In the Matter of:

MICHAEL B. JENKINS,

Employer

Certifying Officer: Chicago National Processing Center

Appearances: Michael B. Jenkins, self-represented
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: DREW A. SWANK
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from Michael B. Jenkins’ (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny his application for temporary alien labor certification under the H-2B non-immigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the United States Department of Homeland Security. See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 1 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 United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

**BACKGROUND**

On January 1, 2022, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for one “nanny” for the period of April 1, 2022, to March 31, 2025. AF 57-71. Employer indicated that the nature of its temporary need was “one-time occurrence.” On Employer’s application (Form 9142), in response to its statement of temporary need, Employer stated:

> We would like to employ a nanny in our home from the Philippines for a few years. We need help with watching over our children. Making sure the children are fed and bathed and have opportunities to learn and play. We need help with meal prep, changing diapers if necessary, doing laundry, doing dishes, etc.

AF 57.

The CO issued a notice of deficiency on February 8, 2022, listing three deficiencies in the Employer’s application. AF 47-56. The CO noted the first deficiency as the Employer’s “[f]ailure to establish the job opportunity as temporary in nature.” The CO cited 20 C.F.R. §655.6(a) and (b) for the requirement that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” AF 51.

The CO noted that an employer’s need is considered temporary if it is justified to the CO as one of the following: 1) a one-time occurrence; 2) a seasonal need; 3) a peakload need; or 4) an intermittent need as defined by DHS regulations. The CO determined that the Employer in this case had not submitted sufficient information to establish its requested standard of need or period of intended employment. *Id.*

The CO observed that employer is requesting one nanny from April 1, 2022, to March 31, 2025 based on a one-time occurrence need. In order to prove a one-time occurrence need, the CO stated:

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2 On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule*, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. §655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

3 References to the appeal file will be abbreviated with an “AF” followed by the page number.
[T]he employer must show that it has not employed workers to perform the service or labor in the past and will not need workers to perform the services or labor in the future or the employer must have an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

*Id.*

The CO recited Employer’s statement of temporary need as stated in his application noting Employer’s desire to employ a nanny from the Philippines in his home for a few years to help with Employer’s children. The CO found that Employer did not demonstrate that it meets the regulatory standard. Specifically, the CO stated, “[E]mployer has not explained what event(s) of short duration has caused the one-time occurrence.” *Id.* The CO also explained that the H-2B program requires an employer to attempt to hire a U.S. worker for its position. The CO stated that Employer’s specification that it seeks a foreign worker from the Philippines for the position raises concerns.

Therefore, the CO requested additional information and documentation to demonstrate the chosen standard of temporary need of one-time occurrence. Specifically, the CO requested a description of the employer’s need for a full time nanny, including information as to how child care was provided in the past and how child care will be provided in the future, noting that the submitted explanation should state how many children will be cared for by the nanny, their ages as of April 1, 2022 and their ages as of March 31, 2025. The CO stated that the explanation must show how the nature of the employer’s job opportunity and number of foreign workers being requested reflects a temporary need and specifically the regulatory standard of a one-time occurrence. The CO also directed the Employer to explain how it determined that its need will begin April 1, 2022 and will end on March 31, 2025. *AF 51-52.*

The CO also noted deficiencies in Employer’s failure to submit an acceptable job order and in the required job order assurances and contents. *AF 52-56.* However, as these deficiencies were apparently cured, and were not listed in the CO’s Final Determination, they will not be addressed in this decision.

On February 9, 2022, Employer filed a response to the Notice of Deficiency attempting to address the noted deficiencies and also submitting an amended job order. *AF 41-46.* Employer noted that he has three children - Jack born on 10/31/18, Axl born on 12/31/19 and Violet born on 1/14/22. In regard to his need for a nanny he states:

We aren’t going to need a nanny forever – just until the youngest is about 3.5 years old or so after which she will be going to school during the week, the following fall - That’s where the March 31, 2025 date came from. We’ve never needed or employed a nanny before and after this period of need is over at the end of March in 2025, we will never need or employ a nanny again.

*AF 41.*
Regarding his need for child care before and after the period of temporary need and candidates for the position, Employer states:

So far, child care for our three children has been handled exclusively by my wife Michelle and myself and after this need ends at the end of March 2025, we will resume full child care responsibilities again … We’ve advertised through the NJ Job Board for the position and have not received any responses. We also interviewed quite a few candidates thru a number of social media outlets and also via the internet (care.com, etc.). Everyone we interviewed was local to our home state of New Jersey with the exception of one. We interviewed a Filipino woman – her name, Brindaley Yap – this is the woman we would like to join our family as a nanny for a few years. We were not exclusively looking for a person from the Philippines… in fact quite the contrary, we were doing everything we could to find someone closer to home but could not find anyone that met our criteria with the exception of Brindaley. So, to be clear, we have tried to find someone local – we feel we have exhausted all available local options we could find in this regard. Also, we don’t want to employ just any Filipino person – we want to employ Brindaley Yap – this is the Filipino woman we interviewed, and thought was the right fit for our family – this is the person that we want to be our kid’s nanny for the next three years.

AF 41-42.

Employer also informed the CO that his three children will be 3 years, 2 years and 3.5 months old on April 1, 2022 and will be 6, 5 and 3 years old on March 31, 2025.

On February 10, 2022, the CO issued a Final Determination Denial to the Employer, stating that the deficiency regarding the Employer’s failure to establish the job opportunity as temporary still remained. AF 34-40. The CO noted Employer’s response as stated above but determined that Employer did not demonstrate the standard of temporary need. The CO determined:

While the employer indicated they would resume child care responsibilities at the end of March 2025, it was not explained what event would be occurring from April 1, 2022 until March 31, 2021 that would prevent the employer from caring for the children. The mention of the youngest child attending school, the following fall season, does not explain how this represents a temporary event of short duration.

AF 40.

The CO also pointed out that Employer’s NOD response still included information about a specific named foreign worker and reminded Employer that the H-2B program requires that an employer attempt to hire a U.S. worker for the position. The CO determined that the Employer’s mention of a pre-identified foreign worker that it would like to hire for the position raises concerns as to Employer’s intentions in this regard. Id.
Therefore, the CO determined that Employer’s explanation and documentation of its temporary need did not overcome the deficiency. The CO found that Employer had not demonstrated a one-time occurrence because Employer’s explanation did not show a temporary event of short duration that has created the need for a temporary worker. Accordingly, Employer’s application was denied. *Id.*

On February 24, 2022, Employer made a timely request for administrative review of the CO’s determination. *Id.* In the request for review Employer argues that its response to the Notice of Deficiency indicated the temporary nature of the need. He explained that they are new parents and need a nanny for their three children, who currently age between one month and 3.5 years. He points out that his need for a nanny is distinct from that of individuals without children or those with older children who do not need nannies. He asserted that both he and his wife need to work to support their family and that his wife is not working at all at this time. He further argued that they will not need a nanny forever and that they will only need a nanny just until their youngest child will start going to school. Employer argues that he has adequately expressed the nature of his temporary need and therefore requests that the denial be reversed.

By Order issued March 3, 2022, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before March 14, 2022. Neither Employer nor the CO filed a brief in this matter.

**SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO’s determination; or
2. Reverse or modify the CO’s determination; or
3. Remand to the CO for further action.

(20 C.F.R. § 655.61(e)).

**STANDARD OF REVIEW**

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO’s determination

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4 Likewise, judicial review under the Administrative Procedure Act provides that an agency’s actions, findings and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2).
In H-2B temporary labor certification cases. See Brook Ledge Inc., 2016 TLN 00033 at 5 (May 10, 2016); see also J and V Farms, LLC, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

ISSUE

Whether the Certifying Officer properly denied the Employer’s H-2B application due to Employer’s failure to establish that its request for one nanny for the period of April 1, 2022 to March 31, 2025, was based upon a “temporary” employment need, according to the Employer’s requested standard of “one-time occurrence?”

DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii). This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.


The DHS regulation further states in regard to the nature of petitioner’s need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.


The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). See, e.g., Alter and Son General Engineering, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In this case the Employer is alleging that it has a temporary need for one nanny, from April 1, 2022 to March 31, 2025 on the basis of a one-time occurrence. Under the DHS regulation in order to establish a temporary need on the basis of a one-time occurrence the following criteria must be met:
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.


In the Notice of Deficiency, the CO stated, “[E]mployer has not explained what event(s) of short duration has caused the one-time occurrence.” Id. The CO also explained that the H-2B program requires an employer to attempt to hire a U.S. worker for its position. The CO stated that Employer’s specification that it seeks a foreign worker from the Philippines for the position raises concerns. Accordingly, the CO requested additional information and documentation to demonstrate the chosen standard of temporary need of one-time occurrence. Specifically, the CO requested a description of the employer’s need for a full time nanny, including information as to how child care was provided in the past and how child care will be provided in the future, noting that the submitted explanation should state how many children will be cared for by the nanny, their ages as of April 1, 2022 and their ages as of March 31, 2025. The CO stated that the explanation must show how the nature of the employer’s job opportunity and number of foreign workers being requested reflects a temporary need and specifically the regulatory standard of a one-time occurrence. The CO also directed the Employer to explain how it determined that its need would begin April 1, 2022 and end on March 31, 2025. AF 51-52.

In his response to the NOD the Employer provided some of the requested information. Employer noted that he has three children - Jack born on 10/31/18, Axl born on 12/31/19 and Violet born on 1/14/22. In regard to his need for a nanny he states:

We aren’t going to need a nanny forever – just until the youngest is about 3.5 years old or so after which she will be going to school during the week, the following fall - That’s where the March 31, 2025 date came from. We’ve never needed or employed a nanny before and after this period of need is over at the end of March in 2025 we will never need or employ a nanny again.

AF 41.

Regarding his need for child care before and after the period of temporary need and candidates for the position, Employer states:

So far, child care for our three children has been handled exclusively by my wife Michelle and myself and after this need ends at the end of March 2025, we will resume full child care responsibilities again … We’ve advertised through the NJ Job Board for the position and have not received any responses. We also interviewed quite a few candidates thru a number of social media outlets and also via the internet (care.com, etc.). Everyone we interviewed was local to our home state of New Jersey with the exception of one. We interviewed a Filipino woman
her name, Brindaley Yap – this is the woman we would like to join our family as a nanny for a few years. We were not exclusively looking for a person from the Philippines… in fact quite the contrary, we were doing everything we could to find someone closer to home but could not find anyone that met our criteria with the exception of Brindaley. So, to be clear, we have tried to find someone local – we feel we have exhausted all available local options we could find in this regard. Also, we don’t want to employ just any Filipino person – we want to employ Brindaley Yap – this is the Filipino woman we interviewed and thought was the right fit for our family – this is the person that we want to be our kid’s nanny for the next three years.

Employer also noted that his three children will be 3 years, 2 years and 3.5 months old on April 1, 2022, and will be 6, 5 and 3 years old on March 31, 2025.

Based on this information provided by the Employer, the CO determined the Employer failed to establish its temporary need on the basis of a one-time occurrence. After reviewing the Employer’s explanation as provided in his response and the other information in the record, the undersigned finds the CO properly denied the Employer’s request for H-2B certification for one nanny between April 1, 2022 and March 31, 2025 on the basis of a one time occurrence. According to the regulation at 8 C.F.R. §214.2(h)(6)(ii)(B) which is noted above, a petitioner must establish either 1) 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 2) 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.

In regard to the first regulatory basis for a one-time occurrence, the Employer adequately explained that it had not employed anyone in the position of nanny previously as he and his wife had provided childcare to the family’s three children in the past, without the use of a live-in nanny. However, Employer failed to establish that it would not need anyone in the position of nanny to provide childcare to the children in the future after the period of temporary need ends which would be March 31, 2025. Employer’s requested period of need is exactly three years and does not appear to correlate to any alleged event. It would appear that the Employer requested this date because a three-year period of need is the maximum amount of time that can be requested under the H-2B regulations for a one-time occurrence. However, by the Employer’s own admission his period of need would not end until his youngest child was in school which would not occur until the fall of 2025 when his youngest child turns approximately three and one half years old. Thus, Employer has not shown that it would not have a need for the nanny position between the termination of the requested three-year period (March 31, 2025) and the time his youngest child would be approximately 3 and one half years old and able to attend school which Employer asserted would be in the fall of 2025. Accordingly, assuming that Employer’s representation of the basis for its one-time occurrence is accurate, the actual period of Employer’s need would begin on March 31, 2022, and end in the fall of 2025 when the school year begins which would equate to a period of need of three years and approximately five to six months. The regulation at 8 C.F.R. §214.2(h)(6)(ii)(B) states the following:
Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.

In this case, the Employer’s period of actual need does not fall within the regulatory timeframe which provides that a one-time occurrence can last only “up to 3 years.” See Jeffrey William Stickle dba Stickle Family, 2018-TLN-00154 (Jul. 13, 2018) (“The purpose of the “one-time occurrence” regulatory requirement that an Employer not have employed workers for the position in the past, or in the future, is to assure that the H-2B program is being utilized to address a one-time temporary event, and which cannot exceed three years.”) See also Phillip Allen, 2018-TLN-00034 (Jan. 13, 2018) (Employer’s duration of need for in-home childcare spanned seven years and therefore exceeded the accepted timeframe of a “one-time occurrence” under the H-2B program).

Employer has also failed to establish the other stated basis for a temporary need under the regulatory standard of a one-time occurrence, that is, “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). The CO accurately determined that Employer has failed to show any temporary event of short duration that has created the need for a temporary worker. Although it is clear from the Employer’s statements that the family has a long term need for childcare, he has not established any temporary event of short duration that has created the need for a temporary worker. The CO stated:

While the employer indicated they would resume childcare responsibilities at the end of March 2025, it was not explained what event would be occurring from April 1, 2022 until March 31, 2025 that would prevent the employer from caring for the children. The mention of the youngest child attending school, the following fall season, does not explain how this represents a temporary event of short duration.

AF 40.

The undersigned finds that the CO properly determine that Employer failed to establish any event of “short term” duration that supports the period of temporary need requested. Employer has also failed to determine that his period of need is less than three years.

The CO also noted that Employer referred to a specific foreign worker from the Philippines who Employer wished to hire for the nanny position, and which raised concerns as to whether Employer understood the requirements of the program, specifically, that an Employer must recruit U.S workers for the position prior to seeking a foreign worker. As it has been determined that Employer did not establish its period of temporary need, this point is moot. However, it should be noted that prior to receiving certification for an H-2B worker, an Employer “must conduct recruitment of U.S. workers [in compliance with specific regulatory
requirements] to ensure that there are not qualified U.S. workers who will be available for the position … [and that] U.S. applicants can be rejected only for lawful job-related reasons.” 20 C.F.R. §655.40 (a). See Tina Schniebs, 2022-TLN-00011 (Nov. 1, 2021) (Finding that because Employer had not made a good faith attempt to contact potential candidates for the nanny position, the Employer had not attempted to ascertain the availability of U.S. workers).

For the reasons stated above, the CO reasonably and properly determined that the Employer failed to meet his burden of establishing a temporary need on the basis of a one-time occurrence, for one nanny for the period of April 1, 2022, to March 31, 2025.

ORDER

The undersigned finds that the CO properly determined that Employer failed to meet his burden of demonstrating his temporary need for one nanny, for the period of April 1, 2022, to March 31, 2025, on the basis of a one-time occurrence standard, as defined by the applicable regulation at 8 C.F.R. §214.2(h)(6)(ii)(B)(1). The CO’s determination is neither arbitrary nor capricious. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge