



Issue Date: 07 March 2019

BALCA Case No.: 2019-TLN-00045

ETA Case No.: H-400-18361-651890

In the Matter of:

FBI BUILDINGS, INC.

Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from FBI Buildings, 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 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).²

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 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 “the Board”). 20 C.F.R. § 655.61(a).

BACKGROUND

On January 7, 2019, the ETA received an application for temporary labor certification from Employer. (AF 51.)³ Employer requested certification of twenty “carpenter helpers” for an

¹ 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).

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 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 opinion and order are to the IFR.

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

alleged period of temporary peakload need from April 1, 2019, through December 1, 2019. *Id.* In addition to its Form 9142B, Employer also submitted a support letter (titled H-2B Detailed Statement of Temporary Need); a foreign recruitment agreement and disclosure contract; an agency and indemnity agreement with its agent, másH2B; a job order; and prevailing wage determination. (AF 64-87.)

Legal Standard

An employer seeking certification under the H-2B program must show that it has a temporary need for workers. Temporary service or labor “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.” 8 C.F.R. § 214.2(h)(6)(ii)(A); 20 C.F.R. § 655.6(a). Employment “is of a temporary nature when the employer needs a worker for a limited period of time” and the “employer must establish that the need for the employee will end in the near, definable future.” 8 C.F.R. § 214.2(h)(6)(ii)(B). An employer’s need is temporary if it qualifies under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent basis, as defined by DHS. 8 C.F.R. § 214.2(h)(6)(ii)(B); 20 C.F.R. § 655.6(a), (b).⁴ “Except where the employer’s need is based on a one-time occurrence, the CO will deny a request for a [certification] where the employer has a need lasting more than 9 months.” § 655.6(b).

An employer can establish a “peakload need” if it shows that it “regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

An employer must also demonstrate a bona fide need for the number of workers and period of need requested. 20 C.F.R. §§ 655.11(e)(3) and (4); *Roadrunner Drywall*, 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need); *North Country Wreaths*, 2012-TLN-43 (Aug. 9, 2012) (affirming partial certification where the employer failed to provide any evidence, other than its own sworn declaration, that its current need for workers was greater than its need in a prior year).

An employer bears the burden of proof. *Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012); *BMGR Harvesting*, 2017-TLN-00015 (Jan. 23, 2017). Bare assertions without supporting evidence are insufficient to carry the employer’s burden. *AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). In addition, the burden is on the employer to provide the information and to present it in such a way so that the CO can determine that the employer has established a legitimate temporary need for workers. *Empire Roofing*, 2016-TLN-00065 (Sep. 15, 2016).

⁴ Because the definition of temporary need derives from DHS regulations that have not changed, 8 C.F.R. § 214.2(h)(6)(ii), pre-2015 decisions of the Board on this issue remain relevant. An appropriation rider currently in place requires the DOL to exclusively utilize the DHS regulatory definition of temporary need. *Consolidated Appropriations Act of 2017*, P.L.115-31, Division H.

Employer's Application

In its application and attached documentation, Employer described its business operations. Employer constructs “post frame buildings and pole barns” for commercial, agricultural, and residential customers in Indiana. (AF 51, 54, 59.) To build these structures, Employer’s workers must perform tasks related to pouring concrete foundations and erecting post frames. (AF 65.) Employer explained that the requested carpenter helpers would “assist skilled carpenters” and perform the following duties: measuring, cutting, and assembling components; assisting in spacing layout; installing fasteners, hardware, and blocking; and site cleanup. (AF 53.)

Employer maintained that its temporary peakload need is based on the weather conditions in Indiana. (AF 65.) Specifically, Employer alleged its need is based on the inability to “provide most construction services” in the colder winter months when the “average monthly low temperature” is twenty-one degrees. (AF 65.) Employer explained that it could not perform “most exterior construction work and other related duties” during this time. *Id.* To substantiate this claim, Employer included a chart showing the average high and low monthly temperatures in Indiana. *Id.*

Employer also included a chart detailing the number of “production hours” per month worked by carpenter helpers in 2017 and 2018. (AF 66.) Employer did not specify the number of workers it employed each month, but rather estimated, based on a “standard 40 hour week,” the number of full-time equivalent carpenter helpers that “would be needed” for each month.⁵ *Id.* The chart provided by Employer is shown below:

⁵ Based on my review of the information provided with Employer’s Form 9142B, Employer appears to have divided the number of “production hours” by 160 (or forty hours per week for four weeks) to arrive at the estimated number of full-time equivalent carpenter helpers employed per month.

2017		Carpenter Helper		Average
Month	Hours	FTE		
JANUARY	8,890	55.56	59.85	
FEBRUARY	9,983	62.40		
MARCH	9,853	61.58		
APRIL	11,651	72.82		
MAY	9,251	57.82	77.74	
JUNE	12,593	78.71		
JULY	13,102	81.89		
AUGUST	12,545	78.40		
SEPTEMBER	10,724	67.02		
OCTOBER	16,454	102.83		
NOVEMBER	11,766	73.54		
DECEMBER	13,856	86.60		

2018		Carpenter Helper		Average
Month	Hours	FTE		
JANUARY	7,927	49.54	57.49	
FEBRUARY	9,336	58.35		
MARCH	10,334	64.59	73.67	
APRIL	13,327	83.29		
MAY	11,489	71.80		
JUNE	10,829	67.68		
JULY	13,217	82.61		
AUGUST	12,207	76.29		
SEPTEMBER	12,102	75.64		
OCTOBER	9,342	58.39		
NOVEMBER				
DECEMBER				

(AF 66.)

Employer justified its request of twenty H-2B workers based on “past, current, and projected business volume.” (AF 67.) Based on its “past need for temporary workers,” the contracts and agreements currently in place, anticipated residential customers, and its experience and “internal business knowledge,” Employer concluded that twenty H-2B carpenter helpers would be required to supplement its permanent workforce from April 1, 2019, through December 1, 2019. *Id.* Employer also asserted that it was unable to hire domestic workers because of “customer demand and the lack of a sufficient number of legal, local workers.” (AF 65.)

Notice of Deficiency

On January 23, 2019, the CO issued a Notice of Deficiency (“NOD”) identifying two grounds for denial of Employer’s application. (AF 44-50.) First, the CO concluded that Employer had failed to sufficiently demonstrate that the job opportunity was temporary in nature pursuant to 20 C.F.R. §§ 655.6(a)-(b). (AF 48.) The CO stated:

The employer submitted climate data for its area of employment. The employer appears to be basing its peakload need on both climatic conditions as well as when its workload increases. However, climatic data alone does not establish when this employer’s peakload begins and ends. Therefore, additional explanation and documentation is needed to support the employer’s requested dates of need.

(AF 48.)

The CO thus instructed Employer to submit: (1) a statement describing Employer's business history, business activities (*i.e.*, primary products or services), and a schedule of operations throughout the year; (2) a detailed explanation as to the activities of Employer's permanent carpenter helpers during the non-peak period; (3) an explanation and supporting documents to substantiate that the type of work performed by carpenter helpers cannot be performed outside of the alleged peakload season; (4) summarized monthly payroll reports for 2017 and 2018 identifying the total number of workers, total hours worked, and total earnings received separately for permanent full-time employees and for temporary employees in the carpenter helper occupation; and (5) any other evidence or documentation that similarly serves to justify Employer's alleged peakload need. (AF 48-49.)

Second, the CO concluded that Employer had "not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities," as required by 20 C.F.R. §§ 655.11(e)(3)-(4). (AF 49.) The CO stated that Employer had not indicated how it determined that twenty H-2B carpenter helpers were needed. *Id.* Accordingly, the CO instructed Employer to submit: (1) an explanation, with supporting documentation, of why twenty workers are needed; (2) documents supporting Employer's need for twenty workers; (3) summarized monthly payroll records as described in the first identified deficiency; and (4) any other evidence or documentation that serves to justify the request of twenty workers. *Id.*

Employer's Response

Employer responded to the NOD on February 5, 2019. (AF 25.) In its response, Employer included a "letter with explanation," summarized monthly payroll reports from 2017 and 2018 for the designated occupation of carpenter helper, a list of Employer's projects commitments in 2019, and a "2019 labor plan." (AF 25-42.)

Employer's letter with explanation expanded on the description of its business operations included in its Form 9142B. Employer clarified that its work continues throughout the entire year, however, its volume "slows significantly" from January to March based on "weather fluctuations." (AF 26.) The frozen ground in the winter months, Employer stated, makes it impossible to dig the post holes needed to construct new buildings. *Id.* During this time, Employer instead performs interior construction projects, such as dry wall installation and repairs. *Id.*

Employer's 2017 and 2018 payroll summaries differentiated between permanent and temporary carpenter helpers, though no such temporary employees are identified. (AF 29.) Employer explained that it has not classified workers as "seasonal" in the past and so is "unable to provide anyone in that category." (AF 27.) The payroll summary chart submitted by Employer is shown below:

2017	Designated Occupation					
	Permanent Employees (permanent or year-round employees in designated occupation)			Temporary Employees (seasonal employees in designated occupation; include U.S.workers as well as foreign H-2B workers)		
Month	Workers	Hours	Total Earnings Received	Workers	Hours	Total Earnings Received
JANUARY	112	15909	\$382,796	0		\$0
FEBRUARY	121	19345	\$504,117	0		\$0
MARCH	123	21762	\$529,965	0		\$0
APRIL	122	17919	\$388,921	0		\$0
MAY	120	15725	\$404,578	0		\$0
JUNE	117	21354	\$522,101	0		\$0
JULY	121	15383	\$406,422	0		\$0
AUGUST	118	16972	\$492,917	0		\$0
SEPTEMBER	112	20716	\$514,033	0		\$0
OCTOBER	110	14844	\$387,968	0		\$0
NOVEMBER	110	13843	\$364,687	0		\$0
DECEMBER	123	16246	\$536,758	0		\$0

2018	Designated Occupation					
	Permanent Employees (permanent or year-round employees in designated occupation)			Temporary Employees (seasonal employees in designated occupation; include U.S.workers as well as foreign H-2B workers)		
Month	Workers	Hours	Total Earnings Received	Workers	Hours	Total Earnings Received
JANUARY	106	10932	\$296,085	0		\$0
FEBRUARY	109	10456	\$427,019	0		\$0
MARCH	113	13204	\$445,655	0		\$0
APRIL	111	14548	\$349,895	0		\$0
MAY	98	13482	\$337,758	0		\$0
JUNE	106	13363	\$427,017	0		\$0
JULY	105	14164	\$339,225	0		\$0
AUGUST	109	16715	\$524,464	0		\$0
SEPTEMBER	104	15417	\$410,285	0		\$0
OCTOBER	98	17868	\$361,447			
NOVEMBER						
DECEMBER						

(AF 29.)⁶ As the chart above shows, Employer did not provide payroll information for November or December 2018.

⁶ The payroll record summaries attached to Employer's Form 9142B and those submitted with its response to the NOD both purport to show the number of hours worked by carpenter helpers, but the records differ significantly. Compare AF 66 with AF 29.

Employer also included a list all of the projects it has committed to, thus far, in 2019. (AF 30-34.) The list includes a project number, project name, the number of man hours for each project, and the project start date. *Id.* This document lists Employer’s scheduled work from the start of the year until June 3, 2019. *Id.* In the letter submitted in response to the NOD, Employer explained that “[w]ork is performed in March, however when considering the H-2B program to meet our seasonal labor needs, we decided for a start date of April 1st due to visa limitations.” (AF 27.)

Employer also added that it has been understaffed for the “last number of years” and included a projected labor plan for 2019. (AF 27, 35.) The plan shows that Employer has committed to 270,503 man hours in 2019 but only has the current capacity to provide 221,850 man hours. (AF 35.) Thus, Employer claimed it will sustain a “labor shortage” of 48,653 man hours in 2019. *Id.*

Final Determination

On February 7, 2019, the CO issued a Final Determination denying Employer’s application for temporary labor certification. (AF 15-24.) The CO found that the two deficiencies identified in the NOD remained despite Employer’s additional submissions. (AF 19-24.)

After reviewing the additional information, the CO again concluded that Employer has failed to establish a temporary need under § 655.6(a) and (b). (AF 20-21.) The CO found that Employer’s “explanation and documentation of its temporary need did not overcome the deficiency.” (AF 20.) Specifically, the CO found that Employer’s payroll summaries did not support its alleged peak season of April 1, 2019, through December 1, 2019. (AF 20-21.) The CO determined that Employer’s 2017 payroll summary showed that carpenter helpers worked the fewest hours in October and November and worked more hours in January and December than they did in April.⁷ (AF 21.)

The CO also determined that the list of committed projects for 2019 did not support Employer’s alleged temporary peakload need. Rather, the CO stated that the committed projects list shows a total of 138 projects for January, February, and March, and only thirty-nine projects for April, May, and June. (AF 21.) Comparing these two periods, the CO concluded that the committed projects list does not support a peak beginning in April. *Id.* The CO acknowledged that Employer anticipated an increase in project volume in the fall but noted that the figures Employer submitted did not establish its alleged peak season. *Id.*

Lastly, the CO addressed Employer’s alleged 48,653 man hour labor shortage. (AF 21.) The CO stated that a labor shortage, no matter how severe, does not establish a temporary need for workers. *Id.*

⁷ In the body of the Final Determination included in the Appeal File, the CO stated “employer’s 2017 full-year payroll summary is show [sic] below.” (AF 20.) This statement is followed by a large blank space where the payroll summary chart was presumably intended to be pasted. Based on my review of the entire record, it appears that the CO is referring to the payroll summary chart submitted by Employer in response to the CO’s NOD.

Thus, based on the 2017 payroll summaries and the list of Employer's 2019 committed projects, the CO concluded that Employer had not overcome the deficiency identified in the NOD and had failed to establish a temporary peakload need as defined by §§ 655.6(a) and (b).

Having determined that Employer failed to establish the requisite need for H-2B workers, the CO also concluded that Employer did not justify its need for twenty temporary carpenter helpers and failed to establish that the request represents a bona fide job opportunity under § 655.11(e)(3)-(4). (AF 21-24.) Therefore, in accordance with § 655.51, the CO denied Employer application for temporary labor certification. (AF 24.)

Employer's Appeal

On February 13, 2019, Employer, through its agent, másH2B, appealed the CO's denial. (AF 2.) Employer argued that both its Form 9142B and responses to the NOD demonstrate its temporary peakload need for twenty carpenter helpers. (AF 2-3.) Employer noted that its peakload construction activities are "unquestionably weather-dependent." *Id.*

I issued a Notice of Assignment and Expedited Briefing Schedule on February 15, 2019. The Office of Administrative Law Judges received the appeal file on February 22, 2019. The CO has not submitted 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 a review by the Board under § 655.61(a), the request for review may contain only legal arguments and evidence that 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 (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

As set forth above, the CO’s ultimate denial of Employer’s application rested on two grounds: (1) Employer failed to substantiate its alleged peak season from April 1, 2019, to December 1, 2019, as required by §§ 655.6(a) and (b); and (2) Employer failed to justify its need for twenty carpenter helpers under §§ 655.11(e)(3) and (4). Based on my review of all the evidence before me, I find that the CO reviewed the evidence submitted by Employer and considered relevant factors, and the Final Determination displayed a rational connection between the facts found and the choices made. *See Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Therefore, for the reasons discussed more thoroughly below, I conclude that the CO’s determination denying Employer’s request for temporary labor certification was not arbitrary and capricious.

Regarding whether Employer established a temporary peakload need, the CO based the determination primarily on Employer’s payroll records and the list of Employer’s committed projects for 2019. First, the CO observed that Employer’s 2017 payroll summaries reflected less carpenter helper hours worked in October and November than in any other month of the year.⁸ (AF 21.) Both October and November are included in Employer’s alleged peak season. Yet, the 2017 payroll records clearly indicate that fewer hours were worked in these months than in any other months that year. Additionally, the 2017 payroll records also show the number of hours worked in April and May (months within the alleged peak season) were lower than the hours worked in March (outside the alleged peak season), and the number of hours worked in February (outside the alleged peak season) was greater than in April, May, July, August, October, and November (all within the alleged peak season). Accordingly, I find that the CO reasonably concluded that the payroll records submitted by Employer in response to the NOD do not establish a temporary peakload need for carpenter helpers between April 1, 2019, and December 1, 2019.⁹

⁸ The CO also stated that less hours were worked in April than in January and December. (AF 21.) This statement is, at best, unclear. The number of man hours worked in April 2017 is greater than the number of hours worked in either January or December. Regardless of whether this particular statement is accurate, though, the CO’s ultimate conclusion that Employer’s 2017 payroll records do not establish a temporary peakload need is correct, for the reasons set forth above.

⁹ The CO did not rely on Employer’s 2018 payroll records in analyzing Employer’s alleged temporary peakload need. Not considering the 2018 records, however, was not an error. Neither the hourly records included with Employer’s Form 9142B nor the payroll summary records included with its response to the NOD include information from November 2018 or December 2018. Because the 2018 records were incomplete, the CO could not have considered the number of hours worked in November (within the alleged peak season) or compared them to the

In addition to the payroll records, the CO also relied on the list of Employer's committed projects in 2019. The CO observed that the total number of projects set to begin in January, February, and March totaled 138, and the total number set to begin in April, May, and June was just thirty-nine. The CO acknowledged that Employer anticipated an increase in volume in the fall but concluded that this project list also did not support Employer's alleged period of temporary peakload need.

Although the CO only appears to have considered the number of projects and not the number of hours worked, the CO is correct that the committed projects list shows that Employer has committed to more work before the alleged peak season than during the alleged peak season. Based on my review, this document shows that Employer has committed to: 24 projects and 11,642.2 man hours in January; 57 projects and 28,824.6 man hours in February; 55 projects and 25,157 man hours in March; 25 projects and 18,210.6 man hours in April; 11 projects and 9,140 man hours in May; and 6 projects and 2,537.8 man hours in June. Hence, the list shows that Employer currently requires more man hours in both February and March than it does in April, May, or June.

Moreover, it is not clear whether the man hours associated with each project are to be worked by carpenter helpers or other employees. Employer has not provided any clarification on this point. Employer has also asserted that it anticipates an increase in volume in the fall. Employer, however, has not submitted any evidence to substantiate this claim. *See AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013). Employer bears the burden to establish a temporary need. *Alter and Son Gen. Eng'g*, 2013-TLN-00003 (Nov. 9, 2012). For these reasons, I find that the CO reasonably concluded that the committed projects list does not establish a temporary peakload need for carpenter helpers between April 1, 2019, and December 1, 2019.

In its appeal, Employer appears to emphasize the seasonal nature of its business operations from April through November. I recognize that Employer's construction activities may be weather-dependent. However, that is not the only question in analyzing "peakload need." Rather, Employer must demonstrate that "it needs to supplement its permanent staff ... on a temporary basis due to a seasonal or short-term demand." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). As set forth above, the CO concluded that Employer's documentation does not demonstrate that Employer needs to supplement its staff from April through November. I find that conclusion was reasonable.

Based on the foregoing analysis, I conclude that the CO, upon consideration of the relevant evidence, rationally concluded that Employer failed to establish a temporary peakload need for carpenter helpers from April 1, 2019, to December 1, 2019, under §§ 655.6(a) and (b). The CO's second finding—that Employer failed to establish its need for twenty carpenter helpers under §§ 655.11(e)(3) and (4)—was premised on the CO's first finding—that Employer failed to

number of hours worked in December (outside of the alleged peak season). Thus, the CO would not have been able to rely on the 2018 records to discern whether Employer actually experienced the alleged temporary peakload need in 2018. While it is likely the case that the 2018 records are a better indicator of Employer's current business operations, the burden to establish temporary need is on Employer. Because Employer did not provide a more complete record of its 2018 payroll and hours worked, the CO did not err by not relying on these records.

establish temporary peakload need under §§ 655.6(a) and (b). Because I have already determined the CO's first finding was not arbitrary and capricious, I need not separately address the CO's second finding. Accordingly, I conclude the CO's Final Determination denying Employer's application for temporary labor certification was not arbitrary and capricious.

CONCLUSION AND ORDER

I conclude the Certifying Officer did not act in an arbitrary and capricious manner in denying Employer's Application for Temporary Employment Certification (ETA Form 9142B). Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is **AFFIRMED**.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey