This appeal is before the Board of Alien Labor Certification Appeals on JC Cares’ application under the H-2B nonimmigrant alien work program. 1 A certifying officer at the Department of Labor’s Employment and Training Administration denied Employer’s application. Employer timely requested BALCA administrative review.

BALCA review of denials of H-2B applications is limited to “the Appeal File, the request for review, and any legal briefs submitted.” 20 C.F.R. § 655.61(e). 2 I will affirm the certifying officer’s denial of the of labor certification.

Findings of Fact

On December 22, 2021, Employer applied for one “Live in Child care worker & live in household keeper” for a nearly three-year period, from March 7, 2022 until March 2, 2025. Employer based the application on an asserted one-time occurrence. AF 44.

Employer explained that she and her husband work in the medical field and that they need to isolate themselves when exposed to COVID patients. They need a live-in childcare and household worker until their soon-to-be-born child will be over two years old, thus providing safety for that child and the entire family, especially during the COVID pandemic. Id.

Employer’s initial application stated that the worker’s job duties will include maintaining a safe and clean environment, creating educational activities, and preparing snacks, and maintaining a clean environment for the children. AF 46. In addition, the worker must provide, “[s]pecialist

1 See Immigration and Nationality Act, 8 U.S.C. § 1101, et seq., and certain of its implementing regulations at 20 C.F.R. Part 655, subpart A.

2 The request for review may contain only legal arguments and evidence that was submitted to the certifying officer prior to issuance of the final determination. 20 C.F.R. § 655.61(a)(5).
skills such as couture wardrobe or antiques and other artefacts,” and “must know Biyasa Dialect (From Philippines).” *Id.*; AF 50. Employer stated the basic wage rate as $22.51 to $22.55 and the overtime wage rate as $34.00 to $35.00 per hour. AF 47.

**Notice of Deficiency.** On January 3, 2022, the certifying officer issued a notice of deficiency, noting five deficiencies. AF 33-43. Two were clerical and were cured. The remaining three are:

1. Employer failed to establish the job opportunity as temporary, citing 20 C.F.R. § 655.6(a) and (b). The CO explained that Employer hadn’t explained how the applicant had been providing childcare in the past, why that couldn’t continue, and why the need for childcare will end on March 7, 2025, especially if the parents continue to work. Moreover, the applicant parents hadn’t shown how this would work if they both were isolating themselves because of exposure to COVID; would the worker provide care 24 hours per day, seven days per week? AF 38.

2. The special skills such as couture wardrobe, antiques and other artifacts, and knowledge of Bisaya dialect were not normal and accepted qualifications for the occupation sought, citing 20 C.F.R. § 655.20(e). AF 39.

3. Employer failed to submit an acceptable job order to the Washington State Workforce Authority, setting a wage consistent with what was on the temporary employment certification form (ETA Form 9142), citing 20 C.F.R. § 655.16 and 20 C.F.R.§ 655.18. AF 41. The job order submitted to Washington SWA also had to include specified amounts of pay during travel. AF 42.

The certifying officer explained what the applicant parents had to do to address the deficiencies.

**Employer’s response to Notice of Deficiency.** On January 20, 2022, the parents explained that they were uncomfortable placing their newborn into day care during the pandemic and that, if the pandemic does not end by March 2, 2025, they will “sacrifice [their] job to take care of [their] kids.” AF 26. They disclosed that their plan was to bring the brother of one of them to do the work on the H-2B visa; he has “some medical background” and they trust him. *Id.* The parents withdrew the asserted need for specialized skills such as couture wardrobe, etc. *Id.* They also said they’d correct the deficiencies on the job order they’d filed with Washington SWA as well as the salary information. AF 20-22.

**Final determination.** On January 12, 2022, the certifying officer denied the application for three reasons. AF 8-19. First, the CO found that the parents had not cured the deficient showing of a temporary, one-time occurrence. AF 12. As the CO wrote:

Care of one’s child is not a temporary occurrence. Care of children occurs round the clock for many years. While a child may enter day care, care continues in the home before and after school hours as well as over summers and holidays. The employer’s need for childcare seems to extend well beyond the requested period and would be fulfilled by another participant (i.e. the children’s school) after the requested period.
AF 14. The certifying officer also found that, while the parents said they’d cure the requirement of the specialized skills, the misstated wage offered, and the submission to the Washington SWA, they had not authorized specific changes to the application or corrected the other items. AF 16-19.

**BALCA review.** The parents requested administrative review of the denial. AF 1-7. They state that they understand that their forms lacked information, and they give the Department permission to make required corrections to the application on their behalf. AF 1. The parents repeat that they are healthcare workers and need to isolate themselves to prevent passing the virus to their newborn baby and other children. They state that they don’t have relatives close by and hope to get a visa to bring the brother to help them. AF 2.3

**Discussion**

**Standard of review.** The regulations are silent about the deference the Board of Alien Labor Certification Appeals should accord to a certifying officer’s determination. When the certifying officer’s determination turns on the Department’s (through ETA) long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (addressing deference courts must give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer’s determination unless it is arbitrary, capricious, or inconsistent with the ETA’s established policy interpretation. But, absent ETA’s long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer’s denial de novo. On the present record, I need not determine the deference owed the certifying officer, for I would affirm the denial of the application even on the less deferential, de novo review.

**H-2B program requirements.** An employer seeking certification under the H-2B program 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); 8 C.F.R. § 214.2(h)(6)(ii)(B).

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.

**Id.** The employer’s need is temporary if it is: “a one-time occurrence; a seasonal need; a peakload need; or an intermittent need.” 20 C.F.R. § 655.6(b).

An employer must also demonstrate that the number of positions and period of need are justified and that the request represents a bona fide job opportunity. 20 C.F.R. § 655.11(e)(3)-(4).

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3 The parents included an obstetrics report confirming the current pregnancy. AF 3-4. On administrative review, BALCA cannot consider evidence that was not before the certifying officer. But, in any event, there has never been a dispute that the applicant is pregnant.
**One-time occurrence.** To establish a temporary, one-time need, “[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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(1).

A temporary need because of the effects of the COVID-19 pandemic on an Employer’s business could be a one-time occurrence in certain situations. But here, Employer has not made that showing. The parents hope they won’t need live-in childcare and household work for more than three years (i.e., beyond March 2, 2025). But, what if they have more infant children, what if the pandemic continues, or what if their child requires care even after age 2 1/2? Their suggestion that they’ll give up working in three years if their children need childcare is not credible; they don’t explain how they will support the family. And the question isn’t the staffing; it’s whether the need is temporary. The parents’ offer to do the work themselves after three years if needed is a change in staffing, not in need; it does not make the need temporary. Finally, how often are both parents exposed to COVID such that they both have to isolate? What is the actual need for the brother to join them?

**Order**

For the foregoing reasons, the Certifying Officer’s final determination that the Employer failed to establish the temporary need is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN  
Administrative Law Judge

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4 See *Henson Family Investments, LLC*, 2022-TLN-00014 (Jan. 24, 2022) (Berlin, ALJ) (finding the effects of the COVID-19 pandemic created a temporary need based on a one-time occurrence where Employer was significantly impacted by changes in the supply/demand economy due to the pandemic).

5 As the certifying officer found, Employer also failed to remedy certain technical errors on the application. There might be a way those could be addressed, but I do not reach the question because Employer’s failure to show a one-time temporary need is a sufficient basis to affirm the certifying officer’s denial of the application.