In the Matter of:

ASPHALT PRESERVATION COMPANY, INC.,
Employer.

Certifying Officer: LESLIE ABELLA
Certifying Officer

Before: WILLIAM P. FARLEY
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to Asphalt Preservation Company Inc.’s (“Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination regarding Employer’s H-2B temporary labor certification.1 Employers that seek to hire foreign workers under this program must apply for and receive a labor certification from the U.S. Department of Labor (“DOL”).2 Such applications are reviewed by a CO in the Office of Foreign Labor Certification of the Employment and Training Administration (“ETA”).

H-2B APPLICATION

Employer is a Minnesota asphalt pavement preservation company. On January 1, 2022, Employer filed this ETA 9142B, Application for Temporary Employment Certification (“Application”) with the CO. Employer requested certification of six CDL Drivers, Occupational Title Heavy and Tractor-Trailer Truck Drivers for the period April 1, 2022 through September 2, 2022, based on seasonal need.3 Employer supported its temporary need with monthly payroll reports from 2018—2021 and a statement of temporary need, citing that April through September is its busiest season.4

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3 AF at 84.
4 AF at 120.
NOTICE OF DEFICIENCY

On January 18, 2022, the CO issued a Notice of Deficiency ("NOD") to Employer, identifying three separate deficiencies under 20 C.F.R. Part 655, Subpart A. The CO listed three deficiency grounds: 1) Failure to establish the job opportunity as temporary in nature (20 C.F.R. § 655.6(a) & (b)); 2) Failure to establish temporary need for the number of workers requested (20 C.F.R. § 655.11(e)(3) and (4)); and 3) Failure to submit a complete and accurate ETA Form 9142 (20 C.F.R. § 655.15(a)).

EMPLOYER’S RESPONSE TO NOD

On January 20, 2022, Employer submitted its response to the NOD. Employer submitted a response letter; statement of business activities, history and need for peak load workforce; statement regarding monthly payroll summaries; 2020 - 2021 monthly contracts reports; Employer’s letter explaining need for six CDL drivers; 2020 - 2021 monthly payroll reports; and a statement response letter.

CO’S FINAL DETERMINATION

On February 16, 2022, the CO issued a Final Determination denying the temporary labor certification. The CO found that two deficiencies remained unsatisfied by Employer’s response: 1) failure to establish the job opportunity as temporary in nature; and 2) failure to establish temporary need for the number of workers requested.

As for the first deficiency ground, the NOD required that Employer submit the following additional information:

1. Payroll reports and the number/pattern of deliveries over the course of the previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested six Heavy and Tractor-Trailer Truck Drivers, the total numbers 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;
2. An explanation of the data in submitted payroll documentation;
3. A summarized monthly list from Asphalt Preservation of the previous calendar year and up to date of current year that indicates the number of truck loads that leave the main worksite for deliveries to other locations for this temporary seasonal truck driving need; and
4. The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer’s response must include, but is not limited to, the contracts signed with the employer’s clients and a summarized report from these clients that supports the

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5 AF at 75-83.
6 AF at 79-83.
7 AF at 38-74.
8 Id.
temporary need that occurs between April 1, 2022 to September 2, 2022 as part of the need for seasonal truck driving by Asphalt Perseveration. 9

In the Final Determination, the CO stated, “the payroll summaries submitted by the employer do not support a peak load increase beginning on the requested start date of April 1, 2022.” 10 Additionally, the CO asserted that “… the employer’s submitted payroll reports do not show an increase in work until June. The employer did not provide an explanation of why its 2019 through 2021 payroll summaries do not show increased work in the months of April and May.”11 The CO goes on to state that “[w]hile the employer’s supporting documentation shows that the employer may experience an increase in work that begins in June rather than April, the employer is reminded that … [an] ETA Form 9142, must be filed no more than 90 days and no less than 75 days before the employer’s date of need.”12 In conclusion, the CO asserts that Employer failed to provide documentation to show an increased demand in work beginning in April and did not overcome the deficiency.

As for the second deficiency ground, the NOD required that the Employer submit the following additional information:

1. An explanation with supporting documentation of why the employer is requesting six Heavy and Tractor-Trailer Truck Drivers for Detroit Lakes, Minnesota during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for six Heavy and Tractor-Trailer Truck Drivers 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 permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earning 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;
4. An explanation of the data in submitted payroll documentation; and
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.13

In the Final Determination, the CO stated that Employer failed to address why it needed six CDL Drivers, Occupational Title Heavy and Tractor-Trailer Truck Drivers. The CO noted that Employer asserted that it calculated a need for six temporary CDL drivers but failed to provide the CO with these calculations. Furthermore, the CO stated that “the documentation does not support the employers need for an additional six temporary CDL drivers beginning on April 1, 2022 – it only demonstrates that the employer does employ seasonal laborers.”14 In Conclusion, the CO

9 AF at 80-81.
10 AF at 32.
11 Id.
12 AF at 33.
13 AF at 81-82.
14 AF at 36.
found that since the documentation submitted by Employer does not show the need for six temporary workers during the requested period of need, Employer failed to overcome the deficiency.

Based on these two deficiencies, the CO denied Employer’s application for temporary foreign workers.

PROCEDURAL HISTORY

On February 25, 2022, Employer filed a Notice of Appeal appealing the CO’s Final Determination. On March 7, 2022, I issued a Notice of Docketing and Order Establishing Briefing Schedule. The Appeal File was received on March 4, 2022.

APPLICABLE LAW

BALCA’s standard of review in H-2B case is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. BALCA may only consider the Appeal File prepared by the CO, 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 submitted to the CO before the date the CO issued the Final Determination. After considering the evidence of the record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action.

The Employer bears the burden of proving that it is entitled to temporary labor certification. The CO may only grant the Employer’s application to admit H-2B workers for temporary nonagricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary service or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The Employer is required to establish that its need for workers requested is “temporary.” Temporary is defined by the regulation at 8 C.F.R. § 214.2(h)(6)(ii). That regulation states, in pertinent part:

(A) Definition. Temporary services or labor under the H-2B classifications 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.

(B) 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

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15 See Brook Ledge, Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016).
16 20 C.F.R. § 655.61.
17 20 C.F.R. § 655.61(e).
19 20 C.F.R. § 655.1(a).
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.\textsuperscript{20}

The Employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program.\textsuperscript{21} Pursuant to 20 C.F.R. § 655.6(a)-(b), an employer seeking certification must show that its need for workers is temporary and that the request is a one-time occurrence, seasonal, peak-load, or intermittent need. An employer establishes an “intermittent need” if it shows it “has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.”\textsuperscript{22}

The Employer must also demonstrate a bona fide need for the number of workers requested.\textsuperscript{23}

**DISCUSSION**

An employer’s failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification.\textsuperscript{24}

In the NOD, the CO clearly identified information and evidence that would provide a reasonable basis upon which to analyze the application. According to the CO, Employer did not provide information and documentation sufficient to overcome its noted deficiencies.

Specifically, for Deficiency 1, Employer submitted payroll reports from 2019 to 2021. However, the payroll reports do not show an increase in labor needs beginning in April but does indicate an increase beginning in May and June.

For Deficiency 2, Employer failed to provide the CO with the calculations used to determine its need for six temporary workers. The CO noted that the information provided by Employer only showed a need for one additional worker.

Employer has not met its burden of showing that it is entitled to temporary labor certifications for the requested laborers. Employer was provided with a NOD and in response, Employer submitted additional evidence. However, the CO determined that the responsive evidence did not cure the deficiencies. After reviewing the evidence considered by the CO and all legal arguments, I agree that Employer did not provide sufficient information and documentation to overcome its deficiencies. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the Denial is **AFFIRMED.**

\textsuperscript{20} 8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).
\textsuperscript{22} 8 CFR 214.2(h)(6)(ii)(4).
\textsuperscript{23} 20 C.F.R. § 655.11(e)(3)-(4); North Country Wreaths, 2012-TLN-00043 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that it had a greater need for workers this year than it did in 2012); Roadrunner Drywall, 2017-TLN-00035 (May 4, 2017).
\textsuperscript{24} 20 C.F.R. § 655.32(a).
ORDER
Accordingly, it is hereby ORDERED that the Certifying Officer’s Final Determination is AFFIRMED.

SO ORDERED.

WILLIAM P. FARLEY
Administrative Law Judge
Washington, D.C.