This case arises from the request of Surfside Resort, Inc. ("Employer") 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 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 ("DHS"). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 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 ("Department") using a Form ETA-9142B, Application for Temporary Employment Certification ("Form 9142B"). A CO in the Office of Foreign Labor Certification of the Department’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 1, 2021, ETA received an application for temporary employment certification from Employer. AF 37-70. Employers requested certification for 25 housekeepers. AF 37.

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2 On April 29, 2015, the Department of Labor and DHS 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 In this Decision and Order, “AF” stands for “Appeal File.”
Employer identified the nature of temporary need as “peakload” and the period of intended employment as April 1, 2021 to October 15, 2021. AF 37.

Included with Employer’s application was a “Statement of Temporary Need.” AF 58-59. In its Statement of Temporary Need, Employer wrote the following:

**Introduction:** Surfside Resort, Inc. (hereafter referred to as Surfside) has been in business providing Tourist with hotel accommodation since 2000. Surfside has a peak load need when it needs to supplement its permanent staff of housekeepers at its place of employment. The peak season takes place when the weather is warm enough for the influx in guess [sic] visiting Virginia Beach. For Surfside, this timeframe is from March through October. Surfside has a need for 25 temporary workers from April 1, 2021 to October 15, 2021. Surfside temporary need for Housekeepers and the timeframe requested is definable, and is consistent with what the four seasons allow.

**Establishment of the four seasons:** Surfside has work in Southeast Virginia. The regions in which they plan to work have what is referred to as four seasons. These seasons are as follows:

1. Spring.
2. Summer.
3. Fall.

**Spring** months consist of March, April and May. Spring bring warmers temperatures above freezing. The days are longer and warmer, ushering in the beginning of tourist season.

**Summer** months of June, July and August allows for continued rise in temperature. Temperatures usually into the mid-80’s during the day. Also known as the height of the tourism season.

**Fall** months of September, October and November start to see a drop in temperature back towards freezing. Rains can fall in excess while temperature declines back towards freezing. Tourism is still heavy as fall festivals are widely popular.

**Winter** months are more commonly known as December, January and February. The temperature and seasonal changes in this Southeastern state are moderate in comparison to those in the Northeast. Moderate changes in the four seasons mean that winter starts in December and will not be as harsh or that spring may start a little earlier than in most other places with severe four-season weather. During these winter months in a four-season area, temperatures can drop at or below freezing overnight. Virginia Beach receives little to no snowfall during the winter. They receive above average rainfall during the winter months. Colder rainier
weather is less attractive for tourists. For this reason, the tourism season for Virginia Beach begins its off-peak season.

Each season can slightly alter in the temperature, amount of precipitation or lack of precipitation. However, these cycles of Spring, Summer, Fall and Winter have remained consistent in four season areas since recorded time began.

**Establishment of work to be performed:** Duties may include: Perform any combination of housekeeping cleaning duties to maintain establishment(s) in a clean, orderly manner. Carry linens, towels, toilet items, cleaning supplies, use wheeled carts. Disinfect equipment, supplies, use germicides or steam-operated sterilizers. Clean rooms, hallways, lobbies, lounges, restrooms, corridors, stairways, other work areas so that health standards are met. Empty wastebaskets, empty-clean ashtrays, transport other trash, waste to disposal areas. Observe precautions protect guest, property, report damage, theft, found articles to supervisors. Replenish supplies, such as drinking glasses, linens, writing supplies, bathroom items. Clean rugs, carpets, upholstered furniture, draperies, use vacuum cleaners, shampooers. Dust, polish furniture, equipment. Keep storage areas & carts well-stocked, clean, and tidy. Wash windows, walls, ceilings, woodwork, wax, polish as necessary & other related Housekeeper activities as per SOC/OES 37-2012 (onetonline.org).

**Establishment of the work that Surfside plans to do in correlation with what the four seasons allows:** Surfside provides lodging by operating as many as 99 hotel rooms that tourists can rent while visiting Virginia Beach, VA. When March arrives, the tourism dramatically increases in Virginia Beach as Virginia Beach sees the first lot of tourism of the year. Specifically, spring breakers. Surfside must supplement its permanent staff at the place of employment, and hire temporary workers. The temporary staff will help handle the influx of visitors that will be renting hotel rooms once the weather warms up in starting in March. Please see attached “Surfside Occupancy Report by Year (2018 – 2020) with Averages”. This report shows the average increase of 66% in rented hotel rooms from February to March. March starts the peak season. This increase is based off of 2018-2019 occupancy reports. Although we have provided 2020 occupancy numbers, they are drastically reduced from what a traditional season would look like due to Covid-19. For this reason, we have not included them in the average increase/decrease percentage.

These temporary workers will maintain the hotel rooms by providing the housekeeping services listed above under Establishment of work to be done. This high peak level of renting will continue through October while the weather remains fairly moderate. At the beginning of November, colder rainier weather arrives. This weather is less attractive for tourists. For this reason, the tourism season for Virginia Beach begins its off-peak season. In fact, the number of hotel rooms rented drops by 41% from October to November. Please see attached “Surfside
Occupancy Report by Year (2018 – 2020) with Averages”. This report shows that hotel rooms rented are down 41% from October to November.

During this off-peak season, Surfside’s permanent staff can handle the small number of people looking to rent hotel rooms. Surfside averages less than 29% occupancy of its hotel rooms rented each month during the 4 months of the off peak-season (November, December, January, and February). Since the number of hotel rooms being rented has drop by 41%, there is no need to retain the temporary workers. The permanent staff no longer needs to be supplemented. The temporary workers will be sent home. They will not become part of Surfside’s permanent staff. It would be a terrible business decision to keep such a large staff with a greatly reduced amount of work.

**Justification for the number of workers Surfside is requesting:** Please see the attached “Surfside Occupancy Report by Year (2018 – 2020) with Averages”. We have provided three years of occupancy reports as 2020 is not a traditional year for tourism due to Covid-19 Pandemic. 2018 and 2019 numbers are historically accurate of what Surfside would see in a traditional year. You will notice that we have provided a chart for the that [sic] corresponds with “Surfside Occupancy Report by Year (2018 – 2020) with Averages”. This chart outlines Surfside’s peak season of March through October. It is Surfside’s best business judgement that it will need 25 temporary workers for the 2021 season. The temporary workers will help supplement the permanent staff as well as reduce the burden of the peak season.

**Summarization:** Surfside is requesting 25 temporary workers for this application. The peak season months for Surfside are March through October. Surfside will work within this time frame from April 1, 2021 to October 15, 2021. The off-peak months for Surfside are November through February due to the colder rainier weather which is less attractive for tourist. For this reason, the tourism season for Virginia Beach begins its off-peak season. It is at this time that Surfside no longer needs to supplement the permanent staff at the place of employment. The temporary workers will not become part of Surfside’s permanent staff and will be sent home at the end of the peak-season.

AF 58-59.

On February 18, 2021, the CO issued a Notice of Deficiency (“NOD”). AF 30-36. The NOD identified two deficiencies in Employer’s application, only one of which is relevant to the matter this Tribunal must decide. Citing to 20 C.F.R. § 655.11(e)(3) and (4), the CO wrote that Employer “has not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities.” AF 34. The CO explained that Employer “indicated that it had attached ‘Surfside Occupancy Report by Year (2018 – 2020) with Averages’ that was used in determining that it needs 25 Housekeepers during the requested period of need . . . .” According to the CO, Employer failed to provide this document.
Thus, the CO directed Employer to submit additional evidence and documentation in order to establish its need for 25 housekeepers.

The CO directed Employer to submit the following: (1) An explanation with supporting documentation of why it is requesting 25 Housekeepers for Virginia Beach, Virginia during the dates of need requested; (2) If applicable, documentation supporting Employer’s need for 25 Housekeepers such as contracts, letters of intent, etc. that specify the number of workers and dates of need; (3) 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. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; (4) An explanation of the data in submitted payroll documentation; and (5) Other evidence and documentation that similarly serves to justify the number of workers requested, if any. AF 34.

On March 9, 2021, Employer submitted its response to the NOD. AF 21-28. Included with Employer’s response was a document titled “Surfside Resort Occupancy Report by Year (2018-2020) with Averages.” This document contains a bar graph showing the average occupancy rate by month from 2018 to 2020. AF 23. Also included are tables with monthly reports for 2018, 2019, and 2020, and the average for 2018-2020, which show the days per month, units available per day, units available per month, units rented per month, occupancy rate per month, and percent increase from previous month. AF 24-25.

On March 17, 2021, the CO issued a Final Determination. AF 13-20. The CO concluded that the previously identified deficiency, i.e., Employer’s failure to establish a temporary need for the number of workers requested, remained. AF 17. Regarding the document that Employer submitted in response to the NOD, the CO observed: “[O]ccupancy of the employer’s units start to increase in March/April until October. However, though the report indicates how many units are usually rented during the peak season, no information was provided in the charts explaining how many workers are needed to clean each unit during the peak season.” AF 18.

The CO further explained:

The employer did not provide an explanation with its NOD response as to why it is requesting 25 Housekeepers. The employer also did not provide a summarized payroll report for a minimum of one previous calendar year that identifies, 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.

Therefore, from the information provided, it is unclear how the employer determined it needs 25 Housekeepers for the requested dates of need. AF 20.

On April 6, 2021, Employer submitted its Request for Administrative Review. AF 1-11. In its Appeal Letter, Employer explained that it requires housekeeping to be performed at 4
different hotels. AF 10. These hotels include: (1) Four Points by Sheraton Virginia Beach (99 rooms, year-round); (2) Ocean Suites (54 rooms, March through October (closed in the offseason)); (3) Royal Clipper Inn & Suites (84 rooms, March through October (closed in the offseason)); and (4) Best Western Plus Holiday Sands (86 rooms, year-round).

Regarding its hotels, Employer wrote:

Based on the occupancy report originally provided to DOL, out of the 99 rooms available at Four Points by Sheraton Virginia Beach, there was an average of 1934 units to be cleaned monthly during the peak season of March through October contrasted with approximately 845 units to be cleaned monthly in the off-peak season.

During the peak season, Four Points has 99 rooms available out of 323 rooms between all 4 hotels. This is 30.65 percent of the units attributed to this hotel out of all 4 hotels during the peak season of March through October. We can use this percentage to extrapolate the data of all 4 hotels in regards to occupancy. Since Four Points has average units cleaned of approximately 1,934 rooms during the peak season, then we infer there are approximately 6,311 rooms to clean monthly during the peak season for all 4 hotels combined. This is found by dividing 1,934 by .3065 (30.65 percent).

During the off-peak season (November through February), there are 185 rooms available between the two open hotels. Four Points accounts for 53.51 percent of the units available during the off-peak season. Four Points has average units cleaned of approximately 845 rooms during the off-peak season, then we infer there are approximately 1,580 rooms to clean monthly during the off-peak season for the 2 open hotels combined. This is found by dividing 845 by .5351 (53.51 percent).

Based on this, we can infer that all 4 hotels would have approximately 6,311 units rented monthly during the peak season, vs 1,580 units rented monthly during the off-peak season. (This is a 299 percent increase during the peak season from the off-peak season).

Surfside currently employs 10 housekeepers performing the duties in the requested occupation year-round. 10 housekeepers are sufficient to clean 1,580 units a month during the slower period of November through February. However, they are insufficient to clean 6,311 rooms per month. The anticipated 299 percent increase in rooms to be cleaned monthly during the peak season of March through October is why they are requesting 25 workers to temporarily supplement the year-round staff during the period of increased demand. They are requesting the 25 supplemental staff in starting in April based off of cap constraints of the H-2B program.

It is based off these occupancy numbers and Surfside Resort's prior experience and business history in the industry that they have a need for 25 temporary workers to
help with the increase in volume of occupancy within their peak season from April 01, 2021 through October 15, 2021.

AF 10-11.

**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 § 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.*

Although 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 a CO’s determinations. *Brazen & Greer Masonry, Inc.*, 2019-TLN-00038 (Mar. 6, 2019); *The Yard Experts, Inc.*, 2017-TLN-00024 (Mar. 14, 2017); *Brooks Ledge, Inc.*, 2016-TLN-00033 (May 10, 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 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 provided. *State Farm*, 463 U.S. at 43; *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**

Pursuant to the applicable regulation, 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), (4). According to the CO, Employer failed to establish its need for 25 housekeepers. AF 18-20, 34. In the NOD, the CO directed Employer to submit an explanation with supporting documentation (contracts, letters of intent, and summarized monthly payroll reports) as to why it is requesting 25 housekeepers. AF 34. In response to the NOD, Employer submitted “Surfside Resort Occupancy Report by Year (2018-2020) with Averages.” This document was largely unresponsive to CO’s
requests, as it contained monthly data and statistics for 2018, 2019, 2020, and the average for 2018 to 2020, about the units available per day, units available per month, units rented per month, and occupancy rate per month. AF 22-25. Accordingly, in the Final Determination, the CO concluded that Employer failed to submit the requested documentation explaining how it determined that it needs 25 housekeepers for the requested dates of need. AF 18-20.

Based on the record before the Tribunal, the undersigned agrees with the CO that Employer failed to establish why it has a need for 25 housekeepers. Neither Employer’s application nor its response to the NOD offers any explanation whatsoever of how Employer calculated that it needs 25 housekeepers. Employer’s response to the NOD was largely unresponsive to the CO’s requests, as it failed to produce supporting documentation such as contracts, letters of intent, or summarized monthly payroll reports for permanent and temporary workers. Furthermore, the documentation Employer did submit does not indicate how many workers have been needed to meet peakloads in the past, nor does it demonstrate what that actual need for workers will be this year. Therefore, the CO’s determination that Employer did not establish a need for 25 housekeepers, as required by 20 C.F.R. § 655.11(e)(3), was reasonable and was not arbitrary or capricious.

CONCLUSION AND ORDER

The Certifying Officer did not act in an arbitrary and capricious manner in denying Employer’s Application for Temporary Employment Certification (Form ETA-9142B). Accordingly, the Certifying Officer’s denial of Employer's Application for Temporary Employment Certification is AFFIRMED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey