In the Matter of:

ANDERSON CONTRACTORS, LLC,
Employer.

Before: Evan H. Nordby
Administrative Law Judge

DECISION AFFIRMING
DENIAL OF CERTIFICATION

This case arises from Anderson Contractors, LLC’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. Preliminarily, I decline to dismiss this appeal on timeliness grounds. On the merits, I find that Employer established a temporary need for two H-2B non-immigrant workers during the period from April 1, 2021 through November 30, 2021. However, I find that the CO’s determination that this application has too significant an overlap with a prior application, in violation of 20 C.F.R. § 655.15(f), is not arbitrary and capricious.

BACKGROUND

Employers who want to hire foreign workers under the H-2B program must get a labor certification from the Department of Labor. A CO in the Office of Foreign Labor Certification (“OFLC”) reviews each Application for Temporary Employment Certification (“Form 9142”). Following a 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).

Here, in an application filed on January 1, 2021, the Employer applied for certification for two Landscaping and Groundskeeping Workers to work on silt fencing and retaining wall construction projects in Burlington, Kentucky. AF at P97-112. The Employer appears to use “General Laborers” interchangeably with “Landscaping and Groundskeeping Workers” when referring to these positions. Compare AF at P97-109 with AF at P112; see also AF at P31. The
Employer asserted a peakload need for these workers, see 8 C.F.R. § 214.2(h)(6)(ii)(B)(3), lasting from April 1, 2021 to November 30, 2021.

The Employer previously submitted an application, H-400-20308-897194, for eight Landscaping and Groundskeeping Workers for a period from February 1, 2021 through November 30, 2021. AF at P48. That application was certified on December 14, 2020. Id.

The H-2B cap for the first half of fiscal year 2021 closed on November 16, 2020. AF at P2. As this was prior to Employer’s certification for their initial application, they could not hire H-2B workers subject to the cap. Id. However, Employer was able to hire six cap-exempt H-2B workers under the terms of the certified application. Id.

Employer’s January 1, 2021 application is an application to fill the two unused spots from the application certified on December 14, 2021. AF at P97-112. Due to the fiscal year cap, the period of need listed in this second application was April 1, 2021 through November 30, 2021 rather than February 1, 2021 through November 30, 2021. AF at P102.

On January 19, 2021, the CO issued a notice of deficiency. The CO found that the application violated the requirements of 20 C.F.R. § 655.15(f), which forbids multiple applications for the same area of intended employment and the same job opportunity during the same period of need. AF at P93. The CO found that the January 1, 2021 application violated this provision in relation to the certified December 14, 2021 application. Id. Additionally, the CO found that the employer had not properly justified the number of workers requested and the period of need, based on inconsistencies with prior applications. Id. at P94-95. Finally, the CO identified an error related to an omission in ETA Form 9142. Id. at P96.

In response to the Notice of Deficiency, Employer indicated that it was requesting certification for four workers in addition to the six cap-exempt workers already hired: two based on the unused spots from the application certified on December 14, 2021 and two to work on a retaining wall contract that had recently been greenlighted. AF at P36. The Employer attached documentary evidence in support of the relevant retaining wall contract (a project on which Employer is a subcontractor for Pepper Construction). Id. at P51-81. These additional workers appear to have been requested for the first time in the Notice of Deficiency. AF at P36.

Employer’s application was denied on February 2, 2021. In the denial, the CO stated that the Employer had: (1) improperly submitted an application for the same position in the same area of intended employment as a previous application for which the certification was still valid; and (2) failed to establish that the number of workers and the listed period of need represented the employer’s true need. AF at P20-31.

In finding that the certified December 14, 2021 application barred the January 1, 2021 application, even solely in relation to the unused spots, the CO wrote:

[i]n the past, OFLC has permitted an employer to return a fully unused certification. Under such circumstances, OFLC marks the certification as returned and notifies U.S. Citizenship and Immigration Services (USCIS) that the certification is unavailable for use. When this
is the case, the employer may file a new application for the same job opportunity, area of intended employment, and period of need without violating 20 CFR 655.15(f). However, an employer cannot return a used certification—even when the employer hired only a portion of the H-2B workers for which it received certification.

AF at P27.¹

As a second ground for denial, the CO found that Employer did not provide sufficient documentation to justify its requested peakload need, either in terms of period of need or in terms of number of workers requested.

For those reasons, the CO denied certification.

This request for administrative review followed. Following the February 2, 2021 Final Determination, Employer mailed the appeal request on February 22, 2021. AF at P1; P18. The appeal was received by the Chicago National Processing Center on February 23 and docketed before BALCA on February 26, 2021. Id.

In the request for administrative review, Employer acknowledged the untimeliness of the request but alleged good cause for the delay. Id. at P1. In particular, Employer’s counsel wrote that the appeal was not timely filed

as a direct result of the winter storm that knocked out power to our office in Lexington, KY preventing me from accessing our shared-drive in order to prepare this document. Power was fully restored Sunday, February 21, 2021 and my husband was able to drive me to our office and [de-]ice our parking lot and stairs.

Id.

DISCUSSION

In my review, I may only consider the Appeal File prepared by the CO; any legal briefs submitted by the parties; and the Employer’s request for administrative review, which may only contain legal arguments and evidence that were actually submitted to the CO before the date the CO issued a Final Determination. Under 20 C.F.R. § 655.61(a), within ten (10) business days of the CO’s adverse determination, an employer may request that BALCA review the CO’s denial. The Employer’s request for review must set forth “the grounds for the request” and is by regulation the Employer’s sole opportunity to make “legal argument.” 20 C.F.R. § 655.61(a)(3), (5). Pursuant to 20 C.F.R. § 655.61(f), the assigned BALCA judge should notify the employer, CO, and counsel for the CO of its decision within seven (7) business days of the submission of the CO’s brief or ten (10) business days after receipt of the Appeal File, whichever is later, using

¹ Ostensibly in relation to this ground for denial, the CO also identified that Employer submitted 187 pages of invoices rather than the executed promises that Employer suggested were attached to the January 1, 2021 application. AF at P28. The CO’s reasoning appears to relate more to the second alleged deficiency in the Final Determination, however. See id. at P28-32.
means to ensure same day or next day delivery. After considering the evidence of record, I 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).

A. Timeliness of Appeal

As above, an employer must request administrative review before the BALCA within ten business days of the final determination. 20 C.F.R. § 655.61. “BALCA, which is housed within the Office of Administrative Law Judges (OALJ), United States Department of Labor, applies OALJ’s Rules of Practice and Procedure at 29 C.F.R. Part 18 in reference to procedural matters not covered by” temporary immigration labor certification regulations. Albert Einstein Medical Center, 2009-PER-00379, slip op. at 11 (Nov. 21, 2011) (en banc) (citing Gino Pizzeria & Ristorante, 2009-PER-00032, slip op. at 2 n.1 (Jan. 27, 2009)); Apache Stone Quarry, LLC, 2018-TLN-00039, -00051, slip op. at 2 n.1 (Mar. 20, 2018) (Order Consolidating Cases and Denying Motion for Reconsideration) (application to temporary immigration certifications); see also 29 C.F.R. § 18.10(a).

There is no specific provision of the H-2B regulations that governs BALCA’s ability to waive the untimeliness of an appeal for good cause. BALCA has found that the mandatory language of what is now 20 C.F.R. § 655.61(a)(1)—mandating that a request for review “[m]ust be sent to the BALCA . . . within 10 business days from the date of determination”—does take precedence over a certain OALJ procedural rule providing for extra time to file. Nicholas Marine & Repair, LLC, 2015-TLN-00014 (Feb. 2, 2015); Coastal Ventures Management, LLC, 2011-TLN-00007 (Feb. 8, 2011). However, the rule at issue in those cases clearly conflicted with the H-2B regulations because the regulations base timeliness on the date of transmission, whereas the OALJ rules base timeliness on the date of filing. See 29 C.F.R. § 18.30(b)(2). BALCA found that adding five extra days to the prescribed period in order to protect parties against delays in transmission was improper under a regulatory scheme that based timeliness upon the transmission rather than the filing date. See Nicholas Marine & Repair, LLC, 2015-TLN-00014; Coastal Ventures Management, LLC, 2011-TLN-00007; see also 20 C.F.R. § 655.61(a)(1).

By contrast, the extension of time in 29 C.F.R. § 18.32(b)(2) for good cause is relevant regardless of whether timeliness is based on transmission or filing date. Additionally, the rule explicitly does not come into conflict with a regulation merely because the regulation uses mandatory language: indeed, the rule allows for extension based upon good cause “[w]hen an act may or must be done within a specified time[.]” 29 C.F.R. § 18.32(b) (emphasis added).

Nor do the H-2B regulations more specifically conflict with the good cause provisions of the OALJ rules. While the H-2B regulations generally create an expedited scheme of review before BALCA, 20 C.F.R. § 655.61, the regulations specifically contemplate provisions for emergency situations at other stages of the application process. 20 C.F.R. § 655.17. Additionally, the expedited nature of the review in these proceedings is designed, at least in part, to allow review before the need for workers in an application becomes moot. This purpose is not in conflict with extending time to appeal a few days for good cause shown.

Thus, the general OALJ rule applies to this case:
When an act may or must be done within a specified time, the judge may, for good cause, extend the time: (1) With or without motion or notice if the judge acts, or if a request is made, before the original time or its extension expires; or (2) On motion made after the time has expired if the party failed to act because of excusable neglect.

29 C.F.R. § 18.32(b). I construe Employer’s acknowledgment of the untimeliness of the appeal but the assertion of lack of fault as a motion made under 29 C.F.R. § 18.31(b)(2).

The Administrative Review Board (“ARB”), which hears appeals from certain DOL OALJ cases, including immigration cases that do not arise before BALCA, generally considers “excusable neglect” to be a low bar. See, e.g., Butler v. Neier, Inc., ARB NO. 16-086, ALJ NO. 2014-STA-068 (ARB Nov. 21, 2016) (distinguishing “exceptional circumstances” from “garden variety ‘excusable neglect’”). The ARB has adopted an ALJ decision considering whether an eventuality was “unplanned or unexpected” in deciding whether the excusable neglect standard had been met. Jordan v. Dyncorp International, LLC, ARB No. 2019-0027 (ARB Sept. 16, 2020), adopt’g and attach’g Jordan v. United States Department of Labor, 2017-SOX-00055 (Jan. 3, 2019).

I find that there is good cause to extend the time for filing the appeal and that Employer’s failure to make a motion or provide notification before the expiration of time was excusable. Although the Final Determination was issued on February 2, 2021, Employer had not received it yet as of February 5, 2021. AF at P19. Additionally, winter storms struck Lexington, Kentucky around the time the appeal was due. AF at P1. The storms knocked out power to Employer’s counsel’s office in Lexington, which prevented Employer’s counsel from accessing the file related to this case. Id. As soon as power was restored, counsel returned to the office and prepared this appeal. Id. The CO has not moved to dismiss the appeal on this basis.

Thus, Employer’s filing was not timely due to unexpected circumstances not the fault of Employer. Employer’s counsel had been an active participant in the H-2B process, including in relation to monitoring timelines. AF at P19. The weather and ensuing power outage made it extremely difficult for Employer’s counsel to make a timely filing. Id. at P1. While it would have been preferable for Employer’s counsel to send notification that an appeal was forthcoming even if delayed, I find the failure to do so excusable.

For the above reasons, I excuse the untimeliness of Employer’s filing on account of good cause. 29 C.F.R. § 18.31(b)(2).

B. CO’s Grounds for Denial

BALCA judges review the CO’s determination in an H-2B application under the deferential “arbitrary and capricious” standard. Jose Uribe Concrete Const. 2019-TLN-00025 (Feb. 21, 2019); Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape, 2016-TLN-00045, slip op. at 19 (Jun. 15, 2016); Brook Ledge, Inc., 2016-TLN-00033, slip op. at 4-5 (May 10, 2016); see also J and V Farms, LLC, 2016-TLC-00022 (Mar. 4, 2016). Under the “arbitrary and capricious” standard, the reviewing judge or panel looks to see if
the initial decision maker 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.” Three Seasons, 2016-TLN-00045, slip op. at 19 (quoting 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)). “If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious.” Id. ²

An employer bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. § 1361; see also Cajun Constructors, Inc., 2011-TLN-00004, slip op. at 7 (Jan. 10, 2011); Andy and Ed. Inc., dba Great Chow, 2014-TLN-00040, slip op. at 2 (Sep. 10, 2014); Eagle Industrial Professional Services, 2009-TLN-00073, slip op. at 5 (Jul. 28, 2009). The CO may only grant an application to admit H-2B workers for temporary nonagricultural employment if an 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. 20 C.F.R. § 655.1(a).

i. Overlapping Applications

Pursuant to 20 C.F.R. § 655.15(f), in general, “only one Application for Temporary Employment Certification may be filed for worksite(s) within one area of intended employment for each job opportunity with an employer for each period of employment.” BALCA has held that a difference in start date is not, per se, enough to make it proper to file separately; rather, when two otherwise similarly-situated “workers are essentially working ‘during the same period of employment[,]’” the positions should be included in the same application. KDE Equine, LLC, 2020-TLN-00043, slip op. at 9 (May 20, 2020). More particularly, an anticipated start date difference of a single month is not enough to differentiate two positions. Id.


² Some judges have recently concluded that de novo, rather than arbitrary and capricious, is the correct standard to apply in an administrative review of an H-2B determination. Best Solutions USA, LLC, 2018-TLN-117, slip op. at 3 n.2 (ALJ May 22, 2018); Fairfield Construction, Inc., 2020-TLN-00055, slip op. at 7 n.19 (Aug. 20, 2020) (following Best Solutions). However, the weight of the case law, as well as a close reading of the H-2B regulations (as well as the similar H-2A regulations) favors arbitrary and capricious review. In the H-2A program, in which the rules predate the current H-2B rules, an employer may elect either an administrative review or a de novo hearing following a denial of certification by a CO. 20 C.F.R. § 655.171. In adopting the current H-2B rules, DHS and DOL stated that the new 20 C.F.R. § 655.61 “does not provide for de novo review.” 80 Fed. Reg. 24042, 24081. Whether that was meant to either set a standard of review or simply to state the obvious, that the new rule did not allow for hearings as the H-2A rules do, is not clear. Therefore, I read the plain language and the case law to mean both: there are no de novo hearings, nor do CO determinations get reviewed de novo under administrative review.
bring in non-immigrant workers. *Id.*; *see also* AF at P24-25. Even after approval, an employer’s ability to hire non-immigrant workers is subject to the H-2B cap. *Id.* The statutory H-2B cap sets a numerical limit on the number of non-immigrants who may obtain H-2B status during a fiscal year. *Id.* The cap is divided into two sections: one for the first half of the fiscal year, from October 1 through March 31, and one for the second half of the fiscal year: from April 1 through September 30. *Id.* Which cap a potential non-immigrant employee falls under depends on when the worker would begin employment. *Id.*

Employers whose period of need begins near the end of a half-year cap may have difficulty hiring under the H-2B cap because the cap is often met well in advance of the end of the half-year period. *Id.* Certain H-2B workers are exempt from or not subject to the cap, however. *Id.* In particular, workers who extend their stay, change employers, or change the terms and conditions of employment are not subject to the cap. *Id.* Additionally, employees who have already been counted against the cap in a given fiscal year or who are in H-4 non-immigrant status as the spouse or child of an H-2B non-immigrant do not count against the cap. *Id.*

Sometimes, when the fiscal year cap applies, even after hiring cap-exempt workers, an H-2B employer may not be able to fill any or all the spots allocated under a certified application. *Id.*; *see also* AF at P35. In such cases, the employer has sometimes sought to return the unused spots and re-apply under the next fiscal year cap for a shorter period of need. *Id.*; *see also, e.g.*, *Green Up Lawncare, LLC*, 2020-TLN-00052. Because the employer’s need has not actually changed due to operation of the cap, the period of employment under this second application tends to be a shorter subset of the period under which the employer initially applied. *See id.* Thus, the limitations of 20 C.F.R. § 655.15(f) are at least arguably of relevance in determining whether such an application is proper or whether it is barred by the prior application.

The CO admits that OFLC has permitted employers to return “fully unused” certifications, allowing them to thereafter file a new application for the same opportunity, area of intended employment, and period of need without finding a violation of 20 C.F.R. § 655.15(f). AF at P27. However, the CO states that OFLC has not permitted returns of partially-used certifications even when the employer was not able to hire the full complement of workers for which it received certification. *Id.*

As a categorical rule, the CO’s assertion is directly contradicted by certain recent BALCA cases that have allowed the return of the balance of partially-used labor certifications. *See, e.g.*, *Green Up Lawncare, LLC*, 2020-TLN-00052, slip op. at 12-13; *Trinity Landscaping LLC*, 2020-TLN-00057, slip op. at 5-6 (Aug. 21, 2020); *Dixie Lawn Services, Inc.*, 2020-TLN-00053 (Aug. 25, 2020); *Dixie Lawn Services, Inc.*, 2020-TLN-00053 (Aug. 25, 2020); *J.F.D.*, 2020-TLN-00058 (Aug. 28, 2020); *Mattamuskeet Crab Co.*, Inc., 2021-TLN-00004 (Nov. 13, 2020); *see also* Fairfield Construction, Inc., 2020-TLN-00055, slip op. at 7 n.19 (Aug. 20, 2020) (similar result but reviewing CO’s determination de novo). *But see* The Nature Group, Inc., 2020-TLN-00056, slip op. at 10 (Aug. 21, 2020); *TLC Landscaping, Inc.*, 2020-TLN-00050 (Aug. 21, 2020); *Crystal Springs Ranch, Inc.*, 2020-TLN-00054 (Aug. 25, 2020); *Morel Landscaping, LLC*, 2020-TLN-00051, slip op. at 10 (Aug. 26, 2020). Once the balance of these certifications has been returned, BALCA has sometimes allowed the employer to apply for a new
certification for fewer workers for a significantly shorter time, even if the period of the new application overlapped with the period of the already-certified application. *Id.*

In *Green Up*, the BALCA judge asserted two reasons for distinguishing *KDE Equine*: (1) that the period of need and number of workers requested was significantly reduced, and (2) that the employer in *Green Up* was not requesting workers in excess of the amount certified in the original application. 2020-TLN-00052, at 12. On these grounds, the BALCA judge found that allowing the second application comported with the purposes of the regulations. *Id.*

While I find the reasoning from *Green Up* persuasive, this case is different for two reasons: (1) Employer requested two workers in addition to the workers requested to fill the spots that were unused under the prior application, AF at P36, and (2) the request under the current application is for most of the time requested in the initial application—i.e., an eight-month subset of the initial ten-month request.

With respect to the two additional workers requested for the St. Elizabeth Hospital project rather than to fill the unused spots, I find that this is improper under 20 C.F.R. § 655.15(f). *KDE Equine, LLC d/b/a Steve Asmussen Racing Stable*, 2020-TLN-00043, slip op. at 9 (May 20, 2020). Even to the extent that the assertion of the need for these workers in the Notice of Deficiency was proper and was properly supported, this is purely additional need when compared to the December 14, 2020 application. AF at P36; see *Green Up Lawncare*, 2020-TLN-00052, at 12. A worker who is working eight out of the ten months another worker is working in the same position and in the same area is working in essentially the same position. See *KDE Equine*, 2020-TLN-00043. And if these two additional positions are, for reasons other than the period of need, sufficiently distinct to justify and require a separate application from the December 14, 2021 application, they are also sufficiently distinct from the other positions in the January 1, 2021 application to justify and require a separate application. See 20 C.F.R. § 655.15(e)-(f).

The issue regarding the two positions applied for on January 1, 2021, which would serve as replacements for the unfilled spots from the original application, is harder. On the one hand, there will be a difficult line-drawing problem that could result in arbitrary results if an employer’s ability to return spots from a partially-used application and reapply depends primarily on whether the new positions are substantially or significantly shorter than the old ones. On the other hand, such a result may be required by 20 C.F.R. § 655.15(f). See *KDE Equine, LLC*, 2020-TLN-00043, slip op. at 9; see also *Green Up Lawncare*, 2020-TLN-00052, slip op. at 12.

I find, on this record, that the CO’s conclusion that the January 1, 2021 application violated 20 C.F.R. § 655.15(f) was not arbitrary and capricious. In all of the cases that I could find that hold otherwise, the period of need delineated is significantly shorter than in the original application with unused spots. See *Green Up Lawncare*, LLC, 2020-TLN-00052, at 12-13 (Aug. 14, 2020); *Trinity Landscaping LLC*, 2020-TLN-00057, at 5-6 (Aug. 21, 2020); *Dixie Lawn Services, Inc.*, 2020-TLN-00053 (Aug. 25, 2020); *Dixie Lawn Services, Inc.*, 2020-TLN-00053 (Aug. 25, 2020); *J.F.D.*, 2020-TLN-00058 (Aug. 28, 2020); *Mattamuskeet Crab Co., Inc.*, 2021-TLN-00004 (Nov. 13, 2020). By contrast, the difference between a ten-month period of need and
an eight-month period of need is not enough for the applications to be construed as applying to different positions. See KDE Equine, LLC, 2020-TLN-00043, slip op. at 9; 20 C.F.R. § 655.15(f).

ii. Temporary Need

The Employer must establish 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-00003-5 (ALJ Nov. 9, 2012). 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); see Titus Works, LLC, 2019-TLN-00023 (Feb. 8, 2019); Roadrunner Drywall, 2017-TLN-00035, slip op. at 9-10 (May 4, 2017); see also Sur-Loc Flooring Systems, LLC, 2013-TLN-00046 (Apr. 23, 2013).

Employment is temporary when the employer establishes that the need for the employee will end in the near, definable future. 8 C.F.R. 214.2(h)(6)(ii)(B). Temporary need must “be limited to one year or less, but in the case of a one-time event could last up to 3 years.” 8 CFR 214.2(h)(6)(ii)(B), Interim Final Rule (IFR), Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24042, 24055 (April 29, 2015). The agencies categorize temporary need into the following four standards: one-time occurrence, seasonal, peakload, or intermittent. 8 C.F.R. § 214.2(h)(6)(ii)(B), 20 C.F.R. § 655.6.

For a peakload need, an 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.” 8 C.F.R § 214.2(h)(6)(ii)(B).

The 2015 IFR, which was jointly issued by DHS and DOL, adopted by reference the DHS definition of “temporary need” at 8 C.F.R. § 214.2(h)(6)(ii)(B), but added an additional bright-line rule for COs to apply and codified it at 20 C.F.R. § 655.6. “Except where the employer’s need is based on a one-time occurrence, the CO will deny a certification where the employer has a need lasting more than 9 months.” 80 Fed. Reg. at 24113. An appropriations rider passed by Congress on December 18, 2015, and renewed with each appropriation since, requires that the DOL apply solely the DHS definition of “temporary need,” without the 9-month bright-line rule.4


4 Prior to the IFR, the Office of Foreign Labor Certification (“OFLC”) took the position that temporary need could not exceed 10 months. See, e.g., Andres Patricio Candalario, 2015-TLN-00017 (Feb. 10, 2015). BALCA judges have issued inconsistent decisions as to whether a period of ten months can or generally meets the definition of temporary need under the current regime, which is governed by the 2015 IFR as modified by the congressional rider. Compare GLD Concrete, 2019-TLN-00068 (Mar. 26, 2019) (“Since this period is less than ten months, Employer has established that it needs to supplement its permanent staff due to a seasonal or short-term demand.”); Jose Uribe Concrete Construction, 2018-TLN-00040, at 13 (Feb. 2, 2018) with Venezia’s New York Style Pizza – T&G, 2020-TLN-00048, slip op. at 7 n.13 (June 9, 2020) (stating that 10 months is longer than the nine-month maximum permitted for an H-2B visa); Southern Refractories, Inc., 2019-TLN-00081, slip op. at 10 n.12 (Apr. 22, 2019). COs
The preamble to the 2015 IFR identified considerations that are relevant to applying the DHS definition of “temporary need” in 8 C.F.R.; in particular, the twin commands that an employer must prove that it “needs to supplement its permanent staff . . . on a temporary basis due to a seasonal or short-term demand” and also, “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) (emphasis added). The DHS and DOL wrote:

Routine allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year would be inconsistent with the statutory requirement that H-2B job opportunities need to be temporary. In our experience, the closer the period of employment is to one year in the H-2B program, the more the opportunity resembles a permanent position. . . . Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from a permanent position, particularly one that offers time off due to a slow-down in work activity.

80 Fed. Reg. at 24056. The agencies continued:

[S]ince temporary need on a peakload basis is not tied to a season, . . . an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis.

Id.

On this record, I agree with the Employer that it has shown a permanent year-round workload and permanent staff, and that its need for workers is greater for the eight months from April through November.

The CO noted that “in 2020, the workers worked more hours during the month of January, which is outside of the requested period of need, than in the months of August and September which are within the requested period of need” and that Employer did not have temporary workers during the months of October and November. AF at P31.

As a factual matter, the CO is mistaken that General Laborers performed fewer hours of work for Employer during April 2020 than during January 2020. See AF at P127. While permanently-employed General Laborers saw a dip in their hours during April 2020—presumably due to pandemic-related closures or knock-on effects—the total hours worked by permanent and temporary General Laborers during April 2020 was 850.75 hours, far in excess of

appear to have more consistently re-adopted the ten-month threshold for assessing temporary need in light of the congressional rider’s effect on the 2015 IFR. See, e.g., The Yard Experts, Inc., 2017-TLN-00024, at 3 (Mar. 14, 2017); Stratton Corporation, 2019-TLN-00122, at 7 (May 13, 2019); Devil’s Thumb Ranch Operating Company, Inc., 2019-TLN-00119, at 2 (Apr. 29, 2019). Because I am not considering Employer’s already-approved February to November application, I do not need to determine whether that period is too long to be an appropriate temporary need.

Regulatory preambles provide some of the most probative interpretive guidance, though of course the plain language of the regulation ultimately controls. For a discussion of the utility of preambles, see generally Kevin M. Stack, Preambles as Guidance, 84 Geo.Wash. L. Rev. 1252 (2016).
the 353.50 hours worked by permanent employees in January 2020. Id. Thus, there was no basis for the CO to conclude that Employer had less need for General Laborers in April 2020 than in January 2020. Id. Similarly, in August and September 2020, adding the hours worked by permanent and temporary workers shows a need far in excess of the need in January. Id. It is arbitrary and capricious to determine Employer’s need for General Laborers just based on the hours worked by their permanent employees.6

Additionally, I find it arbitrary and capricious to place substantial weight on actual hours worked per month during 2020 in determining Employer’s temporary need, without an explanation that accounts for the context. April 2020 was near the beginning of a global pandemic, which caused uncertainty and delay on a number of fronts. See AF at P111. Even those industries exempt from closures experienced knock-on effects. See id.; see also AF at P41. Businesses already adversely affected by the pandemic will face even more difficulties in recovery if their work patterns during the early days of the pandemic are construed as representative of their needs going forward.

What’s more, I find that the actual hours worked comport with Employer’s explanation about the slow-down of work during winter months. Employer has repeatedly explained that many of its projects require or move faster during warmer weather. In particular, Employer asserts that:

silt fencing projects require warm weather conditions in order to hammer wooden pegs into the ground to erect fencing. Furthermore, application of concrete, which is usually installed under warm weather conditions, should not be used when the temperatures fall below forty degrees as concrete freezes when it cools below the freezing point due to its partial liquid composition. When freezing occurs, the ultimate strength of the concrete is reduced by at least fifty percent. The failure of strength makes the finished concrete and retainier walls unsound.

AF at P120; see also AF at P375, P102, P 110.

Employer states that Kentucky weather during the winter is mostly below freezing and that Employer cannot anticipate forecasted temperatures of over forty degrees Fahrenheit for ten to twenty consecutive days in a row until February 1. Id.

For the above reasons, I find that it was arbitrary and capricious for the CO to find that Employer had not demonstrated a temporary need from April 1, 2021 through November 30, 2021.

iii. Number of Workers Needed

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6 I note also that the fluctuation in hours that permanent employees worked does not appear to be based on the employment of temporary employees—i.e., there is no evidence that the employment of temporary non-immigrant workers cut into the hours that permanent employees would otherwise have worked. Rather, there is fluctuation in the schedule of permanent employees that does not always appear to align with Employer’s overall need, likely because there were only two permanent General Laborers or because of COVID-related exigencies. See AF at P127.
The regulation requires *inter alia* that an employer prove “that it needs to supplement its permanent staff at the place of employment,” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3) (emphasis added), and that the number of workers is “justified.” 20 C.F.R. § 655.11(e)(3).

I find the CO’s conclusions about Employer’s need arbitrary and capricious because the temporary employees during 2019 and 2020 worked enough hours to establish a need for eight H-2B visas. An employee working for a month (approximately 4.5 weeks) for 35 hours a week will work 157.5 hours per month. Multiplying that by eight to account for eight temporary employees amounts to 1260 hours per-month of work. During the 2020 season, the temporary employees worked for an average of 1231 hours per month. AF at P127. That accounts to a need for approximately 7.8 temporary employees. Excluding April, which appears to be an outlier month with respect to the permanent employees, which may have been related to the COVID-19 pandemic or the actual arrival date of the temporary employees, the temporary employees worked 1324.6 hours on average, which equates to a need for approximately 8.4 employees. *See id.*

Similarly, in 2019, the temporary employees worked for 1200.625 hours per month on average, which amounts to a need for approximately 7.62 employees. *Id.* at P123. Excluding June 2019, during which the hours worked by temporary workers are clearly based on factors other than Employer’s need, the employees worked for 1380.75 hours on average per month, which amounts to a need for approximately 8.8 employees. *See AF at P123.*

In addition to the fact that these hours establish Employer’s need for eight temporary General Laborers, contrary to the CO’s assertions, they likely, if anything, underrepresent the actual number of hours of work that would be performed were eight workers hired. While Employer only applied for six H-2B visas for General Laborers in previous years, that does not mean that they are limited to six per season forevermore. Because the conclusion as to the number of workers is inconsistent with the evidence before the agency, *see State Farm*, 463 U.S. at 49, I find this conclusion arbitrary and capricious.

**ORDER**

The Certifying Officer’s determination that Employer failed to demonstrate temporary need for eight workers is REVERSED. However, under the deferential arbitrary and capricious standard, the Certifying Officer’s final determination that the Employer failed to comply with filing requirements imposed by 20 C.F.R. § 655.15(f) is AFFIRMED.

For the Board:

EVAN H. NORDBY
Administrative Law Judge