This case arises from Casa Viva’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. 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 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 (“Form 9142”).

FACTS AND PROCEDURAL HISTORY

On August 19, 2021, Employer filed an H-2B Application for Temporary Employment Certification, Form ETA-9142B. (AF at 119). Employer’s application requested certification for one Installer from November 2, 2021 to October 24, 2024. Id. The application represented that the job duties include installing and supervising “the installation of modular kitchens, closets, bathrooms, and European brand doors.” (AF at 121). In its Statement of Temporary Need, Employer explained the pandemic has caused Employer to “face first the absence and now the resignations of our installers, which has led us to confront a serious problem of skilled personnel for these tasks.” (AF at 131). Employer further stated that despite their best efforts to recruit skilled staff, they have “received no candidates for the position.” Id.

3 All references to “AF” reference the administrative file.
The CO issued a Notice of Deficiency ("NOD"), dated August 30, 2021, informing Employer of its failure to establish the job opportunity as temporary in nature, failure to satisfy the obligations of H-2B employers and its failure submit a job order with language that contains all benefits and wages offered to H-2B workers. (AF at 113-118). The CO requested additional information, including an explanation regarding why the position represents a one-time need. *Id.* On September 7, 2021, Employer submitted a response to the NOD. (AF at 77-111).

The CO issued a Final Determination, dated October 13, 2021, denying Employer’s application. (AF at 42). The CO determined that Employer failed to establish the job opportunity as temporary in nature. Specifically, the CO stated that the "employer did not sufficiently demonstrate how the pandemic and lack of qualified workers meets the regulatory standard of a one-time occurrence." (AF at 46).

On October 25, 2021, Employer filed its request for administrative review of the October 13, 2021 CO Final Determination. (AF at 1). The undersigned was subsequently assigned this case and issued a Notice of Assignment on November 22, 2021. The undersigned received the Administrative Files from the Employment and Training Administration ("ETA") on November 22, 2021. The CO submitted their brief on December 2, 2021.

This decision and order is based on the record consisting of the AF forwarded by ETA and the parties’ exhibits. Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer.

**SCOPE OF REVIEW AND APPLICABLE LAW**

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 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).


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4 The chief administrative law judge may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.61. Chief Judge Henley designated a single member of the Board to hear this appeal.

5 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
arbitrary and capricious standard in this matter. Under the arbitrary and capricious standard, if there is any rational basis for the certifying officer’s determination, it must be sustained. See Dellew Corp. v. United States, 108 Fed. Cl. 357, 368 (Fed. Cl. 2012); Erinys Iraq Ltd. v. United States, 78 Fed. Cl. 518, 525 (Fed. Cl. 2007); see also Spokane County Legal Services, Inc. v. Legal Services Corp., 614 F.2d 662, 669, n.11 (9th Cir. 1980).

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 H2B 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.

In this case, Employer alleges that it has a need for one Installer stemming from the one-time occurrence; the inability to hire a qualified worker due to the Covid-19 Pandemic and financial aid related to the pandemic. In order to establish that the need is a one-time occurrence:

[t]he petitioner must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.


**EMPLOYER’S ARGUMENTS**

Employer argues:
Casa Viva, Corp. D/B/A Arkitektura, has a temporary need for one Installer. So far, its efforts to recruit US workers have been unsuccessful, not been able to find any able, willing, qualified and available worker. The need for the services of the Installer is temporary; it is a one-time occurrence. A temporary event of short duration has created said temporary need. Specifically, the Covid-19 pandemic and financial aids such as the PUA have created said temporary need. Both the Covid-19 and the financial aid are temporary events of short duration. The daily trend of Covid-19 cases has been declining for weeks, and the PUA ended on September 4, 2021. But even though these are events of short duration they have created a need for a temporary worker, and not only because Petitioner has not been able to find qualified US workers, but also because the ones he had quitted their jobs.

(AF at 6).

CERTIFYING OFFICER’S ARGUMENTS

The CO argues that the Employer’s need for one H-2B worker is not “temporary” as it does not end in the “definable future.” In so arguing, the Employer states that labor shortages do not justify a temporary need nor establish a one-time occurrence, relying on *Tofte General Store*, 2021-TLN-00010 (November 1, 2021) and *Peninsula Painters*, 2021-TLN-00074 (Sept. 30, 2021). Employer argues:

Employer cannot establish that a need for one H-2B worker caused by the COVID-19 pandemic and the effects of the related financial relief are “temporary” because it is impossible to establish a “definable future” date when the pandemic and its economic effects – and, therefore, employer’s need – will end.

CO’s brief at 6.

DISCUSSION

The primary legal question in the present case is whether the pandemic and by extension, PUA, qualifies as a one-time occurrence under 20 C.F.R. § 655.6(b) and whether it will end in the near, definable future. After considering the parties arguments, I have come to the determination that the pandemic does not have a definable end-date and thus does not qualify as a one-time occurrence under H-2B regulations.

I come to this conclusion as Employer has failed to show that this need is temporary and will end on October 24, 2024. Employer argues that Covid numbers are presently declining. While this trend may, or may not, continue it is unknown when the pandemic will end and “hope falls short of showing that the need in fact is of short duration. As the CO points out, in *Tofte General Store*, supra, it was noted that as “COVID variants have appeared, restrictions have again tightened. In time, restrictions might be relaxed again. This could recur any number of times,” quoting *In re Peninsula Painters*, 2021-TLN-00074, PDF at 5 (September 30, 2021). I find this reasoning persuasive and will follow it in the present case. Indeed, since the filing of the administrative file, a new variant (Omicron) has created concern among health officials. As it is impossible to discern when then the pandemic will end, it is impossible to determine whether
Employer will require additional foreign workers past the date of October 24, 2024. Thus, the pandemic cannot be said to be temporary or a one-time occurrence.

I also agree with the CO that established precedent has concluded 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"). Any labor shortage caused by the pandemic does not qualify as a temporary need.

Accordingly, I find that Employer has failed to show that its need for the additional employees will end in the near, definable future as required by 8 C.F.R. § 214.2(h)(6)(ii)(B). The pandemic is on-going with undetermined end date and, unfortunately, is not temporary and does not qualify as a one-time occurrence.

**CONCLUSION**

For the aforementioned reasons, I find the CO did not act arbitrarily and capriciously in denying Employer’s application for one Installer between the period of November 2, 2021 and October 24, 2024.

**ORDER**

It is hereby **ORDERED** that the Certifying Officer’s determination is **AFFIRMED**.

**SO ORDERED.**

For the Board of Alien Labor Certification Appeals:

**HEATHER C. LESLIE**
Administrative Law Judge
Washington, DC