DECISION AND ORDER

1. **Nature of Appeal.** This matter\(^1\) 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.\(^2\) The H-2B

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\(^1\)This matter arises from two separate ETA cases which have been consolidated before the Board. As such, there are two administrative files in this matter. The administrative file for ETA H-400-21265-600115 shall be marked as AF-1; the administrative file for ETA H-400-21265-600224 shall be marked as AF-2.  

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 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).³

This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to a request by MasterCorp, Inc. (“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 housekeeping services to resorts and hotels throughout the United States. (AF-1, p. 2; AF-2 p. 1)

b. Employer applied for and received certification for the period of April 1, 2020 through December 20, 2020 at the Mountain Run at Boyne (“Mountain Run”) and Wyndham Shawnee Resort (“Shawnee”) worksites (H-400-20002-223732 and H-400-20002-224432, respectively). Employer requested withdrawal of the unused certifications due to the onset of restrictions placed due to the Novel Coronavirus (COVID-19) global pandemic. (AF-1, pp. 57, 64; AF-2, pp. 74, 82)

c. After this withdrawal, Employer reassessed its labor needs and applied for and received certification for the period of December 21, 2020 through September 20, 2021 at the Mountain Run and Shawnee worksites (H-400-20267-842430 and H-400-20267-842163, respectively). (AF-1, pp. 57, 65; AF-2, pp. 74, 83)

d. On September 22, 2021, Employer filed a Form ETA-9142B application with the CO at the CNPC for temporary labor certification for sixteen (16) Housekeeping Service Attendants, Occupational Title Maids and Housekeeping Cleaners beginning December 16, 2021 through September 30, 2022 (H-400-21265-600115) for work to be performed at Mountain Run, a resort. (AF-1, p. 3)

e. Also on September 22, 2021, Employer submitted a second Form ETA-9142B application for temporary labor certification with the CO at the CNPC for twenty (20) housekeepers beginning December 16, 2021 through September 30, 2022 for work to be performed at Shawnee, a resort. (H-400-21265-600224) (AF-2, p. 3)

f. On September 28, 2021, the CO issued a Notice of Deficiency (NOD) for both ETA H-400-21265-600115 (AF-1, pp. 88-92) and ETA H-400-21265-600224 (AF-2, pp. 99-104). In both NODs, the CO stated that Employer failed to establish the job opportunity as temporary in nature

³ On April 29, 2015, the Department of Labor (“DOL”) 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. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule, 80 Fed. Reg. 24,042 et seq. (Apr. 29, 2015). The rules 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). All citations to 20 C.F.R. Part 655 in this opinion and order are to the IFR.
pursuant to 20 C.F.R. § 655.6(a) and (b). (AF-1, p. 90; AF-2, p. 102) Specifically, the CO concluded Employer did not establish a peakload need for either certification application because it had previously received certifications for each worksite for the period of April 1, 2020 to December 10, 2020 based on peakload need. The CO concluded that this demonstrated Employer had a year round need, and not a temporary peakload need in nature. Id.

g. Additionally, for ETA H-400-21265-600115, the CO noted that 2020 payroll report showed a consistent number of permanent employees with no distinct period of peaks in specific months in alignment with the employer’s stated dates of need. Per the CO, the contracting agreement with Mountain Run was for the dates of need for June 9, 2014 through June 8, 2015, not for the requested time periods. (AF-1, p. 91)

h. In the NOD for ETA H-400-21265-600224, the CO noted that the submitted payroll report does not show permanent work hours that are consistent with the stated peak period for Employer, citing as an example, that “in April 2020, the payroll report shows only two permanent workers, no figures provided for the month of May, 33 workers in October and 39 workers in November (which are supposed to be the employers slow months) and 29 workers in December (which is supposed to be the employers’ busy period).” (AF-2, p. 102)

i. To cure the deficiencies in both applications, Employer was directed to provide 1) a statement regarding business history, activities, and schedule of operations; 2) detailed explanation as to the activities of permanent workers in the same occupation during non-peak period; 3) monthly occupancy rates for the past 2 years; 4) signed, “[s]ummarized monthly payroll reports for two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment for the requested occupation Housekeeper, the total number of workers or staff employed, total hours worked, and total earnings received; and 5) other evidence and documentation that similarly serves to justify the dates of need being request for certification. (AF-1 p. 91; AF-2, p. 103)

j. On September 29, 2021, Employer provided an amended job order for ETA H-400-21265-600224. (AF-2, pp. 90-94)

k. On October 4, 2021, Employer responded to the NOD issued for ETA H-400-21265-600115. (AF-1, pp. 56-85) In its response, Employer provided a statement regarding its operations as a provider of housekeeping services on a year-round basis to resorts, a detailed description of the duties its permanent employees perform, a chart showing occupancy rates from November 2017 through April 2021, a payroll report dated January 2019 through September 2020 and an additional payroll report dated January 2020 through September 2021. (AF-1, pp. 60-61, 66-68) Also included were Employer’s withdrawal request (and response received) for the certification approved for April through December 2020 (H-400-20002-223732) and a copy of document J-797A for valid dates 12/21/2020 to 09/20/2020. (AF-1, pp. 64-65)

l. On October 8, 2021, Employer responded to the NOD issued for ETA H-400-21265-600224. (AF-2, pp. 73-92) In its response, Employer provided a statement regarding its operations

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4 The second deficiency cited in the NODs appear to have been cured by Employer’s responses because they were not cited as a basis for the ultimate denials.
as a provider of housekeeping services on a year-round basis to resorts, a detailed description of the duties its permanent employees perform, a chart showing occupancy rates from November 2018 through April 2021, a payroll report dating January 2020 through December 2020, an additional payroll report dating January 2021 through September 2021, and a chart depicting overtime paid for 2019, 2020, and 2021. (AF-2, pp. 77-78, 84-86) Additionally, Employer explained that its permanent workforce is reduced seasonally because many permanent workers leave at the beginning of the high season for tipped-wage employment. “The concern for having employed 33 workers in October and 39 workers in November is consistent with Petitioner’s statement that during non-peakload months staffing is available.” Employer also explained that the 29 workers in December 2020 included those who were temporarily assigned from other markets to supplant its labor shortage. Although permanent employees, “they are not permanent to this worksite, they were temporarily assigned to support the labor shortage so that Petitioner’s contract was not cancelled.” (AF-2, p. 75)

m. On October 18 and 14, 2021, respectively, after reviewing Employer’s applications, the CO issued Final Determination letters and denied certification pursuant to 20 C.F.R. § 655.6(a) and (b). (AF-1, pp. 47-54; AF-2, pp. 52-59)

n. In the final determination on application H-400-21265-600115, the CO decided Employer had not overcome the stated deficiencies because its response had not clearly explained how its peak load need is based on the employer’s business operations and the employer had not explained how its need constitutes a peakload temporary need. (AF-1, pp. 52-54) Specifically, the CO determined that “[i]n review of the employer’s application history, it seems the employer needs temporary workers all 12 months of the year for the worksite. It could not be established how the employer’s need was based on its business cycle.” The CO reasoned that Employer’s “explanation and documentation submitted did not overcome the deficiency.” (AF-1, p. 54) The CO also determined that Employer did not submit a copy of a withdrawal request for MasterCorp, Inc. and the submitted Form I-797A was irrelevant “to the issue that the employer’s application history shows that its applications for temporary certifications have shown dates of need in all 12 months of the year and not only for a specific peak load period.” The CO further determined that the submitted payroll reports entitled H2B Summary Report for Mountain Run likewise “bear no relevance to the employer’s current case as they are for another company.” (AF-1, p. 53) Lastly, the CO determined that Employer failed to address its past application for temporary workers for the dates April 1, 2020 to December 10, 2020. (AF-1, p. 54)

o. Likewise, in the final determination on application for H-400-21265-600224, the CO decided Employer had not overcome the stated deficiencies because it had not provided an explanation why it has needed temporary workers all 12 months of the year and it could not be established how Employer’s temporary need is based on its business cycle. The CO reasoned that Employer’s “explanation and documentation submitted did not overcome the deficiency.” (AF-2, p. 59) For this application, the CO again determined that Employer did not submit a copy of a withdrawal request for MasterCorp, Inc. and the submitted Form I-797A was irrelevant “to the issue that the employer’s application history shows that its applications for temporary certifications have shown dates of need in all 12 months of the year and not only for a specific peak load period.” The CO further determined that the submitted payroll reports entitled H2B Summary Report for
Mountain Run likewise “bear no relevance to the employer’s current case as they are for another company.”\(^5\) (AF-2, pp. 58-59)

p. On November 2, 2021, Employer timely filed separate appeals for review that included Employer’s appeal brief and supporting documentation. (AF-1, pp. 1-45; AF-2, pp. 1-49)

q. Employer’s appeals for both certification applications were consolidated, and both administrative files were received on November 18, 2021.

r. A Notice of Case Assignment was issued on November 18, 2021 advising the parties that the matter had been assigned to the undersigned and notified the CO of its right to file a brief within seven (7) business days pursuant to 20 C.F.R. § 655.61(f). The CO did not file a brief.

3. Applicable Law and Analysis.

a. \textit{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 \textit{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. \textit{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. \textit{See Clay Lowry Forestry}, 2010-TLN-00001, slip op. at 3 (Oct. 22, 2009); \textit{Hampton Inn}, 2010-TLN-00007, slip op. at 3-4 (Nov. 9, 2009); \textit{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

\(^5\) This is the same language used in the denial for H-400-21265-600115.
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 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. Legal Analysis. 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 temporary, peakload need. An employer seeking certification must establish that its need for labor is temporary, regardless of whether the underlying job is permanent or temporary. 20 CFR § 655.6(a). The employer’s 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 regulations. 20 CFR § 655.6(b).

To establish 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 a

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6 The other deficiencies had apparently been cured.
seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 CFR § 214.2(h)(6)(ii)(B)(3).

Employer asserts it has shown a peakload need of December through September for both worksites. The local, permanent labor force has to be supplemented with temporary laborers due to a labor shortage. This labor shortage necessitated Employer to transport permanent staff from one location to another to comply with its contractual obligations. For the Shawnee worksite, this labor shortage is created annually with the local labor pool taking tipped wage positions that come with the high season. Although Employer had originally requested certification for April through December, it reassessed its personnel needs, withdrew certification, and applied for December 2020 through September 2021.

The CO contends Employer’s certification history belies its argument that its peakload need is based on a seasonal demand. Employer had previously requested certification for April through December 2020 (which it returned as unused) and is now requesting certification for December 2021 through September 2022, and thus has shown a year round need.

Employer returned its unused certification for the period of April through December 2020 due to the global pandemic’s effect on its clients’ business operations. It would be legally insufficient to consider a withdrawn, unused certification as part of Employer’s certification history.

The CO also determined that “[i]t could not be established how that employer’s temporary need is based on its business cycle” but did not specify the grounds for such a determination. (AF-1 p. 54; AF-2 p. 59) The undersigned notes the CO requested certain documentation regarding Employer’s payroll reports and worksite occupancy rates, but she included little discussion about these submissions. Rather, the final determinations largely focus on the CO’s determination that Employer had demonstrated a year round need rather than a temporary, peakload need. Conversely, Employer provided the requested payroll records of its permanent employees with explanatory footnotes as justification.8 The undersigned concludes the information from Employer adequately explained to the CO that a recurring seasonal reduction of its available labor force necessitates temporary laborers.

As a result, the undersigned concludes the CO’s decision was arbitrary and capricious and factually or legally insufficient. Consequently, under either standard of review previously applied by the board in cases of a similar nature, the CO’s decision to deny Employer’s application was not a reasonable exercise of her discretion given the facts of this case. As such, the CO’s decision does not comply with the applicable regulations, and Employer established grounds supporting reversal of the decision.

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7 The CO mistakenly noted that the certifications referenced as returned were for Mountain Run and Shawnee as entities rather than the worksites for Employer’s certifications.
8 In its appeal, the employer explained that the submitted payroll documents and withdrawal requests were indeed for MasterCorp. The payroll records reflected permanent employees at the worksites and the requests for withdrawal included the ETA case numbers for each client, hence the document titles.
4. **Order.** The Certifying Officer’s decision in this matter is **REVERSED** and this matter is **REMANDED** for certification.

For the Board:

TRACY A. DALY  
Administrative Law Judge