DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. **Nature of Appeal.** This case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a), and 1184(a) and (c), and its implementing regulations found at 8 C.F.R. § 214.2(h) and 20 C.F.R. Part 655 Subpart A. Employer filed a timely request for administrative review of the denial of its Employment and Training Administration (“ETA”) Form 9142B application for temporary labor certification for ten temporary nonagricultural workers.2

2. **Procedural History and Findings of Fact.**

   a. On January 1, 2022, Program One Professional Building Services, Inc. (hereinafter “Employer”) filed an *H-2B Application for Temporary Employment Certification* Form ETA-9142B (“Form 9142B”) with the Certifying Officer (“CO”) at the Chicago National Processing Center (“CNPC”) for ten (10) temporary Window Cleaners to perform work from April 1, 2022, to December 20, 2022, based on Employer’s peakload need. Employer indicated on its application that it was represented by Barbara Lyon at Labor Consultants International (“Agent”). (AF 409-426).3

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3 Citations to the Appeal File are abbreviated as “AF” followed by the page number.
b. On January 6, 2022, the Office of Foreign Labor Certification (“OFLC”) issued a Notice of Deficiency (“NOD”) which stated that Employer’s “application fails to meet the criteria for acceptance” and identified four deficiencies. (AF 397, 400). The CO found that Employer failed to meet the requirements of 20 C.F.R. § 655.6(a) and (b), which require an employer to establish that its need for nonagricultural labor is temporary and justified based on either: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need. (AF 400). The NOD stated that:

The employer did not sufficiently demonstrate the requested standard of temporary need. The employer is requesting 10 Window Cleaners from April 1, 2022, to December 20, 2022, based on a peakload need. In order to establish a peakload need, the petitioner must show that it regularly employs permanent workers to perform the services or labor at the place of employment, needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand and the temporary additions to staff will not become part of the employer’s regular operation.

(AF 400).

The NOD further stated that “[t]o substantiate its need for temporary workers, the employer submitted work contracts with InSite Oak Brook, Millbrook Properties LLC, and MDC Realtor Advisors. These work contracts, however, are for work to be performed from December 1, 2020, to December 31, 2021, and are not for work to be performed for dates specified in the employers’ (sic) current application, which are April 1, 2022, to December 20, 2022.” (AF 400).

The NOD requested Employer to provide additional information:

1. A description of the employer’s business history and activities (i.e., primary products or services) and schedule of operations through the year;
2. An explanation regarding why the nature of the employer’s job opportunity and number of foreign workers being requested for certification reflect a temporary need; and
3. An explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peak load, or intermittent need.

(AF 400). The NOD also instructed Employer to submit supporting evidence and documentation that justifies the chosen standard of temporary need. The Employer’s response was to include the following:

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4 The NOD also identified two deficiencies that are not relevant to this appeal. Employer’s application failed to meet the requirements of 20 C.F.R. §§ 655.16 and 655.18 for failure to submit an acceptable job order. Employer’s application also failed to meet the requirements of 20 C.F.R. § 655.15(a), which requires the Employer to file a completed Form 9142B. The Employer remedied this deficiency in its response to the NOD. (AF 402-404).
1. If applicable, monthly invoices from previous calendar years 2019, 2020, and 2021 clearly showing that work will be performed for each month during the requested period of need on the ETA Form 9142, Section B., Items 5. and 6.; and
2. Signed service contracts from customers for the calendar years 2021 and 2022.

(AF 401).

Next, the CO found that Employer failed to meet the requirements of 20 C.F.R. § 655.11(e)(3) and (4), which require the Employer to establish that the number of worker positions and period of need are justified; and the request represents a bona fide job opportunity. (AF 401). The NOD stated that the “employer is requesting certification for 10 Window Cleaners from April 1, 2022, to December 20, 2022. However, the work contract documentations submitted by the employer, do not corroborate the employers need for temporary workers” for the stated period of need. (AF 401).

The NOD instructed the Employer to submit supporting evidence and documentation to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. The Employer’s response was to include:

1. An explanation with supporting documentation of why the employer is requesting 10 Window Cleaners for Des Plaines, Illinois during the dates of need requested.
2. If applicable, documentation supporting the employer’s need for 10 Window Cleaners such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of one previous calendar year that identify, for each month and separately for full-time and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF 401).

c. On January 10, 2022, Employer responded by reducing its requested number of workers and shortening the period of need. (AF 388). In response to the NOD’s first deficiency, Employer requested nine (9) workers, instead of the ten (10) requested in its Form 9142B. (AF 388). In addition, Employer requested the end date of need to be changed from its original request of December 20, 2022, to November 30, 2022. (AF 388). In response to the CO’s request for supporting evidence, Employer stated:

Because the H-2B registration process is not in effect, Program One Professional Building Services, Inc. is using the guidelines in §655.12 in order to determine if seasonality has changed significantly from last season, and if it has, provide
evidence to explain the change. Program One Professional Building Services, Inc. has shown that changes from last season to this season have not violated the guidelines set forth in CFR §655.12 and therefore, believe that CNPC should accept the give statement of need as valid, true and applicable.

(AF 388). Employer provided the same response for the NOD’s second deficiency. (AF 389). Employer, however, did not provide the documentation as requested in the NOD.

d. On February 3, 2022, the CO issued a Final Determination denying certification on the basis that Employer failed to remedy Deficiency 1 and 2 identified in the NOD. (AF 379-386). The CO noted, that in its response, Employer requested that the CNPC change the end date of need and reduce the number of workers. (AF 384). The CO explained that “[t]he employer’s request that the number of workers be changed to nine, and its end month of date of need for its current application be the same month as its previous application for the year 2021, does not negate the fact that the employer is seeking workers for the year 2022. The employer has neither provided any explanation nor submitted any documentation to alleviate the issue of the submitted outdated work contracts and how it supports the employer’s requested dates of need.” (AF 384). Thus, the CO determined that Employer did not provide adequate explanation and documentation to substantiate its temporary need. (AF 384). Furthermore, the CO stated that “[t]he employer’s NOD response does not sufficiently demonstrate that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” (AF 386).

e. On February 10, 2022, pursuant to 20 C.F.R. § 655.61, Employer requested administrative review of the CO’s denial. (AF 2). In its administrative review request, Employer explained:

Because of DOL inquisition, and the extreme pressure and competition of the H-2B visa program, it was important to submit a NOD response in a timely fashion to avoid being capped out. It was Program One’s intention to return to a more consistent and historical temporary need in the hopes of securing a quick NOA. In the NOD response[,] Program One explained that it wanted to return to a more consistent temporary need, similar to its previous filing (H-400-20358-978244) by reducing their requested number of workers from the original 10 down to 9. Furthermore, they wanted to reduce the dates of need from April 1, 2022 – December 20, 2022 down to April 1, 2022 – November 30, 2022. The hope was that this reduced number of workers as well as the more consistent dates of need would help secure the NOA, with them now failing under CFR 655.12.

(AF 3).

f. On February 25, 2022, the Board of Alien Labor Certification Appeals (“BALCA”) docketed Employer’s appeal. The CO transmitted the Appeal File (“AF”) to BALCA on the

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5 Attached to its administrative review request were supporting documents: temporary need table; contracts from InSite Oak Brook, Millbrook Properties LLC, and MDC Realtor Advisors; Rolling Volume Summary; and a letter from Clint Coronado (Employer’s President). (AF 8-367).
same date. On March 3, 2022, this matter was assigned to the undersigned Administrative Law Judge (“ALJ”), and a Notice of Case Assignment and Order Establishing Brief Filing Deadlines was issued on March 7, 2022. The Solicitor’s Office was provided seven (7) business days from that date to file an optional brief in support of the denial of certification.6

3. Applicable Law and Analysis.

a. H-2B Program. The applicable section of the H-2B non-immigrant visa program enables United States nonagricultural employers to employ foreign workers on a temporary basis to perform nonagricultural labor or services if unemployed persons capable of performing such service or labor cannot be found in this country.7 Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department of Labor.8

b. Regulations at Issue.

i. Temporary Need. An employer seeking certification under this subpart must establish that its need for nonagricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. The employer’s need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS [Department of Homeland Security] regulations. Except where the employer’s need is based on a one-time occurrence, the CO will deny a request for an H-2B Registration or an Application for Temporary Employment Certification where the employer has a need lasting more than 9 months. 20 C.F.R. § 655.6(a)-(b).

ii. Registration of H-2B employers; NPC review. All employers, including job contractors, that desire to hire H-2B workers must establish their need for services or labor as temporary by filing an H-2B Registration with the Chicago NPC. The CO will review the H-2B Registration and its accompanying documentation for completeness and make a determination based on: The number of worker positions and period of need are justified, and the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4).

c. Scope of Review. BALCA’s scope of review for H-2B cases appealed under 20 C.F.R. Part 655, Subpart A is limited. Specifically, 20 C.F.R. § 655.61 provides that BALCA may only consider the Appeal File prepared by the CO, the employer’s request for administrative review, and any legal briefs submitted. The employer’s request for administrative review may contain only its legal arguments and such evidence as was actually submitted to the CO in support of the employer’s application.9

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6 Counsel for the Solicitor notified the undersigned that the Solicitor’s Office would not file an appeal brief on behalf of the CO; and would rely on the CO’s Notice of Denial in this matter.
8 See 20 C.F.R. § 655.15.
9 20 C.F.R. § 655.61(a)(1)-(5).
After considering the evidence, BALCA must take one of the following actions in deciding the case: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand to the CO for further action.\textsuperscript{10}


e. Analysis. In this case, Employer requests temporary workers for a “peakload” need. To establish a peakload need, an employer must demonstrate 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.”\textsuperscript{11}

Employer has not established that it has a temporary peakload need for ten window cleaners. While Employer provided an adequate explanation for its peakload need, the evidence does not substantiate Employer’s dates of need. The evidence submitted by Employer was not specific to its request for ten window cleaners for the period of April 1, 2022, to December 20, 2022. Rather, the evidence submitted by Employer were work contract orders for the period of December 1, 2020, to November 30, 2021, and January 1, 2021, to December 31, 2021. (AF 429, 431). The CO requested that Employer provide payroll records, contracts, letters of intent, and any other applicable records to justify its need for temporary labors for the period requested. (AF 401). \textit{Employer’s response did not include any of the records requested}, but instead reduced the number of workers needed and the end date of need. Employer further asserted, that it “believe[s] that CNPC should accept the given statement of need as valid, true and applicable” without any supporting evidence. (AF 388). A bare assertion without supporting evidence is insufficient to carry an employer’s burden of proof. \textit{A B Controls & Tech., Inc.}, 2013-TLN-00022 (Jan. 17, 2013).

With its request for administrative review, Employer’s Agent submitted documentation \textit{not} submitted to the CO prior to the date of its determination, including a temporary need table; contracts from InSite Oak Brook, Millbrook Properties LLC, and MDC Realtor Advisors; Rolling Volume Summary; and a letter from Clint Coronado (Employer’s President). Employer’s Agent asserts that based on this evidence the denial should be reversed and an application granted. The regulations governing BALCA’s administrative review are clear. The employer’s request for review “[m]ay contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued.”\textsuperscript{12} Accordingly, \textit{BALCA cannot consider the documentation submitted with the Employer’s request for administrative review as such was not submitted to the CO before the date of the determination letter.}

\textsuperscript{10} 20 C.F.R. § 655.61(e)(1)-(3).
\textsuperscript{11} 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).
\textsuperscript{12} 20 C.F.R. § 655.61(a)(5).
Consequently, Employer has not met its burden of establishing that it has a peakload need for temporary workers between April 1, 2022, and December 20, 2022.

4. Order.

For the foregoing reasons, it is hereby ORDERED that the Certifying Officer’s decision is AFFIRMED.

SO ORDERED this day at Covington, Louisiana.

DAN C. PANAGIOTIS
ADMINISTRATIVE LAW JUDGE