This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request filed by Blake Hershberger Enterprises, LLC (“Employer”), for review of the Final Determination issued by the Certifying Officer (“CO”) in the above-captioned H-2B temporary labor-certification case. The H-2B program permits employers to hire foreign workers to perform temporary, non-agricultural work within the United States (“U.S.”) on a one-time,

1 This Decision and Order has been formatted to substantially comply with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended (“Section 508”). Section 508 requires electronic and information technology procured, developed, maintained, and used by Federal departments and agencies to be accessible to and usable by people with disabilities, unless an exception applies.

2 On April 29, 2015, the Department of Labor (the “Department”) and the Department of Homeland Security jointly published an Interim Final Rule (“IFR”) amending the standards and procedures that govern the H-2B temporary labor certification program. 80 Fed. Reg. 24042 (Apr. 29, 2015). In this Decision and Order, all citations to 20 C.F.R. Part 655 pertain to the IFR.
seasonal, peakload, or intermittent basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (“Department”). 8 C.F.R. § 214.2(h)(6)(iii). A CO in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review before BALCA. 20 C.F.R. § 655.61(a).

I. STATEMENT OF THE CASE

On January 1, 2022, the Employer filed with the CO an Application for Temporary Employment Certification, Form ETA-9142B (“Application”), and supporting documentation. (AF 4123-48.) The Employer requested certification for twelve laborers from April 1, 2022, until November 30, 2022, based on an alleged peakload need for workers during that period. (AF 123.)

On January 25, 2022, the CO issued a Notice of Deficiency (“NOD”) outlining three deficiencies. (AF 114-22.) On February 3, 2022, the Employer responded to the NOD and submitted supporting documentation. (AF 47-113.) On February 15, 2022, the CO issued a Final Determination outlining two deficiencies. (AF 30-45.) Specifically, the CO concluded that the Employer had failed to establish the job opportunity as temporary in nature and failed to establish a temporary need for the number of workers requested. (AF 34-35.) Therefore, the CO denied the Employer’s application. (AF 45.)

By letter dated March 2, 2022, the Employer requested administrative review of the CO’s Final Determination. (AF 1-29.) BALCA assigned this case to me on March 3, 2022. On March 4, 2022, I issued a Notice of Assignment and Order Setting Briefing Schedule permitting the Employer and counsel for the Certifying Officer (“Solicitor”) to file briefs within seven business days of receiving the Appeal File. 20 C.F.R. § 655.61(c). The Employer filed a brief on March 7, 2022, then filed an updated brief after receipt of the AF on March 15, 2022. The Solicitor did not file a brief.

II. DISCUSSION AND APPLICABLE LAW

BALCA’s standard of review in H-2B cases is limited. The review is not de novo. BALCA may only consider the Appeal File prepared by the CO, the legal briefs submitted by the parties, and the Employer’s request for administrative review, which may only contain legal arguments and evidence that the Employer submitted to the CO before the date of the CO’s

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4 “AF” refers to the Appeal File.

5 SOC (O*Net/OES) occupation code 47-2061.00 and occupation title “Construction Laborers.” (AF 123.)
determination. 20 C.F.R. § 655.61. After considering the evidence of record, BALCA must: (1) affirm the CO’s determination; (2) reverse or modify the CO’s determination; or (3) remand the case to the CO for further action. 20 C.F.R. § 655.61(e). While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has adopted the arbitrary and capricious standard in reviewing the CO’s determinations. The Yard Experts, Inc., 2017-TLN-00024, slip op. at 6 (Mar. 14, 2017). Therefore, a CO’s denial of certification must be upheld unless shown by the Employer to be arbitrary and capricious or otherwise not in accordance with the law.

Initially, it is noted that employers seeking certification under the H-2B program "must establish that [their] 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). Need is considered temporary if justified as "a one-time occurrence[,] a seasonal need[,] a peakload need[,] or an intermittent need." 20 C.F.R. § 655.6(b); see also 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(ii)(B). Here, the Employer asserts a peakload need. To qualify 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 seasonal or short-term demand and the temporary additions to staff will not become part of the employer’s regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In the NOD, the CO stated that the Employer did not provide a schedule of operations throughout the year to affirm when its business operations decline and when it no longer needs additional labor services. (AF 118.) The CO therefore stated that further explanation was needed to indicate how the Employer determined its peakload need. (AF 119.) In its response to the NOD, the Employer included payroll charts for 2019, 2020, and 2019, which summarized the wages and number of workers for each month of each year. (AF 49-51.) The Employer also noted that commercial and residential structures are completed outdoors and stated that concrete work is not completed in the winter months. (AF 53.)

In the Final Determination, the CO determined that the 2019, 2020, and 2021 payroll reports showed consistent work being performed year-round. (AF 42.) The CO noted that the Employer hired more temporary workers during the non-peak month of December 2019 than during the entire peak season. (AF 39-40.) Similarly, the CO noted that in 2020, the Employer hired more temporary workers in the non-peak month of January than during the peak months of March to June and September to November. (AF 40-41.) Finally, in 2021, the CO noted that the Employer hired more temporary workers in the non-peak month of December than during its entire peak season. (AF 41.) The CO concluded that these trends demonstrated that the Employer’s business operations were unaffected by either structural deficiencies in concrete pouring or cold weather during the winter months. (AF 42.)

On appeal, the Employer argues that, contrary to the CO’s determination, the payroll reports adequately demonstrate the peakload nature of the Employer’s business. (Employer’s brief at 7.) According to the Employer, the number of workers required to complete projects
differs and increases during the requested dates of need, i.e., April to November. (Id.) The payroll charts, the Employer asserts, show a notable increase during those months. (Id.) Furthermore, the Employer argues that “any projects outside of Employer’s requested period of need are mainly performed by Employer’s permanent workers.” (Employer’s brief at 5.)

I find that the CO had adequate support to conclude that the job opportunity is temporary in nature. As the CO noted in the NOD, the Employer must demonstrate that it needs to temporarily supplement its permanent staff due to a seasonal or short-term demand and that the temporary additions to staff will not become part of the Employer’s regular operation. (AF 118.) Although the Employer argued that the payroll charts showed an increase in temporary workers during the Employer’s alleged peak season, the CO correctly observed that the payroll reports show that the Employer regularly had an increase in temporary workers during non-peak months. In this regard, in 2019 the increases in temporary workers began in March, or one month prior to the alleged peak season; in 2020 the increases began in August, or fourth months after the alleged peak season; and in 2021, the increases began in October, or a full seven months after the beginning the alleged peak season. Therefore, the CO was justified in its assertion that the charts do not consistently show an increase during the Employer’s alleged peak season of April to November.

Moreover, as previously noted, the payroll charts show that the increases in temporary workers continue during the non-peak season, namely December 2019, January 2020, January 2021, and December 2021. The Employer’s argument that projects during the non-season are performed mainly by permanent workers is not reflected in the payroll charts, which show a continued increase in temporary workers in non-peak months. Finally, while the Employer stated that the number of workers differs with each project, this does not negate the fact that the Employer’s payroll charts showed an increased number of temporary workers during the winter months, despite the Employer’s statement that it was limited by low temperatures during those months.

Based on the foregoing, I find that the CO did not act arbitrarily or capriciously in denying the Employer’s application.6

III. ORDER

It is hereby ORDERED that the Certifying Officer’s decision denying the Employer’s Application for Temporary Employment Certification is AFFIRMED.

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6 Because this appeal can be resolved on the issue of failure to establish the job opportunity as temporary, I need not address the CO’s other basis for denial.
For the Board:

JOHN P. SELLERS, III
ADMINISTRATIVE LAW JUDGE