In the Matter of:

IRONSHORE CONSULTING, LLC, Employer.

BALCA Case No. 2022-TLN-00009
ETA Case No. H-400-21230-531559

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the labor certification process for temporary nonagricultural employment in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the associated implementing regulations promulgated by the Department of Labor (“DOL”) at 20 C.F.R. Part 655, Subpart A (collectively, the “Act”). Commonly referred to as the H-2B Nonimmigrant Visa Program, the H-2B visa classification applies to an individual coming to the United States as a temporary worker in a nonagricultural job with no plans to stay permanently. An employer who wants an H-2B visa must first obtain a "temporary labor certification" from the DOL.

Ironshore Consulting, LLC ("Ironshore" or “Employer”) filed an Application for Temporary Employment Certification (“Application”).¹ The Certifying Officer (“CO”) of the DOL’s Employment and Training Administration denied the Application, and Employer subsequently filed a timely request for administrative review to the Board of Alien Labor Certification Appeals (“BALCA”). For the reasons that follow, the CO’s denial of the Application is affirmed.

¹ Appeal File (“AF”) at P188-268.
STATEMENT OF THE CASE

On August 18, 2021, Employer filed the Application to hire one truck driver, SOC Code 53-3032.00, Heavy and Tractor-Trailer Truck Drivers, for the period of November 1, 2021 to November 1, 2022.\(^2\) In an addendum to Section B.8 of the Application (“Statement of Temporary Need”), Employer stated:

Ironshore … is a Florida trucking company operating in the freight transportation industry in the spot market, meaning it transports goods at current market rates per mile as opposed to having long-term contracts with a fixed rate per mile. Ironshore operates out of Lauderhill, Florida and transport [sic] freights of goods and equipment to customers nationally across the lower 48 states.

Ironshore was formed in September of 2020 and became operational in April 2021 upon the grant of authority from the United States Department of Transportation and the federal motor carrier safety administration. The company purchased its first truck on March 31st, 2021, and it purchased a second one on May 18th, 2021. Ironshore has contracts with several freight brokers who solicit cargo shipments in the spot market on its behalf, the company can choose which shipments to take.

The company currently has 1 CDL class a driver. All of Ironshores [sic] drivers are company drivers, paid under a W-2 with a signed employment agreement. Drivers are paid weekly. Salaries range from $800 per week to $1,700 per week, with bonuses on a case-by-case basis.

The temporary need for an additional Class A CDL driver arises from a temporary event of short duration which is the COVID-19 pandemic. It has caused supply chain bottlenecks nation-wide, which in turn led to a temporary surge in demand for the employers [sic] services. As stated in a report published by the White House on June 21st, 2021, US retailers have the lowest historical inventory to sales ratio which means they can only support their sales from existing inventory without new deliveries for a very limited time (33 days). That is because at the beginning of the COVID-19 pandemic US companies anticipated demand for their products to be weak and subsequently reduced their inventory orders. When the economy started to reopen, demand for physical products increased and US

\(^2\) AF at P188.
companies now race to replenish their depleted inventories, temporarily increasing demand for trucking. Based on the report from the White House, the disruptions caused by the COVID-19 pandemic is both temporary in nature and of short duration. Once COVID-19 supply chain issues are resolved demand for trucking will return to pre-pandemic levels, ending the need for a temporary Class A CDL driver.

The demand in the trucking industry is measured by the national average dry-van load-to-truck ratio which measures how many loads that are posted on DAT boards are available for each available truck. DAT is a private company that operates the largest truckload freight marketplace in North America. DAT is well-known among industry participants who rely on DAT for market trends and data insights derived from 249 million freight matches and a database of $110 billion of market transactions. The national average dry-van load-to-truck ratio is currently at elevated levels at 5.81 loads available per truck as of July 2021 while it was 4.4 in July 2020 and only 2.09 in July 2019, the last year when there was no COVID-19 pandemic. Given that demand is more than twice pre-pandemic levels, from 2.09 loads to truck to 5.81 loads to truck, Ironshore is requesting the certification of 1 temporary CDL Class A driver in order to increase its capacity and address the additional demand caused by COVID-19.3

Along with its Application, Employer attached a Florida Job Order,4 a paycheck history report from March 22, 2021 to August 6, 2021, including pay stubs (“Payroll Report”);5 a copy of signed agreements with ATS Logistics Services, Inc., d/b/a Sureway Transportation Company, Direct Traffic Solutions, Inc., Logistic Dynamics, Inc., and Pac Rim Transportation, LLC (collectively, “Signed Agreements”);6 and a Form ETA-9141 Application for Prevailing Wage Determination.7 It also attached two articles explaining the pandemic’s effect on supply chains,8 and an analysis on national supply trends by DAT Solutions, LLC (“DAT Report”).9

3 AF at P193 (original formatting removed).
4 AF at P205-207.
5 AF at P220-230.
6 AF at P231-240, P241-251, P252-255, and P256-263, respectively.
7 AF at P264-268.
8 AF at P198-204 (“Why the Pandemic has Disrupted Supply Chains,” Susan Helper and Evan Soltas [no source information] (June 17, 2021)) (hereafter, “Helper and Soltas Article”); AF at P212-219 (“The Upside of COVID-19 Pandemic-Induced Truck Driver Shortages,” Yossi Sheffi, Supply Chain 247 (May 25, 2021)).
9 AF at P208-211.
On August 26, 2021, the CO issued a Notice of Deficiency ("NOD"), identifying three deficiencies.\textsuperscript{10} The NOD stated, in part, that Employer failed to establish the job opportunity as temporary in nature ("Deficiency 1").\textsuperscript{11} Specifically, the NOD cited 20 C.F.R. 655.6(a) and (b), and explained:

In order to establish a one-time occurrence, the employer must show that it has not employed workers to perform the service or labor in the past, and will not need workers to perform the services or labor in the future or the employer must have an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

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The employer did not sufficiently demonstrate how its need meets the regulatory standard. The employer indicates that a shortage in trucking will "return to pre-pandemic levels" once the supply chain issues related to COVID 19 are resolved. However, the employer is reminded that a labor shortage, no matter how severe, does not justify a temporary need. Therefore, the employer has not explained what temporary event(s) of short duration has caused the one-time occurrence.\textsuperscript{12}

The NOD instructed Employer to submit the following information and documentation:

1. Payroll reports and the number/pattern of deliveries over the course of the previous calendar year that identifies, for each month and separately for full-time permanent and temporary employment in the requested occupation Truck Drivers, 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;

2. An explanation of the data in submitted payroll documentation;

3. A summarized monthly list from Ironshore Consulting, LLC of the previous calendar year and up-to date of current year that indicates the

\textsuperscript{10} AF at P179-187.

\textsuperscript{11} Because this Decision and Order affirms the CO's denial pursuant to Deficiency 1, no other deficiencies are discussed.

\textsuperscript{12} AF at P182.
number of truck loads that leave the main worksite for deliveries to other locations for this temporary seasonal truck driving need; and

4. The employer must submit supporting evidence and documentation that justifies the chosen standard of temporary need. The employer’s response must include, but is not limited to, the contracts signed with the employer’s clients and a summarized report from these clients that supports the temporary need that occurs between November 1, 2021 and November 2022 as part of the need for seasonal truck driving by Ironshore Consulting, LLC.\(^{13}\)

On September 7, 2021, Employer responded to the NOD (“Response”).\(^{14}\) It resubmitted the Payroll Report, Signed Agreements, DAT Report, and Helper and Soltas Article that it initially submitted with its Application.\(^ {15}\) It also submitted a “Payroll Record Explanation” and a “Summary of Operations” statement,\(^{16}\) as follows:

**Payroll Record Explanation**
Ironshore Consulting, LLC

The Paycheck History Report contains payments made to employees. The Pay Date is the date payment was made, the Total Pay column shows the gross weekly pay of the employee, the Net Pay column shows the net pay after standard deductions (Federal Tax, Social Security, Medicare). Further details are provided in each individual paystub below, including withholding amounts and payment period.

**Ironshore Consulting, LLC**
**Summary Of Operations**

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<th>Load Drop Off Date</th>
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\(^{13}\) AF at P182-183.

\(^{14}\) AF at P116-177.

\(^{15}\) AF at P121, 123-132, 134-177. *See also* AF at P198-204, 208-211, 220-2363.

\(^{16}\) AF at P122, 133
In the Response, Employer explained, in part:

Ironshore is requesting one Truck Driver … to address stronger demand for cargo loads that need to be transported in order for the US economy to function properly. This demand is due to a temporary event of short duration which is the COVID-19 pandemic, an unprecedented event of global proportions. The last similar event was the Spanish Influenza pandemic which occurred between 1919 and 1920 or over one hundred years ago.

US retailers have the lowest historical inventory to sales ratio of only 33 days which means they can only support their sales from existing inventory without new deliveries for a very limited time. …

New inventory has to be delivered to US businesses in order to replenish their supplies back to normal levels. As a result, demand for transportation via truck is at historic high as measured by number of loads available for each truck. …

Adding an additional Truck Driver will allow Ironshore to temporarily increase capacity by 50% in order to meet a short-term increase in demand for transportation services. …

Ironshore did not claim labor shortages to justify a temporary need as indicated in the [NOD]. In fact, Ironshore did not claim or made reference to labor shortages in its Statement of Temporary Need[.] Rather the temporary need is based on short-term increase in demand for trucking transportation due to the need to replenish inventories of US businesses. The need to replenish inventories is in turn caused by the COVID-19 pandemic and the subsequent recovery of economic activity.¹⁷

¹⁷ AF at P116-117 (emphasis in original).
On October 4, 2021, the CO issued a Final Determination denying Employer’s Application ("Denial"). With respect to Deficiency 1, the CO found the Employer’s response to the NOD failed to demonstrate a temporary need, stating in part:

… The employer indicated in its NOD response that its one-time occurrence temporary need is based on businesses needing to replenish inventories is in turn caused by the COVID-19 pandemic. However, inventory shortages due to the COVID-19 pandemic, no matter how severe, do not justify a temporary need. In addition, the employer also indicates that it currently employs one Truck Driver to perform the services or labor prior to filing its application. Therefore, the employer’s Statement of Temporary Need and explanation provided in its NOD response do not sufficiently demonstrate how it meets a one-time occurrence temporary need.

The employer provided … documents to support its one-time occurrence temporary need. However, the employer’s paycheck history report, cargo summary, June 17, 2021 article, industry trend analysis, and contract agreements do not indicate that a temporary event of short duration is a direct result of the needs of the employer’s clients. The employer had the opportunity to provide summarized report from its clients that supports its temporary need for a one-time occurrence, as requested in Deficiency 1 of the NOD. However, the requested supporting documentation was not provided. Therefore, the employer’s supplemental documents do not support its one-time occurrence temporary need for one Truck Driver during the requested period of intended employment.

On October 10, 2021, Employer filed a request for expedited administrative review of the Denial (“Request”), which included Employer’s legal brief, Statement of Temporary Need, NOD, Response, and Denial. The Request states in pertinent part:

… Employer states that a temporary event of short-duration is the COVID-19 pandemic. This event has led to increased demand for the Employer’s services, creating the need for a temporary worker. The Employer’s services are the transportation of cargo via truck over long distances. The Employer operates in the spot market which allows it to pick cargo orders

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18 AF at P101-115.
19 AF at P107.
20 AF at P1-P99. See 20 C.F.R. § 655.61(a).
as they become available. The additional demand for cargo transportation via truck caused by the COVID-19 pandemic quickly becomes available in the spot market, directly leading to more demand for the Employer’s services. Therefore, the Employer needs an additional Truck Driver in order to be able to service this additional demand.

The [Denial] conveniently omits parts of the Employer’s [Response] and Statement of Temporary Need[.]. Specifically, it fails to mention that the temporary need is based on ‘short-term increase in demand for trucking transportation’ which is driven by the COVID-19 pandemic and its effects on the supply chain. By ignoring the short-term increase in demand for trucking transportation, the [Denial] incorrectly claims that the Employer relies solely on inventory shortages to justify the need for temporary worker. The [Denial’s] statement represents a change of stance from the [NOD] where he or she stated that ‘a labor shortage, no matter how severe, does not justify a temporary need’ to ‘inventory shortages due to the COVID-19 pandemic, no matter how severe, do not justify a temporary need’ in [Denial]. The CO’s ever-shifting stance and nitpicking through every word resulted in an arbitrary and capricious decision at a time when demand for the Employer’s services is at an all-time-high.

The [Denial] also states that the supporting documents provided by the Employer ‘do not indicate that a temporary event of short duration is a direct result of the needs of the employer’s clients.’ … Given the nature of the Employer’s operations and the market it serves, it would be impossible to show explicit future commitments from clients for the period of intended employment. Instead, the appropriate measure is the load-to-truck ratios provided by [the DAT Report], the largest truckload marketplace in North America, that measures the cargo loads available per each available truck in the spot market. The DAT load-to-truck ratio clearly shows that demand for the Employer’s services has nearly tripled as compared to pre-pandemic levels.

With respect to contracts in the commercial trucking industry, the Employer operates in the spot market meaning that it transports goods at current market rates per mile. The Employer chooses which shipments to take based on rates and availability of trucks and drivers. Spot contracts differ from long-term contracts with respect to not having fixed routes, fixed rates per mile and future commitments to transport a certain amount of cargo. On the other hand, spot contracts usually command higher rates per mile and
allow for flexibility on part of clients to transport more or less cargo based on market conditions. As a result of operating in the spot market, the Employer does not have contracts that provide visibility in the number of future orders. Rather, the Employer, just as the other participants in the spot market commercial trucking industry, relies on market data to assess demand for future services and make hiring decisions. The spot market contracts that the Employer has in place are standard for the commercial trucking industry in which it operates.

In fact, the Employer has submitted strong market data evidence for the short-term increase in demand for trucking transportation in the US spot market since the start of the COVID-19 pandemic in the form of data provided by a credible source (DAT) that measures the loads available per truck in the spot market. This is the standard industry metric that measures demand for trucking transportation in the spot market. The national average dry-van load-to-truck ratio is at 5.81 loads available per truck as of July 2021 while it was only 2.09 in July 2019, the last year before the COVID-19 pandemic. That evidence shows that demand in the industry is nearly three times pre-pandemic levels and there are a lot more cargo loads available per each available truck. Yet, this evidence appears to have been ignored [in the Denial].

This case was subsequently assigned to the undersigned, and on October 13, 2021, I issued a Notice of Assignment and Expedited Briefing Schedule, directing the CO to assemble and file the Appeal File, and informing the Associate Solicitor for Employment and Training Legal Services ("Solicitor") that he may file a brief within seven business days of receiving the Appeal File.

On October 21, 2021, the CO filed the Appeal File. The Solicitor did not file a brief.

21 AF at P7-9 (citations omitted).
22 See 20 C.F.R. § 655.61(b) and (c).
23 See 20 C.F.R. § 655.61(f) (BALCA decision due within seven business days of the submission of the Solicitor’s brief or 10 business days after receipt of the Appeal File, whichever is later).
SCOPE AND STANDARD OF REVIEW

The scope of review for a denial of a temporary labor certification is limited to the written record, which consists of the Appeal File, legal briefs, and the employer’s request for administrative review (which, itself, may only contain legal arguments and evidence actually submitted before the CO). The standard of review is arbitrary and capricious, which requires the reviewing judge or panel to determine if the initial decision maker examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”

DISCUSSION

An employer bears the burden of demonstrating “that its need for non-agricultural services or labor is temporary.” A “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 [Department of Homeland Security] regulations.” The relevant DHS regulations provide:

(A) Definition. Temporary services or labor under the H-2B classification refers to any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) Nature of petitioner’s need. 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.

24 20 C.F.R. § 655.61(a) and (e).


26 Three Seasons Landscape Contracting Service, Inc. DBA Three Seasons Landscape, 2016-TLN-00045, (Jun. 15, 2016) (alteration in original, citation and internal quotation marks omitted).


28 20 C.F.R. § 655.6(b).
(1) One-time occurrence [sic]. The 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.29

Here, Employer attempts to meet its burden of establishing a one-time occurrence temporary need by submitting information and documentation showing that the COVID-19 pandemic has created supply chain issues due to retailers’ significant demand for cargo loads to replenish historically low inventories. However, while the COVID-19 pandemic could lend support to a finding of temporary need,30 an increase in demand secondary to the pandemic is not by itself sufficient to meet an employer’s burden.31 An employer must provide more than industry data to meet its burden,32 and must sufficiently link the industry trend with its specific need.33 Employer’s Application, Response, and Request fail to adequately make that connection. I recognize that the nature of Employer’s business made it difficult, if not impossible, to provide the CO with a “summarized report from its clients that supports its temporary need for a one-time occurrence,”34 but its submissions nonetheless fall short of providing sufficient support for establishing that its “need for the employee will end in the near, definable future,”35 and that the current demand is a “temporary event of short duration.”36 Indeed, while the current demand for cargo reasonably supports Employer’s present need for an employee, there is no evidence that such need will end on Employer’s proposed date of November 1, 2022. As recently stated in Peninsula Painters: “Employer seems to hope it won’t need the additional worker after [its proposed end date], but a hope falls short of showing that

29 8 C.F.R. § 214.2(h)(6)(ii)
31 See Peninsula Painters, 2021-TLN-00074 (Sept. 30, 2021) (“An increase in demand for painting because of a relaxation of COVID restrictions conceivably could be shown as a one-time need. But, here, Employer has not shown a one-time need within the regulatory definition.”); El Tataki Sushi and Mexican Grill, LLC, 2021-TLN-00071 (Oct. 5, 2021) (employer failed to demonstrate a temporary need caused by COVID-19, and rather demonstrated a need to support a growing yearly demand for workers).
32 See BMC West Corporation, 2016-TLN-00039 at 5 (May 18, 2016) (general statistics regarding an industry are insufficient to establish a specific employer’s need).
33 See GM Tile LLC, 2017-TLN-00032 (Apr. 25, 2017) (data showing an overall trend in an industry is insufficient to establish a temporary need specific to an individual employer)
34 AF at P107. See also AF at P8.
the need in fact is of short duration. As COVID variants have appeared, restrictions have again tightened. In time, restrictions might be relaxed again. This could recur any number of times. Accordingly, upon consideration of the Appeal File, Employer’s Request, the Act, and relevant case law, I find that the CO did not act in an arbitrary or capricious manner in denying Employer’s Application.

ORDER

Based on the foregoing, it is hereby ORDERED that the Certifying Officer’s denial is AFFIRMED.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC

37 2021-TLN-00074.