BALCA Case No.:  2022-TLN-00017
ETA Case No.: H-400-21257-583057

In the Matter of:

CUTLASS GRILLE, INC.,
Employer.

Before:    Timothy J. McGrath
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION


I. Statement of the Case

Cutlass Grille, Inc. (“Employer”) is a restaurant located in Chesapeake, Virginia.  AF 134. On August 17, 2021, Employer filed a Form ETA-9142B and supporting documentation seeking certification to employ six Line Cooks from December 1, 2021, through May 1, 2022.  AF 153-79.

On September 22, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) identifying five deficiencies in Employer’s application and requesting more information from Employer.  AF 138-50.  On October 6, 2021, Employer submitted its response to the NOD and an amended job order.  AF 57-137.  On October 13, 2021, the CO issued its Final Determination denying certification based largely on Employer’s inadequate responses to the NOD which fail to show a temporary or peakload need.  See AF 38-56.

On November 2, 2021, Employer appealed the denial of certification and requested administrative review pursuant to 20 C.F.R. § 655.61.  AF 1-37.  The matter was assigned to me.

1 On April 29, 2015, the Departments of Labor and Homeland Security jointly published an Interim Final Rule (“2015 IFR”) amending the standards and procedures for the H-2B temporary labor certification program.  80 Fed. Reg. 24042 (Apr. 29, 2015).  This case will be heard under the procedures outlined in the 2015 IFR and all citations to 20 C.F.R. Part 655, Subpart A refer to the regulations as amended in the 2015 IFR.

2 The Administrative File is referred to herein as “AF”.


on November 15, 2021. On November 17, 2021, I held a preliminary conference call with counsel for both parties. During the call, the parties stated they would discuss the potential for resolution. Counsel for the CO, Jeremy Marshall, Esq., advised via email on November 19, 2021, that “[t]he CO has indicated that she does not agree to a settlement in this matter, and will not take the case back on remand.” Email from Jeremy Marshall, Attorney for the CO, to Kristen Wice, Attorney-Advisor to Judge McGrath (Nov. 19, 2021 12:21PM).

II. Standard of Review

The scope and standard of review in the H-2B program are limited. The Board “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(e). The Board must affirm the CO’s determination, reverse or modify the CO’s determination, or remand the case to the CO for further action. Id.

III. Analysis

The first deficiency listed in the Final Determination states Employer failed to establish the job opportunity as temporary in nature pursuant to sections 655.6(a) and (b). AF 42-46. The CO notes that the documents Employer submitted in reply to the NOD were mostly non-responsive, making it difficult, if not impossible, to verify Employer purported temporary need.

Section 655.32(a) states that “[t]he employer’s failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.” 20 C.F.R. § 655.32(a) (emphasis added). A review of the documents submitted in response to the NOD reveal that Employer clearly failed to supply all the information requested by the CO.

Notably, the CO requested “[s]ummarized monthly food/beverage gross sales report for a minimum of two previous calendar years.” AF 143. Instead of monthly totals, Employer submitted its quarterly profit loss statements, which include food and beverage sales for 2020 and 2019. AF 126-33. Further, the quarterly food and beverage totals, and total sales do not support the increase in business during the holidays and a 30 percent increase in sales volume beginning in February as stated by Employer. Because the profit loss statements are grouped by quarter, two months during Employer’s claimed peak period, December and April, are not adequately represented.4 While it is possible, or even likely, that Employer’s business does increase substantially in December and February, I cannot verify that assertion without reviewing the monthly sales totals as requested by the CO.

3 Employer points out that the CO erroneously stated the profit loss statements only contain information from 2020. AF 2. Indeed, the profit loss statements provided in response to the NOD contain information for the previous two years; however, they still do not comply with what the CO requested.

4 As Employer correctly notes in its appeal, the first quarter of the year, January through March, is part of the claimed peak period and does represent the highest sales total for 2020. This information alone, however, is not enough for the CO to evaluate Employer’s need for workers during the peakload period.
The CO also requested “[s]ummarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Line Cook, the total number of workers or staff employed, total hours worked and total earnings received.” AF 143. In response, Employer submitted various employee pay stubs dated September 30, 2019, through September 30, 2021. Employer did not summarize this data in the manner requested by the CO, and thus she was “unable to compare the employer’s non-peak season against its requested dates of need to further analyze how it determined it has a peakload need from December 1, 2021 through May 1, 2022.” AF 46.

At bottom, Employer did not submit the information requested by the CO. Without such documentation, Employer cannot rely solely on its statements to show a temporary need. Accordingly, I find Employer has not met its burden of showing that it is entitled to temporary labor certification for the six Line Cooks.5

ORDER

Based on the foregoing, it is ORDERED that the Certifying Officer’s decision denying Employer’s H-2B Application for Temporary Employment Certification is AFFIRMED.6

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

---

5 Because the CO’s denial of certification is upheld based on Employer’s failure to submit adequate documentation in response to the NOD, it is not necessary to discuss the other deficiencies cited in the CO’s Final Determination.
6 I note that Employer can refile its application for H-2B workers with the correct documentation in support of its temporary need.