In the Matter of:

SOUTH FLORIDA LIGHTING TEAM, LLC,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kurt Stange, self-represented
For the Employer

Robert P. Hines, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Natalie A. Appetta
Administrative Law Judge

DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER’S DENIAL OF EMPLOYER’S EXTENSION REQUEST

This case arises from the request for review of South Florida Lighting Team, LLC (“Employer”) in regard to the Certifying Officer’s (“CO”) February 4, 2022 denial of Employer’s certification extension request 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 (DHS). 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). The regulations also provide for review of the CO’s denial of an extension request under 20 C.F.R. § 655.60.

**BACKGROUND**

On July 6, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 10 laborers under the occupation title of “Merchandise Displayers and Window Trimmers” for the period of October 1, 2021 to February 28, 2022. AF 44-79. Employer indicated that the nature of its temporary need was “seasonal.” AF 44.

On August 19, 2021, after the completion of procedural requirements, the Certifying Officer certified Employer’s H-2B application for 10 laborers under the stated occupation title for the period of October 1, 2021 to February 28, 2022. AF 17-21.

By email correspondence dated January 26, 2022, Employer filed an extension request for the previously certified period of employment. AF 13-16. Employer stated that it was requesting an extension until May 31, 2022, for 5 of the 8 H-2B employees that it currently employed, noting that they were currently certified through February 28, 2022. Employer stated:

> The reason for the requested extension is due to the lack of U.S. workforce. We have been trying to find local laborers since June 2021 by advertising our job opening through various job portals like Indeed, Monster and our career site but we have received very few applications which is why we decided to bring in laborers from outside the country. By December 2021, we have reopened the job for Warehouse Assistants in anticipation of our H2B employees’ visa expiration. We have a total of 5 local employees who have resigned from the company for the past 2 months as well and having the H2B employees have helped fill in for those positions. Despite our efforts to replace those vacant positions, we are still yet to find candidates from the few people who have applied that will fit the needs of the company.

AF-15.

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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.
In its extension request Employer further summarized the reason for its request by stating, “We are requesting this extension because we are still in need of our H2B employees’ services. We will be moving to a new warehouse by the end of February and we will be needing the manpower to accomplish this as well as in organizing all decor once we move. We will also be needing their help in construction and fabrication of new decors for new upcoming projects.” Id.

On February 4, 2022, the CO issued a Denial of Employer’s extension request. AF 6-8. The CO reiterated the Employer’s statement concerning its reason for its extension request as stated in Employer’s January 27, 2022 letter. The CO determined that the Employer has not demonstrated that its extension is necessary due to weather conditions or other reasons beyond the control of the employer that could not be reasonably foreseen. The CO also found that employer’s extension request is “solely based on a shortage of labor within the area of intended employment.” AF 7. The CO reminded the Employer that a “labor shortage, no matter how severe, does not justify an extension for 5 H-2B workers.” AF 8.

On February 14, 2022, Employer filed a timely request for administrative review in regard to the CO’s February 4, 2022 denial of its request for an extension of its H-2A certification. AF 1-5. In this letter, Employer indicates that it is requesting an extension for all eight of its H-2B workers, contrary to the January 27, 2022 extension letter sent to the CO which only requested an extension for five of its eight H-2B workers. Employer also alleges additional reasons for its extension request which include “the Delta variant of Covid and [its] loss of H-2B workers part way through their visa period.” These reasons were not included in the January 27, 2022 letter sent to the CO. Employer also alleges for the first time, that these challenges were unforeseen.

By Order issued on February 23, 2022, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before March 4, 2022. The Certifying Officer filed a brief on March 4, 2022 which has been considered. The Employer did not file a brief by the deadline.

The CO argues in its brief that BALCA may not consider the reasons given for Employer’s extension request in its February 14, 2022 request for review, as neither the argument nor supporting documentation, were submitted to the CO prior to the appeal, citing 20 C.F.R. § 655.61(a)(5) and Bassett Construction, Inc., 2016-TLN-00023 (Apr. 1, 2016). The CO argues alternatively that even if the reasons given in the request for review, were considered, they do not establish a basis for the extension under the regulations as they were not provided with any documentation proving that the extension was needed and that the reason for the extension could not have been reasonably foreseen by the Employer, as required by 20 C.F.R. §655.60. The CO argues that Employer has not provided any documentation in support of its claim that the Delta variant of COVID-19 has caused the need for the extension, other than the assertions in the request for review. Further, the CO argues that Employer’s claims related to a pandemic related labor shortage fail on the merits because Employer has failed to establish that the pandemic effects were unforeseeable as the pandemic had been if effect for over a year by the time Employer applied for certification in July 2021. The CO asserts that a pandemic- based
need can no longer be considered temporary or unforeseeable without specific evidence or documentation.

**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)).

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 in H-2B matters. BALCA has, fairly consistently, applied an arbitrary and capricious standard to its review of the CO’s determination in H-2B temporary labor certification cases. See Brook Ledge Inc., 2016-TLN-00033 at 5 (May 10, 2016) (BALCA panel acknowledging that it reviewed the CO’s determination under an arbitrary and capricious standard).

**ISSUE**

Whether the Certifying Officer properly denied Employer’s extension request due to Employer’s failure to establish grounds for its extension request under 20 C.F.R. § 655.60.

**DISCUSSION**


The H-2B regulations allow for the extension of the H-2B certification period under certain circumstances. The regulations provide:

An employer may apply for extensions of the period of employment in the following circumstances. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will
notify the employer of the decision in writing. Except in extraordinary circumstances, the CO will not grant an extension where the total work period under that Application for Temporary Employment Certification and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent …

20 C.F.R. § 655.60

In this case the Employer received temporary labor certification for 10 laborers under the occupation title of “Merchandise Displayers and Window Trimmers” for the period of October 1, 2021 to February 28, 2022, on the basis of a seasonal need. Employer is requesting an extension until May 31, 2022 for five of the certified workers. Thus, in this case the total requested certification period including the extension is eight months. Accordingly, the Employer need not establish extraordinary circumstances but must prove that the extension request is due to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer.

Employer submitted a letter to the CO on January 26, 2022, requesting the extension and stating that the “reason for the requested extension is due to the lack of U.S. workforce.” Employer went on to state:

We have been trying to find local laborers since June 2021 by advertising our job opening through various job portals like Indeed, Monster and our career site but we have received very few applications which is why we decided to bring in laborers from outside the country. By December 2021, we have reopened the job for Warehouse Assistants in anticipation of our H2B employees’ visa expiration. We have a total of 5 local employees who have resigned from the company for the past 2 months as well and having the H2B employees have helped fill in for those positions. Despite our efforts to replace those vacant positions, we are still yet to find candidates from the few people who have applied that will fit the needs of the company.

AF-15.

Employer further summarized its need for the extension request as follows:

We are requesting this extension because we are still in need of our H2B employees’ services. We will be moving to a new warehouse by the end of February and we will be needing the manpower to accomplish this as well as in organizing all decors once we move. We will also be needing their help in construction and fabrication of new decors for new upcoming projects.

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4 Employer’s January 26, 2022 letter to the CO requesting an extension of the certification period indicated it requested the extension for five of the H-2B workers it currently employed. AF 13-16. However, Employer’s February 14, 2022 states that it requests an extension for all eight of the H-2B workers it employed.
In the Final Determination letter, the CO determined that the Employer failed to meet the regulatory requirements for obtaining an extension under the H-2B program regulations. The CO found that the Employer had not demonstrated that its extension is necessary due to weather conditions or other reasons beyond the control of the employer that could not be reasonably foreseen. The CO concluded that employer’s extension request is “solely based on a shortage of labor within the area of intended employment.” AF 7.

The reason provided by the Employer was that it was still in need of its H-2B employees, in part, because it was moving to a new warehouse by the end of February and would need manpower to accomplish this, as well as for other related tasks. Employer also stated that it needed the help for construction and fabrication of new decors and for new upcoming projects. Employer also asserted its difficulty in finding local labor since June 2021. AF 15.

After reviewing the reason provided by the Employer in its January 26, 2022 letter to the CO, requesting an extension of its labor certification for five workers, the undersigned finds that the CO properly determined that the Employer did not meet its burden of proving that its need for the extension complied with the guidelines set out in the regulations at 20 C.F.R. § 655.60 which states that, “[a] request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer.”

Employer provided no explanation, nor supporting documentation, as to why its need for labor to assist in “moving to a new warehouse by the end of February” and “for new upcoming projects” was related to weather conditions or other factors beyond the control of the employer. Nor did Employer provide any support for a finding that the basis for the extension could not have been reasonably foreseen by the Employer, in compliance with the stated regulatory requirement. Although Employer asserted that it had difficulty finding labor since June of 2021, a labor shortage alone is not a sufficient basis to support an extension of its certification. Underwood Brothers Inc. 2022-TLN-00025 (Dec. 9, 2021) (a labor shortage alone, does not meet the regulatory requirements for granting an extension). See also BMC West LLC, 2018-TLN-00099, at 11 (July 13, 2018) (“The presence of a labor shortage … does not support a finding that Employer’s need is temporary in nature”) and Tofte General Store, Inc., 2022-TLN-00010, at 5 (Nov. 1, 2021) (finding that a “wage war” in the employer’s location due to a labor shortage caused by the COVID-19 pandemic does not meet the requirements for a successful H-2B application). Further, Employer noted that it was aware of the labor shortage in June of 2021 which is prior to the filing of its H-2B application for the original period of October 1, 2021 to February 28, 2022. Accordingly, it does not follow that the need for labor could not have been reasonably foreseen by the employer.

In its request for review Employer provided some additional reasons in support of its extension request which included “the Delta variant and [its] loss of H-2B workers part way through their visa period.” Employer argued that the impact of the Delta variant caused it to make significant changes to its normal operations which had a major effect on its H-2B
workforce. This information, which did not include any supporting documentation, was alleged for the first time in the request for review and therefore cannot be considered by the undersigned in reaching this determination as it was not provided to the CO and is not a part of the administrative record. Pursuant to 20 C.F.R. § 655.61(a)(5) the 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.” The regulation further provides, in cases where an administrative review is requested, that “BALCA must review the CO’s determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(f). See J & J Construction Company 2019-TLN-00020, slip op. at 5 (Jan 30, 2019) (Information in the request for review that was not provided to the CO as part of the Employer’s extension request, cannot be considered by BALCA in reviewing the CO’s action).

After reviewing the record that was before the CO, I find that the CO properly determined that the Employer did not meet its burden of proving that its request for an extension of its current H-2B labor certification complied with the regulatory requirements at 20 C.F.R. § 655.60. Specifically, Employer did not show that its stated reason for extending its labor certification, which was related primarily to its difficulty in obtaining labor to assist in moving to its new warehouse and to help with upcoming projects, was due to weather conditions or other factors beyond the control of the employer, nor did Employer show that the reason given for its extension request could not be reasonably foreseen. Accordingly, the Certifying Officer did not act arbitrarily or capriciously in denying the Employer’s extension request.

ORDER

The undersigned finds the CO’s denial of Employer’s extension request was not arbitrary or capricious. Accordingly, the CO’s denial of Employer’s extension request for 5 laborers under the occupation title of “Merchandise Displayers and Window Trimmers” for the period of February 28, 2022 until May 31, 2022 is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge