In the Matter of

Tofte General Store, Inc.

Employer.

DECISION AND ORDER AFFIRMING THE DECISION OF THE CERTIFYING OFFICER

This case arises from Tofte General Store’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny an 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); 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”).

FACTS AND PROCEDURAL HISTORY

On July 14, 2021, Employer filed an H-2B Application for Temporary Employment Certification, Form ETA-9142B. (AF at 98). Employer’s application requested certification for seven workers to work in the position of “Checker-Stocker” at its store in Tofte, Minnesota from October 1, 2021 to October 1, 2022. Id. The application represented that the job duties include customer service, operating a cash register, and bagging merchandise. (AF at 104). In its Statement of Temporary Need, Employer explained that both the pandemic and its remote location have rendered it unable to find and retain U.S. workers to work for the store. (AF at 103). Employer described the “wage war” in his community and its inability to pay the high wages currently required to retain employees. Employer stated it will likely go out of business if it is not

3 All references to “AF” reference the administrative file.
able to find U.S. or foreign workers to fill the current vacancies. Employer stated it needs seven or more people to run its store.

The CO issued a Notice of Deficiency (“NOD”), dated July 22, 2021, informing Employer of its failure to establish the job opportunity as temporary in nature and its failure to establish temporary need for the number of workers requested. (AF at 93-94). The CO requested additional information, including payroll history and an explanation regarding why the position represents a temporary need. *Id.* The CO also requested an explanation as to why Employer requested seven workers during the specific dates. *Id.* On August 1, 2021, Employer submitted a response to the NOD. (AF at 31-88).

The CO issued a Final Determination, dated September 7, 2021, denying Employer’s application. (AF at 20). The CO determined that Employer did not sufficiently demonstrate the standard of temporary need nor did it show the how its need meets the regulatory standard. Specifically, the CO argued that “a labor shortage, however severe, does not establish a temporary need under the H-2B classification.” (AF at 24).

On September 17, 2021, Employer filed its request for administrative review of the September 7, 2021 CO Final Determination. (AF at 1). The undersigned was subsequently assigned this case⁴ and issued a Notice of Assignment on October 20, 2021. The undersigned received the Administrative Files from the Employment and Training Administration (“ETA”) on October 19, 2021. The CO submitted a closing brief on October 28, 2021.

This decision and order is based on the record consisting of the AF forwarded by ETA and the parties’ exhibits. Upon a review of the record and the relevant legal authority, the undersigned AFFIRMS the determination of the Certifying Officer.

**SCOPE OF REVIEW AND APPLICABLE LAW**

The Board’s standard of review in H-2B certification cases is limited. The Board may only consider the appeal file prepared by the certifying officer, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the certifying officer before the date the certifying officer issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board must: (1) affirm the certifying officer’s determination; (2) reverse or modify the certifying officer’s determination; or (3) remand the case to the certifying officer for further action. 20 C.F.R. § 655.61(e).


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⁴ The chief administrative law judge may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61. Chief Judge Henley designated a single member of the Board to hear this appeal.
Accordingly, I will apply the arbitrary and capricious standard in this matter. Under the arbitrary and capricious standard, if there is any rational basis for the certifying officer’s determination, it must be sustained. See Dellew Corp. v. United States, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); Eriny's Iraq Ltd. v. United States, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); see also Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662, 669, n.11 (9th Cir. 1980).

The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; see also Cajun Constructors, Inc., 2011-TLN-00004, *7 (Jan. 10, 2011); Andy and Ed. Inc., dba Great Chow, 2014-TLN-00040, *2 (Sep. 10, 2014); Eagle Industrial Professional Services, 2009-TLN-00073, *5 (Jul. 28, 2009). To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. §§ 655.6(b), 655.11(a)(3). The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a). The applicable regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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 peak load need, or an intermittent need.

In this case, Employer alleges that it has a need for seven “checker-stockers” stemming from the one-time occurrence of the labor shortage caused by the Covid-19 Pandemic. In order to establish that the need is a one-time occurrence:

[t]he 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.


5 However, while a decision of a judge sitting on the Board may be considered persuasive authority by other judges sitting on the Board, it is not binding precedent on them. Thus, there have been some Board decisions in which judges have rejected the arbitrary and capricious standard in favor of a de novo standard of review for appeals of certifying officers’ determinations on H-2B applications. See, e.g., Herder Plumbing, Inc., 2019-TLN-00022, *2-3; ATP Restaurant Inc., 2019-TLN-00018, *5 (Dec. 20, 2018); Best Solutions USA, LLC, 2018-TLN-00117, *2, n. 2 (May 22, 2018). Additionally, in one or more cases, the Board has applied a deferential standard of review for particular types of issues in H2-B certification cases. See, e.g., Royal Hospitality Services, LLC, 2011-TLN-00010, *9 (Mar. 29, 2011).

6 Brazen & Greer Masonry, Inc., 2019-TLN-00038, PDF at 3-9 (Mar. 6, 2019) (analyzing the various standards of review used by the Board to review certifying officers’ determinations of H-2B applications and choosing the arbitrary and capricious standard).
EMPLOYER’S ARGUMENTS

Employer submitted its response to the NOD on August 1, 2021. (AF at 31). In that response, Employer submitted a statement establishing the job as temporary and establishing the need for the number of workers. Id. In argument, Employer explained they have owned and operated the Tofte General Store since 2012 and have been able to find sufficient full-time and temporary cashiers (Checker-Stockers) to sustain business needs. Employer also stated they are the only grocery store within 30 miles and provide grocery products to the Cook County community in Minnesota. After the pandemic began, Employer began to have difficulty recruiting U.S. workers. Due to Covid-related concerns, Employer has seen a heightened demand for its services, as the community does not want to travel a longer distance to another grocery store or risk being exposed to Covid in a larger store. Employer further elaborated on the amount of temporary workers required to run its store. It explained that with a “skeleton crew[,]” it needs at least two people in the morning to open, at least three to close, one additional person on “load days” during the slow time, and three extra people during the busy season. Thus, Employer explained it would “need a minimum of nine (9) full time people to keep this place running perfectly.” (AF at 32). It currently only has three full time staff and two who are part time.

Employer submitted its brief on September 17, 2021. (AF at 1-18). In that brief, Employer argued that the CO’s decision was arbitrary and capricious for failing to provide a “satisfactory explanation for its actions including a rational connection between the facts and the choice made to deny the certification . . . .” (AF at 11). Specifically, Employer argues the pandemic and its impact in NE Minnesota is the event/cause of the short-term demand and argues that it is temporary in nature. Employer asserts that it meets the requirement to project into the future to determine the end of the temporary need because it submitted articles documenting that the pandemic is expected to be an event of short duration. Employer also asserts that a one-time occurrence can last up to three years, by which time the pandemic will likely end. Employer also argued that it fully explained its reasoning for requiring seven full-time temporary foreign workers and provided data regarding employees over the past three years. (AF at 16).

CERTIFYING OFFICER’S ARGUMENTS

The CO submitted its brief on October 28, 2021. In that brief, the CO argued that Employer’s need for H-2B workers is not temporary because the end of the pandemic is not definable in nature. Specifically, the CO cites to the Department of Homeland Security Regulation which states that employment is temporary when the need for the employee will end in the “near, definable future.” (CO Brief at 6, citing 8 C.F.R. § 214.2(h)(6)(ii)(B)). The CO asserts Employer has failed to meet that threshold because Employer defined the end of its one-time occurrence as the end of the pandemic, when it hopes to return to normal. The CO asserts that the pandemic does not have a definable end date. In addition, the CO counters that the pandemic is not the primary reason for Employer’s request of temporary workers, pointing to Employer’s “admitted inability to compete in a local ‘wage war’” within its community. (CO Brief at 7).

DISCUSSION

The primary legal question in the present case is whether the pandemic qualifies as a one-time occurrence and whether it will end in the near, definable future as to qualify under H-2B regulations. After weighing both sets of arguments of the parties, I have come to the determination that the pandemic does not have a definable end-date and thus does not qualify as a one-time occurrence under H-2B regulations.
The CO correctly points to established precedent that a “labor shortage” does not justify a temporary need. *BMC West LLC*, 2018-TLN-000999, PDF at 11 (July 13, 2018) (“The presence of a labor shortage, however, does not support a finding that Employer’s need is temporary in nature”). I agree with some of the CO’s initial concerns regarding Employer’s Statement of Temporary Need, specifically Employer stating that there was a “wage war” going on in the local community and its inability to pay higher wages to attract workers. (AF at 103). I agree that these reasons do not meet the criteria for a successful H-2B application.

I next turn to the primary issue at hand, which is whether the pandemic meets the criteria to be a one-time occurrence under 20 C.F.R. § 655.6(b). Unfortunately, Employer has failed to show that this need is temporary and will end on October 1, 2022. It is unknown when the pandemic will end and “hope falls short of showing that the need in fact is of short duration. As COVID variants have appeared, restrictions have again tightened. In time, restrictions might be relaxed again. This could recur any number of times.” *In re Peninsula Painters*, 2021-TLN-00074, PDF at 5 (September 30, 2021). I find this reasoning persuasive and follow it in the present case. As it is impossible to discern when then the pandemic will end, it is impossible to determine whether Employer will require additional foreign workers past the date of October 1, 2022. Accordingly, I find that Employer has failed to show that its need for the additional employees will end in the near, definable future as required by 8 C.F.R. § 214.2(h)(6)(ii)(B).

CONCLUSION

For the aforementioned reasons, I find the CO did not act arbitrarily and capriciously in denying Employer’s application for seven checker-stockers between the period of October 1, 2021 and October 1, 2022.

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer’s determination is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

HEATHER C. LESLIE  
Administrative Law Judge  
Washington, DC