This case arises from BMC West, LLC’s (“Employer”) request for review of the Certifying Officer's (“CO”) decision to deny twelve applications 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 non-agricultural 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 seeking to utilize this program must apply for

---

1 Employer received twelve denied applications. In Employer’s Brief, Employer noted it was not aware of any consolidation of the matters and “would have opposed consolidation as the facts in each case are quite different AND the issuance of one decision may prejudice individual applications.” E. Br. at 1, fn. 1. I have reviewed each of Employer’s applications that are on appeal before me, and determined each involves different locations across the United States, different occupations, and different responsive documentation to the CO’s Notices of Deficiency. Therefore, I will render a decision in each case.

and receive labor certification from the U.S. Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies the application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien labor Certification Appeals (“BALCA”). 20 C.F.R. § 655.61(a).

**Background**

Employer is a building and construction materials supplier. (AF 68). On January 1, 2018, Employer filed its Form 9142 seeking eight full-time, peakload Assembler/Material Handers ("Assemblers") for the period of April 1, 2018 to November 15, 2018. Id. Employer’s Statement of Temporary Need stated, in part:

The Liberty County location has a temporary peak load need for persons with these skills because its busiest seasons are traditionally tied to the spring, summer and fall months, from approximately April 1st to November 15th, during which time we need to substantially supplement the number of workers for our labor force for these positions. As is well known, Georgia winters (during which time our business slows significantly each year due to the harsh winter weather conditions) are normally predictable, and it is possible for us to predict that these dates are regularly when the coldest and slowest part of the season will be. These winter dates are the dates that we have the least need for workers, and therefore do not need the temporary peakload workers during these winter months (we do however continue to employ some year round workers). Our temporary peak load workers are only needed during our busy season and do not become a part of our permanent labor force. Due to the nature of our work we are unable to engage in much business during the winter months, of approximately November 15th to April 1st, because the cold and wet weather is not conducive to construction work. . . . [O]ur business is directly tied to the construction industry. Since construction in general slows down during the winter months due to the cold and wet weather and the holidays, the need for laborers is substantially reduced since, in our experience, the home builders and construction companies do not purchase as much product during the winter months when they are not building as much.

---


4 Citations to the Appeal File are abbreviated as “AF” followed by the page number.

5 The standard occupational classification title was listed as “ Helpers—Production Workers” SOC code 51-9198. (AF 68).
On January 8, 2018, the CO issued a Notice of Deficiency (“NOD”), citing three deficiencies in Employer’s application. (AF 61-67). First, the CO determined that Employer did not provide sufficient information “to establish its requested standard of need or period of intended employment,” and cited 20 C.F.R. § 655.6(a)-(b). (AF 64). The CO wrote:

The employer explains that its peakload need is based on the construction industry that [] will slow during the winter months. The employer indicates that during the winter months, it is unable to engage in much business, because the cold and wet weather is not conducive to construction work. However, the employer’s work is done in Liberty County, Georgia, which is relatively favorable to year-round outside work.

…

The employer’s explanation of its temporary need points to an overall increase in its work projects which has resulted in its need for additional workers. However, it is unclear if the employer experiences a true peak in its business during its requested dates of need and if the employer experiences a lull in business during its nonpeak dates, November 16 through March 31. Further explanation and documentation is needed to support its peakload need.

(AF 64-65).

To correct this deficiency, the CO directed Employer to submit the following additional documentation:

1. A statement describing the employer’s business history and activities (i.e. primary products or services) and schedule of operations through the year;
2. An explanation and supporting documents that substantiate the employer’s statement that it is unable to engage in much business, because the cold and wet weather is not conducive to construction work. This documentation can include supportive letters from building trade organizations in the employer’s area of intended employment;
3. Summarized monthly payroll reports for a minimum of two previous calendar year[s] that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Assembler/Material Handlers, the total number 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; and
4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the
employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 65).

The CO also cited a second deficiency, finding that Employer failed to establish temporary need for the eight Assemblers it requested on its application. Id. The CO cited the applicable regulations at 20 C.F.R. § 655.11(e)(3)-(4). To correct this deficiency, the CO directed Employer to submit the following:

1. An explanation with supporting documentation of why the employer is requesting eight Assembler/Material Handlers for its worksite in Liberty County, Georgia during the dates of need requested;
2. If applicable, documentation supporting the employer’s need for eight Assembler/Material Handlers, 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 (Assembler/Material Handlers), the total number 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; and
4. Other evidence and documentation that similarly serves to justify the number of workers requested, if any.

(AF 66).

The CO cited a third deficiency, finding that Employer failed to establish the area of intended employment pursuant to 20 C.F.R. § 655.15(e). Id. To correct this deficiency, the CO directed the Employer to “amend Section Fc., Item 7[a]. of the ETA Form 9142 to indicate that its work will be performed in multiple worksites. The employer must also identify in Section Fc., Item 7a. the additional geographic place(s) of employment with as much specificity as possible.” (AF 67).

On January 19, 2018, Employer submitted its response to the NOD. (AF 28-60). Employer submitted documentation, including a written statement, a 2016 to 2017 summarized payroll, a 2016 to 2017 sales chart, charts detailing advantages of employing H-2B workers, letters of intent, an article on property sales, and a FEMA disaster declaration.

On February 26, 2018, the CO issued a Non-Acceptance Denial denying Employer’s application for temporary labor certification for Employer’s failure to establish the job
opportunity as temporary in nature and failure to establish temporary need for the number of workers requested. (AF 16-21). First, the CO determined that Employer did not submit sufficient information “to establish its requested standard of need or period of intended employment.” (AF 16).

The CO wrote:

The employer states that its temporary need is based on projections and building schedules provided by its customers, general industry projections, and lack of available labor. The employer also stated that its business is tied directly to that of the builders’ fiscal year and labor. The employer was specifically asked to submit an explanation as well as supporting documents that substantiate the employer’s statement that it is unable to engage in much business because the cold and wet weather is not conducive to construction work. This document would provide support for the employer’s statement that “harsh winter weather conditions” cause the employer to not engage in much business. However, this document was not included in the employer’s NOD response, thus failing to support their claim. The employer included a report of climate in Georgia; however, based on the submitted report and the Department’s research, the weather in the areas of intended employment shows that the monthly average low temperatures during its nonpeak period do not fall below freezing and the highs in the nonpeak period are between 63 and 72 degrees.

The employer explained that its peakload need is due to a labor shortage and the lack of temporary workers needed to accommodate the demand for its business operations. The employer explained that once their Austin worksite was able to obtain H2B workers, that worksite was able to meet their peak season demand. The employer believes that the same would happen at their Midway, Georgia truss plant because increased labor is needed to increase production. However, it remains unclear if the employer has an overall labor shortage or if their need is tied to its requested dates of need.

Therefore, the employer did not overcome the deficiency.

(AF 18-19).

On March 9, 2018, Employer requested administrative review of the CO’s Final Determination/Non-Acceptance Denial. (AF 2). The case was docketed by the Board of Alien
Labor Certification Appeals (“BALCA”), and I issued a Notice of Docketing and Order Establishing Briefing Schedule on March 20, 2018.

On March 29, 2018, Employer filed Applicant’s Brief on Appeal (hereinafter “Employer’s Brief” or “E. Br.”). Employer argues that “the CO failed to follow recent departmental guidance regarding the processing of renewal applications,” and “the CO erred in her determination of the merits in virtually every critical respect.” E. Br. at 1-2.

**Standard of Review**

BALCA’s standard of review in H-2B cases is limited. BALCA reviews H-2B decisions under an arbitrary and capricious standard. See Brooks Ledge, Inc., 2016-TLN-00033, slip op. at 5 (May 10, 2016). 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 actually submitted to the CO before the date the CO issued the Final Determination. 20 C.F.R. § 655.61. After considering the evidence of 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. 20 C.F.R. § 655.61(e).

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, slip op. at 7 (Jan. 10, 2011); Andy & Ed. Inc., 2014-TLN-00040, slip op. at 2 (Sept. 10, 2014); Eagle Indus. Prof’l Servs., 2009-TLN-00073, slip op. at 5 (July 28, 2009). 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 services 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. 20 C.F.R. § 655.1(a).

**Discussion**

Employer is required to establish that its need for the 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 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.


The employer bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; Alter & Son Gen. Eng'g, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); BMGR Harvesting, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). Need is considered temporary if justified as “a one-time occurrence[,] a seasonal need[,] a peakload need[,] or an intermittent need.” 20 C.F.R. § 655.6(b); see also 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6).

The employer must also demonstrate a bona fide need for the number of workers requested. 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).

In this case, Employer applied for temporary labor certification on a “peakload” basis. An employer establishes a “peakload need” if it shows it “regularly employs permanent workers to perform the services 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). Employer asserted that its peakload need is based on projections and build schedules and the lack of available labor. (AF 35). In its appeal brief, Employer argues that: (1) the CO’s failure to follow Department of Labor guidance; (2) her failure to understand and review certain documents; and (3) her misplaced reliance on weather patterns, all warrant overturning the denial. E. Br. at 1-2. I address these arguments in turn.

I. Department of Labor Guidance

Employer argues that the CO’s decision is “starkly at odds with the Department of Labor’s 2016 guidance regarding subsequent determinations of an employer’s previously certified temporary need and the evidence necessary to support such a subsequent determination.” E. Br. at 4. Employer bases this argument on ETA’s Announcement of Procedural Change to Streamline the H-2B Process for Non-Agricultural Employers: Submission of Documentation Demonstrating “Temporary Need” (Sept. 1, 2016), available at https://www.foreignlaborcert.doleta.gov/pdf/FINAL_Announcement_H-2B_Submission_of_Documentation_Temporary_Need_082016.pdf (last visited June 28, 2018) (“Guidance”). The Guidance provides:

To reduce paperwork and streamline the adjudication of temporary need, effectively [sic] immediately, an employer need not submit additional documentation at the time of filing the Form ETA-9142B to justify its temporary need. It may satisfy this filing requirement more simply by completing Section B “Temporary Need Information,” Field 9 “Statement of Temporary Need” of the Form ETA-9142B. . . . Other documentation or evidence demonstrating
temporary need is not required to be filed with the H-2B application. Instead, it must be retained by the employer and provided to the Chicago NPC in the event a Notice of Deficiency (NOD) is issued by the CO.

Employer argues that its application should have been certified based on the Guidance because it has a history of previously approved certifications, and has recurring peakload staffing needs. E. Br. at 7. Further, Employer argues that its application “explicitly noted that it was seeking ‘recertification’ to utilize ‘returning workers’” and its prior applications adequately explained its business and peakload need. Id. at 8. Employer argues that the CO’s failure to consider its history of applications, contrary to the Guidance, was arbitrary and capricious. Id.

The Guidance addresses 20 C.F.R. § 655.11(j), which reads:

In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the FEDERAL REGISTER a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.

While the Guidance may have been intended to serve as a stopgap until changes to the OFLC registration process were promulgated, it is not a regulation. See also Gordon Stone Co., LLC, 2018-TLN-00083, slip op. at 5 (Apr. 16, 2018) (noting the Guidance’s non-regulatory status). Moreover, Employer’s strict interpretation of the Guidance belies the Guidance’s non-regulatory nature.

Neither the Guidance nor the current regulations prohibit the CO from requesting additional information. On the contrary, the Guidance specifically provides:

If the job offer has changed or is unclear, or other employer information about the nature of its need requires further explanation, a NOD requesting an additional explanation or supporting documentation will be issued. The factors used by the CO to determine whether the employer’s need is temporary in nature are the requirements in 20 C.F.R. §§ 655.6 and 655.11(d) and (e).

It is the quality, consistency, and probative value of the information provided on the Form ETA-9142B itself that will be determinative in the CO’s assessment of temporary need. The issuance of prior certifications to the employer does not preclude the CO from issuing a NOD to determine whether the employer’s current need is temporary in nature. Likewise, inconsistencies between the employer’s written statements on the Form ETA-9142B with other evidence in the current or prior application(s) will cause the CO to issue a NOD.

Once the CO issued the NOD in this case, the burden was on the Employer to produce responsive documentation. “The 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. §
Moreover, though applications should reasonably be reviewed within the context of previous certifications where the CO concluded that the basic requirements for certification were met in the previous years, the Guidance and regulations do not allow a non-meritorious application to survive simply based on previous years’ approvals. See Jose Uribe Concrete Constr., 2018-TLN-00044, slip op. at 14 (Feb. 2, 2018); see also H & H Tile & Plaster of Austin, Ltd., 2018-TLN-00049 (Feb. 16, 2018). Thus, though the success of previous applications should be considered, this metric is not dispositive.

In reviewing this application and the appeal file, I find that no prior applications (or data therefrom) have been included in the record. See generally (AF 1-102). Employer provided a list of 2017 application numbers in its brief, but it did not provide any copies or specific information regarding those applications. Accordingly, I cannot make any determinations based on the previously filed applications. Even if I were able to consider Employer’s previously filed applications, the CO’s denial of certification would nonetheless be affirmed based on my findings below.

II. Evaluation of Employer’s Supporting Documents

To support its requested peakload need period of April 1, 2018 to November 15, 2018, Employer provided a letter of explanation, 2016 to 2017 summarized payroll reports, 2016 and 2017 sales reports, a seasonal capacity analysis, letters of intent, an article on property sales, and a FEMA disaster declaration. (AF 28-60).

a. Letters Submitted as Supporting Documents

Employer provided a letter with an updated explanation of its temporary need. (AF 35-39). Employer’s letter states that its “sales reports do not accurately reflect the seasonality of our business due to the lack of available labor necessary to meet the demands of our customers.” (AF 35). Employer also states its peakload season from April 1 to November 15 is “due to colder weather and the holidays.” (AF 38). Employer asserts that “the average low temperature and decrease in hours of sunlight negatively impact the volume of construction that occurs from December to March.” Id.

The CO found that Employer failed to establish if the winter weather causes a true peakload need. The CO noted that the weather report provided by Employer and the Department’s own research does not show that the “temperatures during its nonpeak period do not fall below freezing and the highs in the nonpeak period are between 63 and 72 degrees.” (AF 9). Additionally, although Employer asserts that fewer daylight hours from December to March negatively impact its ability to do work, it does not explain why its work capacity during the decreasing daylight hours during its “peakload” months of mid-September to November are not similarly limited. See (AF 38). Accordingly, I find that employer’s letter of explanation does not support the temporary peakload need asserted by Employer.

In lieu of submitting contracts, Employer submitted five letters of intent to support its
peakload need period of April 1, 2018 to November 15, 2018. (AF 45-49). Each letter contains nearly identical language regarding peakload, which states: “[t]he peak months that services are performed for our company by BMC are April 1, 2018 through November 1, 2018.” See, e.g., (AF 45). The letters do not explain the reason for the asserted peakload need. Id. Thus, the letters of intent fail to clarify whether the “peak in need is tied directly to the availability of the workers or an actual peakload need for the employer’s services.” (AF 10). Accordingly, I find that the letters of intent do not help Employer establish its peakload need or a need for the number of workers requested.

b. Articles on Property Sales and FEMA Declaration

In addition to these letters, Employer submitted an article on property sales and a FEMA disaster declaration. (AF 51-60). The article on property sales shows median days that homes across the U.S. were on the market prior to sale; but the article did not speak to new home construction or the labor needs in Employer’s identified area of need. (AF 51-55). Employer includes the FEMA disaster declaration to demonstrate that its Georgia facility “is perfectly situated” to provide trusses to construction sites in South Georgia and Northeast Florida, which are rebuilding following the damage caused by Hurricane Irma. (AF 36-37, 56-60). Upon reviewing these documents the CO determined that they “do not point to a temporary need in the industry nor [do they] point to a peakload in new home construction or in the employer’s business.” (AF 10). The Employer, however, did not submit contracts or other documentation showing a temporary increase in labor needs or Employer’s involvement with any specific rebuilding as a result of the hurricane. Thus, while I am mindful of the property damage caused by Hurricane Irma, I find that the Employer has not provided sufficient documentation to link its 2018 labor needs with a temporary need that may have resulted from Hurricane Irma. Accordingly, I find that the article on property sales and the FEMA declaration do not help establish Employer’s peakload need or a need for the number of workers requested.

c. Payroll Reports

Employer submitted summarized payroll reports of the overtime hours worked during 2015, 2016, and 2017. (AF 40). The overtime payroll reports are for “Assembler” workers and are separated based on permanent and temporary employees. Id. The CO found that the overtime payroll reports show that the amount of hours worked fluctuates year-round, without an identifiable peak period. (AF 17). Employer asserts that, absent the labor shortage in the region, its “monthly sales and payroll reports would reflect seasonality.” (AF 36). It is the employer, however, who bears the burden of establishing why the job opportunity reflects a temporary need within the meaning of the H-2B program. 8 U.S.C. § 1361; Alter & Son Gen. Eng’g, 2013-TLN-00003, slip op. at 4 (Nov. 9, 2012); BMGR Harvesting, 2017-TLN-00015, slip op. at 4 (Jan. 23, 2017). In this matter, the payroll reports do not establish why the job opportunity reflects a temporary need or Employer’s need for the number of workers requested.

d. Sales Reports

The Employer provided sales reports for its Midway, Georgia location from 2016 and 2017. (AF 41-42). The CO found that the 2017 sales report “shows the employer’s nonpeak
months of February and/or March had bigger net sales than all of the requested peak months of April through November.” (AF 10). Similarly, the 2016 net sales fluctuate year-round, with the nonpeak month of January having net sales greater than any month identified by Employer as a peakload month. See (AF 42). Accordingly, I find that the sales reports do not support Employer’s asserted temporary need or a need for the number of workers requested.

e. Employer’s H-2B Seasonal Capacity Analysis

Employer submitted charts demonstrating an increased capacity in labor at its various locations H-2B workers were employed. (AF 43-44). Employer states that, in the Marietta area, an increase in the “available projects in the marketplace followed” the availability of H-2B workers. (AF 44). Further, the Employer attributed the need for H-2B workers to the region’s “labor constraints.” Id. The presence of a labor shortage, however, does not support a finding that Employer’s need is temporary in nature. Rather, Employer bears the burden to establish “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). I find that Employer’s seasonal capacity analysis demonstrates only that Employer has an increased capacity when a greater number of laborers are available; it does not establish that Employer’s labor need is seasonal, short-term, or temporary in nature. Accordingly, I find that Employer’s seasonal capacity analysis does not support Employer’s assertion of peakload need or a need for the number of workers requested.

f. Employer’s Supporting Documents Fail to Establish Temporary Need

For the reasons explained above, I find that Employer has failed to provide sufficient information to establish peakload need. The evidence submitted by Employer does not support Employer’s attestation that due to seasonal winter weather conditions its peakload need spans the period of April 1 through November 15, 2018. Moreover, Employer’s evidence does not explain or support its alleged need for eight Assemblers. Accordingly, I find the CO’s grounds for denial were properly supported by the record.

III. Statements Regarding the Weather

In Employer’s Brief, Employer asserts that “the CO’s rationale for rejecting BMC West’s applications rested on her evaluation of a single phrase: the favorable weather condition in the location of intended work.” E. Br. At 9. The CO noted in her Non-Acceptance Denial that Employer had been asked to submit “an explanation as well as supporting documents” to substantiate its claim that it is “unable to engage in much business because the cold and wet weather is not conducive to construction work.” (AF 9). The CO explained that “the monthly average low temperatures during its nonpeak period do not fall below freezing and the highs in the nonpeak period are between 63 and 72 degrees.” Id.

Employer argues that the CO’s subjective views regarding the weather “properly play no part in determining whether... an applicant has demonstrated the requisite ‘seasonal or short-term demand’ for employer’s services.” E. Br. At 10 (quoting 8 C.F.R. § 214.2(h)(6)(ii)(B)(3)).
Employer’s assertion that its application was improperly denied solely due to weather issues is contradicted by the record. As explained above, Employer’s evidence failed to establish that the job opportunity is temporary in nature. Accordingly, the CO’s statement regarding the weather is moot – Employer’s application was flawed for numerous evidentiary reasons and the CO focuses on those issues in her denial.

Moreover, I fail to see how the CO’s statement is improper. The CO noted, based on weather data, that the average temperature and weather conditions in the off peakload season did not appear unconducive to construction. (AF 9). The CO asked for additional evidence to establish that the weather was a factor in determining the peakload season. This request is not unreasonable or improper. Employer raised the weather as a factor limiting the peakload need period; the CO may properly ask Employer to support that statement and, here, Employer failed to do so.

CONCLUSION

For the reasons discussed above, I find that the Employer has not met its burden of showing that its employment need is temporary in nature based on peakload need or that it needs the number of workers requested. Further, I find the CO’s determination was neither arbitrary nor capricious. Accordingly, I find that the denial of Employer’s H-2B certification is affirmed.

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is AFFIRMED.

For the Board:

LARRY S. MERCK
Administrative Law Judge