This case arises from Alcan Management, LLC’s (“Employer”) request for review of the Certifying Officer’s (“CO”) decision to deny its 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 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 (DHS). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 1 20 C.F.R. § 655.6(b). Employers 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 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 July 15, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for 15 herbicide applicators for the period of October 1, 2021 to October 31, 2021. AF 36-57. Employer indicated that the nature of its temporary need was “peakload.” In response to its statement of temporary need, Employer stated:

> Our need for Herbicide Applicators reflects a temporary, peak load need since our herbicide application services are weather dependent and accomplished when the targeted plants are actively growing and cannot be applied effectively after the first frost of the winter. The herbicides used are designed specifically to be effective only when the plants have full leaf out. Typically, this will be from early spring to early fall. The actual months may vary with the seasonal temperatures of any given year. Our utility customers typically request a 3 year cycle for this service which translates into a seasonal demand for additional workers on a temporary basis.

AF 36.

Although Employer noted that its usual season for application of herbicides is spring to early fall, its application requested the 15 herbicide applicators for October 1, 2021 to October 31, 2021, “to finish out [its] temporary seasonal need” in the current year. AF 47.

The CO issued a Notice of Deficiency (“NOD”) on July 23, 2021, listing two deficiencies in the Employer’s application. AF 29-35. The CO noted the first deficiency as the Employer’s “[f]ailure to justify the dates of need requested” and the second deficiency as “[f]ailure to establish temporary need for the number of workers requested.” As the CO only listed the

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

3 References to the appeal file will be abbreviated with an “AF” followed by the page number.

4 The CO incorrectly noted the Employer’s requested dates of need as October 1, 2021 through December 31, 2021 in the Notice of Deficiency. AF 33-34.
In regard to Deficiency 2, Employer’s “[f]ailure to establish temporary need for the number of workers requested,” the CO noted that the regulations at 20 C.F.R. §§ 655.11(e)(3) and (4), provide that an employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity. The CO stated that the employer had not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. The CO stated that the Employer had not indicated how it determined that it needs 15 Herbicide Applicators during the requested period of need, and that further explanation and documentation is required to establish the Employer’s need for 15 Herbicide Applicators. AF 34.

The CO directed the Employer to submit further documentation including an explanation with supporting documentation of why the Employer is requesting 15 Herbicide Applicators for Frisco City, Alabama during the requested dates of need, including contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year that identify, “for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received.” The CO also specified that the documentation must be signed by the Employer attesting that the information being presented was compiled from the Employer’s actual accounting records or system. The CO also directed the Employer to provide an explanation of the data in the submitted payroll documentation, as well as other evidence and documentation that similarly serves to justify the number of workers requested. AF 34-35.

On August 5, 2021, Employer filed a response to the Notice of Deficiency providing additional explanation as well as two payroll graphs as shown below. AF 25-28
Employer noted that the NOD had inaccurately stated that Employer had requested dates of need from October 1, 2021-December 31, 2021. Employer authorized the Chicago NPC to amend its application to show the correct end date of October 31, 2021 and make the dates consistent throughout. AF 25. Employer noted that it is new to the H-2B program which is the reason the Employer’s initial date of need is October 1, 2021 and that in subsequent years the Employer’s initial date of need will be April 1, 2021.

In regard to the two graphs supplied, the Employer stated that it ordinarily subcontracts out this work, so it is providing “the summarized monthly payroll to subcontractors to perform this work.” AF 27. One graph is titled 2020 Contractor Payroll and the other is titled 2020 Employee Payroll Report. Employer indicated that the graphs showed a sizable increase in payroll costs during the months of April through the end of October. In regard to the number of workers, the Employer stated, “[T]he employer is experienced in this area of work. The employer took the anticipated number of workers that would be required from a subcontractor and has requested that number as the employer wishes to bring this work in house.” AF 28.

On September 1, 2021, the CO issued a Final Determination-Denial to the Employer, stating that the Employer’s explanation and documentation failed to overcome the deficiency regarding the number of workers requested. AF 16-22. The CO confirmed Employer’s clarification requesting that the Department amend the end date of need from December 31, 2021 to October 31, 0221 and confirmed that the Department is analyzing the Employer’s application for 15 Herbicide Applicators for dates of need of October 1, 2021 to October 31, 2021 based on a peakload need.

The CO acknowledged the Employer’s explanation that it determined the number of workers requested based on the number of subcontractors that it has historically been required to hire. The CO determined however, that the Employer did not provide any documentation to support the number of workers hired by its subcontractors in previous years. Specifically, the CO stated that the Notice of Deficiency instructed the Employer to provide supporting documentation including contracts, letters of intent etc. that specify the numbers of workers and dates of need. The CO noted that Employer failed to provide this information. The CO also noted that the NOD instructed Employer to “submit summarized monthly payroll reports for a minimum of one previous calendar year that identified, for each month and separately for full time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received with an explanation of the data in [the] submitted payroll documentation.” The CO determined that the Employer failed to provide the requested payroll documentation. The CO stated that the provided payroll charts did not identify the number of full time permanent and temporary workers in the requested occupation or specify the total hours worked by permanent and temporary “Herbicide Applicators.” Further, the CO noted that Employer did not submit an explanation of the data submitted. Therefore, the CO determined that the payroll documentation is not sufficient to establish that the Employer has a peakload need for 15 workers during the requested period of need from October 1, 2021 to October 31, 2021. Accordingly, the CO denied Employer’s application.
By letter dated September 15, 2021, Employer made a timely request for administrative review of the CO’s determination. Employer asserts that it provided two separate payroll charts to the CO and a statement attesting that the information was compiled from actual accounting records. Employer argues that the subcontractor chart “specifically identifies the temporary workers in this occupation as requested by the NOD.” Employer also states that the payroll chart does “specifically break down both temporary and permanent employee’s payroll cost by month for one calendar year.” Therefore Employer argues it provided the requested information. AF 2-5.

By Order issued on September 27, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before October 5, 2021. Neither Employer nor the CO submitted briefs by the deadline.

**SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO’s determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

1. Affirm the CO’s determination; or
2. Reverse or modify the CO’s determination; or
3. Remand to the CO for further action.

20 C.F.R. § 655.61(e).

**STANDARD OF REVIEW**

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO’s determination in H-2B temporary labor certification cases. See Brook Ledge Inc., 2016 TLN 00033 at 5 (May 10, 2016); see also J and V Farms, LLC, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

**ISSUE**

Whether the Employer has met its burden of establishing its temporary need for 15 herbicide applicators for the period of October 1, 2021 to October 31, 2021.

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5Likewise, judicial review under the Administrative Procedure Act provides that an agency’s actions, findings and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2).
DISCUSSION

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii). This regulation states:

(A) Definition. Temporary services or labor under the H-2B classification 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.


The DHS regulation further states in regard to the nature of petitioner’s need:

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years. The petitioner’s need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need.


The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). See, e.g., Alter and Son General Engineering, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

In this case the Employer is alleging that it has a temporary need for 15 herbicide applicators due to a peakload need from October 1, 2021 to October 31, 2021. AF 36. To establish a peakload need according to the DHS regulation, the employer

must establish 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.


In this case the CO’s final denial is based on Employer’s failure to establish the temporary need for the number of workers requested. An Employer must 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). See Roadrunner Drywall, 2017-TLN-00035, 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).

In the final denial letter the CO noted that the Employer indicated that it determined the number of workers requested based on the number of subcontractors that it has historically been required to hire. However the CO determined that the Employer did not provide any documentation to support the number of workers hired by its subcontractors in previous years. The CO reiterated the information that was requested in the NOD which included contracts, letters of intent etc. that specified the number of workers and dates of need. None of this information was supplied. In addition, the CO observed that the NOD specifically requested summarized monthly payroll reports for a minimum of one previous calendar year that identified “for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received with an explanation of the data in submitted payroll documentation.” AF 22.

The CO acknowledged the payroll charts that Employer provided but determined that Employer failed to provide the requested information. The CO found that, “[n]either chart identifies the number of full-time permanent and temporary workers in the requested occupation (Herbicide Applicator) or specify the total hours worked by permanent and temporary Herbicide Applicators.” Id. Further, the CO determined that the explanation provided with the documentation was insufficient to support the Employer’s application for 15 workers during the requested period of need from October 1, 2021 to October 31, 2021.

After reviewing the charts and other information submitted by the Employer, I find the CO correctly determined that the specific information requested by the CO in the NOD was not provided. Although the graphs generally address the payroll of subcontractors, as well as permanent and temporary employees, it is not broken down by the specific occupation of “Herbicide Applicator,” nor does it address in any form the number of employees, nor total hours worked by temporary or permanent employees for the previous calendar year.

The charts do not indicate how many Herbicide Applicator positions were subcontracted in the previous year, nor in what months, despite the fact that this specific information was requested in regard to the herbicide applicator position in the NOD. Employer argues in its request for review that it supplied payroll charts showing its subcontractor payroll as well as permanent and temporary employees. However, neither chart, nor any other information in the record, refer to the number of Herbicide Applicators used in the previous year, whether hired as subcontractors or employees, nor does any of the supplied information provide any reasonable basis to calculate whether the number of workers requested is based on “bona fide” job opportunities. There is no way to interpret the information submitted which would have allowed the CO to determine whether Employer had proven a bona fide need for the 15 Herbicide Applicators requested, on the basis of a peakload need for the requested period of October 1, 2021 to October 31, 2021.
Employer also failed to explain how the total wages as noted in the graph equate to a specific number of workers. Employer failed to provide any explanation as to how it calculated its need for the specific number of Herbicide Applicators in either the previous year, or in the requested period of need of October 1, 2021 through October 31, 2021. Although Employer stated that it is “experienced in this area of work” and used the “anticipated number of workers that would be required from a subcontractor,” Employer failed to supply any information which enabled the CO to verify the Employer’s calculation.

As Employer failed to provide any of the requested documentation which would have allowed the CO to reasonably determine whether the request for 15 herbicide applicators represented a “bona fide job opportunity” as required by 20 C.F.R.§ 655.11(e) (3) and (4), the CO did not act arbitrarily or capriciously in denying the Employer’s application for H-2B workers. See Roadrunner Drywall Corp. 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). See also North Country Wreaths, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word’’); and Empire Roofing, 2016-TLN-00065 (Sept. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of document-on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers”). Accordingly, the CO’s denial of the Employer’s application for failure to establish its temporary need for the number of workers requested is supported by the record.

For the reasons stated above, Employer failed to meet its burden of establishing a bona fide need for 15 herbicide applicators for the period of need requested.

ORDER

Employer has failed to meet its burden of establishing its temporary need for 15 herbicide applicators for the requested period of October 1, 2021 through October 31, 2021. Accordingly, the CO’s denial of Employer’s application for temporary labor certification is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge