



**Issue Date: 08 February 2019**

**BALCA Case No.:** 2019-TLN-00027  
**ETA Case No.:** H-400-18334-233925

*In the Matter of:*

**AQUASAFE POOL MANAGEMENT, INC.,**  
*Employer.*

**DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION**

This case arises from AquaSafe Pool Management, Inc.’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, 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);<sup>1</sup> 20 C.F.R. § 655.6(b).<sup>2</sup>

Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142B, Application for Temporary Employment Certification (“Form 9142B”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Department of Labor’s Employment and Training Administration (“ETA”) reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “Board”). 20 C.F.R. § 655.61(a).

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<sup>1</sup> The definition of temporary need is governed by 8 C.F.R. § 214.2(h)(6)(ii)(B). Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, Division B, Title I, § 112 (2018).

<sup>2</sup> 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 ha[ve] 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 decision and order are to the IFR.

## **BACKGROUND**

On December 1, 2018, Employer filed its Form ETA-9142B application for temporary labor certification with ETA. (AF 119.)<sup>3</sup> Employer requested certification for seven “Service Helpers” for its Baltimore-area pool management business from March 1, 2019, through October 15, 2019, based on its alleged seasonal need. *Id.* Along with its Form ETA-9142B, Employer submitted a “support letter” regarding its temporary seasonal need, a job order, information relating to recruitment, and an application for prevailing wage determination. (AF 133-61.)

### **Employer’s Application**

Employer’s Form 9142B indicates that it was unable to fill the requested positions because the “seasonal need for the position does not overlap with the regular U.S. college or high school summer vacation schedule,” and the temporary nature of the position deters other potential candidates. (AF 119.) Employer described the duties performed by Service Helpers as follows:

During the late winter and spring months, these workers assist Service Technicians in preparing recreational facilities for inspection by the Health Department prior to opening for the summer. They use chemicals and equipment to clean pools, furniture, and decks, and otherwise prepare the grounds and facilities in properties contracted by the service department. Workers also examine areas for any damage to facilities or equipment, correct settings and conduct minor repairs to plumbing, equipment, decks and filter systems. Once the facilities have been cleaned and are in working order, the worker is assigned to recreational facilities where he or she will continue to clean, check and fix minor damage or irregularities above and below water during the summer months. Service Helper might supervise Recreational Workers at the recreational facility. Upon closing on or around Labor Day, the worker will then assist the service department in winterizing the facilities.

(AF 121, 126.) Service Helpers would be required to work forty hours per week and must have the ability to swim and to lift fifty pounds. (AF 121-22.)

### **Support Letter**

Employer attached a “support letter” to its Form 9142B to further explain its temporary seasonal need. (AF 140-42.) Employer described itself as a “full service pool management company providing management, staffing, repairs and other services” to its customers, who include “apartment complexes, hotels, home owners [sic] associations and residential clientele with private home swimming pools.” (AF 140.) Employer provided recent sales figures and explained that it anticipated “substantial growth” in 2019 based on its own “conservative projections.” *Id.*

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<sup>3</sup> Citations to the Appeal File will be abbreviated with an “AF” followed by the page number.

Employer prepares its customers' "pools, facilities, and grounds" to pass local inspection in the early spring. *Id.* To that end, Service Helpers clean a customer's facilities of debris, inspect for damage caused during the winter months, and, if necessary, make minor repairs. (AF 141.) This "pre-preparation phase" concludes in May. *Id.*

During the summer months (approximately Memorial Day through Labor Day), Service Helpers clean and inspect facilities for "irregularities or damage." *Id.* From approximately Labor Day through October 15 of each year, Service Helpers "complete the process to winterize and close" facilities. *Id.* Employer explained that from October 15 through February, "there is no need for our services," and, therefore, "we do not employ service helpers" during this period. *Id.* Employer reiterated that "[a]ll the Service Helper positions are seasonal in nature." *Id.*

With regards to the number of workers requested, Employer indicated that it has requested a total of fourteen H-2B workers: seven for the Baltimore metropolitan area (the application at issue here), and seven for the Philadelphia metropolitan area (a separate application). (AF 142.) Employer maintained that its projection of fourteen Service Helpers is based on the "increased demand for our services for the upcoming season" and "is a reflection of the adequate staffing levels for this position in previous years." *Id.* Employer explained that it "employed 12 temporary workers seasonal helpers in 2016, filed ETA-9142 for 12 temporary seasonal service helpers in the 2017 season, and filed ETA-9142 for a total of 14 workers for out Baltimore and Philadelphia metropolitan areas in the 2018 season." *Id.*

#### Notice of Deficiency

On December 13, 2018, the CO issued a Notice of Deficiency, providing two reasons why the application could not be accepted for consideration. (AF 114-18.<sup>4</sup>) First, the CO concluded that Employer had failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a)-(b). (AF 117.) The CO explained that "it is not clear if the employer operates facilities outside of its requested period of time; and if so, who performs the job duties outlined in the application from October 15 to March 1." *Id.*

The CO thus instructed Employer to submit: a description of its business history and activities and schedule of operations through the year; an explanation of why the nature of the job opportunity and number of workers requested reflects a temporary need; an explanation of whether Employer performs the work to be performed by the requested H-2B employees outside of the requested season, and, if so, who performs this work; and an explanation regarding how the request for temporary labor certification meets the regulatory standards. (AF 117.) The CO also requested specific documentation to justify the temporary need, including: (1) summarized monthly payroll reports for the previous year demonstrating the number of permanent and temporary staff employed in the requested occupation, as well as total hours worked and earnings received; and (2) a "[c]opy of the employer's Monthly Approved Jobs data for 2018-Repairs and Maintenance Division." (AF 118.)

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<sup>4</sup> The December 13, 2018, Notice of Deficiency included in the Appeal File is missing the final page. The missing page, however, was included in the documents submitted to the Office of Administrative Law Judges and appears in the Appeal File at page 21.

Second, the CO concluded that Employer had failed to justify its need for the number of workers requested and had failed to establish that the request represents a bona fide job opportunity as required by § 655.11(e)(3)-(4). (AF 118.) The CO again instructed Employer to submit evidence and documentation to substantiate its assertions. Specifically, the CO requested: (1) an explanation with supporting documentation of why Employer is requesting seven Service Helpers during the dates of the alleged need; (2) documentation supporting Employer's need for seven Service Helpers ("such as contracts, letters of intent, etc. that specify the number of workers and dates of need"); and (3) summarized monthly payroll reports for the previous two years demonstrating the number of permanent and temporary staff employed in the requested occupation, as well as total hours worked and earnings received. (AF 21, 118.)

### Employer's Response

On December 21, 2018, Employer responded to the CO's Notice of Deficiency via email. (AF 72-113.) Employer's response included copies of two pool management contracts, a monthly gross sales report, a payroll summary, and a yearly revenue comparison. The text of Employer's transmittal email indicates a "copy of a response letter" is attached, and the auto-generated list of email attachments includes a document titled "NOD – SH MD – Response – Signed 12-21-2018.pdf." (AF 72.) However, no such letter is included in the Appeal File.

### *Pool Management Contracts*

The two contracts included in Employer's response are swimming pool management agreements between Employer and a swimming pool facility in Maryland. (AF 74-92.) One contract is a two-year contract from 2017-2018 (AF 84), and the other is a one-year contract from 2019 (AF 74). With the exception of the durational terms, the two contracts are substantially similar. Each contract specifies that the pool will be open from the last week of May until the first week of September. (AF 74, 84.)

In each contract, Employer agreed to perform necessary tasks required to prepare the pool for opening. These tasks include: draining and cleaning the pool; notifying the facility owner of any defects; assembling and starting the filtration system; installing diving boards, railings, ladders, lifeguard chair, etc.; scheduling required local inspections; and visiting the pool once per week to monitor the filtration system. (AF 75, 85.) The contracts explicitly exclude repairs and provide that "pre-opening preparation" will begin on or after March 1. (AF 75, 85.)

Employer also agreed to provide lifeguard and management personnel, maintain filter operations, test chlorine levels, clean the pool and other facilities, remove trash, enforce pool rules, and close the pool each night. (AF 77-78, 87-88.) Finally, Employer agreed to "winterize" the pool facility before October 15 by: turning off the filtration system; draining the pool; adding anti-freeze to toilet bowls and tank, urinals, and sink traps; removing pool furniture; and installing a pool cover. (AF 79, 88-89.)

### *Sales Figures*

Employer submitted a report of its “monthly gross sales” for both the “management division” and the “repairs and maintenance division” from January 2017 through December 2018, as well as a report of the “monthly approved jobs” for the “repairs and maintenance division” for the same period. (AF 93.) Employer did not explain what these reports represent, but the reports generally show an increase in “gross sales” from May to August and an increase in “approved jobs” from April through August for the “repairs and maintenance division.” *Id.* The report for the “management division” reflects an increase in “gross sales” from March to August. *Id.*

*Payroll Summaries*

Employer submitted summarized payroll records from 2017 and 2018. (AF 95-112.) The records show that Employer did not employ any permanent Service Helpers in either year. (AF 95, 99-100, 104, 108-09.) The number of Service Helpers employed by Employer and the hours they worked in 2017 were as follows:

<b>Month</b>	<b>Baltimore</b>	<b>Hours Worked</b>	<b>Philadelphia</b>	<b>Hours Worked</b>
January	0	0	0	0
February	0	0	0	0
March	0	0	0	0
April	7	1,034	0	0
May	8	1,522	5	793
June	7	912	5	758
July	3	350	2	169
August	3	362	1	148
September	3	465	1	143
October	2	242	1	119
November	0	0	0	0
December	0	0	0	0

AF 108-09.

In 2018, the number of Service Helpers and hours worked was:

<b>Month</b>	<b>Baltimore</b>	<b>Hours Worked</b>	<b>Philadelphia</b>	<b>Hours Worked</b>
January	0	0	0	0
February	1	24	0	0
March	6	681	0	0
April	7	965	1	43
May	12	1,736	2	313
June	8	984	0	0
July	4	665	0	0
August	4	918	0	0
September	4	498	0	0
October	3	503	0	0
November	0	0	0	0
December	0	0	0	0

AF 95, 99-100.

### *Yearly Revenue Comparison*

Employer submitted a breakdown of its annual revenue in 2017 and 2018 by company division. (AF 113.) This record indicates that the number of pools managed by Employer increased from 230 in 2017 to 248 in 2018. *Id.* Over this time period, the annual revenue of Employer's "pool management division" increased by 14.6%, and the annual revenue of the "repairs and maintenance division" increased by 11.3%. *Id.*

### Final Determination

On January 8, 2019, the CO issued a Final Determination denying Employer's application for temporary labor certification. (AF 65-71.<sup>5</sup>) The CO concluded that Employer's submissions failed to remedy the two deficiencies identified in the Notice of Deficiency. (AF 14, 69-71.)

First, the CO again concluded that Employer has failed to establish a temporary need. (AF 69-70.) The CO found the Employer's "explanation and documentation of its temporary need did not overcome the deficiency." (AF 69.) In response to its Notice of Deficiency, the CO understood Employer to have submitted:

a response letter signed and dated, two pool management contracts for 2019, approved proposals for repairs from its previous season, approved proposals for repairs performed throughout the pool season in its previous season, a yearly revenue comparison document, summarized monthly gross sales reports, monthly approved jobs with monthly sales, and complete payroll and staffing charts for 2017 and 2018.

(AF 69.)

The CO explained that Employer's submissions indicate its "pool preparation phase starts on March 1," and the provided contracts "do not include any repairs, equipment, and services to meet" local inspection requirements. *Id.* The CO then concluded that "it appears that the requested positions will perform both the monthly approved jobs as well as the invoiced jobs." *Id.*

After reviewing Employer's sales records, the CO identified a "clear jump in April, not February," which the CO suggested shows that Employer's "seasonal need begins in April." (AF 70.) The CO continued: "[a]lthough, December and January show the lowest revenue of the year, it does not suggest that all other months are considered a seasonal period." *Id.*

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<sup>5</sup> The January 8, 2019 Final Determination included in the Appeal File is also missing the final page. The missing page, however, is included in the documents submitted to the Office of Administrative Law Judges and appears in the Appeal File at page 14.

The CO then addressed a specific statement apparently provided by Employer. The statement reads:

In addition to the pool preparation, pool management, staffing, and winterization that is part of the pool management contract as we described above, Aquasafe provides a multitude of different repairs and services. These repairs are not part of the pool management contract and they are approved by the client outside the pool management contract. These repairs are also billed separately from the pool management contract.

*Id.* Based on the information included with Employer’s application and response to the Notice of Deficiency, the CO concluded that the “different repairs and services’ do not appear to be traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” *Id.*

Second, the CO again found that Employer had failed to justify its need for seven temporary Service Helpers and failed to establish that the request represents a bona fide job opportunity under § 655.11(e)(3)-(4). (AF 13-14, 71.) Based on the same documents the CO believed Employer submitted in conjunction with this application, the CO determined that the Employer’s “explanation and documentation of its temporary need did not overcome the deficiency.” (AF 14.) The CO explained:

As described in the first deficiency, the employer's response does not describe a seasonal event that has caused a March 1 start date of need. Instead, the employer's job opportunity includes duties that are permanent and not tied to a season of the year. This position may include seasonal duties; however, the data shows that the season does not start until late March and runs through August.

The employer’s explanation and documentation do not establish the employer’s need for its seven requested Service Helpers during the request dates of need, March 1, 2019 through October 15, 2019

*Id.* Thus, in accordance with § 655.51, the CO denied Employer application for temporary labor certification.

#### Employer’s Appeal

On January 19, 2019, Employer appealed the CO’s denial. (AF 1-5.) Employer explains that the outdoor pool season in the region, while somewhat variable based on weather conditions, generally begins at the end of May and continues to September. Employer indicates that, to prepare for the opening of a pool in May, “the preparation work must start as early as March 1.” (AF 2.) Employer explains that its “pool closing procedure starts in September, right after the pool closes to the public, and it must be completed by the middle of October” to prepare the pool “for cold and freezing winter.” *Id.* Employer emphasizes that it “provides seasonal pool management and repair services only to outdoor swimming pool facilities” and does not operate “any swimming pools, such as indoor pools, that operate throughout the entire year.” *Id.*

Employer's primary argument is that the CO "erroneously confused" this application (for Service Helpers) with another of its current applications (for Maintenance Helpers). (AF 1.) Employer clarifies that the Service Helper position is different than the Maintenance Helper position. Employer explains that Service Helpers primarily fulfill the duties required by its pool management contracts (described above). Employer stresses that its dates of temporary need for Service Helpers correspond with the dates included in these contracts. Specifically, pre-opening procedures must commence on or after March 1, and closing procedures must be completed no later than October 15. (AF 2-3.)

Next, Employer explains that the reports of "gross sales" and "monthly approved jobs" for the repairs division "includes only additional work that is approved in addition to the Pool Management Contract and it should not be considered in this H-2B application for Service Helpers." (AF 3.) Again, Employer emphasizes that Service Helpers are responsible for the obligations Employer undertakes in its pool management contracts (pool opening, summer operations, and winterization). In contrast, the repair work Maintenance Helpers perform (outside of the pool management contracts) is "materially different in the extent and type." Employer thus asserts that it is the pool management contract (with a start date of March 1 and completion date of October 15)—and not the repair division's gross sales and approved jobs reports (which show only repairs approved and billed in addition to the pool management contract)—that should control the CO's analysis of temporary need. (AF 3-4.)

Employer then asserts that, contrary to the CO's statement in the Final Determination, it did not submit any approved proposals for repairs in connection with this application for Service Helpers. Rather, Employer submitted those documents in connection with its application for Maintenance Helpers. Thus, Employer concludes the CO "by error mixed up this H-2B Application for the Service Helper position with the H-2B Application for the Maintenance Helpers." (AF 4.)

Finally, Employer argues that all of its Service Helper positions are temporary and seasonal, and its pool management services follow the same recurring and seasonal pattern every year. Employer also asserts its current need for seven Service Helpers reflects current employment needs, as it employed eight Service Helpers in May 2017 and has struggled to fill its Service Helper positions. (AF 4-5.)

I issued a Notice of Assignment and Expedited Briefing Schedule on January 24, 2019, and I received the Appeal File on January 29, 2019. The CO did not file a brief. This decision is issued within ten business days of receipt of the Appeal File, as required by 20 C.F.R. § 655.61(f).

### **STANDARD OF REVIEW**

The scope and standard of review in the H-2B program are limited. When an employer requests review by the Board under 20 C.F.R. § 655.61(a), the request for review may contain only legal arguments and evidence which were actually submitted to the CO prior to issuance of the final determination. § 655.61(a)(5). The Board "must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted." § 655.61(e).

The Board must affirm the CO's determination, reverse or modify the CO's determination, or remand the case to the CO for further action. *Id.*

While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, the Board has adopted the arbitrary and capricious standard in reviewing the CO's determinations. *The Yard Experts, Inc.*, 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 2016); *see also J&V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

Under the "arbitrary and capricious" standard of review, a reviewing body retains a role, and an important one, in ensuring reasoned decision making. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011). Thus, the Board must be satisfied that the CO has examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). In reviewing the CO's explanation, the Board must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

A determination is considered arbitrary and capricious if the CO "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence." *Id.* Inquiry into factual issues "is to be searching and careful," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but the Board may not supply a reasoned basis that the CO has not itself provided. *See State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1946)); *see also FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (noting the requirement that "an agency provide reasoned explanation for its action").

## **DISCUSSION**

It appears that Employer's assertion, that the CO "erroneously confused" this application with another, has merit. After reviewing the Appeal File and the CO's Final Determination, I find that the CO based the Final Determination, at least in part, on information not relating to this application and not included in the Appeal File. Accordingly, I conclude the CO erred, and the Final Determination is arbitrary and capricious.

With respect to the first alleged deficiency, regarding the temporary nature of the requested workers under § 655.6(a)-(b), Employer responded to the CO's notice of deficiency by submitting two pool management contracts covering 2017-2018 and 2019; a monthly gross sales report; a payroll summary; and a yearly revenue comparison. (AF 72-113.) However, in reaching its Final Determination, the CO considered "two pool management contracts for 2019, approved proposals for repairs from its previous season, [and] approved proposals for repairs performed throughout the pool season in its previous season," among other things. (AF 69.) These documents are not included in the Appeal File, and Employer asserts it did not submit them in connection with this application.

Moreover, the CO's Final Determination includes a block quote that references "different repairs and services." (AF 70.) Based on this quote, the CO concluded that the duties of the requested workers "do not appear to be traditionally tied to a season of the year by an event or pattern [or] of a recurring nature." (AF 70.) The quoted language on which the CO relied is not included in Employer's Form 9142B, its support letter, its response to the Notice of Deficiency, or anywhere else in the Appeal File. Thus, it appears this information is either associated with a separate application or was omitted from the record.<sup>6</sup>

Additionally, after listing the Employer's monthly revenue for both "approved jobs" and "invoiced jobs," the CO concluded that Employer's seasonal need begins in April, "not February." (AF 70.) The CO appears to be rejecting a contention by Employer that its seasonal need begins in February. However, the alleged seasonal need at issue in this application begins on March 1, 2019. (AF 119.) Thus, the CO's assertion that Employer's temporary need does not arise in February also suggests that the CO may have confused Employer's instant application with another.<sup>7</sup>

Finally, Employer's reasoning as to why it believes the CO may have reviewed material in connection with its separate application for Maintenance Helpers is persuasive. As set forth above, the instant application seeks certification for Service Helpers. In its appeal, Employer explains that Service Helpers perform the duties associated with its pool management contracts, whereas Maintenance Helpers perform repairs outside the scope of its pool management contracts. Those "additional" repairs are approved and invoiced separately from the pool management contracts, and those repairs are reflected in the "gross sales" and "monthly approved jobs" reports for the repairs division. The CO cited these reports (and the numbers therefrom) as part of the basis for finding that Employer failed to establish a temporary need for Service Helpers. However, the CO did not explain how these reports (which apparently relate to work performed by Maintenance Helpers, and not to the pool management contract services performed by Service Helpers) relate to Employer's temporary need for Service Helpers.

Based on my review of the record, it appears the CO relied on evidence connected with a separate application for temporary labor certification. At the very least, the CO clearly relied on evidence that is not included in the Appeal File. Inasmuch as the CO's decision relied on factual findings based on evidence related to a separate application, I cannot conclude that the CO's decision displays a "rational connection between the facts found and the choice made." *See State Farm*, 463 U.S. 29, 43 (1983). Without reviewing all of the evidence on which the CO based the decision, I cannot properly ensure that the CO's decision was well reasoned and supported by the record or determine whether there was an error in judgment. *See Judulang*, 565 U.S. at 53; *State Farm*, 463 U.S. at 43. Therefore, I find the CO's analysis of temporary need under § 655.6(a)-(b) to be arbitrary and capricious.

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<sup>6</sup> As indicated above, although Employer's email responding to the Notice of Deficiency references a "response letter," such a letter does not appear in the Appeal File. It is unclear whether such a letter was actually included with Employer's response or, if so, whether the CO reviewed the letter. In any case, I cannot identify the source of this quote. Therefore, I cannot properly determine whether it is a valid and rational basis for the CO's conclusion.

<sup>7</sup> I also note that Appeal File does not include an explanation from either party defining the terms "approved jobs" or "invoiced jobs."

Turning to the second deficiency, the CO concluded that that Employer failed to justify the temporary need for seven Service Helpers to fill bona fide job opportunities under § 655.11(e)(3)-(4). (AF 14.) The CO again considered “two pool management contracts for 2019, approved proposals for repairs from its previous season, [and] approved proposals for repairs performed throughout the pool season in its previous season” in making this finding. (AF 71.) Again, this information is not included in the Appeal File, so I cannot determine whether the CO properly considered it or whether it supports the CO’s determination.

Additionally, the CO determined that the positions for which temporary alien workers were requested included duties that were permanent in nature, albeit, with seasonal duties to be performed between March and August. (AF 14.) Because Employer had not established a seasonal temporary need under § 655.6, the CO determined that Employer could not justify the need for the number of workers requested under § 655.11. The CO’s determination thus explicitly relies on its flawed § 655.6 analysis. Because the CO’s determination under § 655.11 was derivative of the § 655.6 analysis, it must also be considered arbitrary and capricious.

Based on the record before me, I am unable to determine whether the CO examined the data and factors relevant to the temporary labor application at issue, and I cannot conclude that the CO satisfactorily explained the reasons for the conclusions set forth in the Final Determination. Therefore, I find the CO’s denial of Employer’s H-2B application for Service Helpers was arbitrary and capricious.

### **CONCLUSION AND ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s Final Determination denying Employer’s ETA Form 9142, H-2B Application for Temporary Employment Certification, is **REVERSED** and **REMANDED** for further proceedings in accordance with this Decision.

For the Board:

**LAUREN C. BOUCHER**  
Administrative Law Judge

Cherry Hill, New Jersey