DECISION AND ORDER

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.¹ 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

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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).²

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request by BEP Lyman, LLC. (“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 provides major carpentry labor services, framing and trim carpentry labor, window and house wrap installation, wall panels and pre-built components to the production and CAD services for the residential construction industry. (AF p. 303)

b. On July 6, 2021, Employer filed a Form ETA-9142B application for temporary labor certification with the CO at the Chicago National Processing Center (CNPC) for team assemblers to perform work beginning October 1, 2021. This application (H-400-21188-447168) was filed along with a Prevailing Wage Determination (PWD), Form ETA-9141 (P-400-20170-664713), which expired on June 30, 2021. (AF p. 3)

c. On July 16, 2021, the Department issued a Notice of Application Returned (Without Review), returning application H-400-21188-447168 because it did not include a valid PWD, citing 20 CFR 655.15. The Notice advised that “[o]nce the employer has obtained a valid ETA Form 9141 PWD from the National Prevailing Wage Center (NPWC), a new H-2B application may be submitted that meets the filing timeframe requirements (i.e., submission no more than 90 and no less than 75 days before the start date of work). (AF pp. 11-12)

d. On July 23, 2021, Employer submitted a second Form ETA-9142B application for temporary labor certification with the CO at the CNPC for fifteen (15) team assemblers beginning October 6, 2021 through December 31, 2021 (H-400-21204-481258), the subject of this appeal. This application was filed with a Form ETA-9141 (P-400-21175-423978). (AF pp. 504-710)

e. On August 3, 2021, the CO issued a Notice of Deficiency (NOD) stating that the Employer submitted an application that matches a filing for which employer previously received certification and failed to submit an acceptable job order in violation of 20 CFR §§ 655.15(f), 655.16 and 655.18. (AF pp. 496-503)

f. In Deficiency 1, the CO noted that the “current filing is for the same position in the same area of intended employment, and for an overlapping period of need as a prior still valid, certification.” In support, the CO identified three (3) applications: H-400-21001-987768, an

application for twelve (12) team assemblers for the period of April 1, 2021 to December 31, 2021 was certified; H-400-21188-447168, an application for fifteen (15) team assemblers for the period of October 1, 2021 to December 31, 2021 was pending certification; and H-400-21204-48128, the subject of this appeal, an application for fifteen (15) team assemblers for the period of October 6, 2021 to December 31, 2021 was also pending certification. (AF pp. 496-500)

   g. To cure this deficiency, Employer was directed to either “demonstrate that the job opportunities presented in each application are not the same” by “provid[ing] detailed explanation that demonstrates that the work described in the certification application is not the same as that covered by the newly filed Application” or provide support to show that it has a need for additional workers, totaling 42 Team Assemblers and demonstrate that this need was not present at the time the employer’s prior application was filed” with additional supporting documents. These documents included: documentation supporting the employer’s need for 42 Team Assemblers such as contracts, letters of intent, etc. that specify the number of workers and dates of need; summarized monthly payroll reports for a minimum of two previous calendar years; an explanation of the data in submitted payroll documentation; and other evidence and documentation that similarly serves to justify the total number of workers requested, if any. The CO also provided instructions to return a certification if unused due to the H-2B cap. (AF pp. 496-500)

   h. The second deficiency could be cured by submitting an amended job order, which Employer submitted on August 17, 2021, and again on September 2, 2021. (AF pp. 280, 501-503)

   i. Employer responded on August 17, 2021. In its response, Employer clarified that it was seeking an additional fifteen workers for the fall, totaling twenty-seven, and that application H-400-21204-48128 was submitted after application H-400-21188-447168 was rejected. Employer included the Notice of Application Returned, e-mail correspondence between Employer and the CNPC, a statement of temporary need, Delaware assurance letters and company information, payrolls reports, employee information, CDC restrictions, articles regarding plant closures, supply chain delays, and consulate closures, worksite information, company forecasts, charts of employee schedules, and invoices. (AF pp. 282-492)

   j. On September 15, 2021, after reviewing Employer’s application, the CO issued a Final Determination letter and denied certification pursuant to 20 CFR § 655.15(f). The CO determined Employer had not overcome the first deficiency because it failed to provide the correct documentation or sufficient explanations for how the submitted documentation relates to the requested peakload need. Additionally, the application was denied because “the employer has already employed H-2B workers under certification H-400-21001-987768, the employer cannot now seek another certification for the same job opportunity, in the same area of intended employment, covering the same period of need.” The CO further explained that a new application may only be filed in instances in which the employer returns an unused certification. (AF pp. 269-278)

3 In the final determination, the CO notes that Employer’s response was due August 11, 2021. (AF p. 273) Employer argues that this was incorrect; the Notice of Deficiency was issued on August 3, 2021, which required a response within ten (10) business days, which was Tuesday, August 17, 2021. Therefore, Employer’s response was timely.
On September 30, 2021, Employer timely filed an appeal for review that included Employer’s appeal brief and supporting documentation. (AF pp. 1-268)

1. The administrative file was received on October 13, 2021. The CO filed a timely brief on October 21, 2021.4

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

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4 The CO’s brief is marked as CB.
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 when they 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. Law and Analysis. The CO preliminarily denied the application on the basis of 20 CFR § 655.15(f) which states, in pertinent part, that “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.” The CO informed Employer that the deficiency could be overcome by 1) demonstrating that the requested positions are different; 2) demonstrating a need for additional team assemblers and that such a need did not exist at the time of the original application; or 3) return the unused certification.

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 need for additional workers and demonstrate that this need was not present at the time the employer’s prior application was filed.5

The CO determined that Employer failed to adequately support its assertions with documentation, and likewise submitted documentation without adequate explanation. In the denial discussion, the CO noted that Employer “did not provide summarized monthly payroll reports for a minimum of two previous calendar years 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.” The payroll

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5 While much of Employer’s brief is dedicated to the issue of a prior rejection on the basis of an outdated PWD and the ensuing confusion (AF pp. 5-6), the basis for the denial is that the current application requests foreign workers for the same positions, area, and time period as a prior certification. Therefore, the undersigned does not need to address the validity of a PWD or whether application No. H-400-21188-447168 was improperly withdrawn.
documents Employer provided were unsigned, lacked the company’s name, and were not specific to the position of Team Assembler. (AF p. 277)

Additionally, Employer claimed that it has contracted with “several temp agencies in attempts to bridge the gap between increased demand and a diminished workforce” but failed to include these contracts or letters of intent in its responsive effort to specify the number of workers and dates of need. *Id.*

Likewise, the builder schedule list provided did not include an explanation as to how it relates to the requested peakload need. “In addition, the employer provided a ‘Projections vs. Capacity for CCC (Walls)’ and a ‘Daily pace 6-21 6-25’ document which was illegible. The 2020-2021 invoices submitted by the employer did not give an explanation as to the hours worked or the number of workers required to fulfill each invoice.” *Id.*

Lastly, Employer contends that business operations were “severely impacted by CDC related plant closures and supply chain delays.” The CO noted that “[a]lthough the employer provided documentation concerning CDC restrictions related to the Covid-19 pandemic, H-2B cap limitations, plant closures, supply chain delay, consulate closures, and a 2020-2021 employee work schedule, the employer did not provide specific documentation related to its lost revenue or decreased labor.” Thus, the CO determined that the employer had not justified a need for the fifteen additional workers and that such a need did not exist previously. *Id.*

On appeal, Employer contends that the payroll reports “provided otherwise should have overcome the burden of showing the need did not exist especially when the company is turning away over $1.6 Million worth of work due to lack of labor. It is common sense that one occupation would have similar seasonality to another similarly related occupation.” (AF p. 7) Employer also asserts on appeal that the proffered builder schedule is meant to be considered as part of the whole record and that “[i]t is clear from the list that the majority of the projects began after the initial labor certification,” thus evidencing an increased need post-certification. (AF p. 6) While no letters of intent or contracts were provided, invoices for several recruitment attempts were included.

With respect to the illegible documents, Employer conceded that “a small portion of the key is cut off in the submitted file,” but argued that it was unreasonable for the Department to point out the compromised quality after twenty eight days of review. Employer argues, “[a]s the file indicated the company has lost over $1.6 Million which should have prompted the CO to see the extent of the financial loss and further inquire and request new copies of this important data.” (AF p. 7)

It is not the CO’s responsibility to request applicable, legible documents; rather, it is the responsibility of the employer to provide the appropriate documentation in support of its request for additional foreign laborers. Additionally, the CO is not required to assume that the payroll reports for carpentry workers would mirror that of team assemblers by virtue of “common sense.” Moreover, while the undersigned appreciates that all industries have been effected by the Novel
Coronavirus (COVID-19) pandemic, Employer did little to justify its position by including supporting documents that were nonspecific to both position and industry.

Therefore, the undersigned concludes the CO’s decision was neither arbitrary and capricious nor 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 a reasonable exercise of her discretion given the facts of this case. As such, the CO’s decision complies with the applicable regulations, and Employer failed to establish grounds supporting reversal of the decision.

4. **Order.** Employer failed to carry its burden to establish its eligibility for H-2B labor certification. The CO’s denial of Employer’s Application for Temporary Employment Certification is **AFFIRMED.**

For the Board:

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TRACY A. DALY  
Administrative Law Judge