DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer’s (“the CO”) denial of 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 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). Following the CO’s denial of an application under 20 C.F.R. § 655.32, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.33(a). The scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).

STATEMENT OF THE CASE

On March 2, 2012, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary peakload labor certification from Keiwit Offshore Services, Ltd. (“the Employer”). AF 787-848. The Employer requested certification for 100 pipe fitters (SOC occupation title “plumbers, pipefitters, and steamfitters”) from April 1, 2012 through January 31, 2013. AF 793. The Employer provided the following statement of temporary need:

[The Employer] regularly employs Pipe Fitters for the fabrication, assembly, installation and hydro testing of process piping systems for offshore drilling jackets and decks for both structural and process pipe applications, but requires the temporary services of Pipe Fitters to supplement the permanent staff during its anticipated peakload period. This supplementation is due to its anticipated increase in demand for the company’s fabrication services from April 2012 to January 2013. Once this seasonal demand subsides, the Company will no longer need these workers as the permanent workforce will be back to its normal operations which are sufficient to cover the regular periods of business.

Id. With its application, the Employer submitted a chart showing the number of pipe fitters needed between February 2012 through January 2014. The chart shows the following need for pipe fitters:

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1 Citations to the 848-page appeal file will be abbreviated “AF” followed by the page number.
AF 805. The Employer also submitted a “Historical Yard Histogram,” showing fluctuations in the number of workers between January 2005 and March 2010. The Employer did not include any numbers to quantify the data on the y-axis. AF 804.

On March 9, 2012, the CO issued a Request for Further Information (“RFI”), notifying the Employer that it was unable to render a final determination for the Employer’s application because the Employer did not comply with all requirements of the H-2B program. AF 777-786. The CO determined that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. §§ 655.21(a) and 655.6(b). AF 779. The CO noted that the Employer’s requested dates of need in the current application overlap with the Employer’s previous application for pipe fitters. Id. The CO determined that because the Employer received certification for 150 Pipe Fitters and Steamfitters in the same area of intended employment from October 1, 2011 through July 31, 2012, the Employer has an ongoing and continuous need for pipefitters. AF 779-780. The CO acknowledged that the occupation titles in each application were slightly different, but found that the job duties described in each application were nearly identical. AF 780.

Additionally, the CO found that it was unclear how the Employer’s dates of need would have changed from the previously stated peakload need between October 1 and July 31, and why the Employer is requesting 100 pipe fitters in addition to the 150 pipe fitters for which it is currently certified. Id. Furthermore, the CO found that the

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Employer failed to explain the nature of the temporary need based on the Employer’s business operations. *Id.*

The CO evaluated the Employer’s chart of the pipe fitters on staff from February 2012 through January 2014, and noted that the number of pipe fitting jobs in February 2012 is nearly equal to the number of pipe fitting jobs in July 2012. AF 780. The CO found that the chart does not substantiate a temporary peakload need for pipe fitters from April 2012 through January 2013. *Id.* Therefore, the CO required the Employer to submit additional information to justify its temporary need for pipe fitters. AF 781. The CO required the Employer to submit a description of the Employer’s business history and activities (i.e. primary products and services) and schedule of operations though the year, an explanation why the nature of the Employer’s job opportunity and number of foreign workers requested reflect a temporary need, and an explanation regarding how the request for temporary labor certification meets one of the regulatory standards of a one-time occurrence, seasonal, peakload, or intermittent need. *Id.*

In addition, the CO required the Employer to submit the following supporting documentation: (1) signed work contracts and/or monthly invoices from previous calendar year(s) clearly showing work will be performed for each month during the requested period of need; (2) annualized and/or multi-year work contracts or work agreements supplemented with documentation specifying the actual dates when work will commence and end during each year of service and clearly showing work will be performed for each month during the requested period of need; (3) summarized monthly payroll reports for 2010 and 2011 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 earnings received; 4) a written, signed attestation that explains why the Employer is requesting additional workers when it has a currently certified application for a similar job opportunity at the same worksite location; and 4) other evidence and documentation that similarly serves to justify the chosen standard of temporary need. AF 781-782.

The CO also found five other deficiencies, including a deficiency with the Employer’s recruitment report and the date that the Employer’s State Workforce Agency (“SWA”) job order closed.
The Employer responded to the RFI on March 16, 2012. AF 56-776. The Employer explained that it specializes in the custom fabrication of large steel structures and components for deep-water offshore oil and gas projects, and that it employs approximately 1,800 full-time workers at its facility. AF 56. The Employer stated that it regularly employs pipe fitters for the fabrication, assembly, installation and hydro-testing of process piping systems for offshore drilling jackets and decks for both structural and process pipe applications. AF 242. The Employer stated that it is a party to contracts with Anadarko Petroleum Corporation, Shell Offshore, Inc., and Chevron North America, and that these contracts extend for the period of need from April 1, 2012 until January 2013. AF 56-57. The Employer stated that each of these contracts is entering a new stage, during which the Employer needs additional pipe fitters to complete its contractual obligations. AF 57. The Employer stated that it will not need the 100 additional pipe fitters after the peakload period ends on January 31, 2013. Id.

With respect to the chart that it submitted with its application, the Employer stated that:

[The chart] summarizes the perfect scenario of [the Employer’s] workload by contract or project. However, based on the Employer’s experience, and as evident from the historical yard histograms, the workload is usually delayed by 3 or 4 months from the “perfect work schedule.” Therefore, the actual peak load, as evident from the historical data, shifts to later in the year covering the listed periods of employment. The delays that the Employer experiences are most commonly due to a variety of reasons including hurricanes, strong winds and strong rains at the Gulf of Mexico, material delivery delays (e.g. earthquake and tsunami in Japan) as well as other transportation events. Therefore, the actual peak need is shifted to the months [of] April through January, with an increase in the work in the months [of] May through December.

AF 58. The Employer explained that its need for pipe fitters meets the regulatory definition of peakload need, because it regularly employs pipe fitters at its facilities but is temporarily in need of additional pipe fitters to supplement its existing workforce due to the anticipated increased demand for its fabrication services from April 2012 through January 2013. AF 59. The Employer stated that 100 pipe fitters are needed in order to meet the Employer’s contractual obligations and construct massive structures by January 2013. Id. The Employer also submitted copies of its current contracts and schedules.
The Employer submitted its contract with Chevron North America for work on the Jack & St. Malo Project. AF 98-162. The parties entered into the contract on February 15, 2011 and work was to commence immediately. AF 98-114. The entire project was to be completed by October 1, 2011. AF 114. The contract schedules submitted for the Jack & St. Malo Project indicate that the project will be completed by February 5, 2013. AF 115-162, 413. The Employer’s contract with Anadarko Petroleum Corporation for the Lucius Project, entered into on December 15, 2011, provides that work will commence immediately. AF 163-181. The contract schedule indicates that the project will be completed by January 15, 2014. AF 186-232. The Employer entered into a contract with Shell Offshore for the Olympus Project on September 15, 2010. AF 256-258. The contract provides that work will commence on September 15, 2010 and be completed by June 1, 2013. AF 258.

The Employer also submitted copies of its payroll records and invoices that it sent to companies that it performed work for during 2010 and 2011. AF 469-775. These payroll records show the number of hours worked by each employee and each employee’s job title, but do not include the total number of temporary and permanent pipe fitters employed each month. *Ibid.*

On April 12, 2012, the CO denied the Employer’s application, finding that the Employer failed to establish that the nature of its need is temporary, as required by 20 C.F.R. §§ 655.21(a) and 655.6(b). AF 44-55. The CO found that the Employer’s three contracts do not support the Employer’s asserted peakload need, noting that the Employer submitted these contracts as part of its previously certified application for 150 pipe fitters and steamfitters from October 1, 2011 to July 31, 2012. AF 50. Additionally, the CO found that the contract schedules show that some work has been completed prior to the Employer’s starting date of need, and that work will continue beyond the Employer’s ending date of need. *Id.* Based on the evidence provided, the CO determined that it was unclear how the Employer’s need constitutes a peakload need lasting fewer than ten months. *Id.* The CO also found that the Employer did not sufficiently explain why it does not need the pipe fitters in February and March. *Id.*
The CO also denied certification based on the Employer’s failure to include the Employer’s ending date of need in its newspaper advertisement and job order, and its failure to submit a complete and accurate recruitment report. AF 51-55.

The Employer appealed the CO’s determination to BALCA on April 20, 2012, and the Board received the administrative file on April 30, 2012. The Employer filed a brief on May 4, 2012, asserting that its need for 100 pipe fitters meets the regulatory definition of peakload need. The Employer explained that it has more than 130 pipe fitters actively working on existing contractual obligations, and that as different phases of a contract begin and end, there are spikes in the temporary need for pipe fitters. The Employer also contends that several of the CO’s findings were incorrect. While the CO determined that the three contracts that the Employer cited as the reason for its peakload need were the same contracts that the Employer relied upon in its previously certified application for pipe fitters and steamfitters, the Employer points out that it entered its contract with Anadarko Petroleum Corporation on December 15, 2011, after its previous filing. Additionally, the Employer argues that the contracts are multiphase documents and different stages require an increased or decreased need for differing types of work.

The Employer also submitted a timeline of showing the need for workers on the Anadarko Petroleum Corporation project and the Shell Offshore project. The Employer’s timeline indicates that: 1) the Employer entered into the contract with Anadarko in December 2011; 2) from December 2011 to March 2012, the Employer was in the “Production Deck Phase,” which it staffers with permanent employees; 3) from April 2012 to January 2013, the Employer will be in the “Cellar Deck Phase,” which it cannot complete with permanent workers; 4) from January 2013 to July 2013, the Employer will be in the “Sub-cellar Deck Phase,” which it will staff with permanent workers. The Employer’s Shell Offshore timeline indicates that: 1) the Employer entered into the contract with Shell Offshore on September 15, 2010; 2) from October 2011 to July 2012, the Employer assembling the modules, which was performed by permanent staff; 3) from April 2012 to January 2013, the Employer will be working on the mechanical completion of the modules, which cannot be completed by permanent staff; and 4) from January 2013 to the end of the project, the Employer will be loading-out the modules, which can be completed by permanent staff.
Counsel for the CO filed a brief on May 7, 2012, arguing that the Employer did not establish a temporary peakload need for 100 pipe fitters and that the Employer’s advertisements and job order did not contain all of the information required by the regulations. The CO contends that the Employer’s need for pipe fitters lasts more than ten months, as evidenced by the Employer’s prior certification for 150 pipe fitters from October 1, 2011 through July 31, 2012. Additionally, the CO argues that the Employer’s requested period of certification does not correspond with the Employer’s projected need for pipe fitters. The CO points out that the Employer has 133 permanent pipe fitters on staff, and its projected needs chart predicts it will need fewer than that number of pipe fitters during October 2012.

DISCUSSION

In order to establish eligibility for certification under the H-2B program, an employer must establish that its need for nonagricultural services or labor qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the 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). The DHS regulations provide that 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B). To establish a peakload need, the employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The H-2B regulations provide that “[e]xcept where the employer’s need is based on a one-time occurrence, the Secretary will, absent unusual circumstances, deny an Application for Temporary Employment Certification where the employer has a recurring, seasonal or peakload need lasting more than 10 months.” 20 C.F.R. § 655.6(c). The Employer received certification for 150 pipe fitters from October 1, 2011 through
July 31, 2012, and now seeks certification for 100 pipe fitters from April 1, 2012 to January 31, 2013. The Employer’s need for pipe fitters is ongoing. According to the Employer, it has 133 permanent pipe fitters on staff. However, the Employer also has 100 temporary pipe fitters on staff. If the Employer’s application were certified, it would have “temporary” pipe fitters on staff for 16 consecutive months, which clearly contravenes Section 655.6(c).

The Employer argues that the specific phase of the contract that the Employer is currently entering has prompted its peakload need. However, the Employer is seeking fewer pipe fitters than it needed between October 1, 2011 and July 31, 2012. The Employer cannot parse out each individual phase of each project to dissect an ongoing need for pipe fitters into numerous “temporary” or “peakload” needs without any explanation why more pipe fitters are needed. On appeal, the Employer asserts that its permanent pipe fitters cannot work on the “Cellar Deck Phase” on the Anadarko Petroleum project and the “Mechanical Completion of Modules” phase on the Shell Offshore project. However, by the Employer’s own projections, it will not need any pipe fitters working on the Anadarko project until October 2012, when it will need just eight pipe fitters. Additionally, in November 2012, the Employer anticipates needing 122 pipe fitters; in December 2012, it anticipates needing 35 pipe fitters, and in January 2013, it anticipates needing 55 pipe fitters. That the Employer requests 100 pipe fitters to work during months where the Employer does not have an increased need for pipe fitters suggests that the temporary workers could supplant, rather than supplement, the Employer’s permanent work force.

Based on the foregoing, I find that the CO properly denied certification because the Employer failed to establish that it has a temporary peakload need for 100 pipefitters.

I note that the Employer failed to provide the documentation of demonstrating the number of temporary and permanent workers on staff for this occupation, separated by month, as the CO required in its RFI. Thus, there is no documentation in the record before me demonstrating that the Employer has 133 permanent pipe fitters on staff.
ORDER

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge