



Issue Date: 13 May 2019

BALCA Case No.: 2019-TLN-00122  
ETA Case No.: H-400-19036-1111076

*In the Matter of:*

**STRATTON CORPORATION**  
**d/b/a STRATTON MOUNTAIN MAIDS**  
**AND HOUSEKEEPING CLEANERS**  
*Employer*

Appearances: Angelica M. Ochoa  
*Fisher & Philips, LLP*

Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Scott R. Morris  
Administrative Law Judge

**DECISION AND ORDER REVERSING**  
**DETERMINATION OF DEFICIENCY**

This case arises from Stratton Corporation’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 nonimmigrant program. The H-2B program permits employers to hire foreign workers to perform temporary nonagricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the 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

<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*

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 9142”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration 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 February 25, 2019, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer. AF 57-78.<sup>3</sup> Employer requested certification of 18 “Maids and Housekeeping Cleaners,” for an alleged period of peakload need from May 15, 2019 to October 15, 2019. AF 47.

On March 14, 2019, the CO issued a Notice of Deficiency, finding four deficiencies in Employer’s application. AF 40-46. First, the CO concluded that Employer failed to establish that the job opportunity was temporary in nature under 20 C.F.R. § 655.6(a)-(b). The CO noted that Employer had requested periods of need that extend beyond 10 months: the break between its current application and prior application was only 33 days. Since the DOL has generally viewed “temporary need” as lasting no longer than 10 months, the CO concluded that the temporary positions requested were less distinguishable from a permanent position. The CO directed Employer to submit additional documentation that would justify its requested dates of need. AF 43-44.

Second, the CO concluded that Employer had failed to establish a need for the number of workers requested as required by 20 C.F.R. § 655.11(e)(3)-(4). The CO instructed Employer to submit evidence and documentation to establish that the number of workers requested for certification represented bona fide job opportunities. AF 44-45. Third, the CO found that Employer’s foreign recruiter agreement did not contain the required language prohibiting seeking or receiving payments from prospective employees as indicated at 20 C.F.R. § 655.20(p). AF 45-46. Lastly, the CO noted that Employer’s submitted ETA Form 9143 contained conflicting information regarding the work shifts the position required, and directed Employer to submit an amended ETA Form 9142. AF 46-47.

On March 27, 2019, Employer responded to the CO’s Notice of Deficiency. AF 28-38. To substantiate its alleged peakload need, Employer asserted that it requested an earlier season of need due to an unusually high demand for rooms in the summer of 2019. It noted that the 2019 room reservations for May represented a 172% increase over last year at this time and a 296% increase from two years ago. Employer also asserted that while it received DOL certification for H-2B workers in the summer of 2017, it did not file an H-2B petition with USCIS. AF 30.

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*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.

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

Employer noted that its usual pattern of requesting workers for the prior years had complied with the DOL's rules by not requesting workers for more than 10 months out of the year, and that this year was the only year in which it requested workers for a period longer than 10 months. Accordingly, Employer argued that its *recurring* peakload or seasonal need was less than 10 months out of the year, and its current application represented a *one-time* need for workers, which is acceptable under the regulations. Nevertheless, to comply with the CO's application of the regulations, Employer requested that its application's start date be modified to June 1, 2019. AF 32.

To demonstrate a need for 18 additional workers, Employer again pointed to the 172% increase in May room bookings. Employer noted that it had 12 housekeepers and one houseman on staff, and desired a total of 29 housekeepers so it could handle all new room reservations. Employer also noted that it may continue to book more rooms over the summer, and asserted that it needs more housekeeping staff to cope with the marked increase in the room reservations and guests. AF 33.

In response to the third deficiency, Employer submitted an updated foreign worker recruitment contract, which included the required language prohibiting seeking or receiving payment from prospective employees. AF 34. Employer also requested that the CO make the necessary correction to its ETA Form 9142 to reflect work shifts from 7:30 a.m. to 4:00 p.m. AF 34.

On April 1, 2019, the CO issued a Final Determination, finding that two deficiencies remained with Employer's application despite its submissions. AF 20-28. First, the CO again concluded that Employer had failed to substantiate a peakload need under 20 C.F.R. § 655.6(a)-(b). The CO stated initially that if Employer's application were amended to have a start date of June 1, then Employer's application would run afoul of 20 C.F.R. § 655.15(b), which requires that applications be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need. Further, the CO found that Employer's submitted payrolls for 2017 and 2018 did not show a peakload need for Employer's requested dates of need, June 1 through October 15.

Second, the CO again found that Employer had failed to establish a temporary need for 18 Maids and Housekeeping Cleaners under 20 C.F.R. § 655.11(e)(3)-(4). AF 26-27. The CO noted that Employer had only submitted a booking report for the month of May, not the entire summer in which it claimed a need for temporary workers. Since Employer's payroll did not support a peak in hours during the summer season, the CO concluded that Employer had not established a need for additional workers. The CO also noted that because Employer's payroll report shows temporary workers employed during 11 months of the previous years, Employer likely needed to increase its permanent workforce.<sup>4</sup> AF 27.

On April 12, 2019, Employer appealed the CO's denial. In this appeal, Employer repeated the arguments it made before the CO and requested that its starting date be amended to May 26, 2019 to conform to the 90-day filing timeline at 20 C.F.R. § 655.15(b).

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<sup>4</sup> The CO did not reiterate the previously identified deficiencies of an inadequate foreign worker recruitment agreement and inconsistent ETA Form 9142.

This Tribunal received the appeal file and issued a Notice of Assignment and Expedited Briefing Schedule on April 25, 2019. The CO has not filed a brief.

## 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 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. 20 C.F.R. § 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.” 20 C.F.R. § 655.61(e). The Board must affirm, 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).

In this case, Employer has submitted one document with its appeal that was not submitted to the CO: a letter from its President and COO, Bill Nupp, alleging that Employer and neighboring businesses will be harmed by the denial of its application. AF 17. However, a request for review “[m]ay contain only legal argument and such evidence as was actually submitted to the CO in support of the application.” 20 C.F.R. § 655.33(a)(5). The Board has held that it will not take official notice of any evidence that would undermine the regulation’s clear restrictions on the Board’s scope of review. *See Albert Einstein Medical Center*, 2009-PER379, slip op. at 9-13 (Nov. 21, 2011) (en banc). As the evidence that the Employer submitted with its appeal is neither a part of the record upon which the CO based his denial nor an appropriate subject of official notice, this Tribunal cannot consider it on appeal.

Similarly, Employer’s newly requested start date of peakload need—May 26, 2019—was not considered by the CO. Therefore, the undersigned will consider this appeal on the basis of Employer’s prior requested amended start date of June 1, 2019.

## DISCUSSION

### A. Legal Standard

An 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; *BMGR Harvesting*, 2017-TLN-15, slip op. at 4 (Jan. 23, 2017); *Alter and Son Gen. Eng’g*, 2013-TLN-3, slip op. at 4 (Nov. 9, 2012). Under 20 C.F.R. § 655.6(a) and (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.<sup>5</sup> Temporary service or labor “refers to any job in which

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<sup>5</sup> Since 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

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). An employer establishes 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).

To qualify as a seasonal need, the employer “must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner’s permanent employees.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(2); *Alter and Son General Engineering*, 2013-TLN-00003 (Nov. 9, 2012) (affirming denial of certification where the employer only made unsupported assertions about how weather conditions and contract patterns cause job openings to fluctuate); *Stadium Club, LLC d/b/a Stadium Club, DC*, 2012-TLN-00002 (Nov. 21, 2011); *Nature’s Way Landscaping, Inc.*, 2012-TLN-00019 (Feb. 28, 2012); *Caballero Contracting & Consulting*, 2009-TLN-00015 (Apr. 9, 2009); *Marco, LLC*, 2009-TLN-0043 (Apr. 9, 2009); *KBR*, 2016-TLN-00026 (Apr. 6, 2016).

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), (4); *Roadrunner Drywall*, 2017-TLN-35, slip op. at 9-10 (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); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application); *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).

## B. Analysis

As explained above, the CO’s ultimate denial rested on two findings: (1) that Employer failed to substantiate its alleged peakload season from June 1 to October 15, 2019, and (2) that Employer failed to establish a need for 18 Maids and Housekeeping Cleaners. Upon review of the Appeal File and Employer’s request for review, this Tribunal finds that the CO’s denial of Employer’s application was arbitrary and capricious. Accordingly, for the reasons that follow, the Tribunal reverses the CO’s denial of Employer’s application.

### 1. Temporary Need

The CO’s denial rested first upon a conclusion that Employer did not demonstrate the existence of a peakload—rather than year-round—need for workers. In particular, the CO

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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.

seemed to believe that Employer’s payroll records did not demonstrate a peakload need during Employer’s requested dates of need: June 1<sup>6</sup> to October 15. The Tribunal disagrees.

As the CO noted, the following chart summarizes the total monthly hours worked by housekeepers for Employer in 2017 and 2018:

<b>Month</b>	<b>2017 Total Hours Worked</b>	<b>2018 Total Hours Worked</b>
January	9,498	12,566
February	9,780	11,803
March	14,058	17,221
April	4,269	6,230
May	539	1,182
June	586	1,883
July	2,155	3,249
August	2,047	4,084
September	2,701	1,893
October	2,039	8,640
November	6,383	11,356
December	14,273	12,432

AF 25, 37. In addition, Employer submitted its booking report—pulled on March 22, 2019—of the rooms reserved for May 2019. AF 36. This report shows that—compared to the exact same booking reports as of March 22, 2018 and March 22, 2017—Employer’s room booking for May 2019 had increased by 162% and 374%, respectively.<sup>7</sup> AF 33.

The undersigned finds this data to adequately support a finding of a peakload need from June 1 to October 15, 2019. First, Employer’s housekeeper payroll hours for 2017 and 2018 unambiguously show a peakload need from July through April, with reduced housekeeper hours generally needed in May and June. In fact, the housekeeper payroll data shows two distinct “seasons” of peakload need: a smaller peakload period from July to October/November, and a larger peakload period from October/November to March/April.<sup>8</sup> Indeed, the only outlier month from this clear pattern was September 2018, in which Employer’s housekeepers logged only 10 and 711 more hours than they did during Employer’s 2018 slow period in June and May, respectively. Thus, based on this housekeeper payroll data, Employer has clearly documented a pattern of peakload need from July to October.

<sup>6</sup> The CO found that neither Employer’s initial requested start date of need (May 15, 2019) nor its requested amended start date of need (June 1, 2019) were justified by Employer’s submissions. AF 22-25.

<sup>7</sup> Employer incorrectly asserts that these figures represent a 172% and 296% increase from 2018 and 2017, respectively. *See* AF 33. Using the “All” category, 524 rooms (booked for May 2019) is a 162% increase from 324 rooms (booked in May 2018) and a 374% increase from 140 rooms (booked in May 2017).

<sup>8</sup> These two distinct peakload seasons are reflected in Employer’s H-2B applications from 2016 to the present, with separate applications submitted for each of these periods of need. *See* AF 23.

Employer's current bookings<sup>9</sup> for May 2019 support its contention that its peakload season this year will start earlier than the past two years. This data shows a clear increase in projected room bookings for May, with a 162% increase from May booking at that same date in 2018 (524 rooms vs. 324 rooms). Accordingly, it was reasonable for Employer to anticipate that its peakload would start earlier this year than last, and Employer's newly requested start date of June 1 is justified by its documentation.

In finding that Employer's alleged peakload season was not justified by the data, the CO failed to perceive the clear trend in Employer's housekeeper payroll data that unambiguously showed peakload seasons from July to October/November and October/November to March/April. This finding conflicts with the payroll data submitted by Employer, and is therefore rejected by this Tribunal as erroneous.<sup>10</sup> In addition, the CO took umbrage with the fact that Employer's two H-2B applications for workers spanning the period between October 2018 and October 2019 reflected a total alleged annual peakload need of greater than ten months. AF 23-24. Thus, the CO reasoned that Employer had not submitted sufficient information to demonstrate that its requested period of need was temporary in nature.

The CO's analysis misconstrues Employer's documentation. The CO erroneously concluded that Employer's requested peakload need only showed 33 days out of the year in which Employer did not need H-2B workers. AF 23. This is the number of days between Employer's current and most recent application for H-2B workers; however, the CO failed to consider that Employer's current application was only for half of the year—the 2019 summer season. As noted by the CO, Employer has historically submitted separate H-2B applications for summer and winter seasons.<sup>11</sup> AF 23. When considering Employer's prior two applications together, spanning the period of October 15, 2018 to October 15, 2019, Employer's requested peakload season from shows 43—not 33—days of non-peakload need. *See* AF 23. This calculation assumed the peakload starting date of May 15, 2019; however, as Employer has requested that its starting date of peakload need be moved from May 15 back to June 1, its total non-peakload season from October 15, 2018 to October 15, 2019 now spans 60 days, or two months. In other words, Employer's amended application reflects an asserted net annual peakload need of 10 months, which has been approved by BALCA as comporting with the definition of "temporary need." *See Andres Patricio Candalario*, 2015-TLN-00017, slip op. at 5 n.24 (Feb. 10, 2015); *Pronto Sandblasting*, 2015-TLN-00038 (April 2, 2015).<sup>12</sup> Accordingly, the requested period of peakload need is both justified by Employer's documentation and does not exceed the maximum period that can be considered "temporary need" under the regulations.

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<sup>9</sup> That is, current as of March 22, 2019. AF 36.

<sup>10</sup> In particular, the CO did not address the fact that this payroll data shows the existence of two distinct peakload seasons, discussed above, which perhaps explains the CO's curious assertion that "the total hours worked by its permanent and robust temporary workers does not support a peak in work performed during the employer's requested dates of need, June 1 through October 15." AF 25.

<sup>11</sup> Of note, Employer did not request any temporary H-2B workers for the summer season of 2018, as it increased the number of permanent housekeeping staff as well as using increased temporary housekeepers from non-H-2B sources. *See* AF 23, 37.

<sup>12</sup> These decisions pre-date the appropriations rider that required the use of DHS regulations in determining temporary need. The impact, if any, of the appropriations rider on these BALCA decisions has yet to be adjudicated.

The undersigned also rejects the CO's application of 20 C.F.R. § 655.15(b) as a bar to Employer's requested amendment of its application to reflect a period of peakload need starting on July 1 instead of May 15. That regulation only requires that an employer's application "must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need." 20 C.F.R. § 655.15(b). At the time Employer filed its application on February 25, 2019, its requested starting date of need (May 15) was 79 days away, which comported with this regulation. After Employer requested an amendment to this date on March 27, 2019 in response to the CO's notice of deficiency, the CO noted that this change would alter Employer's application such that it would not meet the regulatory filing timeframe at 20 C.F.R. § 655.15(b).

The undersigned disagrees with this strict interpretation. Nothing in § 655.15(b) expressly prohibits such amendments after the initial filing, even if they would retroactively have been considered invalid if initially filed using those dates. The regulations permit a back and forth process between the CO and employers to resolve deficiencies, and there is no indication that Employer abused the process to file its application earlier than it would have been permitted to under 20 C.F.R. § 655.15(b). Moreover, accepting a June 1 start date, Employer's application would have only been filed six days early. Given the delays in the approval process of Employer's application that it has experienced with the CO's denial and this appeal, it would be more harmful to require Employer to submit a new application than simply approve a slight modification. Accordingly, the undersigned finds that 20 C.F.R. § 655.15(b) is not a valid ground to deny Employer's modified application.

For these reasons, the undersigned finds that the CO's analysis of temporary need under 20 C.F.R. § 655.6(a)-(b) to be arbitrary and capricious. Employer's documentation justifies its assertion of a peakload need from July 1 to October 15.

## 2. Number of Workers Requested

As explained above, an employer must also demonstrate a bona fide need for the number of workers requested. 20 C.F.R. § 655.11(e)(3), (4); *see also Roadrunner Drywall*, 2017-TLN-35, slip op. at 9-10 (May 4, 2017) (affirming denial where the employer's temporary and permanent employee payroll data did not support its claimed number of workers); *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) (reversing denial where the employer sufficiently justified the number of workers requested in its application); *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).

The regulations do not specify what quanta of need will justify a request for each additional worker. *See* 20 C.F.R. § 655.11(e)(3). However, § 655.20(d) requires that an employer's job opportunity be for a "full-time temporary position," which § 655.5 defines as "35 or more hours of work per week." The undersigned finds the Department's decision to set 35 hours per week as the lowest amount of work considered "full-time" employment an appropriate benchmark by which to adjudicate an employer's request for a number of workers. Accordingly,

for Employer's documentation to support its requested number of workers, it must bear some relation to the Department's definition of "full-time": 35 hours per week, per worker.

Here, Employer has submitted housekeeper payroll data for 2017 and 2018, which breaks down the amount of monthly hours worked by its permanent and temporary housekeepers. This data shows that in 2018 Employer's permanent and temporary<sup>13</sup> housekeepers worked 1883 hours in June, 3249 hours in July, 4084 hours in August, 1893 hours in September, and 8640 hours in October. Taking only half of October's hours into account (4320), since Employer's requested period of need only extends through October 15, Employer's housekeepers worked a total of 15,429 hours during the 2018 period of June 1 to October 15: an average of 3428 hours per month, 816 hours per week.<sup>14</sup> During this same period, Employer employed approximately nine permanent housekeepers, who worked on average 44.38 hours per week. *See* AF 37.

For calculating its projected 2019 labor needs during this period, as noted above, Employer has submitted its booking report—pulled on March 22, 2019—of the rooms reserved for May 2019. AF 36. This report shows that—compared to the exact same booking report as of March 22, 2018—Employer's room booking for May 2019 had increased by 162%. AF 33. Employer notes that it currently has 12 housekeepers on staff, and wants to increase its total housekeeping staff to 29.<sup>15</sup> AF 33.

The undersigned finds the data submitted by Employer sufficient to justify a request for 18 temporary H-2B housekeepers from June 1 to October 15, 2019. Using Employer's data for May 2019 room bookings, Employer reasonably anticipated that it would experience a 162% increase in demand during the summer season. Indeed, a 162% increase from 2018 to 2019 would actually be less than the increased demand it experienced from 2017 to 2018. *See* AF 25. Applying that increase to the number of hours Employer's housekeepers worked in the summer season of 2018 (15,429), Employer could expect to need 24,994 housekeeper hours from June 1 to October 15, 2019.<sup>16</sup> For this four and a half month period, therefore, Employer's housekeepers would work an average of 5554 hours per month, or 1322 hours per week.

Employer has asserted that it currently has 12 housekeepers and one houseman on staff. Thus, using Employer's 2018 data for permanent housekeepers showing an average workweek of 44.38 hours, these 13 workers will be expected to work an average of 577 hours per week during the summer of 2019.<sup>17</sup> That leaves a shortfall of 745 hours that Employer needs to cover with additional housekeepers. Using the Department's minimum definition of full-time employment at 20 C.F.R. § 655.5—35 hours per week—this 745-hour shortfall would justify hiring an

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<sup>13</sup> The temporary housekeepers were non-H-2B temporary workers, as Employer did not request H-2B workers for the summer of 2018. *See* AF 23.

<sup>14</sup> This calculation assumes that a month has 21 working days, or 4.2 weeks.

<sup>15</sup> Employer did not explain why it was requesting authorization to recruit an additional 18 H-2B housekeepers for the summer of 2019, when 17 would suffice to reach 29 total housekeepers.

<sup>16</sup>  $15,429 \times 1.62 = 24,994$ .

<sup>17</sup>  $13 \times 44.38 = 576.94$ .

additional 21 workers.<sup>18</sup> Accordingly, Employer's request for certification of 18 H-2B housekeepers is justified by the May 2019 booking report and the 2018 housekeeper payroll data that together provided a reasonable estimate of Employer's labor needs for the 2019 summer season.

The CO appeared to reject Employer's request for 18 housekeepers partly on the basis that Employer did not submit documentation of booking demand for its entire 2019 summer season. AF 27. The undersigned finds this reason insufficient to deny Employer's application. For one, it appears that Employer submitted the best evidence in its possession regarding projected demand for rooms in the 2019 summer season. At the time Employer submitted its response to the CO's notice of deficiency in March 2019, it could only estimate future demand for rooms based on current bookings. Thus, when asked by the CO to supply documentation supporting Employer's request for 18 housekeepers over the 2019 summer season, Employer submitted the booking report for the earliest month in which it had requested workers—May 2019. Employer noted in its response that it may continue to book more rooms over the summer, and asserted that, based on this data, it needs more housekeeping staff to cope with the marked increase in the room reservations for May 2019 that its booking report showed compared to the same booking report a year prior had showed for May 2018. AF 33.

Obviously, this was a rough and imperfect approximation of Employer's expected demand for rooms, but this May 2019 booking report appears to be the best evidence available at the time Employer attempted to quantify its projected labor needs. For the remainder of the 2019 summer months—even farther removed from the time Employer submitted this evidence of demand in March 2019—one would reasonably expect room bookings to decrease as less people had booked rooms that far in advance. Therefore, the Tribunal questions how much predictive power, if any, evidence of room bookings for the period of June through October that Employer had in its possession in March would have to forecast Employer's labor needs during that period. The CO's denial rested on a tacit assumption that Employer's booking report in March for rooms in June through October would demonstrate whether Employer's request for 18 housekeepers was justified by the data. However, the Tribunal finds this assumption to be speculative in light of the nature of Employer's business, where bookings are made on a rolling basis and not necessarily far in advance. Accordingly, data for the first month in the period of alleged peakload need would likely provide the most probative data regarding Employer's demand for the 2019 summer season vis-à-vis the 2018 summer season.

Second, the CO's denial on this ground cannot be sustained because the CO did not request the specific information related to Employer's room bookings for the remainder of summer 2019 in the Notice of Deficiency. The CO merely requested that Employer submit "documentation supporting the employer's need for 18 Maids and Housekeeping Cleaners such as contracts, letters of intent, etc. that specify the number of workers and dates of need."<sup>19</sup> AF

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<sup>18</sup> Even using Employer's stated shifts of 7:30 a.m. to 4:00 p.m. (presumably an eight-hour day with a 30 minute break), at a 40-hour week, Employer's labor shortfall would justify hiring an additional 18 housekeepers. (745 / 40 = 18.63)

<sup>19</sup> The CO also requested an explanation of Employer's request for 18 housekeepers and summarized monthly payroll reports for its housekeepers in the two prior calendar years. AF 45. Employer complied with both of these requests.

45. As explained above, the undersigned finds Employer's submitted documentation sufficient to justify its request, and Employer therefore complied with the CO's request. Thus, the undersigned find that Employer's failure to submit this additional information does not provide a valid ground for denial of its application.<sup>20</sup>

For these reasons, the Tribunal finds that the CO's analysis of temporary need for the number of workers under 20 C.F.R. § 655.11(e)(3)-(4) to be arbitrary and capricious. Employer's submitted data shows that it will experience a projected labor shortfall of at least 18 housekeepers during the 2019 summer season.

### **CONCLUSION AND ORDER**

For the reasons explained above, the CO's denial of Employer's application for 18 housekeepers for the period of June 1 to October 15 was arbitrary and capricious. The CO's denial is therefore **REVERSED**, and this matter is **REMANDED** to the CO for acceptance and recruitment under § 655.40.

**SO ORDERED.**

For the Board:

**SCOTT R. MORRIS**  
Administrative Law Judge

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<sup>20</sup> Had the CO requested this information and Employer not provided it, that would have constituted grounds for denial of Employer's application. *See U.S. Travel Work and Study Overseas One Corp.*, 2014-TLN-00032 (Jul. 18, 2014).