DECISION AND ORDER AFFIRMING DENIALS OF CERTIFICATIONS

These consolidated cases arise 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.

Eagles Beachwear and Swimwear of Myrtle Beach, Inc. d/b/a Eagles Beachwear, Eagles Surf Shop, Inc., Bargain Beachwear Corporation, and Pipeline Surf Shop, Inc. (collectively, “Employer”) seeks administrative review of the Certifying Officer’s (“CO”) denials of Employer’s applications for temporary employment certification. For the reasons that follow, the CO’s denials of the applications are affirmed.

STATEMENT OF THE CASES

On December 22, 2021, Employer filed an application for temporary employment certification, ETA Case No. H-400-21357-784091 / BALCA Case No. 2022-TLN-00040 ("Application 1"). The application requested certification for seven cashiers, from March 7, 2022 to October 31, 2022, and contained: ETA Form 9142B; Appendix C; Appendix D; Signed Appendix B; Signed payroll attestation; Statement of Temporary Need; 2019 –
On December 23, 2021, Employer filed a second application for temporary employment certification, ETA Case No. H-400-21357-784202 / BALCA Case No. 2022-TLN-00036 (“Application 2”). The application requested certification for 120 cashiers, from March 8, 2022 to October 31, 2022, and contained: ETA Form 9142B; Appendix A; Appendix C; Appendix D; Signed Appendix B; DHS Form G-28; Signed payroll attestation; Statement of Temporary Need; List of additional worksite locations; 2019 – 2021 quarterly number of workers report; University academic calendars; SWA Job Order; Recruiter Agreement; and Prevailing Wage Determination P-400-21243-556210.1

In addendums to Applications 1 and 2 (“Statement of Temporary Need”),3 Employer stated, in part:

Beginning usually in mid-March and lasting usually through the end of October, the beach communities of the South Carolina and southern North Carolina coasts receive massive influxes of vacation tourists, creating a large need for cashiers at Employers’ retail stores serving the area. Though most Employers’ stores remain open year-round, they typically operate at reduced hours and with much fewer staff during the months of November through mid-March given the greatly reduced demand during the area’s ‘off season.’ Further, during the area’s ‘peak-load’ season, the local U.S. workforce has a large number employment options among many other seasonal employers. Combined with the increasing prevalence of temporary ‘gig’ work opportunities, like Uber driving or DoorDash delivery, and entirely remote customer-service work opportunities for e-commerce retailers like Amazon, etc., which allow employees to work full-time from home, it has become extremely difficult for the Employers to recruit and retain the cashiers they need to operate during the spring and summer ‘peak load’ season.4

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As demonstrated in the enclosed payroll summary charts, even with their 2021 H-2B certification, Employer was not able to employ as many Cashiers in 2021 as they had in 2019. Having sufficient numbers of competent and reliable cashiers to assist customers and maximize sales during their entire ‘peak load’ season is critical for the Employers’ business. In 2021, the Employer observed greater-than-expected numbers of tourist patrons

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1 Appeal File 1 ("AF 1") at 83-136.
2 Appeal File 2 ("AF 2") at 65-113.
3 AF 1 at 88, 106-07; AF 2 at 70, 84-86.
4 AF 1 at 107; AF 2 at 85.
earlier in their traditional ‘peak load’ season, beginning around mid-March. Further, as most major colleges and universities in North and South Carolina re-open for in-person, on-campus classes, Employers expect college students to again flock to Carolinas' beaches for ‘spring break.’ For example, the University of North Carolina at Charlotte (‘UNC Charlotte’) and the University of South Carolina at Columbia (‘USC Columbia’) will both let out for Spring Break from March 7-11, 2022, The University of North Carolina at Chapel Hill (‘UNC Chapel Hill’) and North Carolina State University (‘NC State’) will let out for Spring Break March 14-18, 2022, and Clemson University lets out March 21-25. Therefore, the month of March is expected to be a large part of the Employers’ ‘peak load’ season in 2022.

The Employers employ U.S. workers in its Cashiers positions on a permanent, year-round basis, but their number of year-round employees is insufficient to meet the demands of their ‘peak-load’ season. As previously noted, hiring employees during the peak-load season has become extremely challenging. And hiring an adequate number of temporary workers for the ‘peak-load’ season exclusively from the local U.S. workforce has become virtually impossible.5

Application 1

On January 4, 2022, the CO issued a Notice of Deficiency (“NOD 1”), identifying four deficiencies.6 The NOD 1 stated, in part, that Employer failed to establish the job opportunity as temporary in nature (“Deficiency 1”).7 Specifically, the NOD 1 cited 20 C.F.R. §§ 655.6(a)-(b), and explained:

The employer did not submit sufficient information in its Application for Temporary Employment Certification to establish its requested period of intended employment.

The employer did not include adequate attestations to justify the change in dates of need from the employer’s prior certification, H-400-21004-992378, which requested four Cashiers from April 1, 2021 through November 30, 2021. The current application requests seven Cashiers from March 7, 2022 through October 31, 2022. It is unclear why the employer’s dates of need have changed from its previous certification.

To support the employer’s request it has submitted supporting documentation including printable calendars for the University of North Carolina and the University of South Carolina, Number of workers charts

5 AF 1 at 107; AF 2 at 86.
6 AF 1 at 74-82.
7 AF 1 at 78-79.
and Wages and Compensation charts per quarter for years 2020 and 2021. The quarterly charts for 2020 and 2021 support [sic] a peak beginning in April and it did not support a peakload need occurring in March, and the employer has not historically had a peak in work during the month of March. Based on the documentation submitted, it is unclear how the employer determined its dates of need requested.

* * *

Although the employer indicates that it expects to experience a high demand of tourism in the area of intended employment during the dates of need requested, it is unclear if tourism decreases during the attested nonpeak period of November 1st through March 6th. The employer has not established the cause of its peak during its requested period of need and the causes of its nonpeak period. It is unclear why the employer’s dates of need have changed from its previous [sic]. Further explanation and documentation is needed to support the employer’s peakload need from March 7, 2022 to October 31, 2022.

The NOD 1 instructed Employer to submit the following information and documentation:

1. A statement describing the employer’s business history and activities (i.e. primary products or services);
2. Schedule of operations through the year;
3. Summarized monthly payroll reports for three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Cashier, the total number of workers or staff employed, total hours worked, and total earnings received;
4. Summarized monthly gross sales reports for a minimum of two previous calendar years of the employer’s worksite location. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or systems;
5. An explanation of the data in submitted payroll documentation; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

On January 17, 2022, Employer responded to the NOD 1 (“Response 1”), submitting a Response Letter; 2018 – 2020 North Carolina Regional Visitor Profile; 2018 – 2021 payroll charts; 2018 – 2021 Form 941 Quarterly Tax Returns; Excerpts from

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8 AF 1 at 78.
9 AF 1 at 79 (emphasis in original).
In addressing Deficiency 1, Employer stated in part:

[I]n 2021 the Employers observed greater-than-expected numbers of tourist patrons earlier in their traditional ‘peak load’ season — ‘peak load’ demand began around mid-March rather than April, as expected. **The Employer expects its peak-load season in 2022 to begin in March through October, a change from its 2021 H-2B application (see 2021 case no.: H-400-21004-992378).**

Further, as provided in the enclosed excerpts from the Economic Development Partnership of North Carolina (EDPNS)’s, Visit NC Regional Visitor Profile reports from 2018-2020, when compared to the 2020 COVID-19 “pandemic year” of 2020, the most recent ‘pre-pandemic’ years of 2018 and 2019 saw the **spring as the second busiest tourism season on the North Carolina coast, behind only the summer.** The year 2020—the most recent year for reference in the Employer’s 2021 H-2B application—saw lower than usual rates of tourist travel in the spring months due to the COVID-19 pandemic. The enclosed 2018 and 2019 regional tourism data provide a more accurate picture of the seasonal trends for the region and demonstrate that tourists begin visiting the area in the spring, including March.

Further, the Employer’s quarterly payroll records demonstrate that during the ‘pre-pandemic’ years of 2018 and 2019, the Employer employed on average 5 more workers during the first quarter, including the month of March, than during the first quarter of the ‘pandemic years’ of 2020 and 2021. Thus, the Employer’s own payroll records indicate that Employer’s traditional increase in ‘peak load’ hiring has in fact begun earlier than April given historic, pre-pandemic trends. The Employer now expects 2022 to follow historic pre-pandemic trends. The enclosed Form 941 Quarterly Federal Tax Returns for the first quarters of 2018-2021 demonstrate that such labor needs do typically begin to increase in March of each year (note the changes in tax liabilities in ‘Month 3,’ i.e., March, on schedule B (Form 941) each year).

Lastly, the Employer anticipates that the 2022 ‘vacation rush’ beginning in March is going to be even larger due to the ongoing COVID-19 pandemic. As reported in the **Wilmington Star-News**, seasonal employers in the Employer’s area saw and ‘early surge of tourists’ in 2021, which, though welcome, created new challenges given region-wide ‘staffing concerns’ that impacted ‘seasonal businesses’ the most ‘because they can’t guarantee work year-round in Topsail.’**

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10 AF 1 at 23-73.
11 AF 1 at 24-25 (citations omitted; emphasis in original).
On January 27, 2022, the CO issued a Final Determination denying Employer’s Application 1 (“Denial 1”). With respect to Deficiency 1, the CO found Employer’s response to the NOD 1 failed to establish that the job opportunity was temporary in nature, stating in part:

The employer did not overcome the deficiency. The employer explains that its peakload need is a result of ‘recent observations, historical experience, and projected tourism trends for the North Carolina coast for the 2022 tourism season’. However, the employer did not justify with supporting documentation, how it determined it change in dates of need. …

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[T]he employer refers back to the University Calendars and scheduled spring break. The employer also included excerpts from ‘Visit NC Regional Visitor profile’ reports for years 2018-2020 and an excerpts from Wilmington Star-News titled, ‘More Visitors, Less Staff: Topsail, Surf City Businesses Balance Concerns with Optimism.’ The excerpts broadly discussed surges in tourism. The employer further states that the enclosed 2018 and 2019 regional tourism data provides ‘a more accurate picture of the seasonal trends for the region.’ However this data would have been present during its previous filing and does not provide an explanation of what caused the employer’s shift in requested dates of need. The employer’s NOD response did not adequately established the cause in its shift from its previously established peak-load dates of need. Additionally, it is difficult to assess how the submitted report and articles have a direct correlation to the employer’s change in dates of need without the proper supporting payroll data.

In its response, the employer provided summarized quarterly payroll data for 2018-2021. However, the Additional Information Requested section of the NOD instructed the employer to provide, summarized monthly payroll reports for three previous calendar years to identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Cashier, the total number of workers or staff employed, total hours worked, and total earnings received. The information submitted was not summarized in such a way that clearly supported the employer’s change in dates of need requested. The payroll documentation was broken down quarterly, instead of the requested monthly payroll. It is therefore unclear how the employer determined its peak starts in March.

The employer also submitted quarterly tax returns for 2018-2021. However, quarterly tax returns represent the employer’s entire business and all of its workers. It does not contain monthly hours worked by a single occupation, in this case Cashiers. Further, the documentation was incomplete, only

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12 AF 1 at 14-21.
showing the first quarter of each year. Although the employer attempts to illustrate that the month of March initiates the uptick in its “tax liabilities,” it is not a clear indicative of its need for cashiers in March because quarterly tax returns are not specific to the occupation. Therefore, these documents were not used to assess the potential dates of need requested by the employer.\(^{13}\)

On February 10, 2022, Employer filed with the Board of Alien Labor Certification Appeals (“Board”) a request for administrative review of Denial 1 ("Request 1").\(^{14}\) In its Request 1, Employer argues:

As explained in the initial submission in this case, the Employer attributes the earlier start to the “peak load” season to college-student “spring breakers.” Most major colleges and universities in North and South Carolina have re-opened for in-person, on-campus classes, and the Employer anticipates college students to again flock to Carolinas' beaches for “spring break.” For example, the University of North Carolina at Charlotte (“UNC Charlotte”) and the University of South Carolina at Columbia (“USC Columbia”) will both let out for Spring Break from March 7-11, 2022, The University of North Carolina at Chapel Hill (“UNC Chapel Hill”) and North Carolina State University (“NC State”) will let out for Spring Break March 14-18, 2022, and Clemson University lets out March 21-25, 2022. Therefore, the month of March is expected to be a large part of the Employers’ “peak load” season in 2022 and the surge of vacationers requires an increased number of workers in March rather than waiting until April.

Further, as provided in the enclosed excerpts, also included in the Employer’s Notice of Deficiency Response dated January 18, 2022, from the Economic Development Partnership of North Carolina (EDPNC)’s, Visit NC Regional Visitor Profile reports from 2018-2020, when compared to the 2020 COVID-19 ‘pandemic year’, the most recent ‘pre-pandemic’ years of 2018 and 2019 saw the spring as the second busiest tourism season on the North Carolina coast, behind only the summer. The year 2020—the most recent year for reference in the Employer’s 2021 H-2B application—saw lower than usual rates of tourist travel in the spring months due to the uncertainty surrounding travel during the beginning of the COVID-19 pandemic. The pandemic year of 2020 was an even further anomaly as the traditional spring break rush never occurred because universities adopted a more hybrid model of learning allowing students to return to their homes instead of the traditional ‘in-person’ model of study. The enclosed 2018 and 2019 regional tourism data provide a mor[e] accurate picture of the seasonal trends for the region and demonstrate that tourists

\(^{13}\) AF 1 at 20-21 (emphasis in original).

\(^{14}\) AF 1 at 1-13.
begin visiting the area in the spring, including March. If the Employer cannot secure the labor it needs during its new peak-load period in 2021-2022, store profits could take a noticeable decline.

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Furthermore, the CO failed to consider that the Employer ‘justified’ their request for an earlier start date based on payroll data that has similarly been submitted in prior H-2B approvals. The CO seems to be holding the Employer to a higher standard other than preponderance of the evidence for “justification”. The Employers requested period of employment is justified. The beginning years of COVID-19 had a severe impact on the ability to vacation translated to lower numbers of vacationers, now more than ever people want to escape their homes and spend time outside on the beaches of North Carolina.

The Employer, through undersigned counsel, acknowledges that its recent history of payroll records do not format the data by month or by position type (temporary versus full-time permanent). ... [T]he Employer does not maintain historical payroll data in this precise format. ... During the time period in question, the Employer did not identify or “code” temporary workers separately from permanent, year-round workers and did not distinguish “Cashiers” from other position categories, though the near entirety of its workforce would properly be classified as “Cashiers.” The evidence provided by the Employer constitutes a good faith attempt to provide alternative supporting documentation. ... The Employer was certified for workers in 2021 based on the same type of payroll data presented this year. As asserted previously, the Employer is simply trying to return to its previous employment levels of pre-pandemic years. If the Employer cannot secure the labor it needs during its peak-load period in 2021-2022, store profits could take a noticeable decline.15

15 AF 1 at 4-5 (citations omitted; emphasis in original). Employer also takes issue with the CO’s statement that “[a]lthough the employer indicates that it expects to experience a high demand of tourism in the area of intended employment during the dates of need requested, it is unclear if tourism decreases during the attested nonpeak period of November 1st through March 6th.” AF 1 at 4. However, the CO made that statement in the NOD 1 and not the “Denial Discussion” contained in the Final Determination. See AF 1 at 18-21.
Application 2

On January 3, 2022, the CO issued a Notice of Deficiency in Application 2, identifying five deficiencies (“NOD 2”). The NOD 2 stated, in part, that Employer failed to justify its requested increase in workers (“Deficiency 2”). Specifically, the NOD 2 cited 20 C.F.R. §§ 655.11(e)(3)-(4), and explained:

In its current application, H-400-21357-784202, the joint employer’s [sic] are seeking certification for 120 Cashiers from March 8, 2022 through October 31, 2022. The joint employers previously received certification for 40 Cashiers from April 1, 2021 to November 30, 2021 in its previously submitted application, H-400-21004-992361. The joint employers are therefore requesting an increase of 80 workers in the total number of workers requested.

The joint employer’s [sic] did not sufficiently indicate how it determined that it needs 80 additional workers during the requested period of need. Further explanation and documentation is required in order to establish the employer’s need for a total of 120 workers.

The NOD 2 instructed Employer to submit the following information and documentation:

1. An explanation with supporting documentation of why the employer is requesting 120 Cashiers for Myrtle Beach, SC during the dates of need requested. The explanation must include supporting documentation concerning why the employer is requesting an additional 80 workers for the same worksite;
2. If applicable, documentation supporting the employer’s need for 120 Cashiers such as contracts, letters of intent, etc. that specify the number of workers and dates of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years for each joint employer that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation (Cashiers), the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by each joint employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
4. An explanation of the data in submitted payroll documentation; and

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16 AF 2 at 55-64.
17 AF 2 at 59-60.
18 AF 2 at 59.
5. Other evidence and documentation that similarly serves to justify the number of workers requested, if any. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the number of workers being requested for certification.19

On January 17, 2022, Employer responded to the NOD 2 (“Response 2”), submitting a Response Letter; Form ETA 9142, Sections C and D for joint employers; 2018 – 2021 payroll documentation; Amended Job Order; and Amended List of Additional Worksite Locations.20 In addressing Deficiency 2, Employer stated in part:

The enclosed Combined Summarized Payroll Data for 2018-2021 show that the average number of workers during the Employer’s peak-load seasons of need during the recent COVID-19 “pandemic years” of 2020-2021 was 263 workers whereas the average number of workers for “pre-pandemic years” of 2018-2019 was 450 workers. Thus, the difference between the Employer’s pre-pandemic peak-load periods in 2018 and 2019—in which the Employer considers itself to have been fully staffed—vs. the pandemic years of 2020 and 2021, is an average deficit of 187 workers. In other words, the employer has experienced persistent labor shortages of approximately 187 workers in both 2020 and 2021. So, the Employer is now requesting 120 H-2B foreign workers in an attempt to return to the adequate staffing levels of 2018-2019 (pre-pandemic years).

As demonstrated in the enclosed payroll summary charts, the Employer has struggled with persistent deficiencies in labor supply. In 2018 and 2019 (pre-COVID-19) the Employer operated with much higher numbers of employees. Due to ongoing labor shortages related to COVID-19, the Employer has not been able to return to the same levels of workers, even with the H-2B foreign worker program it began in 2021.21

On January 17, 2022, the CO issued a Final Determination denying Employer’s Application 2 (“Denial 2”).22 With respect to Deficiency 2, the CO found Employer’s response to the NOD 2 failed to justify its requested increase in workers, stating in part:

19 AF 2 at 60.
20 AF 2 at 24-54.
21 AF 2 at 25-26 (citations omitted; emphasis in original).
22 AF 2 at 16-23.
In response to the NOD, the employer … provided Number of Workers per Quarter and Wages and Compensation for Workers per Quarter for calendar years 2018-2021 for EBB Corp. and for each joint employer, Eagles Beachwear and Swimwear of Myrtle Beach, Inc., Eagles Surf Shop, Inc., Bargain Beachwear Corporation, and Pipeline Surf Shop, Inc. The employer’s explanation and documentation of its temporary need did not overcome the deficiency.

The Additional Information Requested section of the NOD instructed the employer to provide, ‘summarized monthly payroll reports for a minimum of two previous calendar years for each joint employer that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation (Cashiers), the total number of workers or staff employed, total hours worked, and total earnings received’ for each joint employer. However, the payroll documentation provided in the NOD response is not summarized on a monthly basis, separated for full time permanent and temporary employment and does not indicate it is specific to the requested occupation, Cashiers. Additionally, the payroll reports did not all specify the total hours worked by permanent and temporary Cashiers. Therefore, the payroll information was not submitted as requested in its NOD.

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It is unclear how the employer determined the average number of workers needed during its peak season, March-October, when the documentation submitted is based on quarterly data categorized from January-March; April-June; July-September; and October-December. Furthermore, it is unclear from the documentation provided whether the number of workers needed during the employer’s peak season were permanent or temporary or for the Cashier job opportunity.

In addition, the employer asserts that it calculated the number of workers requested by comparing the average number of workers needed the during its peak season in the ‘prepandemic’ years of 2018-2019 to that of the number of workers need in the ‘pandemic’ years 2020 – 2021 which were lower due to a labor shortage. The employer is reminded that a labor shortage is not sufficient alone to support a temporary need. The employer’s documentation does not support a temporary peakload need for 120 Cashiers from March 8, 2022 through October 31, 2022.23

On February 9, 2022, Employer filed with the Board a request for administrative review of Denial 2 ("Request 2").24 In its Request 2, Employer argues:

23 AF 2 at 13-14.
24 AF 2 at 1-15.
In denying the Employer’s application, the CO failed to consider the Employer’s explanation that, given the new COVID-era conditions affecting labor availability, Employer has experienced severe labor shortages during the precise times when they need it most—during the spring and summer “vacation influx,” peak-load months. Whereas Employer’s domestic U.S. labor force has been mostly capable of meeting demands in pre-pandemic years (2018-2019), the charts and graphs provided by the Employers clearly demonstrate that 120 additional workers needed to put the Employers back to pre-pandemic employment levels.

The summary payroll charts demonstrate that the Employer has experienced a deficiency of an average of 187 workers in 2020 and 2021 compared to 2018 and 2019. Thus, the Employer’s request for 120 workers is clearly justified.

The Employer also notes that in 2021 only 40 workers (ETA case no.: H-400-21004-992361) were requested as the Employer were unsure if beach vacations could and would be taken. Thankfully, in 2021 the Employer’s had their busiest and most profitable year since the pandemic hit. The Employers were conservative in their 2021 requested number of workers to ensure they could properly employ every worker requested and are justified in their request for an additional 80 workers in 2022. Thus, the Employer is attempting to re-establish pre-pandemic employment levels as the rise in vacationers continues to grow.

Given the naturally occurring seasonal demand for Employer’s products in their stores in spring and summer months, when consumers are most likely to take beach vacations, Employer needs additional temporary workers for the increase in store foot traffic. Due to COVID-19, the beach was a highly sought-after vacation destination. The Employer experience high visitation levels and wishes to staff their stores to the same capacity as they were able to in 2018 and 2019.

When relying exclusively on available domestic labor supplies, the Employer’s employment rates are now suddenly lower than needed during its peak-load months given the new COVID-19 labor supply. So the Employer is now looking to the foreign labor market to meet its seasonal, peak-load labor need.

The Employer, through undersigned counsel, acknowledges that its recent history of payroll records do not format the data by month or by position type (temporary versus full-time permanent). The Employer does not maintain historical payroll data in this precise format. During the time period in question, the Employer did not identify or “code” temporary workers separately from permanent, year-round workers and did not distinguish “Cashiers” from other position categories, though the near
entirety of its workforce would properly be classified as “Cashiers.” The evidence provided by the Employer constitutes a good faith attempt to provide alternative supporting documentation. … The Employer was certified for workers in 2021 based on the same type of payroll data presented this year. As asserted previously, the Employer is simply trying to return to its previous employment levels of pre-pandemic years. If the Employer cannot secure the labor it needs during its peak-load period in 2021-2022, store profits could take a noticeable decline.

Furthermore, the CO failed to consider that the Employer “justified” their request for 120 workers based on payroll data that has similarly been submitted in prior H-2B approvals. The CO seems to be holding the Employer to a higher standard for “justification” than the established “preponderance of the evidence” standard. The Employer’s requested number of workers is justified based on the quarterly payroll showing a decline in workers in 2020 and 2021 compared to the same quarterly periods from 2018 and 2019. It is clear that COVID-19 had a severe impact on the ability to hire US workers which translated to lower numbers of workers shown in payroll data from 2020 and 2021.25

On February 14 and 16, 2022, these cases were assigned to the undersigned. On February 17, 2022, the CO filed the appeal files. Counsel for the CO did not file a brief in support of the CO’s denials.26

**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).27 The standard of review is arbitrary and capricious,28 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.”29

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25 AF 2 at 6-7 (citations omitted; emphasis in original).
26 See 20 C.F.R. § 655.61.
27 Id.
29 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).
DISCUSSION

An employer bears the burden of demonstrating “that its need for non-agricultural services or labor is temporary.”\(^{30}\) 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.”\(^{31}\) 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.

(3) Peakload need. The petitioner 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.\(^{32}\)

Here, the CO’s determination that Employer failed to meet its burden of establishing a peakload temporary need was not arbitrary and capricious. In both Application 1 and Application 2, Employer submitted summaries of the “Number of Workers per Quarter” and the “Wages and Compensation for Workers per Quarter” for the years 2019 to 2021.\(^{33}\) In the NOD 1 and NOD 2, the CO specifically requested summarized monthly payroll reports that identify, for each month and separately for full-time permanent and temporary employment of cashiers, the total number of workers or staff employed, total hours worked, and total earnings received.\(^{34}\) Rather than submitting the requested documentation, or making any attempt to provide additional detail,


\(^{31}\) 20 C.F.R. § 655.6(b).

\(^{32}\) 8 C.F.R. § 214.2(h)(6)(ii).

\(^{33}\) AF 1 at 109; AF 2 at 89-92.

\(^{34}\) AF 1 at 79; AF 2 at 60.
Employer submitted the same quarterly summaries that it submitted with its applications, with the only difference being the addition of 2018 summaries. Employer concedes that it failed to provide the payroll information requested by the CO, explaining that it does not maintain payroll records in the form or format the CO requested, and it neither “codes” temporary workers separately from permanent workers nor does it distinguish “cashiers” from other position categories. While Employer may not maintain such records in their normal course of business, it makes no representation that it could not have created the records, or provided some other form of supporting responsive documentation, in an effort to comply with the NODs. Employer instead appears to rely on the fact that it “was certified for workers in 2021 based on the same type of payroll data presented” in these applications. But the NODs clearly put the Employer on notice that its quarterly summaries were insufficient. The burden is on Employer “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.” The CO determined Employer failed to meet that burden, explaining, in part, that: (1) the quarterly summaries submitted by Employer did not allow the CO to properly assess how the “Visit NC Regional Visitor profile” reports and excerpts from Wilmington Star-News have a direct correlation to Employer’s change in dates of need; (2) it was unclear how Employer determined the average number of workers needed during its peak season, March-October, when the documentation submitted is based on quarterly data categorized from January-March; April-June; July-September; and October-December; and (3) it was unclear from the quarterly summaries whether the number of workers needed during the employer’s peak season were permanent or temporary for the cashier job opportunity. These explanations are satisfactory and provide a rational connection between the evidence of record, the requested dates of need and number of workers, and the CO's ultimate finding.

35 AF 1 at 46-47; AF 2 at 37-46.
36 AF 1 at 5; AF 2 at 5, 7.
37 AF 1 at 5; AF 2 at 7.
39 AF 1 at 20-21; AF 2 at 13-14.
40 See Three Seasons Landscape, 2016-TLN-00045. See also 20 C.F.R. § 655.32(a) (“The employer’s failure to comply with a Notice of Deficiency, including … not providing all required documentation, will result in a denial of the Application for Temporary Employment Certification.”); Produce Online, LLC, 2020-TLN-00070 (Sept. 23, 2020) (“The Employer was instructed by the CO to submit summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately, full time permanent and temporary employment in the requested occupation Food Processors; as well as the total number of workers or staff employed, the total hours worked, and the total earnings received. The Employer only submitted a listing of employee payroll information that did not address all of the CO’s deficiency issues. While the Employer has stated that, as a new company, it is not able to provide two years of payroll summaries, it failed to submit the additional documentation requested by the CO. Therefore, the Employer’s payroll documentation, submitted in response to the NOD, is insufficient to establish a temporary need for 12 workers during the requested period of need.”); Alcan Management, LLC, 2021-TLN-00068 (Oct. 7, 2021) (The “CO observed that the NOD specifically requested summarized monthly payroll reports for a minimum of one previous calendar year that identified ‘for each month and separately
Accordingly, upon consideration of Employer’s requests for administrative review, the appeal files, the Act, and relevant case law, I find that the CO did not act in an arbitrary or capricious manner in denying Employer’s applications.

ORDER

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

For the Board:

THEODORE W. ANNOS
Administrative Law Judge
Washington, DC