This case arises from H & H Tile and Plaster of Austin’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny 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 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); 1 20 C.F.R. § 655.6(b). Employers seeking to utilize this program must apply for

1 The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii). Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division H, Title I, § 113 (2015). This definition has remained in place through
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 swimming pool plastering and renovation business. (AF 196-97). On November 9, 2017, Employer filed its Form 9142 seeking eighteen full-time, peakload plaster finishers for the period of January 23, 2018 to November 23, 2018. (AF 187-89). Employer’s Statement of Temporary Need stated:

Our need for additional workers is peak load, because the seasonal nature of our business results in a peak in our production during portions of the year. Because our business is tied to landscape, nursery and construction industries that are affected by the seasonal nature of the work, there are times during the year when certain landscape installation work and construction related work is reduced or halted due to seasonal fluctuations. Since our business functions within the project plans and schedules of our customer’s landscape design plans and construction projects, our peak load is tied to the seasonal nature of the landscape and construction related business. We are submitting support documents that support our recurrent/seasonal peak load need. Due to a natural seasonal slowdown of demand from our customers, there is a regular reduction in our workload, and therefore, a reduction in our workforce. However, each year when the workload demands from our customers increases, their work load demands cause an increase in their demands for the product we produce and we experience a peak load period of need, directly tied to customer and market demands. Therefore, we need additional workers for this peak load seasonal period. For our Company, there are times during the year when there is much more work. Due to the natural climate changes, weather conditions, and customer needs for our services, our needs are peak load. Our Company is chosen by customers and subsequent appropriations legislation, including the current continuing resolution. See Further Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-123, Division B, Title XII, Subdivision 3, § 20101 (2018).

2 On April 29, 2015, the Department of Labor (“DOL”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules provided in the IFR apply to applications “submitted on or after April 29, 2015, and that have a start date of need after October 1, 2015.” IFR, 20 C.F.R. § 655.4(e). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.

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

4 The standard occupational classification title was listed as “Plasterers and Stucco Masons,” SOC code 47-2161. (AF 187, 255).
contractors to provide a product for their use in their landscape and construction projects. There is a peak period during the year (seasonal) when there is more work to be performed in quarry production. We have permanent employees and we only need additional workers during the peak load portion of the year, and it is difficult to obtain these peak load temporary workers when we need them. During our peak load period, we need additional workers and despite recruiting and advertising we have not been able to find them in the area we are located or where the work is to be performed. For the combined reasons listed above, our Company’s need for this type of labor is peak load and temporary.

(AF 192-93). Employer attached letters of intent, an additional statement of temporary peak load need, a client list, sample contracts, and sample invoices to its filing, in support of its application. (AF 195-238).

On November 20, 2017, Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), citing two deficiencies in Employer’s application. (AF 180-86). 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 183-85). The CO noted specifically that it was “not clear if the employer experiences a true peak in its business during its requested dates of need, and if the employer experiences a slowdown in business during its nonpeak dates.” Id.

To correct this deficiency, the CO directed Employer to include a detailed statement of temporary need containing:

1. A description of the business history and activities (i.e. primary products or services) and schedule of operations through the year; and
2. An explanation regarding why the nature of the job opportunity being requested for certification reflect a temporary need. The employer must explain why it experiences an increase need for workers during its stated period of need, January 23, 2018 to November 23, 2018. The employer must also explain why it does not have a need for its workers from November 24 to January 22.

(AF 184). Further, the CO wrote:

The employer must submit supporting documentation that justifies the dates of need requested for certification. The employer’s response must include, but is not limited to, the following:

1. Summarized monthly payroll reports for 2016 and up-to-date 2017 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. 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. A summary of monthly projects for 2016 and up-to-date for 2017 in the employer’s area of intended employment. The summary must include worksite location and beginning/ending dates of work;

3. Signed contracts for each project identified in the employer’s project summary. The contracts must include worksite location and the commencement and end dates of each project. Contracts/agreements should include a description of the work that was performed and include the title and signatures of all appropriate parties. If the contract is signed by an agent (as indicated by initials accompanying the signature) additional information is needed demonstrating that such person is authorized to enter into contracts on behalf of the company;

4. If applicable, documentation specifically indicating that the employer’s type of work cannot be performed during the entire time from November 24 to January 22 due to weather conditions; and

5. Other evidence and documentation that similarly serves to justify the standard of need and dates of need being requested for certification.

Note: If the submitted document(s) and its relationship to the employer’s need are not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) support its need for temporary workers.

(AF 184-85).

The CO also cited a second deficiency, finding that the employer failed to demonstrate that the eighteen workers it requested on its application is “true and accurate and represents bona fide job opportunities.” (AF 185). 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 a “detailed statement of temporary need containing an explanation as to how the employer determined the number of workers requested for certification.” Id. The CO also requested several documents similar to the documents requested previously, including summarized monthly payroll reports, a summary of monthly projects, and signed projects. (AF 185-86). The CO further requested any other evidence or documentation that justified Employer’s need for eighteen plaster finishers. Id.

On December 4, 2017, Employer submitted its response to the NOD. (AF 58-179). Employer reiterated that it submitted extensive documentation with its Form 9142, and also argued that it had submitted similar documentation with its previous applications, all of which were approved. (AF 62). Employer submitted additional documentation, including quarterly IRS payroll reports, customer intent letters referring to a peak load time period of mid-January to mid-November, and signed contracts. (AF 63-64). Employer also included “Sales by Customer Summar[ies]” for each month in 2016 and 2017. (AF 143-67). Employer also submitted a “Projected Staffing Levels per 2018 Project Plans” chart, which projected twenty permanent employees, and temporary employees ranging from eight to eighteen, for all twelve months of the year. (AF 168).

On December 20, 2017, Employer filed a request to amend its dates of need from January 23, 2018 through November 23, 2018 to February 6, 2018 through November 9, 2018. (AF 55-
Employer stated that its request was “due to changes in upcoming plans and project dates.” (AF 57).

On December 25, 2017, the CO issued a Final Determination denying Employer’s application for temporary labor certification because Employer failed to establish the job opportunity as temporary in nature and failed to establish temporary need for the number of workers requested. (AF 38-46). The CO determined that Employer did not submit sufficient information “to establish its requested standard of need or period of intended employment.” (AF 40). The CO noted that while Employer submitted numerous documents, those documents did not adequately establish peakload need and contained “quarterly tax returns, invoices for work completed on unspecified dates in the year 2017, and general letter of intent from an unknown sampling of customers.” (AF 42).

The CO further explained the reasoning for the denial:

Although the employer did submit staffing graphs for the years 2016 and 2017, they did not identify, for each month and separates 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. Additionally, the employer provided a general staffing chart that did separate permanent and temporary workers for the upcoming year 2018, but did not identify the occupations or hours to be worked and is based on undefined projections. Therefore, the staffing and payroll documentation submitted in whole is not sufficient to establish the employer’s need for workers during the dates of need requested.

As additional support of its peakload need, the employer provided three bid proposals with projected start dates identified generally as January 2018, but only one is signed by the client. The employer also provided three contracts with [a client]. The cover sheets (but not the actual contracts) identify two of the contracts as starting in “January 2018,” and the remaining contract as a “sample contract” from 2017. The contracts themselves do not specify deadlines or the dates for which the work will be performed and none are signed by the client. The incomplete nature of these documents is not sufficient to establish the employer’s peakload need for workers during the dates of need requested.

Also in the employer’s NOD response, it charted its past certifications with the program and stated, “[a]t this time, we hope that the chart above clearly establishes that [Employer’s] dates of need are for a temporary period of only ten (10) months.” The employer attempted to establish its peakload need based solely on past certifications; however, the employer did not provide the documents specifically requested in its NOD and the additional documentation was not sufficient to establish its peakload need requested. It is important to note that prior participation in the program alone does not establish the employer’s temporary need for workers.
Additionally, the employer explained that its change in its beginning and ending dates of need were not significant. The employer’s beginning date of need moved forward by 23 days and its end date of need extended eight days further. While the total change in the employer’s period of need is 31 days and is not justified in the documentation provided, the employer was required to justify its peakload temporary need overall.

. . . .

The employer’s filing history shows that it has systematically moved its start date to an earlier date each year since 2014. The employer’s starting dates of need in its last four certified applications have been 04/16/2014, 04/01/2015, 03/09/2016 and 02/15/2017. Each of these applications stated the same reasons for its peakload need: Natural climate changes, weather conditions in the employer’s area of intended employment and the customer needs for its services. In review of these previous applications, sufficient documentation was not provided to justify its peakload need or why the starting dates of need continually changed when the weather in this part of Texas has remained relatively consistent since the year 2014.

Lastly, the Chicago NPC received an email from the employer on December 20, 2017 requesting to change its dates of need to February 6, 2018 through November 9, 2018. For the reasons discussed above, the employer did not justify its overall peakload temporary need. This minor change in the dates of need requested does not impact this decision, and therefore will not be considered.

(AF 43-44).

The CO also determined that Employer did not demonstrate that “the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” (AF 44). The CO wrote:

In response to the NOD, the employer submitted 120 pages of documentation. The documentation contained copies from its initial submission which included a Letter of Intent, Statement of Temporary Peak Load Need, Client List, Sample Contracts and Sample Invoices. The NOD response also included new documents which included quarterly tax returns, general letter of intent from an unknown sampling of customers, unsigned bid proposals and unsigned contracts that do not specify deadlines or the dates for which the work will be performed.

. . . .

The employer also submitted quarterly tax returns. However, quarterly tax returns represent the employer’s entire business and all of its workers. It does not contain monthly hours worked by a single occupation, in this case Plaster
Finishers. Therefore, these documents were not used to assess the potential number of workers needed by the employer.

The employer did not provide sufficient documentation to measure the employer’s potential need for temporary workers. Therefore the employer did not overcome the deficiency.

(AF 45-46).

On December 29, 2017, Employer requested administrative review of the CO’s Final Determination/Non-Acceptance Denial. (AF 1). Employer attached a copy of the Non-Acceptance Denial as well as a copy of its response to the NOD. (AF 5-37). The case was docketed by the Board of Alien Labor Certification Appeals (“BALCA”), and I issued a Notice of Docketing and Briefing Schedule on January 16, 2018.5

On January 25, 2018, counsel for the CO filed a notice stating it would not be filing a brief, and requested that the application be denied for the reasons provided in the CO’s final determination. CO’s Notice at 1. On January 26, 2018, Employer filed its Brief in Support of Employer’s ETA9142B Application for Temporary Labor Certification (hereinafter “Employer’s Brief”).6

**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)

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5 The Appeal file was received on January 9, 2018. However, the briefing schedule was adjusted, and required briefs to be submitted within seven business days of January 16, 2018, the date of the Notice of Docketing, due to unforeseen circumstances that delayed the issuance of the Notice of Docketing. See Notice of Docketing and Order Establishing Briefing Schedule at 1, fn.2.

6 Employer’s brief was filed timely. The briefing period ended on January 25, 2018, but was extended one business day due to the federal government shutdown on Monday, January 22, 2018.
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). 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, peakload, or intermittent need. 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).

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).

Employer applied for temporary labor certification for eighteen Plaster Finishers on a “peakload” basis. In its response to the NOD, Employer provided documentation that supports that it has permanent employees, but also has a need to supplement for its peakload period of need from January 23, 2018 to November 23, 2018. Employer’s documentation includes tax

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7 See supra , at fn. 1.
documentation relating to payroll, which shows that Employer had a total of forty-one employees
during the first quarter of 2016, fifty-three employees during the second quarter, fifty-one
employees during the third quarter, and thirty-four employees during the fourth quarter. (AF
124-34). Likewise, Employer submitted similar documentation for 2017 showing that it
employed thirty-six employees in the first quarter, forty-one employees in the second quarter,
and fifty-three employees in the third quarter. (AF 137-42). Employer also submitted bar
graphs demonstrating this information. (AF 121-23; 134-36).

Employer also included documentation of four previous approvals for the years 2014 to
2017, and asserted that it was “certified for approximately the same range of temporary peak
load dates of need for the last two (2) years, and always for a temporary peak load need of ten
(10) months or less.” (AF 60-61; 169-75). Employer explained that its peakload period of need
“is not a static date that remains the same year after year, without some change.” (AF 74). It
further explained that for 2018, it projected its peakload period of need would be mid-January
through mid-November based on its “yearly invoices, bidding, contracts signed, and prior
experience.” Id.

Employer submitted the following chart summarizing its prior year approvals:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Case Status</th>
<th>Start Date of Need</th>
<th>End Date of Need</th>
<th>Notes/Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-400-14092-807873</td>
<td>DOL Certification issued</td>
<td>4/16/2014</td>
<td>10/31/2014</td>
<td>(18) Plasterers</td>
</tr>
<tr>
<td>H-400-15083-462865</td>
<td>DOL Certification issued</td>
<td>4/1/2015</td>
<td>10/30/2015</td>
<td>(15) Plasterers</td>
</tr>
<tr>
<td>H-400-15339-151917</td>
<td>DOL Certification issued</td>
<td>3/9/2016</td>
<td>11/22/2016</td>
<td>(18) Plasterers</td>
</tr>
<tr>
<td>H-400-16331-409699</td>
<td>DOL Certification issued</td>
<td>2/15/2017</td>
<td>11/15/2017</td>
<td>(18) Plasterers</td>
</tr>
</tbody>
</table>

(AF 65).

In support of its peakload need period of January 23, 2018 to November 23, 2018,
Employer submitted six letters of intent from clients. (AF 76-83). Each letter contains a
statement from the client regarding how long it has contracted with Employer, states that their
need for Employer’s services is peakload seasonal from mid-January to mid-November, and
states how many projects Employer is expected to complete for the client. Id. Project
predictions per client range from ten to two hundred projects. Id. Employer also submitted three
purchase orders for projects with expected start dates in January 2018, as well as contracts for
two projects expected to commence in January 2018.8 (AF 84-107).

Employer also submitted sales by customer reports with corresponding bar graphs for
2016 and 2017. (AF 143-56). Each sales by customer report contains a breakdown by customer
and the total amount of sales to each customer in the corresponding month. Id. The bar graph
for 2016 shows increasing sales from January to June, with a small drop in July followed by a
significant drop in August. Id. Sales for December are the lowest for the year. Id. The bar
graph for 2017 shows high sales numbers for May through July, and a sharp decline in sales for

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8 It is unclear from the contracts that they are set to commence in January 2018. However, Employer submitted a
brief description with each contract stating that the expected start date is January 2018.
November. (AF 156). Data for December 2017 is unavailable in the information submitted. *Id.* Overall, the data shows a peak amount in sales in the second and third quarter (April through September), which corresponds with higher wages paid in the second and third quarters. *See AF 122-23; 136.*

In its appeal brief, Employer argues that the CO made factual errors and omissions in her decision and failed to consider the extensive favorable evidence submitted in response to the NOD. *Emp. Br.* at 1. Employer also argues that the CO misconstrued the regulations and limited peakload need to a nine-month time period, which resulted in the CO applying the wrong analysis. *Id.* at 2. Employer argues that it provided extensive records in good faith, and a reasonable person would have understood the temporary and peakload nature of its business based on those records. *Id.* Employer asserts that CO should have issued a second notice of deficiency because the response was made in good faith and substantive rather than denying certification. *Id.* at 3. Finally, Employer argues that the CO failed to look at the totality of the evidence submitted, which provides sufficient information for a favorable determination and was submitted in good faith and reasonable effort. *Id.* at 6.

The documentation submitted by Employer with its application and in response to the NOD supports Employer’s assertions that it has a peakload need between January and November 2018. The six letters of intent, as explained above, are signed by company representatives and explicitly state that each of the companies intends to use Employer’s services between January and November 2018. Employer also explained its peakload need in its statement of need and in its response to the NOD. Employer explained:

> Our need for additional workers is peak load, because the seasonal nature of our business results in a peak in our production during portions of the year. Because our business is tied to the landscape, nursery and construction industries that are affected by the seasonal nature of the work, there are times during the year when certain landscape installation work and construction related work is reduced or halted due to the seasonal fluctuations. Since our business functions within the project plans and schedules of our customer’s landscape design plans and construction projects, our peak load is tied to the seasonal nature of the landscape and construction related businesses. (AF 73).

This statement explains the reason for Employer’s peakload need, which depends on the landscape, nursery, and construction industries that are “reduced or halted due to the seasonal fluctuations.” This also is reflected in Employer’s evidence of wages paid and sales summaries, which show lower wages paid and lower sales during the first and last quarters of the year. I find that the Employer’s statement of need together with its supporting documentation from six clients, its documentation of wages paid, and its sales summaries provide credible support for Employer’s peakload need. *See Jose Uribe Concrete Constr.*, 2018-TLN-00044, slip op. at 11 (Feb. 2, 2018).
The CO stated in the denial that Employer’s contracts submitted with its application do not specify deadlines or dates of performance, nor are they signed by the client. The CO also acknowledged the three bid proposals submitted with the application, but stated only one was signed by the client. Thus, the CO determined that the documents were “not sufficient to establish the employer’s peakload need for workers during the dates of need requested.”

While these statements from the CO regarding the contracts and bid proposals are accurate, the analysis is not complete. One of the “bid proposals” is a purchase order from a client and printed on the client’s letterhead; it is not a bid proposal sent to a client by Employer. Further, the CO did not acknowledge the six letters of intent submitted with the application, one of which was signed by a company representative from the same company that entered into both of the contracts submitted as supporting documentation by the Employer. The letters of intent from six clients support the peakload period of January 23, 2018 through November 23, 2018; the contracts and bid proposals only serve as additional supporting documentation.

The CO also stated in the denial that staffing graphs submitted by the Employer did not provide the specific payroll information requested by the CO. The CO requested payroll reports 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.” Employer submitted quarterly IRS payroll reports that show the total number of workers and total wages paid per quarter, as well as a graph with projected staffing levels. The lowest number of employees in any given quarter was thirty-four; even assuming that Employer’s approved temporary staff from previous years was still employed during that quarter, Employer had at least sixteen permanent employees. Further, the projected chart shows a baseline of twenty permanent employees, which is reasonable and consistent with the payroll reports. I find under the facts of this case that Employer’s documentation of the number of workers employed each month for 2016 and 2017, together with its previous years’ applications, is sufficient to establish that it has a permanent workforce that it is supplementing.

Certification is not guaranteed based on previous years’ approvals, and each application must stand on its own merits. However, the current application should reasonably be reviewed, within the context of the previous certifications, and the understanding that the certifying officer had concluded that the basic requirements for certification had been met in the previous years. *Jose Uribe Concrete Constr.*, 2018-TLN-00044 (Feb. 2, 2018). When reviewing this application in light of Employer’s previously approved applications, I find that the totality of the evidence submitted by the Employer establishes that it has a permanent workforce consisting of at least eighteen employees.

To address Employer’s argument that the CO is attempting to impose a nine month limit on its application, such a limit is not supported by the applicable regulations. As noted previously in this opinion, the controlling DHS definition of temporary need requires that the period of temporary need be limited to one year or less and does not impose a nine month limit. *See 8 C.F.R. § 214.2(h)(6)(ii)(A)-(B).* Also, previous BALCA cases reflect a longstanding policy of generally limiting a period of temporary need to ten months or less. *See Andres Patricio Candalario*, 2015-TLN-00017 (Feb. 10, 2015) (“Ten months is the usual cut-off for a

For the reasons discussed above, I find that the Employer has established its requested peakload period of January 23, 2018 through November 23, 2018. Also, based on my review of the evidence in the record, Employer has also established its need for eighteen Plaster Finishers. Employer has requested eighteen Plaster Finishers in three of the last four years. Based on Employer’s history of prior certifications, the last two years of payroll and wages documentation, and the sales summary reports (which show increasing sales), Employer has established its need for eighteen Plaster Finishers.

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer’s denial of the Employer’s Application for Temporary Employment Certification is REVERSED and that this matter is REMANDED for further processing. ⁹

For the Board:

LARRY S. MERCK
Administrative Law Judge

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⁹ On remand, the CO should consider Employer’s request to amend its start and end dates of its period of need from January 23, 2018 through November 23, 2018 to February 9, 2018 through November 9, 2018. (AF 57). The CO did not make a determination on the request based on the denial. The CO should now consider the request fully.