brief convincingly paints a picture of a labor shortage, but, as the CO pointed out, a labor shortage standing alone does not establish a temporary need. AF 4 (CO stating that the Employer’s Application, which described a labor shortage in Section B.8, does not justify a temporary need).
Employer’s Failure to Comply with 20 C.F.R. § 655.10(a)

The regulation reads:

(a) Offered wage. The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H-2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

20 C.F.R. § 655.10(a).

The CO noted that the Employer’s Application indicates an hourly wage ranging from $22.00 to $22.48. AF 183, 261. The CO also noted that this “is not equal to the highest of the prevailing wage and applicable minimum wages, which is $22.48 per hour according to the Employer’s ETA Form 9141, Prevailing Wage Determination (P-400-21263-592784).” AF 183, 273. The CO requested the Employer allow the CO to modify the Application so that it would indicate the Employer would pay the highest of the applicable wages, which is $22.48 per hour. AF 184. In response, the Employer “granted the [CO] permission to amend [the Application] to reflect varying cents per mile among U.S. workers, Canadian, and European workers.” AF 184. Thus, the CO found the Employer did not correct this deficiency because the Employer was instructed to amend the Application to indicate that it will pay the highest of the applicable wages, and failed to do so. AF 184. I agree with the CO. The Employer failed to comply with 20 C.F.R. § 655.10(a) because the Employer did not advertise the position at a wage at least equal to the prevailing wage obtained from the NPWC, which was stated on the Employer’s ETA Form 9141. AF 273.

Having determined that the Employer failed to comply with 20 C.F.R. §§ 655.11(e)(3) and 655.10(a), I need not reach the remaining deficiencies identified 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