This case arises from Employer Viking Fence Co., Inc.’s request for review of the Certifying Officer’s (CO) Final Determination in an H-2B temporary alien labor certification matter. The H-2B non-immigrant 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. 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 using a Form ETA-9142B, Application for Temporary Employment Certification. A certifying officer in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA) reviews applications for temporary labor certification. Following the certifying officer’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

The ETA received an Application for Temporary Employment Certification from the Employer (Application). The Employer sought a temporary labor certification to hire 28 Helper Carpenters from April 1, 2021 to December 31, 2021. (AF 38). The Employer described the nature of its temporary need as “peakload,” and justified such need as follows:

VIKING FENCE CURRENTLY Requires THE SHORT-TERM SERVICES OF TWENTY-EIGHT (28) WORKERS TO FILL THE TEMPORARY, PEAKLOAD NEED POSITION FOR HELPER CARPENTER AT OUR WORKSITE LOCATED IN AUSTIN, TEXAS. THESE TWENTY-EIGHT TEMPORARY ADDITIONS TO OUR WORKFORCE WILL NOT BECOME PART OF OUR REGULAR OPERATIONS. THIS IS AN APPLICATION FOR RECERTIFICATION AS DOL HAS GRACIOUSLY APPROVED TEMPORARY LABOR CERTIFICATIONS IN FY2019: H-400-18322-841840. WE WITHDREW THE APPLICATION LAST YEAR AS WE RAN AFOUL OF THE VISA CAP.

VIKING FENCE, AS WITH SIMILAR SUB-CONTRACTORS IN THE CONSTRUCTION FIELD, GENERALLY EXPERIENCES A SUBSTANTIAL RISE IN PROJECT ORDERS DURING THE EARLY WINTER AND SPRING SEASONS BEGINNING IN APRIL. OUR COMPANY SPECIFICALLY EXPERIENCES A SIGNIFICANT SPIKE FOR FENCE CONSTRUCTION AND INSTALLATION SERVICES DURING THOSE SEASONS. ACCORDINGLY, THE NEED EXCEEDS THE AVAILABLE LABOR. SO, WE NEED TO SUPPLEMENT OUR PERMANENT WORKFORCE WITH TEMPORARY STAFF DURING THE PEAKLOAD SEASONS. IN THIS CASE, VIKING IS REQUIRING ADDITIONAL HELPER CARPENTER WORKERS TO ASSIST IN THE INFLUX OF PROJECTS BREAKING-GROUND IN AUSTIN AND SURROUNDING AREAS. OVERALL DEMAND IN THE CONSTRUCTION FILED [sic] GROWS CONTINUOUSLY EVERY YEAR; HOWEVER, PRIVATE CONSTRUCTION FIRMS WHO PERFORM MANY NONRESIDENTIAL PROJECTS, SUCH AS WE DO, CANNOT FIND ENOUGH QUALIFIED, WILLING, AND ABLE WORKERS TO KEEP THE

24042 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). The rules provided in the IFR apply to this case. All citations to 20 C.F.R. Part 655 in this Decision and Order are to the IFR.

3 References to the appeal file in this Decision and Order are abbreviated with an “AF” followed by the page number.
PACE WITH GROWING DEMAND. ACCORDING TO THE ANALYSIS PROVIDED BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, FIRMS ARE STRUGGLING TO REPLACE RETIRING WORKERS AMID A GROWING LABOR MARKET (SEE EXHIBIT 3). IN FACT, A RECENT SURVEY THAT WAS CONDUCTED REPORTED THAT 86% OF FIRMS WITHIN THE MARKET ARE HAVING TROUBLE FILLING AVAILABLE JOBS.

THE SPIKE IN PROJECT ORDERS IS DUE TO CLIENTS WAITING UNTIL AFTER THE HOLIDAY SEASON TO BEGIN THINKING ABOUT AESTHETICALLY UPDATING HOMES AND BUSINESSES IN PREPARATION FOR THE SPRING AND SUMMER (SEE EXHIBIT 4). FOR LARGER COMMERCIAL CUSTOMERS, BUDGETED MONIES FOR BEAUTIFICATION PROJECTS ARE ALLOCATED JANUARY 1. DURING THE HOLIDAY SEASON (JANUARY THROUGH MARCH EACH YEAR), THE COLD TEMPERATURES AND THE LACK OF AVAILABLE CASH-ON-HAND CONTRIBUTES TO A DECLINE IN ORDERS FOR FENCE CONSTRUCTION AND INSTALLATION.

ADDITIONALLY, IN AUSTIN, THE WARMER TEMPERATURE YIELD TO NUMEROUS OUTDOOR EVENTS AROUND THE CITY THAT NEED FENCING. AUSTIN IS A CITY KNOWN FOR ITS PLEASANT WEATHER SANS THE WINTER SEASON WITH A BEAUTIFUL NATURAL ENVIRONMENT AND VIBRANT CULTURE. ITS BEEN DUBBED THE LIVE MUSIC CAPITAL OF THE WORLDHOSTING MANY OUTDOOR ACTIVITIES AND EVENTS THAT ATTRACT A LARGE, DIVERSE, AND COMMONLY OUT-OF-TOWN CROWD. SUCH EVENTS INCLUDE MUSIC, HEALTH AND FITNESS, SPORTING, AND CORPORATE-SPONSORED EVENTS. THESE RESULT IN INCREASED ORDERING OF CHAIN LINK FENCING, RENTAL FENCING, ACCESS GATES, AND PERIMETER SECURITY TO KEEP PROPERTIES (AND VISITORS) SAFE AND ACCESSIBLE TO PEOPLE DURING THE TEMPORARY EVENT SET-UPS (SEE EXHIBIT 4).

GIVEN THE CURRENT DEMAND FOR OUR SERVICES AND THE TRENDS IN A VERY LIMITED WORKFORCE IN OUR FIELD, VIKING FENCE FACES A TEMPORARY, PEAKLOAD NEED FOR WORKERS TO AUGMENT THOSE EMPLOYEES ALREADY IN PLACE IN ORDER TO COMPLETE WORK THAT IS ANTICIPATED TO LAST THROUGH DECEMBER 31ST BEFORE THE HOLIDAY SEASON. IT IS IMPORTANT TO RECOGNIZE THAT VIKING FENCES TOTAL REVENUE DEPENDS ON HAVING A FULL STAFFED WORKFORCE SO THAT THE COMPANY WILL CONTINUE TO LIVE-UP TO ITS REPUTATION SERVING ITS CUSTOMERS NEEDS. IN THIS PARTICULAR INSTANCE, VIKING WILL NEED TO DEPEND ON HAVING ENOUGH HELPER CARPENTER WORKERS TO HELP FULFILL THE AMOUNT OF WORK ORDERS FROM OUR CUSTOMERS. VIKING
FENCES INABILITY TO MEET PROJECT DEADLINES WILL ULTIMATELY RESULT IN SIGNIFICANT LOSS OF OUR REPUTATION AND BUSINESS OPPORTUNITIES AND THEREBY, THE PROFIT FOR OUR COMPANY.

ACCORDINGLY, VIKING FENCE IS AN IDEAL CANDIDATE AND HAS PREVIOUSLY BENEFITED FROM H-2B TEMPORARY WORKERS AND BELIEVES IT WILL GREATLY BENEFIT FROM THE PROGRAM IN THE FUTURE.

(AF 43, 50-51).

The CO issued a Notice of Deficiency (NOD) on January 11, 2021. (AF 30). The Employer timely responded to the NOD on January 20, 2021. (AF 18; AF Document Index). The CO issued a Final Determination denying Employer’s Application on January 25, 2021. The CO identified the following deficiencies in the Employer’s Application and response to the NOD: (1) a failure to establish the job opportunity as temporary in nature pursuant to 20 C.F.R. § 655.6(a) and (b); (2) a failure to establish temporary need for the number of workers requested pursuant to 20 C.F.R. § 655.11(e)(3) and (4); (3) a failure to submit a complete and accurate ETA Form 9142 pursuant to 20 C.F.R. § 655.15(a); and (4) deficiencies with respect to Employer’s job order assurances and contents governed by 20 C.F.R. § 655.18(a)(1). (AF 2-17). The Employer submitted this timely appeal to the Board on February 5, 2021, within 10 business days of the CO’s decision. In its Appeal, the Employer challenges the CO’s determination, expressly including the CO’s finding that it failed to establish that its peakload job opportunity is and will be temporary in nature.4 The CO has not filed a brief and has advised my staff that she will not be filing a brief.5

DISCUSSION AND APPLICABLE LAW

A. Standard of Review and Burden of Proof

The Board’s standard of review in H-2B certification cases is limited. The Board may only consider the appeal file prepared by the certifying officer, 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 certifying officer before the date the certifying officer issued a final determination. 20 C.F.R. § 655.61. After considering the evidence of record, the Board must: (1) affirm the certifying officer’s determination; (2) reverse

4 The Employer does not elaborate on its challenge to the CO’s Final Determination. Although the Employer states in its appeal that it “reserves the right to fully articulate with legal authority in a brief in support of the appeal until after the Honorable Office of Foreign Labor Certification has the opportunity to deliver the administrative record to the court,” no such right exists. The Employer is entitled to include its legal argument in its request for review (i.e. appeal), not a subsequent brief. See 20 C.F.R. § 655.61. Only the CO is entitled to file a brief after the Employer requests the Board review the CO’s determination. See id.

5 The Office of Administrative Law Judges’ (OALJ) Case Tracking System (CTS) shows that the Appeal File was uploaded into CTS on February 17, 2021. However, this is inaccurate. OALJ’s Docketing Team did not upload the Appeal File into CTS before February 26, 2021, at which time the undersigned became aware of the availability of the Appeal File.
or modify the certifying officer’s determination; or (3) remand the case to the certifying officer for further action. 20 C.F.R. § 655.61(e).


The Employer bears the burden of proving that it is entitled to temporary labor certification. 8 U.S.C. § 1361; see also Cajun Constructors, Inc., 2011-TLN-00004, *7 (Jan. 10, 2011); Andy and Ed. Inc., dba Great Chow, 2014-TLN-00040, *2 (Sep. 10, 2014); Eagle Industrial Professional Services, 2009-TLN-00073, *5 (Jul. 28, 2009). To obtain certification under the H-2B program, the Employer must establish that its need for workers qualifies as temporary under one of the four temporary need standards: one-time occurrence, seasonal, peakload, or intermittent. 20 C.F.R. §§ 655.6(b), 655.11(a)(3). The Employer “must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” 20 C.F.R. § 655.6(a). The applicable regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B) provides:

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 peak load need, or an intermittent need.

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6 However, while a decision of a judge sitting on the Board may be considered persuasive authority by other judges sitting on the Board, it is not binding precedent on them. Thus, there have been some Board decisions in which judges have rejected the arbitrary and capricious standard in favor of a de novo standard of review for appeals of certifying officers’ determinations on H-2B applications. See, e.g., Herder Plumbing, Inc., 2019-TLN-00022, *2-3; ATP Restaurant Inc., 2019-TLN-00018, *5 (Dec. 20, 2018); Best Solutions USA, LLC, 2018-TLN-00117, *2, n. 2 (May 22, 2018). Additionally, in one or more cases, the Board has applied a deferential standard of review for particular types of issues in H2-B certification cases. See, e.g., Royal Hospitality Services, LLC, 2011-TLN-00010, *9 (Mar. 29, 2011).

7 Brazen & Greer Masonry, Inc., 2019-TLN-00038, PDF at 3-9 (Mar. 6, 2019) (analyzing the various standards of review used by the Board to review certifying officers’ determinations of H-2B applications and choosing the arbitrary and capricious standard).
In this case, the Employer alleges that it has a peakload need for 28 Helper Carpenters. In order to establish a peakload need, 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.” 8 C.F.R. 214.2(h)(6)(ii)(B)(3); *Masse Contracting*, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation); *Natron Wood Products LLC*, 2014-TLN-00015 (Mar. 11, 2014).

**B. The CO’s Determination that the Employer Failed to Establish the Job Opportunity as Temporary in Nature**

In the CO’s NOD, she stated that the Employer “did not sufficiently demonstrate the requested [sic] standard of temporary need.” (AF 5, 33). The CO recited the proper standard for temporary need. (See AF 5, 33; 8 C.F.R. 214.2(h)(6)(ii)(B)(3)). And, the CO elaborated that “[t]he employer did not sufficiently demonstrate how its need meets the regulatory standard. In its temp need statement the employer referenced supporting documentation. However, such supporting documentation was not found.” (AF 5, 33). Hence, the CO requested that the Employer submit further information and documents as follows:

1. A statement describing the employer's business history, activities (i.e. primary products or services), and schedule of operations throughout the year
2. A summary listing of all projects in the area of intended employment for the previous two calendar years. The list should include start and end dates of each project and worksite addresses;
3. Summarized monthly payroll reports for the 2019 and 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Helper Carpenter*, 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 dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.
Note: If the submitted document(s) and its relationship to the employer’s need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF 34 (emphasis in original)).

The Employer’s responded to the NOD with a 5-page letter containing various information and a 6-page Work in Process Report for December 31, 2020. (See AF 18-28).

After reviewing the Employer’s response, the CO noted that the Employer did not submit (1) a summarized monthly payroll report for 2019 and 2020 for the occupation of Helper Carpenters that distinguished between permanent and temporary workers as instructed in the NOD; or (2) a summary listing of all projects in the area of intended employment for the previous two calendar years with start and end dates of each project and worksite addresses. The CO explained that such payroll information was essential to evaluate the number of permanent and temporary workers employed throughout an entire year related to Employer’s stated peakload period. And, the project information was essential to establish an employer’s yearly workload to indicate if a peakload occurs during the dates of need requested. (AF 7-9). The CO is correct that Employer’s response did not include this information.

The CO pointed out that a review of the payroll data the Employer did submit shows that monthly peaks do not always align with the Employer’s stated peakload period and are not consistent from year to year. “If the employer had a peakload need from April through December one would expect to see consistently higher figures for those months.” (AF 8). The CO is correct that the monthly payroll peaks submitted by the Employer do not always align with the Employer’s stated peakload period. For instance, Employer’s payroll for March 2018 is greater than its payroll for April, June, September, November, and December 2018, five different months within Employer’s stated peakload period. And, its March 2019 payroll is less than all the months in its stated peakload period, except November 2019. (See AF 8, 21).

The CO found that another chart provided by the Employer entitled “Fence Erection Labor Expense – Austin” did not support its peakload claim because Employer’s fence erection labor expenses increased and decreased throughout the stated peakload period in 2018, 2019, and 2020; the expenses were higher in the non-peak month of January 2019 than the peak months of May, June, September, October, and November 2019; and the expenses were higher in the non-peak month of March 2020 than the peak months of April, May, July, and December 2020. (AF 8). A review of the Fence Erection Labor Expense – Austin chart submitted by Employer demonstrates that the CO was correct in her observations. (See AF 8, 21).

The CO analyzed historical sales data submitted by the Employer and found, similar to the payroll data, that it failed to establish a peakload need for the dates requested because sales increased and decreased throughout the stated peakload period in 2019 and 2020, and sales were higher in one or more non-peak months in each year than one or more peak months in each year. (AF 9-10). Although these observations by the CO are correct, the CO did not address Employer’s statement about the historical sales data that “[s]ome months can be impacted by weather (e.g. Sept 2019 was a heavy rain month that caused a lot of construction delay), but for
the most part, you can see a trend that drives additional resources needs starting in February and going thru November of most years.” (AF 20). Nonetheless, the CO’s failure to address this one point is not such a great oversight as to undermine her analysis or conclusion. The Employer did not assert that the lower sales in the peakload months referenced by the CO resulted from inclement weather. It merely stated that “[s]ome months can be impacted by weather . . . .” This is too vague an assertion to call into question the reasonableness of the CO’s analysis and conclusion.

In its response, the Employer provided a chart and a graph of its historical awarded contracts by quarter in 2019 and 2020, to show that it experienced an unprecedented and completely unexpected increase of contracts in the third and fourth quarters of 2020. (See AF 18-19). However, the CO analyzed this information and noted that “[i]f the employer had a peakload need from April through December, in calendar year 2019 the total amount of awarded contracts in quarters two, three and four would have been consistently higher than the total amount of awarded contracts in quarter one and in calendar year 2020, the total amount of awarded contracts would not have decreased in quarter four.” (AF 10). The CO analyzed another graph provided by Employer entitled “Awarded Contracts and Anticipated Completed Job Revenue,” and concluded that it similarly fails to support Employer’s claimed peakload need. (AF 11). The CO did not err in her factual observations about the chart and the graphs and her conclusions about them are not unreasonable. (See AF 18-19, 21).

The CO also analyzed backlog data provided by Employer. The CO noted that “[t]he data provided is not presented in relation to the employer’s permanent or temporary workforce, or the overall volume or work performed throughout the year. This data does not universally support the employer’s attested peak need.” (AF 11). A review of the backlog data provided by the Employer supports the CO’s observations and conclusion. (See AF 19-20).

Lastly, the CO states:

Finally, the employer explains, “Viking Fence is still witnessing the same temporary lull in production during the end of the fourth quarter, the up-tick in orders for the beginning of the second quarter, AND the lack of applicants for temporary, peakload employment opportunities we have consistently witnessed during the preceding ten years running”. The employer is reminded that, a labor shortage, no matter how severe, does not justify a temporary need.

In summary, the employer's explanation and documentation did not establish a peakload temporary need. Therefore, the employer did not overcome the deficiency.

(AF 12). The CO is correct that a labor shortage does not justify a temporary need. BMC West LLC, 2018-TLN-00099, PDF at 11 (July 13, 2018) (“The presence of a labor shortage, however, does not support a finding that Employer’s need is temporary in nature”). And, her recitation of this point is astute given Employer’s argument.
As seen above, the CO did not err in her analysis of the information and data provided by the Employer relating to its claimed peakload need. And, the observations and conclusions that she drew from such analysis were supported by the evidence and not unreasonable. In light of the shortcomings in the information presented by the Employer and the Employer’s failure to provide certain information and documents requested by the CO in the NOD, the CO had a rational basis for finding that Employer’s explanation and documentation did not establish a peakload temporary need. The CO had a rational basis for finding that the Employer failed to establish the job opportunity as temporary in nature. Thus, the CO did not act arbitrarily or capriciously in denying Employer’s Application.

Since I have upheld the CO’s decision based on the first deficiency noted in her Final Determination, i.e. the Employer failed to establish the job opportunity as temporary in nature, I will not address the remaining deficiencies noted in the Final Determination.

C. Employer’s Opposed Motion to Remand

On February 24, 2021, the Employer filed a Motion to Remand. Employer argues as follows:

Viking Fence, Co., Inc. timely filed two applications for temporary labor certifications, the first of which was denied in the above referenced case, H-400-21002-991916. Based upon the same theory of temporary, peakload need, the complimentary case for a different occupation was approved in case H-400-21003-992105. Because it is internally inconsistent for an agency to deny a labor certification in one case, and based upon the same theory, approve a complimentary case, remand for reconsideration by the agency is appropriate.

The CO opposes the Motion.

As stated above, the Board may only consider the appeal file prepared by the certifying officer, 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 certifying officer before the date the certifying officer issued a final determination. 20 C.F.R. § 655.61. Consideration of Employer’s Motion would require the Board to consider evidence outside of the appeal file. As this is prohibited by regulation, I decline to consider the merits of Employer’s Motion to Remand.

ORDER

For the foregoing reasons, the Certifying Officer’s final determination denying certification is AFFIRMED.
SO ORDERED.

For the Board:

Jason A. Golden
Administrative Law Judge