DECISION AND ORDER REVERSING THE CERTIFYING OFFICER’S DENIAL OF TEMPORARY LABOR CERTIFICATION

On October 31, 2016, Mammoser Farms, Inc. ("Employer") filed a request for a de novo hearing in regard to the Certifying Officer’s October 27, 2016 Denial of Employer’s application for temporary labor certification in the above-captioned H-2A temporary alien labor certification matter, arising under the Immigration and Nationality Act, as amended, and the implementing regulations promulgated by the United States Department of Labor. 8 U.S.C. §1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B. This matter was assigned to Administrative Law Judge Richard A. Morgan for de novo hearing and decision.

The Administrative File was received from the Certifying Officer on November 3, 2016. A telephone conference call with Employer’s Counsel and the Solicitor was held on November 4, 2016, in regard to the scheduling of this matter for hearing. At that time Employer waived its right to a formal hearing within five business days, and the parties requested a decision on the record following the Employer’s submission of certain additional documentation, agreed upon by the parties.1 By Order dated November 8, 2016, the undersigned granted the

1 The parties may move for a decision on the record under 29 C.F.R. §18.70(d).
request for a decision on the record and provided the parties the opportunity to submit additional evidence by November 15, 2016 and closing briefs by November 18, 2016

Statement of the Case

On September 23, 2016, Mammoser Farms, Inc. (“Employer”) filed an H-2A application for 10 workers to perform the position of “Grounds/Maintenance Worker.” The job duties on ETA Form 9142A were listed as follows:

Perform general winter maintenance at various Mammoser Farm properties in Erie County locations totaling 4000 acres of property. Perform snow removal from pathways, roadways and roads. De-ice and repair manure/water pipes/bunker silos. Repair and maintain equipment (plows, skidsteers, tractors, feeder trucks, parlor equipment). Work in all weather conditions. … Ability to lift heavy snow. 40 lb lifting requirement.

(AF 147 – 150).2

In Employer’s accompanying statement of seasonal need dated September 10, 2016, Employer listed the position as “Winter Grounds/Maintenance Workers to perform various winter maintenance-related duties at Mammoser Farms, Inc.’s facilities in Eden, New York and surrounding areas in Erie County for the period of November 30, 2016 to March 31, 2017.” (AF 166-167). Employer further stated, “The Winter Maintenance/Grounds Workers will have responsibility for performing general winter maintenance at Mammoser Farms, Inc. and its locations totaling 4000 acres of property. Specifically, the workers will: perform snow removal from pathways, roadways and roofs; de-ice and repair manure/water pipes; and repair farm/mechanical equipment.”

In its ETA Form 790 the job description for the position was assigned the SOC Occupational code of 45209100 with job title of Agricultural Equipment Operator by the State Workforce Agency (SWA) and was listed as follows:

Perform general winter maintenance at various Mammoser farms properties in Erie County. Perform snow removal from pathways/roadways and roads. De-ice and repair manure/water pipes and bunker silos. Repair/maintain equipment (plows, skidsteers, tractors, feeder trucks, parlor equipment). Work in all weather conditions. … Ability to lift heavy snow (up to 40lbs.) Workers referred against this order must have a minimum of 3 months experience in performing the tasks described in this order.

Notice of Deficiency

By letter dated September 30, 2016, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) for four deficiencies in Employer’s application including its failure to establish its job opportunity as “temporary or seasonal in nature.” (AF 126-131). (As the other

---

2 For purposes of this opinion, “AF” refers to the “Administrative File.”
three deficiencies were successfully remedied, they will not be addressed in this decision. See AF 102). The CO stated in its September 30, 2016 NOD that the Employer had not sufficiently demonstrated its standard of need as temporary citing 20 C.F.R. § 655.103(d) which defines temporary or seasonal need as follows:

For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

The CO pointed out that the Employer’s current application requests “10 Agricultural Equipment Operators (SOC 45-2091) to work under the job title, Grounds/Maintenance Workers, from November 30, 2016 through March 31, 2017. However, the employer previously received certification, H-300-16012-851934, for 10 Farmworkers and Laborers, Crop, Nursery and Greenhouse to work under the job title, Farmworker-Diversified Crop (SOC 45-2092), from March 31, 2016 through November 30, 2016.”

The CO’s position regarding its determination that the two positions are not sufficiently different so as to be considered two different job opportunities, can be summed up by the following statement in the NOD, “[a]lthough the employer’s applications were filed under different SOC(O*Net) occupational titles and job titles; given the nature of the shared duties surrounding equipment maintenance and use of agricultural equipment suggest that both jobs should be coded as agricultural equipment operators, creating an impermissible year round need for the same job opportunity.”

The CO noted the job descriptions of the two positions as follows:

Position # 1 (3/31/16 – 11/30/16) Farmworkers and Laborers under job title
Farmworker- Diversified Crop (SOC 45-2092)

Drive tractors/trucks and perform a variety of crop (hay and corn) raising duties at various Mammoser Farm properties in Erie County, NY. **Plow, harrow, plant, fertilize, cultivate, spray and harvest using a variety of farm machinery. Will maintain/repair farm implements used in planting/harvesting crops from field to storage.** Pick stones, clean out/repair fence line. Manure pushing/spreading, barn cleaning. Work in all weather conditions. Random drug testing may be required at employer expense post hire. Ability to lift up to 75 lbs. with assistance. Workers referred against this order must have a minimum of 3 months experience in performing tasks described in this order (emphasis added).

Position # 2 (11/30/16 – 3/31/17) Grounds/Maintenance Workers under job title
Agricultural Equipment Operator (SOC 45-2091)
Perform general winter maintenance at various Mammoser Farm properties in Erie County locations totaling 4000 acres of property. **Perform snow removal from pathways, roadways and roads.** De-ice and repair manure/water pipes/bunker silos. Repair and maintain equipment (plows, skidsteers, tractors, feeder trucks, parlor equipment). Work in all weather conditions. Random drug testing may be required at employer expense after hire for safety of workers due to operation of dangerous equipment. Ability to lift heavy snow. 40 lb lifting requirement (emphasis added).

The CO reasoned that “both job opportunities involve the use and maintenance of agricultural equipment” and therefore should be considered a year round need for the same job opportunity.

**Employer’s Response and CO’s Non-Acceptance Denial**

Employer responded to the Notice of Deficiency by email on October 3, 2016. (AF 106-107). Employer reiterated its position that the position of Winter Grounds/Maintenance Worker is distinctly different from the Farmworker position with different job duties and with each being tied to different seasons of the year. Employer pointed out that its seasonal need for these two distinct positions, each under the regulatory limit of 10 months, had been approved by the U.S. Department of Labor for the past 8 years. Employer acknowledged its understanding that it is not able to utilize the H-2A program for milking duties at its four farms and that it uses all of the available U.S. workers to meet its milking needs. Employer further pointed out that the State Workforce Agency had issued Job Orders under separate occupational classifications for the two positions, further supporting that they are separate and distinct positions. Employer acknowledged that both positions require the use and maintenance of equipment, but argued that “the nature of the equipment varies between Winter and Crop related work and the purpose and use of this equipment is separate and distinct requiring different applications.”

On October 27, 2016 the CO issued a Denial letter based on its finding that the employer was unable to demonstrate that its need for H-2A workers is seasonal or temporary. AF 100-105. The CO confirmed its previous finding in the NOD and pointed out that Employer had filed two applications each year with consecutive dates of need resulting in continuous H-2A certifications that cover every day of the year. In regard to Employer’s argument that its applications for these two positions had been certified and approved by the DOL for the last eight years, the CO stated, “each filing in the H-2A program is dealt with on a case by case basis, and the issuance of a certification in a prior filing does not compel the issuance of a certification in the present filing.” The CO therefore rejected Employer’s argument that the current application should be approved on the same basis as the prior applications.

The CO reasoned that despite the different SOC occupational codes given to each position, each job contained a “similar mixture of job duties involving the use and repair of farm equipment and facility maintenance,” with the only distinction between the job opportunities pertaining to “seasonal variation (i.e. a slight shift in job specifics due to changes in weather).” The CO concluded that the requirements of each position were “virtually identical,” with the only distinction in the job requirements being a 40 pound versus 75 pound lifting requirement.
The CO determined that because “both jobs can be performed by workers with the same level of skill and experience indicates that the differences in equipment are minimal.”

Accordingly, the CO concluded that the “position requested is fundamentally identical to the employer’s previous certification, and that the combined dates reflect a need for agricultural workers that is not temporary, but year-round.” Therefore, the current H-2A application was denied.

**Evidentiary Submissions and Briefs**

The parties have supplemented the Administrative File with the following evidence which has been received and is admitted without objection:

EX 1- Employer’s Supplemental Job Description for Mammoser Farms, Inc. H-2A Programs dated November 7, 2016 and received on November 7, 2016.

CO 1 – The CO’s supplemental statement entitled “Declaration of John Rotterman” dated November 15, 2016 and received on the same date.

A “Declaration in Support of Certification/Brief” was also submitted by the Employer and received on November 16, 2016. In this statement Employer reiterates its position that the two positions for which it has submitted temporary labor certification applications are distinct and separate positions and therefore each must be examined independently to determine whether the employer has a seasonal or temporary need. Employer argues that the CO is incorrect in relying heavily on agency “policy and practice” of not considering the “purpose and use” of agricultural equipment to distinguish the two positions, since this policy is not found in DOL regulations or other published documents of the DOL. Employer argues that purpose and use of equipment should be only one consideration since a basic reading of the job descriptions shows that the positions are separate and distinct with different job duties.

The Solicitor’s brief was received on November 18, 2016. The Solicitor argues in support of the CO’s determination that the two positions are “fundamentally identical,” and because both positions involve the use and repair of agricultural equipment, both positions should be classified as “agricultural equipment” operators. Therefore, the Solicitor argues that the Employer’s current and previous applications for certification for the two positions should be combined in determining whether the Employer’s need for an “agricultural equipment” operator is seasonal or temporary.

The Solicitor cites several cases for the proposition that the H-2A program is meant to address temporary or seasonal employment needs and not a permanent or year round need to fill an agricultural position. The Solicitor quotes the CO’s discussion in CO 1 regarding his recognition that two separate SOC occupational codes were assigned to the two positions. The CO points out in his supplemental statement that despite the two different SOC codes that were assigned by the SWA (state workforce agency), he does his own analysis to determine whether the job duties are “sufficiently different” to determine whether the Employer has a temporary need. The CO pointed out in his statement that “the assignment of different SOC codes, coupled
with the seasonal differences in the duties of the jobs, prevented the agency from previously identifying the nature of the employer’s permanent need.”

The Solicitor cites several cases where it was determined that an employer’s need for workers was year round rather than seasonal. In particular, the CO identified the case of Rolling Meadows Farm, 2012 –TLC-00007 as having “nearly identical” facts to the current case. In that case the employer’s temporary labor certification applications for “winter” job duties noted as “[w]inter grounds maintenance,” as well as “growing season duties” for a “farmworker-diversified crop position” were denied, as they were found to represent only seasonal variances in the same year round position. Significantly, the Solicitor noted that the job titles for both positions were listed as “Farmworkers and Laborers,” with both positions having the same SOC Code of “SOC Code 45-2092.” (As will be discussed below, this is a significant distinction in that case and the current case.)

The Solicitor argues that the CO’s denial of certification in this case should be affirmed because “[t]he CO determined that the positions requested are so similar to the positions previously certified as to represent the same job opportunity (Equipment Operator) for purposes of the H-2A program, despite the seasonal variations in job duties.” (Solicitor’s brief at 15).

**Issue**

Whether the Employer has met its burden of establishing that its need for agricultural services or labor as stated in its current H-2A application is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. §655.103(d)?

**Scope of Review**

The current case arises from the Employer’s request for a de novo hearing in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program. The regulation pertaining to appeals of the CO’s determinations in H-2A labor certification matters states, in cases where a de novo hearing has been requested, that the procedures in 29 C.F.R. Part 18 will apply and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. §655.171(b)(ii).

The regulations further provide that after a de novo hearing “the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken…The Decision of the ALJ is the final decision of the Secretary.” 20 C.F.R. §655.171(b)(2).

Since neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO, I will review the evidence presented in this case de novo, but will also review the CO’s decision for abuse of discretion. *T. Bell Detasselling, LLC, 2014 TLC 00087, slip op. at 3, fn. 7 (May 29, 2014), citing RP Consultant’s, Inc., 2009-JSW-00001,
Applicable Law

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

(1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and

(2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); see also 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161. Employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). A “seasonal” need occurs if employment is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103(d).

Discussion

In determining temporary need for purposes of the H-2A program it is well settled that it is “not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” Matter of Artee Corp., 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). See Sneed Farm, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). (It is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal). See also William Staley, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).

In order to utilize the H-2A program the burden is on the employer to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). See Altendorf Transport, 2011-TLC-158, slip op at 11 (Feb. 15, 2011).

It is also well established that the H-2A program is in place to fill only temporary or seasonal labor needs and therefore the need for the particular position cannot be a year round need, except in extraordinary circumstances. 20 C.F.R. §655.103(d). A seasonal need has generally been interpreted to be 10 months or less. See Grand View Dairy Farm, 2009-TLC-2 (Nov. 3, 2008).
In administering the H-2A program, BALCA has resisted efforts to use temporary labor certification under the H-2A program to address permanent or year round employment needs to fill a particular position. There have been several cases where employers have gone to great lengths in their attempts to characterize what is in fact, a year round need for a particular position, as a seasonal need. Some of these attempts have involved employers who have filed multiple labor certification applications through separate but related business entities or submitted applications by related individuals in order to portray a year round need for a particular position, as seasonal. See Katie Heger, 2014 TLC-00001 (November 12, 2013). (Certification denied where two applications covering entire year reflected “same job title, job duties, job requirements and were filed by different but related parties for the same worksite).

Similarly, denial of certification has been affirmed where it was determined that two applications involved only minor seasonal variations in a year round position. Lancaster Truck Line, 2014 –TLC-00004 (November 26, 2013) (Minor seasonal variation in position with the same job title does not establish employer’s need for this position as seasonal despite applications filed by separate legal entities).

In its brief the Solicitor lists several similar cases where certification has been denied because it has been determined that an employer’s separate applications for the winter and summer duties of a farmworker position actually represent the same job opportunity with slight seasonal variances. See eg. Rolling Meadows Farm, 2012-TLC-00007. Unlike the current case, the cases cited have generally involved multiple labor certification applications with consecutive or overlapping dates of need, to fill positions with the same job title and occupational code. 3

Employer would argue that the instant case can be distinguished from these cases because its H-2A applications involve the Employer’s request to fill two separate and distinct positions, as opposed to the same position with minor seasonal variances in the duties.

In determining whether employer has met its burden of showing a seasonal need for two separate and distinct positions, it should be noted that BALCA would not reasonably require that all of an Employer’s various and distinct employment needs be considered in conjunction in determining whether the Employer’s need for a particular job is year round or seasonal. For example, it would be unreasonable to consider an employer’s need for field workers in conjunction with its need for kitchen workers or office workers in determining whether its labor need for field workers is year round or seasonal. Therefore, the analysis must be on whether an Employer’s need to fill a particular agricultural position has been established as seasonal, to determine whether an employer may utilize the H-2A program to fill this position.

3 Another distinction between the current case and the Rolling Meadows Farm case is the fact that the Employer in the current case has a permanent workforce of approximately 35 employees which it is attempting to supplement based on its alleged seasonal need, whereas the permanent workforce in the Rolling Meadows case was alleged to consist of two family members who were employed by the farm. Thus, the CO also questioned whether, in fact, the Employer was attempting to establish a permanent workforce through the H-2A program, rather than supplementing its permanent workforce.
In reaching this determination the duties of two separate positions would have to be sufficiently similar to be considered the same position for purposes of determining the length of the employer’s need for that position and whether it is year round or seasonal.

In the instant case, the CO determined that the two positions which Employer has listed as two separate seasonal employment opportunities, with two separate job titles, i.e. Farmworker and “Winter Grounds/Maintenance Worker,” are in fact the same position, with only minor seasonal variances. For the reasons that follow, I do not find the CO’s determination that the duties of the two positions are “essentially interchangeable” and therefore represent the same job opportunity, to be supported by the record. See Denial letter at AF 103.

The two job descriptions are listed as follows in Employer’s H-2A applications and in the CO’s Denial letter:

Position # 1 (3/31/16 – 11/30/16) Farmworkers and Laborers under job title Farmworker- Diversified Crop (SOC 45-2092)

Drive tractors/trucks and perform a variety of crop (hay and corn) raising duties at various Mammoser Farm properties in Erie county, NY. Plow, harrow, plant, fertilize, cultivate, spray and harvest using a variety of farm machinery. Will maintain/repair farm implements used in planting/harvesting crops from field to storage. Pick stones, clean out/repair fence line. Manure pushing/spreading, barn cleaning. Work in all weather conditions. Random drug testing may be required at employer expense post hire. Ability to lift up to 75 lbs. with assistance. Workers referred against this order must have a minimum of 3 months experience in performing tasks described in this order (emphasis added by the CO).

Position # 2 (11/30/16 – 3/31/17) (Grounds/Maintenance Workers under job title Agricultural Equipment Operator (SOC 45-2091) Also referred to as Winter Grounds/Maintenance Worker)

Perform general winter maintenance at various Mammoser Farm properties in Erie County locations totaling 4000 acres of property. Perform snow removal from pathways, roadways and roads. De-ice and repair manure/water pipes/bunker silos. Repair and maintain equipment (plows, skidsteers, tractors, feeder trucks, parlor equipment). Work in all weather conditions. Random drug testing may be required at employer expense after hire for safety of workers due to operation of dangerous equipment. Ability to lift heavy snow. 40 lb lifting requirement (emphasis added by the CO).

First, as Employer points out in its brief, the job descriptions are clearly different. The description of Position 2, noted variously as Winter Grounds/Maintenance Worker or Grounds/Maintenance Worker, involves primarily winter maintenance including snow removal and deicing of equipment, necessitated by the severe winter season experienced in the
Employer’s location of western New York. As stated in the Employer’s supplemental statement at EX 1, regarding the Winter Maintenance position,

The Winter Maintenance/Grounds Worker has primary responsibility for performing general winter maintenance at Mammoser Farms, Inc. properties totaling 4,000 acres of property. Specifically the workers perform general winter maintenance at various Mammoser Farms properties in Erie County that include snow removal from pathways, roadways and roofs. Due to the harsh winters that we experience in Erie County, New York, the majority of this position involves snow removal, de-icing and repair of manure/water pipes and bunker silos that freeze during the winter months. There is a chronic problem each winter with our pipes, water lines, pneumatic equipment and hoses freezing as many of our buildings are not heated.

There are no crop- related duties mentioned in the winter job description whatsoever, nor is the equipment operated in this position necessarily the same equipment utilized during the growing season, although some equipment, may be. The only similarity in the two positions is the repair of the farming machinery which is used in Position 1(Farmworker Position). In finding that they are the same position the CO focused on the fact that one of many job duties was similar, that is, both jobs included the use and repair of equipment. While this observation is true, one cannot ignore the fact that all of the remaining duties are distinctly unalike.

The differences in the two positions are bolstered by the Employer’s supplemental job description (EX 1) which elaborated on the two positions and the Employer’s seasonal need for these two positions to supplement its permanent workforce of 35 workers on its 4000 acre farm operation. The Employer notes the different job duties with the only overlapping duty being the repair and maintenance of equipment. The CO appears to mischaracterize the job requirements when he states in the Denial letter that “the job duties in both applications are essentially interchangeable.” (AF 103). The CO appears to take one sentence out of each description and ignores the rest of the description in order to characterize the two positions as the same.

Secondly, the CO appears to place little significance on the fact that two separate Standard Occupational Classification (SOC) codes were assigned to the two positions in the job orders issued by the New York State SWA (state workforce agency). The New York State SWA, an independent and presumably objective organization, assigned the two positions separate SOC codes. Position 1 was assigned Farmworker- Diversified Crop (SOC 45-2092) in the Employer’s previous H-2A application, while Position 2 was assigned Agricultural Equipment Operator (SOC 45-2091) in the current application.

In an attempt to support its position that the two jobs are in fact the same, the CO emailed the SWA on September 29, 2016, and inquired as to why two separate codes were assigned despite the fact that both positions include “machinery duties.” See AF 132. The CO also asked whether the Employer had requested two different SOC codes. The SWA replied in an email dated September 30, 2016, that it had assigned the Ag. Equip Operator code in the current job order (the winter maintenance position) because it seemed “more appropriate” despite the similarities in the job duties. This email confirms that the determination regarding the two SOC codes was made by the SWA and not at the Employer’s request.
Although the CO points out in its supplemental statement (CO 1) that it is not bound by the SWA’s determination to assign two different SOC codes to the positions at issue, one would assume that the assignment of such codes is within the generally accepted expertise of the SWA, which is required to issue job orders for many different types of jobs, with various different job descriptions, many of which must include the operation of heavy equipment.\(^4\) In this regard the SWA is tasked with posting the specific job description and job classification for open positions, for the purposes of determining the availability of U.S. workers, as required by the H-2A regulations. There does not appear to be any obvious reason to question the SWA’s assignment of two different job codes, which does in fact support the conclusion that these are two distinct job opportunities.

Further, although both job descriptions involve the use of machinery the SOC code assigned to Position 1 (Farmworker – Diversified Crop) (Employer’s previously certified application) also includes job duties that do not involve heavy equipment. Employer’s job description for this position notes “Drive tractor/trucks and perform a variety of crop (hay and corn) raising duties at various Mammoser Farm properties…” The CO assumes that the “variety of crop raising duties” all involve the operation of heavy farm equipment, notwithstanding the SOC code assigned to this position (Farmworkers and Laborers, Crop 45-2092.02) which also includes non-equipment related duties. The CO points out in his NOD that he believes both positions should have been classified as “agricultural equipment operator,” which was in fact the actual occupational code given by the SWA in the current application. To the extent that the CO questions the assignment of the occupational code related to the Employer’s previous application for certification of workers for the Farmworker position, it would seem these questions would more appropriately have been raised when the application for temporary labor certification for the Farmworker position was before the CO. A reconsideration of the proper occupational code in the previous application is not before the undersigned at this time.

The CO’s attempt to minimize the differences in the positions also fails to place significance on the fact that the two positions have two different weight lifting requirements. The Farmworker position has a weight lifting requirement stated as “ability to lift up to 75 lbs.,” while the winter equipment operator position only has a 40 lb. lifting requirement.\(^5\) The Dictionary of Occupational Titles classifies the level of difficulty of a position, in part, by such lifting requirements. Under the posted standards, lifting of 20-50 pounds would be classified as “medium” level work while lifting of 50 to 100 pounds would be classified as “heavy” work. Thus the different levels of difficulty applicable to the two positions also supports that they are separate and distinct positions.

The Employer submitted, along with its request for hearing in this case, information regarding the extreme winter conditions that exist in its location of western New York and specifically, the Buffalo, NY area. See AF 12 – 15. This information, which was not before the CO at the time he issued his denial of certification, supports that Buffalo, NY is ranked 8th in

---

\(^4\) If the only important distinguishing characteristic of a job opportunity were whether it involved the operation of heavy equipment, farmworkers, coal miners and construction workers would all be classified with the same SOC code since all positions involve the operation of heavy equipment.

\(^5\) The Solicitor fails to address the difference in the weight lifting requirement in her brief.
terms of highest average snowfall when U.S. Cities, with population of 50,000 plus, are considered. Information submitted by the Employer, also supports elevated snow averages in Buffalo, for the months of December through March, as evidenced by the average snowfalls for these months for the years 1940 – 1916. This information supports the Employer’s seasonal need during the months of December through March for winter snow removal and deicing of equipment, which coincides with its requested dates of need for the “winter grounds/maintenance worker” position as November 30, 2016 – March 31, 2017. It is important to recognize that this information also supports the Employer’s seasonal need for this position in that it is based on the seasonal weather conditions in its geographical location and the seasonal need for winter maintenance workers to perform work, which would not be the typical work performed by the average U.S. Farm worker in the off season, and especially in a more temperate geographical area.

Lastly, I find it to be significant, albeit not controlling, that the CO has in fact previously determined for the last eight years that the two positions are separate and distinct positions. I recognize that the CO is not bound by a previous determination made by its office and such determinations are made by the facts of each case independently, on a case by case basis. However, the previous determinations which were in support of the employer’s position, do lend support to the view that the applications involve two distinct positions, and at the very least, that the current change in the CO’s viewpoint, is not clearly supported or defensible.

For the above stated reasons I find that the record supports that the Employer’s current application represents a seasonal need for winter grounds, maintenance workers lasting approximately 4 months, coinciding with the requested dates of need of November 30, 2016 – March 31, 2017. Further, the Employer has established that this position is a separate and distinct position from the Farmworker position, for which it has filed other applications for seasonal workers.

This determination is based on my de novo review of the Administrative File, including information and evidence submitted with the Employer’s request for hearing (See AF 12-15), as well as my consideration of EX 1 and CO 1, as well as the briefs submitted on behalf of the parties. I find that the record supports Employer’s seasonal need in its current application. It should be noted that the additional information submitted by the Employer was not before the CO when he made his determination denying certification of the current application. Further, although I have found that Employer has established its seasonal need during its stated dates of need of November 30, 2016 – March 31, 2017, in its current application, it should be made clear that I have not addressed whether Employer has sufficiently established its seasonal need for temporary labor certification for the Farmworker position during the previously certified period of March 31, 2016 – November 30, 2016, as this issue is not before me at this time. I have determined, however, for the purposes of addressing the current application, that the job descriptions in the two applications represent separate and distinct job opportunities.

Although a CO is not bound by a previous determination regarding an Employer in a previous year, one would hope a CO would strive for a certain amount of consistency in the decision making of its office, particularly regarding an employer with applications in eight previous years. One would have to question the rationale in changing a determination from year to year when there has been no change in the regulations or clear factual change in an Employer’s application.
Therefore, as Employer has met its burden of establishing its seasonal need for workers in its current application filed under the H-2A regulations, the CO’s denial of Employer’s current application is reversed.

ORDER

Accordingly, it is ORDERED that the Certifying Officer’s decision to deny Employer’s application for temporary labor certification is REVERSED and the case is REMANDED to the CO for further processing, in an expedited manner, to the extent possible.

SO ORDERED.

RICHARD A. MORGAN
Administrative Law Judge