DECISION AND ORDER
(Directing Grant of Certification)

1. Nature of Appeal. This matter arises under the H-2B temporary non-agricultural labor provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184(c)(1), and the implementing regulations at 20 C.F.R. Part 655, Subpart A. 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 Department of Homeland Security. 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).

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request by Pennum Inc. (“Employer”) for administrative review of the Certifying Officer’s (“CO”) denial of the temporary labor certification under the H–2B non-immigrant program.

2. **Procedural History and Findings of Fact.**

   a. Employer is a small industrial fabrication business that makes several different types of chemical, oil and gas industry equipment. (AF p. 317)³

   b. On July 3, 2021, Employer filed a Form ETA-9142B application for temporary labor certification with the CO at the Chicago National Processing Center (CNPC) for seventy-five (75) Welders, Cutters, Solderers and Brazers to perform work from October 1, 2021 to July 31, 2022 in connection with contracts to provide welding related services to Kiewit Offshore Services, Ltd. (“Kiewit”) and Bay Ltd. (“Bay”) at various locations in Texas in the fourth quarter of 2021 through the second quarter of 2022. (AF pp. 427-439)

   c. On July 13, 2021, the CO issued a Notice of Deficiency (NOD) stating that the Employer failed to identify the job opportunity as temporary in nature and to submit a complete and accurate ETA Form 9142. The CO cited three deficiencies and directed Employer to submit supporting evidence and documentation that justifies the chosen standard of temporary need, to clarify both the city names in Appendix A and to clarify the number of workers requested.

   d. Employer responded on July 15, 2021. In its response, Employer provided a supplemental statement of temporary need; Letters of Intent between both Employer and Kiewit and Bay; Employer’s 2019-2020 schedule of projects; executed subcontract between Employer and Kiewit; and statement of temporary need dated June 30, 2021. (AF pp. 343-426)

   e. On August 11, 2021, after reviewing Employer’s application, the CO issued a Final Determination letter and denied certification pursuant to 20 CFR 655.6 (a) and (b). The CO determined Employer had not overcome the deficiencies “it is unclear how certain contracts establish a seasonal or short-term demand in [Employer’s] business operations” and that “[f]urther explanation and documentation is needed to demonstrate the employer’s peakload need.” (AF pp. 313-326)

   f. On August 23, 2021, Employer timely filed an appeal for review, which included Employer’s appeal brief and supporting documentation. (AF pp. 1-311)

   g. The administrative file was received on September 3, 2021. The CO did not file a brief.

3. **Applicable Law and Analysis.**

   a. **H–2B Program.** The H–2B program permits employers to hire foreign workers on a temporary basis to “perform temporary service or labor if unemployed persons capable of
performing such service or labor cannot be found in [the United States].” 8 U.S.C. § 1101(a)(H)(ii)(b). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361. Employers who seek to hire foreign workers through the H-2B program must apply for and receive a “labor certification” from the United States Department of Labor (“DOL” or the “Department”), Employment and Training Administration (“ETA”). 8 C.F.R. § 214.2(h)(6)(iii). To apply for this certification, an employer must file an Application for Temporary Employment Certification (“ETA Form 9142”) with ETA’s Chicago National Processing Center (“CNPC”). 20 C.F.R. § 655.20. After an employer’s application has been accepted for processing, it is reviewed by a Certifying Officer (“CO”), who will either request additional information, or issue a decision granting or denying the requested certification. 20 C.F.R. § 655.23. If the CO denies certification, in whole or in part, the employer may seek administrative review before BALCA. 20 C.F.R. § 655.33(a).

In seeking review, the employer’s request must: (1) clearly identify the particular determination for which review is sought; (2) set forth the particular grounds for the request; (3) include a copy of the CO’s determination; and (4) only contain 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).

b. Standard of Review. BALCA’s review is limited to the information contained in the record before the CO at the time of the final determination; only the CO has the ability to accept documentation after the final determination. See Clay Lowry Forestry, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); Hampton Inn, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); Earthworks, Inc., 2012-TLN-00017, slip op. at 4-5 (Feb. 21, 2012), (“[t]he scope of the Board’s review is limited to the appeal file prepared by the CO, legal briefs submitted by the parties, and the request for review, which may only contain legal argument and such evidence that was actually submitted to the CO in support of the application. 20 C.F.R. § 655.33(a), (e).”)

After considering 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).

However, neither the Immigration and Nationality Act nor the regulations applicable to H-2B temporary labor certifications identify a specific standard of review for an employer’s request for administrative review. The Board has fairly often applied an arbitrary and capricious standard to its review of a CO’s determination in a labor certification case. Brook Ledge, Inc., 2016-TLN-00033 (May 10, 2016). Conversely, in a number of other decisions, a quasi-hybrid deference standard or de novo standard have been used. Best Solutions USA, LLC, 2018-TLN-00117 (May 22, 2018).

BALCA may overturn a CO’s decision if it finds the decision to be arbitrary or capricious. Brook Ledge, Inc., 2016-TLN-00033 (May 10, 2016). The arbitrary and capricious standard adopted by the Board no doubt stems from the Administrative Procedure Act. 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)(A). This standard of review operates to prevent a
reviewing court from substituting its judgment for that of the agency, especially in factual disputes involving substantial agency expertise. However, these concerns are not implicated during the administrative review by an agency tribunal of the decision of another adjudicator within the same agency. *Albert Einstein Med. Ctr., supra; see also, U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6-7 (2001); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 376 (1989).*

Accordingly, in reviewing the CO’s decision in this matter, the undersigned will determine whether the CO’s stated basis for denying the application is legally and factually sufficient. In so doing, the undersigned adopts the standard of review defined in *Best Solutions USA, LLC,* 2018-TLN-00117 (May 22, 2018) for the reasons stated therein.

c. Temporary Need. The CO determined that Employer’s response did not overcome the first deficiency outlined in the Notice of Deficiency and denied the application. Specifically, the CO denied the employer’s application on the grounds that it could not establish a temporary, peakload need. 4 An employer seeking certification must establish that its need for labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 CFR § 655.6(a). The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS regulations. 20 CFR § 655.6(b).

To establish 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 CFR § 214.2(h)(6)(ii)(B)(3). To establish a one-time occurrence, an employer must show a temporary event of short duration has created the need for a temporary worker in an otherwise permanent employment situation. 8 CFR § 214.2(h)(6)(ii)(B)(1).

i. Place of Employment. Employer represents that it has a pending contract with Kiewit to provide welding and fabrication services for a specific project at their location in Ingleside, Texas (among other work locations). 5 The fabrication services consist of only labor; Kiewit is providing all the material onsite because it is highly specialized. In its denial, the CO stated that:

[t]he employment situations at the in-house manufacturing facility in Houston, Texas and the various off-site fabrication projects located in Ingleside, Texas, Calhoun County, Nueces County, and Victoria County differ in that the off-site fabrication project positions are located in entirely different [Metropolitan Service Areas]. Furthermore, they represent separate employment situations— permanent for the in-house fabrication versus temporary for the off-site fabrication.

(AF p. 261) The CO concluded that based on these representations, “it appears that the workers working on the Kiewit project will be working in a different area of intended employment than the

---

4 The other deficiencies had apparently been cured.
5 Employer provided a fully executed contract with Kiewit and a letter of intent with Bay. The CO correctly notes that such a letter is not a fully executed contract, and neither party made further argument regarding that specific intended contract.
employer’s permanent workers.” *Id.* In its motion, Employer responds that it will, indeed, have “supervisors, safety coordinators and other permanent workers assigned to this project site” and that it “has had permanent workers at the Ingleside place of employment previously.” (AF p. 6) Employer further notes that in the industry “it is customary to also assist in the installation and commissioning of the in-house fabricated equipment at various client plant site locations which could include the nearby additional MSAs listed such as Victoria and Calhoun.” *Id.*

The CO also concluded that “the employer appears to be in the business of supplying supplemental labor to its clients as a subcontractor.” (AF p. 262) Employer responded that it “is in fact the business of fabricating equipment and modules for the industry and needs skilled craft workers, in this case, welders, to execute this work as evidenced in its original filing” and its response to the Notice of Deficiency.

ii. *Peakload Need.* In its original application, the employer noted that the projects performed in 2019 and 2020 were performed at Employer’s facility located in Houston, Texas and the payroll records from that time period show a decrease in workers. The CO concluded that Employer’s 2019 and 2020 data do not show a “discernable pattern of activity to establish a peakload during the requested period of need from October through July.” (AF p. 263)

Employer responds that the global pandemic suspended many of its projects and caused a decrease in its workforce. The moratorium now necessitates an accelerated schedule for its in-house industrial fabrication projects which has “maxed out” its permanent staff. Notably, the “business decrease was magnified due to the Covid-19 lockdowns of many states and the interruption of the national and global supply chain of essential project materials.” (AF pp. 10-11)

Employer further justifies its need for temporary workers as a result of a short-term demand, reasoning that the “letters of intent and the proposed contract reflect with specificity the exact time frame in which work is to be performed, and that these projects fall within the peakload need when [Employer] has other workers staffing other company projects.” (AF p. 10)

iii. *Analysis.* Employer seeks seventy-five (75) additional, temporary workers to perform welding and fabrication services at various sites in the state of Texas to fulfill contractual obligations (both real and intended) along with its permanent staff, which Employer asserts has been reduced and are largely occupied with accelerated projects due to the ongoing COVID-19 pandemic. In its denial, the CO contends that Employer failed to meet the requisite elements to establish a peakload need for such temporary labor because it does not 1) regularly employ permanent workers at jobsites outside its Houston, Texas location and 2) its payroll and project history does not show a discernable pattern of activity sufficient to establish a seasonal, short term demand.

In its response to the Notice of Deficiency and the Motion for Administrative Review, Employer cites the Board’s decision in *In Re: Industrial Equipment Solutions, Inc.*, 2018-LTN-00147, 00148 (July 13, 2018). These cases are strikingly similar. In that matter, the employer contracted with Kiewit to provide pipe fitters in Texas, while its permanent workers were fully

---

6 In the Department’s denial, the CO cited this decision without further discussion, adding only that “[e]ach application [is] individually based on the circumstance presented on a case by case basis.” (AF pp. 260-261)
devoted to working on other projects, primarily ones located in California, and thus had a need for temporary labor to supplement. Like Employer, the temporary workers would have been supervised directly by Employer and that the payroll records confirm that there is a permanent staff to be supplemented. *Id.* at 6. Although the location of permanent employment was not at issue, Industrial Equipment, like Employer, had noted that it regularly employs workers for jobs in the areas of Texas where workers were sought. *Id.*

Industrial Equipment also argued a delay in its projects due to Hurricane Harvey’s impact on coastal Texas necessitated the need for temporary workers. The Board considered this argument, and determined that “though it is not directly clear how that affects this particular period of peak demand” . . . such “delays do not weaken the Employer’s case, as it is not unreasonable to consider that the delays may have moved past work into the current period of peak demand.” *Id.* at 7. In the instant matter, Employer argues that delays and interruptions in supply chains caused by the COVID-19 pandemic have likewise delayed prior projects, thus creating a peakload need.

The Board considered the CO’s denial on the basis of the past projects and payroll records and determined that:

> [w]hile the CO was correct in suggesting that there was no periodic increase in demand apparent from the pay records or the list of projects, those items are of limited relevance to the peakload need cited by the Employer—the need for temporary workers for the pending Texas contract . . . The CO’s analysis in this case, seems to be fixed on evidence that would show a seasonal increase in demand for work, when that element of seasonality was not necessarily required by the regulations. To demonstrate a temporary peakload need, the basis can be, according to the regulation, seasonal or short term. So a lack of seasonal increase in past payroll records does not doom the application if the Employer is seeking a short-term peakload need.

*Id.* Here, as in *Industrial Equipment*, the CO inappropriately focused on attempting to find a discernable pattern of past payroll and projects to establish such peakload need.

In the instant matter, the employer plainly described its need for temporary workers based on a short-term demand caused by a considerable contract. Employer asserts this supplementation is necessary because much of its permanent staff has shifted focus to the projects delayed by the ongoing pandemic, although it notes that it will still devote permanent staff to the projects at issue. In reviewing the evidence as a whole, Employer has sufficiently shown the temporary need for the temporary foreign labor as petitioned in its application.

Therefore, the undersigned concludes the CO’s decision was arbitrary and capricious and factually or legally insufficient. Consequently, under either prior standard of review used by the board in past cases of a similar nature, the CO’s decision to deny Employer’s application was not a reasonable exercise of her discretion given the facts of this case. As such, the CO’s decision does not comply with the applicable regulations, and Employer established grounds supporting reversal of the decision.
4. **Order.** The Certifying Officer’s decision in this matter is **REVERSED** and this matter is **REMANDED** for certification.

For the Board:

**TRACY A. DALY**
Administrative Law Judge