This case arises from OHMYGOSHCOFFEE, LTD’s (“Employer”) request for review of the Certifying Officer’s (“CO”) November 4, 2021 Final Determination denying its 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 (DHS). See 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6);\(^1\) 20 C.F.R. § 655.6(b).\(^2\) Employers who seek to


\(^2\) 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
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”). A CO in the Office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. Following the CO’s denial of an application under 20 C.F.R. § 655.53, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.61(a).

**BACKGROUND**

On September, 20, 2021, the Department of Labor’s Employment and Training Administration (“ETA”) received an application for temporary labor certification from Employer requesting certification for one “gastronomic consultant with specialty in Columbian dishes” for the period of December 12, 2021 to June 12, 2022, under the SOC code of “Chefs and Head Cooks.” AF 353-370. Employer indicated that the nature of its temporary need was “peakload.” In regard to its statement of temporary need, and its request for labor certification for Juan Burgos, Employer stated:

Greetings from Carlos Ramirez, president and founder of the importer OHMYGOSHCOFFEE, I would like to state the reasons why we are requesting the approval of the labor certification to continue with the H2B visa process for Juan Burgos.

OHMYGOSHCOFFEE is a Colombian coffee importer which has more than twelve years’ experience importing the best and most exotic coffee of Colombian origin to the American consumer. Also, throughout time we have expanded our business model such as Romeo and Juliet Coffee, a project apart from commercializing coffees mentioned, highlights and conveys the best of Colombian culture and seeks to create a connection between American and Colombian culture.

Given the great response of our consumers has allowed us to grow and expand our commercial objectives with the opening of new locations, extend our product line and services, create job opportunities in both the United States and Colombia, and dignify the identity of Colombian culture and its coffee farmers and producers.

As such its necessary the presence of a Colombian gastronomic consultant along with an administrative projection which is why we decided on our necessity for a professional such as Juan Burgos whose skills in traditional and ancestral Colombian cuisine, expertise and professional profile are indispensable in our 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 provided 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.

3 References to the appeal file will be abbreviated with an “AF” followed by the page number.
team to face the upcoming challenges with the creation of menus and the expanding of new franchises.

Juan Burgos is a certified professional chef specialized in traditional and ancestral Colombian cuisine, with an administrative profile that is vital in the development of new menus and dishes, strategies on commercializing the dishes mentioned in a modern perception, as well as with the organization and leadership of existing and upcoming team members.

Also, his compression of the English language is proficient, he has been in New York City and other American cities, traveling and getting familiar with local customs which makes him the ideal bridge between our purpose and our customers.

Finally, we trust him because of the previous experiences we have had in the last few months working with him in Colombia. We highlight his dedication, honesty, leadership, adaptability, and his deep love for both cultures and his willing to grow our project and to contribute the best of traditional Colombian cuisine to the American market and its culture.

AF 358.

The CO issued a Notice of Deficiency (“NOD”) on September 29, 2021, listing six deficiencies in the Employer’s application. AF 344-352.

The CO noted the first deficiency as the Employer’s failure to “establish the job opportunity as temporary in nature.” 20 C.F.R. §§ 656.6(a) and (b). The CO explained that “an employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary.” AF 347. The CO noted that an employer’s need is considered temporary if it is justified to the CO as one of the following: (1) a one-time occurrence; (2) a seasonal need; (3) a peak load need; or (4) an intermittent need as defined by DHS (Department of Homeland Security) regulations. The CO explained that “[i]n order to establish a peakload need the employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, that it needs to temporarily supplement its permanent staff at the place of employment 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.”

The CO cited the Employer’s statement of temporary need and in particular Employer’s statement asserting that:

[T]he presence of a Columbian gastronomic consultant along with an administrative projections which is why we decided on our necessity for a professional such as Juan Burgos whose skills in traditional and ancestral Colombian cuisine, expertise and professional profile are indispensable in our
team to face the upcoming challenges with the creation of menus and the expanding of new franchises.

AF 347.

In light of this statement the CO determined that Employer did not sufficiently demonstrate how its need meets the regulatory standard nor did Employer explain what events cause the seasonal or short term demand that leads to its peakload need.

Accordingly, the CO requested that the Employer submit additional information and documentation including a statement describing Employer’s business history, activities, and schedule of operations throughout the year; an explanation regarding why the nature of the employer’s job opportunity and number of foreign workers reflect a temporary need and how the request meets one of the regulatory standards of one time occurrence, seasonal, peak load, or intermittent need. The CO also informed the Employer that it must submit supporting evidence and documentation that justifies the standard of temporary need and must include the following:

- Monthly invoices from the previous two calendar years, 2019 and 2020, clearly showing that work will be performed for each month during the requested period of need;
- Signed service contracts from customers for the previous two calendar years;
- 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, the total hours worked, and the total earnings received; and
- An explanation of the data in the submitted payroll records.

AF 348.

The second deficiency found by the CO was the Employer’s “[f]ailure to establish temporary need for the number of workers requested.” The CO noted that the regulations at 20 C.F.R. §§ 655.11(e)(3) and (4), provide that an employer must establish that the number of worker positions and period of need are justified, and that the request represents a bona fide job opportunity. The CO stated that the employer had not sufficiently demonstrated that the number of workers requested on the application is true and accurate and represents bona fide job opportunities. The CO stated that the Employer had not indicated how it determined that it needs one “chef and head cook” during the requested period of need, and that further explanation and documentation is required to establish the Employer’s need for one “chef and head cook.” Id.

The CO directed the Employer to submit further evidence and documentation including an explanation with supporting documentation for why the Employer is requesting one “chef and head cook” for New York, New York during the requested dates of need, including contracts, letters of intent, etc., that specify the number of workers and dates of need, as well as summarized monthly payroll reports for a minimum of one previous calendar year 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.” *Id.* The CO also specified that the documentation must be signed by the Employer attesting that the information being presented was compiled from the Employer’s actual accounting records or system. The CO also directed the Employer to provide an explanation of the data in the submitted payroll documentation, as well as other evidence and documentation that similarly serves to justify the number of workers requested. AF 348-349.

The third deficiency listed was the Employer’s failure to submit an acceptable job order pursuant to 20 C.F.R. §§655.16 and 655.18. AF 349-350. The CO cited the regulation at Section 655.16 which provides that the employer must submit the job order to the SWA (state workforce agency) serving the area of intended employment at the same time it submits the Application for Temporary Employment Certification, and also must submit a copy of the job order to the Chicago National Processing Center (“CNPC”). 20 C.F.R. §655.16. AF 349.

The CO stated that the Employer did not submit a copy of a job order with its application to the CNPC, and additionally the New York state SWA confirmed that the Employer had not placed a job order for the requested position. The CO also cited the required information that must be included in an acceptable job order pursuant to 20 C.F.R. §655.18. The CO informed the Employer that in order to comply with the regulation Employer must submit a job order that includes all of the required information to the CNPC and must also submit its job order to the SWA serving the area of intended employment. AF 349-350.

The CO also noted deficiencies numbered 4 through 6, pertaining to the Employer’s “[f]ailure to submit a complete and accurate ETA Form 9142,” in violation of 20 C.F.R. §655.15(a). AF 350-352. In this regard the CO noted errors in Employer’s application at the following application sections: 1) Section B.8 where Employer did not list its statement of temporary need but instead indicated it was attaching a letter; 2) Sections A and B regarding inconsistent statements of whether Employer is utilizing an attorney and Section B, Item 22 which Employer failed to initial; and 3) Section F.a., Item 11, where Employer mentioned the name of a pre-selected worker, by the name of Juan Burgos, which is not allowable. Employer was informed of changes it needed to make in order to correct the above noted deficiencies including removing all discussion about the pre-selected individual from ETA Form 9142. *Id.*

Employer submitted its response to the Notice of Deficiency on October 22, 2021, including multiple attachments. Employer provided a statement granting authorization to amend its application at section b.8 as well as other sections as needed. Employer’s attached documentation included 2019-2020 payroll reports, multiple tax documents, both Federal and the state of New York, and a copy of ETA Form 750. AF 179-340.

On November 4, 2021, the CO issued a Final Determination-Denial to the Employer, finding that five deficiencies remained. AF 164-176. In regard to the first deficiency, the CO acknowledged the information submitted by the Employer but determined that the information did not overcome the deficiency. In particular the CO noted certain information submitted pertaining to Juan Burgos as well as Employer’s explanation that it intended to expand its operations including “the opening of new Romeo and Juliet locations.” The CO noted that it appeared the Employer did not have the need for the requested position until it planned to open new locations. Also the CO determined that “the employer pre-identified a candidate, Juan
David Burgos Pantoja and thereby failed to establish that it regularly employs permanent workers as Gastronomic Consultants and its need to temporarily supplement its permanent staff due to a seasonal or short term demand.” In addition the CO pointed out that an employer is required to conduct recruitment to ensure that there are not qualified U.S. workers available for the position listed in the application before a candidate may be selected. The CO also determined that the Employer failed to establish that the temporary addition to its staff will not become part of the employer’s regular operation as required by the regulations. For these reasons the CO determined that Employer did not overcome the deficiency.

The CO also determined that the Employer failed to remedy the second deficiency regarding its failure to establish the temporary need for the number of workers requested. The CO noted that the documentation and explanation provided by the employer failed to establish that the number of workers being requested for certification is true and accurate and represents bona fide job opportunities. Specifically the CO determined that the payroll and financial information provided by the employer did not specify the number of workers and dates of need, was not separated for full-time permanent and temporary employment in the requested occupation, and was not signed by the employer, attesting that the information being presented was compiled from the Employer’s actual accounting records or system. Therefore the CO concluded the Employer did not overcome the deficiency.

The CO noted that Deficiency 3 regarding the requirement that an acceptable job order be submitted to the SWA, with a copy to the CNPC, still remained as Employer’s submitted documentation did not include a copy of an acceptable job order. AF 173-174. Employer also failed to cure Deficiencies 4 and 5 regarding a complete and accurate application (ETA Form 9142). The CO noted that the submitted documentation still showed Employer failed to sign Appendix B Section b and failed to initial item #22. The CO also determined that Employer failed to remove any reference to the preselected candidate, Juan Burgos, in ETA Form 9142 as the CO had requested in the Notice of Deficiency.

Accordingly, due to the five remaining deficiencies as set out above, the CO determined that Employer’s application was denied.

On November 16, 2021 Employer filed a request for Administrative Review and also included multiple documents, many of which had not been previously submitted to the CO. AF 1-162. Employer again asserted that it is attempting to expand its business and requested temporary labor certification under the H-2A program for a specific individual candidate by the name of Juan Burgos. Employer states:

The growth and expansion of our business has given rise to new employment needs that we must supply in the most efficient and professional way possible. In order to meet this need, we require the position of a new head chef with certified knowledge in Colombian gastronomy. The professional chef Mr. Juan David Burgos, thanks to his expertise in the area, fits perfectly with the cultural and gastronomic theme that look for our company, we understand that with the temporary hiring of Juan David Burgos, we will be adding a key element to meet the particular need that we have…
By Order issued on November 30, 2021, the CO and the Employer were given the opportunity to file briefs in support of their positions on or before December 9, 2021. Neither Employer nor the CO submitted briefs by the stated deadline.

**SCOPE OF REVIEW**

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the employer’s request for review, which may contain only 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). After considering this 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).

**STANDARD OF REVIEW**

Neither the Immigration and Nationality Act, nor the regulations applicable to H-2B temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO’s determination in H-2B temporary labor certification cases. *See Brook Ledge Inc., 2016 TLN 00033 at 5 (May 10, 2016); see also J and V Farms, LLC, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).*

**ISSUES**

Whether the CO properly denied the Employer’s temporary labor certification application due to:

1) Employer’s failure to meet its burden of establishing its temporary need for one “gastronomic consultant with specialty in Columbian dishes” for the period of December 12, 2021 to June 12, 2022 on the basis of a “peak load” standard of need;

2) Employer’s failure to meet its burden of establishing a bona fide need for the number of workers requested;

---

4Likewise, judicial review under the Administrative Procedure Act provides that an agency’s actions, findings and conclusions shall be set aside that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C § 706(2).
3) Employer’s failure to file and submit an acceptable job order as required by 20 C.F.R. §655.18; and

4) Employer’s failure to submit a complete and accurate ETA Form 9142 in violation of 20 C.F.R. §655.15(a).

**DISCUSSION**

In order to obtain temporary labor certification for foreign workers under the H-2B program the Employer is required to establish that its need for the requested workers is “temporary.” Temporary need is defined by the DHS regulation at 8 C.F.R. §214.2(h)(6)(ii). This regulation states:

(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.


The DHS regulation further states in regard to the 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 peakload need, or an intermittent need.


The Employer bears the burden of establishing why the job opportunity and number of workers being requested reflect a temporary need within the meaning of the H-2B program. 20 C.F.R. § 655.6(a) and (b). *See, e.g., Alter and Son General Engineering, 2013-TLN-3 (ALJ Nov. 9, 2012)* (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

The Employer is alleging that it has a temporary need for one “gastronomic consultant with specialty in Columbian dishes” for the period of December 12, 2021 to June 12, 2022. AF 353. To establish a peakload need according to the DHS regulation, the 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 seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.

After reviewing the Employer’s documentation submitted in response to the NOD, the CO determined that the Employer had not proven a peakload temporary need. Specifically, the CO cited the regulatory provision noted above which requires that the Employer “must establish that it regularly employs permanent workers to perform the services or labor.” 8 C.F.R. §214.2(h)(6)(ii)(B)(3). In particular the CO noted certain information submitted in the Employer’s response to the Notice of Deficiency, pertaining to the hiring of a specific individual, Juan Burgos, as well as Employer’s explanation that it intended to expand its operations including “the opening of new Romeo and Juliet locations.” The CO noted that it appeared the Employer did not have the need for the requested position until it planned to open new locations. Also the CO determined that “the employer pre-identified a candidate, Juan David Burgos Pantoja and thereby failed to establish that it regularly employs permanent workers as Gastronomic Consultants and its need to temporarily supplement its permanent staff due to a seasonal or short term demand.” In addition the CO pointed out that an employer is required to conduct recruitment to ensure that there are not qualified U.S. workers available for the position listed in the application before a candidate may be selected. The CO also determined that the Employer failed to establish that the temporary addition to its staff will not become part of the employer’s regular operation as required by the regulations.

The record supports the CO’s determination in regard to Employer’s failure to prove its temporary peakload need in this case. None of the records submitted by the Employer establish that it “regularly employs permanent” workers in the requested position and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short term demand. The payroll records submitted by the Employer were not broken down by the specific position for which the Employer is seeking certification in this case, that is, “gastronomic consultant with specialty in Columbian dishes” under the SOC code of “Chefs and Head Cooks.” Therefore Employer did not establish that it has permanent staff in this position. The CO also reasonably determined that the Employer’s explanation supports that it is looking to hire on the basis of an expansion of its business and not on the basis that it is attempting to supplement its permanent staff in the requested position on the basis of an established temporary “peakload need.” Masse Contracting, 2015-TLN-00026 (April 2, 2015) (to utilize the peak load standard, the employer must have permanent workers in the occupation); D&R Supply, 2013-TLN-00029 (Feb. 22, 2013) (Employer failed to establish its peakload need when it did not address whether it had previously employed permanent workers in the position of stock clerk, the position for which it requested temporary H-2B workers on a peakload basis). See, also Alter and Son General Engineering, 2013-TLN-3 (ALJ Nov. 9, 2012) (affirming denial where the Employer did not provide an explanation regarding how its request fit within one of the regulatory standards of temporary need).

The CO also reasonably determined that Employer impermissibly pre-identified an individual it wished to hire under the H-2B program. The preselection of an individual to be hired is inconsistent with the H-2B program requirement that the employer conduct required recruitment of U.S. workers in the open position and can only reject qualified U.S. workers for
lawful job related reasons. See 20 C.F.R. §655.40. In pre-identifying a specific individual the Employer appears to misunderstand this requirement of the H-2B program.

The CO’s determination that Employer failed to cure the second deficiency regarding Employer’s failure “to establish a bona fide need for the number of workers requested” is also supported by the record. The CO determined that “[t]he payroll and financial information provided by the employer [ ] does not specify the number of workers and dates of need, is not separated for full-time permanent and temporary employment in the requested occupation, and is not signed by the employer, as requested,” in the NOD. AF 171. Consistent with the CO’s statement, the undersigned finds that the Employer has failed to provide the documentation and explanation requested by the CO, which would have allowed the CO to determine whether the request for one “gastronomic consultant with specialty in Columbian dishes” for the period of December 12, 2021 to June 12, 2022, under the SOC code of “Chefs and Head Cooks represents a “bona fide job opportunity” as required by 20 C.F.R.§ 655.11(e) (3) and (4). As noted by the CO, the payroll information was not provided for the specific position at issue, as directed by the CO. Also, Employer provided additional documents but failed to explain how these documents support its need for one temporary position under the stated job title. Accordingly, Employer has failed to establish its bona fide need for the number of workers requested for the stated period of need. See Roadrunner Drywall Corp. 2017-TLN-00035 (May 4, 2017) (affirming denial where the employer’s temporary and permanent employee payroll data did not support its claimed number of workers or period of need). See also North Country Wreaths, 2012-TLN-00043 (Aug. 9 2012), slip op. at 6 (“it is the Employer’s burden to prove that the requested positions represent bona fide job opportunities, and the CO is not required to take the Employer at its word”); and Empire Roofing, 2016-TLN-00065 (Sept. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of document-on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers”).

Employer also failed to cure the third deficiency noted by the CO in the Final Determination regarding Employer’s failure to submit an acceptable job order. In the Notice of Deficiency the CO noted that pursuant to 20 C.F.R. §§655.16 and 655.18 an Employer must submit a job order to the SWA serving the area of intended employment at the same time it submits its Application for Temporary Employment Certification, and must also submit a copy of the job order to the CNPC. The record supports the CO’s finding that the Employer did not submit a copy of a job order with its application. Further, the CO confirmed that the New York SWA did not receive a job order for the requested position.

Pursuant to the program regulations, the job order is used by the SWA to advertise the job opportunity to U.S. workers. The undersigned finds that the CO correctly determined in the Final Determination that Employer failed to submit a job order to the New York state SWA and also failed to submit a copy of the job order with its application as required by the regulations. See 20 C.F.R. §§655.16 and 655.18. Therefore, the CO’s determination that Employer failed to submit an acceptable job order is also affirmed.
In addition to the above noted deficiencies, the CO’s Final Determination also noted two additional deficiencies in the submission of a complete and accurate ETA Form 9142. These deficiencies pertain to Employer’s failure to initial a particular section of its application and also Employer’s failure to remove the identification of a preselected worker in its application as directed by the CO in the Notice of Deficiency. A review of the record supports the CO’s determination that the Employer did not correct the stated errors in its October 22, 2021 response to the NOD, or in its revised application. Therefore, the CO’s determination that these deficiencies in the application were not cured is also affirmed.

For the reasons stated above, Employer has failed to meet its burden of establishing its temporary peakload need under the H-2B regulations for the requested worker during the stated period of need, and has also failed to prove a bona fide need for the number of workers requested. In addition, Employer has failed to comply with program regulations regarding the requirement of submitting an acceptable job order to the SWA serving the area of intended employment, as well as additional requirements pertaining to the filing of its application for temporary labor certification (Form 9142) as noted in the CO’s Final Determination.

CONCLUSION

Employer has failed to meet its burden of establishing its temporary peakload need for one “gastronomic consultant with specialty in Columbian dishes” for the period of December 12, 2021 to June 12, 2022, under the SOC code of “Chefs and Head Cooks.” Accordingly, the CO’s denial of Employer’s application for temporary labor certification is AFFIRMED.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge