This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to North Shore Resort’s (the “Employer”) request for review of the Certifying Officer’s (“CO”) Final Determination in the above-captioned H-2B temporary labor certification matter. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time, seasonal, peakload, or intermittent basis. 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 U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A Certifying Officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

1 On April 29, 2015, the Department of Labor (the “Department”) 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. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.
STATEMENT OF THE CASE

On July 3, 2021, the Employer filed with the Certifying Officer (“CO”) an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 57-75). The Employer requested certification for 15 Housekeepers, SOC Occupational Title, Maids and Housekeeping Cleaners. (AF 57). On July 8, 2021, the CO issued a Notice of Deficiency requesting additional information on the issues of seasonal and temporary need, and an amended job order. (AF 47-56). The Employer filed a response on July 15, 2021.

The CO issued a Final Determination on September 1, 2021. (AF 20-35). The CO found that the Employer failed to submit some of the additional information requested. The CO determined that the Employer failed to establish that the need is temporary, that the need is seasonal, and failed to submit an acceptable job order. Therefore, the CO denied certification. (AF 20-35).

On September 15, 2021, the Employer requested administrative review of the CO’s Denial before BALCA, as permitted by 20 C.F.R. § 655.61.7 On September 20, 2021, the Board of Alien Labor Certification Appeals (“BALCA”) received the request for administrative review. The matter was assigned to Administrative Law Judge Joseph E. Kane. The appeal file was received on the same date. Per a notice of docketing issued September 21, 2021, the parties were given 7 days to file a brief. The parties did not file briefs in this matter.

DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer actually submitted to the CO before the date of the CO’s determination. 20 C.F.R. § 655.61. Therefore, any arguments and evidence submitted on appeal, including that submitted with the briefs, cannot be considered unless presented to the CO. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA 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). Therefore, a CO’s denial of certification must be upheld unless shown by the Employer to be arbitrary and capricious or otherwise not in accordance with the law.

The Employer bears the burden of proving that it is entitled to temporary labor certification. The CO may only grant the Employer’s Application to admit H-2B workers for

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2 “AF” refers to the Appeal File.
3 The Employer states on appeal that they are requesting 30 workers. The application indicated 15 workers and the job order lists 30.
temporary non-agricultural employment if the Employer has demonstrated that: (1) insufficient qualified U.S. workers are available to perform the temporary services or labor for which the Employer desires to hire foreign workers; and (2) employing H-2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.\(^5\)

Accordingly, the Department’s H-2B regulations require employers to complete specific domestic recruitment steps before filing an Application for Temporary Employment Certification. 20 C.F.R. § 655.15(a). These steps include, inter alia, the placement of a job order with the State Workforce Agency (SWA) serving the area of intended employment. 20 C.F.R. § 655.15(e)(1). This job order must contain all of the detailed information listed in the regulations, including the “expected start and end dates of employment” and the number of workers requested. See 20 C.F.R. § 655.15. Applications that do not comply with the required criteria “shall not be accepted for processing.” 20 C.F.R. § 655.15(a).

The Employer’s application requests 15 housekeeping workers. (AF 57). The job order, however, requests 30 workers. (AF 34). In the Notice of Deficiency, the CO provided the Employer with an opportunity to correct the number of workers requested. The Employer filed a new job order, but it also did not match the number of workers requested on the application. Therefore, the CO denied certification on this issue. On appeal the Employer agrees that it submitted the wrong number of workers and asks to submit additional documentation. However, throughout the appeal request the Employer notes it needs 30 workers, not the requested 15 on the application. (AF 1-2). Therefore, based on the evidence in the record, I find that the Employer has failed to comply with the requirements of 20 C.F.R. § 655.16 and § 655.18. The requested number of workers on the application and job orders do not match. (AF 57, 34). It is unclear the number of workers actually requested.\(^6\)

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s denial is AFFIRMED.

For the Board:

JOSEPH E. KANE
Administrative Law Judge

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\(^5\) 20 C.F.R. § 655.1(a).
\(^6\) As I have affirmed the CO’s denial on this issue, I do not need to address the other two deficiencies.