This matter is before the Board of Alien Labor Certification Appeals on Frost Wines LLC’s application for a certification under the H-2A temporary alien agricultural labor certification program. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer at the Department of Labor’s Employment and Training Administration denied the application. Frost Wines timely requested administrative review. See 20 C.F.R. § 655.171.

This Decision and Order is based on the written record, which consists of the Administrative File. Having considered the full record, I will affirm the Certifying Officer’s denial of the labor certification.


2 On April 10, 2019, I issued an Order to the Certifying Officer to explain or correct the administrative file. It appeared that most of Frost Wines’ response to the Notice of Deficiency was missing. The Certifying Officer responded that the file was correct; it included what ETA had received. Frost Wines, however, stated that the second page of its response was missing. Frost Wines supplied a copy and confirmed that it had submitted this page to ETA with the first page.

Having reviewed the full submission, it is evident that Frost Wines did submit the second page to ETA and that the Certifying Officer read it. The Certifying Officer had asked Frost Wines to allow an amendment to its application. On the second page of its response to the Notice of Deficiency, Frost Wines authorized the amendment. The Certifying Officer amended the application consistent with the authorization. I conclude that the Certifying Officer would not have amended the application without the applicant’s authorization. Since the authorization was on page 2, the Certifying Officer must have received and read that page.

Accordingly, I have marked both pages of the Frost Wines’ response to the Notice of Deficiency as ALJ Exhibit 1 and admit it to the record. See 20 C.F.R. § 655.171(a). This corrects the administrative error when ETA prepared the Administrative File and replaces what was page 31 of that file.
Findings of Fact

Frost Wines operates a vineyard, nursery, and winery. AF at 1. The present application is for an H-2A Temporary Employment Certification based on a “seasonal” or temporary need. AF at 76. Frost Wines sought to hire six vineyard workers to work at two worksites – Dundee and Hector, New York – from February 15, 2019 to December 25, 2019. AF at 76, 79. In the application, Frost Wines detailed the workers’ job duties and working conditions. AF at 78, 82. It stated that it needed the requested workers because it was unable to find sufficient temporary agricultural help. AF at 76.

Notice of Deficiency. To determine whether Frost Wines’ need was temporary, the Certifying Officer considered the time period for which Frost Wines was currently applying for temporary workers together with Frost Wines’ immediately previous application. The earlier application led to a certification for H-2A workers from August 29, 2018 to June 30, 2019, based on seasonal need. It was for two vineyard workers to work at Dundee and Rochester, New York. AF at 129, 132. The present application plus the prior certified period, when combined, extend over 15 months and 26 days, during all which Frost Wines represented that it has (or had) a temporary seasonal need. AF at 65.

The Certifying Officer summarized as follows:

<table>
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<tr>
<th>Case Number</th>
<th>Employer</th>
<th>Case Status</th>
<th>Start Date</th>
<th>End Date</th>
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<tbody>
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<td>H-300-18187-139301</td>
<td>FROST WINES LLC</td>
<td>Certified – Full</td>
<td>08/29/2018</td>
<td>06/30/2019</td>
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<td>H-300-18353-835322</td>
<td>FROST WINES LLC</td>
<td>Received</td>
<td>02/15/2019</td>
<td>12/25/2019</td>
</tr>
</tbody>
</table>

Id.

Given the 15+–month temporary need that Frost Wines asserted, the Certifying Officer issued a Notice of Deficiency. He required Frost Wines to submit additional information going to temporary need.4

In its response, Frost Wines submitted a two-page brief, its payroll records from May 2017 to December 2018, and duplicates of some previously submitted materials. AF at 31-62; ALJ Ex. 1. It did not dispute that the jobs on this current application were the same as on the prior certified period, and the work was to be done in the same general geographical area. As to the time periods that the Certifying Officer recited in the chart above, Frost Wines argued that the visas it received on the prior certification were drafted “incorrectly.” The work period was supposed to extend to June 30, 2019, but the visas expired six months earlier, on December 31, 2018. AF at 31.

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3 “AF” refers to the Administrative File.

4 The Certifying Officer identified two other areas of deficiency. As he later determined that Frost Wines sufficiently addressed these in a supplemental submission – a conclusion that I affirm – I need not address the two other deficiencies; they are not a basis for denial of the application.
In addition, Frost Wines explained that the seasonal issue was that “unpredictable weather” in January and February requires it to conduct its work at other times of the year. Frost Wines described its projects for 2018 as:

February – April: Pruning/Tying
February – May (Nursery): grafting 300,000 nursery vines
May: Planting Nursery vines and replants in established Vineyards along with planting new vineyard acreage
June – July: Canopy Management, Leaf Pulling, Shoot Positioning on 140,000 vines in established vineyards
August: hand weeding and crop thinning
September – November: grape harvest (130 acres of grapes)
November – December 15: Harvest Nursery stock, grade vines, and prepare winter storage of grafted vines.

ALJ Ex. 1.5

Denial of application. Having reviewed the supplemental submission, the Certifying Officer denied the application for failure to show that the jobs were temporary or seasonal. AF at 25, 27. He again found that, coupled with the previous certification, Frost Wines was requesting workers for a continuous period of 15 months and 26 days. AF at 27-28. He found the error on the visas irrelevant because Frost Wines was still asserting that it had a continuous need for temporary workers over the 15+ month period, even if ultimately it was not able to have the workers authorized for a brief portion (about 6 weeks from January 1 to February 14, 2019) of the 15+ months requested. As the Certifying Officer stated, “The fact remains that the employer sought to have workers until June 30, 2019, in which combined with the current application is a request for workers year [round].” Id. In addition, the Certifying Officer found that the submitted payroll records showed that in 2018, Frost Wines had H-2A workers year-round from January 1 through December 21, 2018. In the Certifying Officer’s view, this was not a temporary or seasonal need.

Discussion

Frost Wines has requested administrative review of the Certifying Officer’s denial of the application. See 20 C.F.R. § 655.171. On administrative review, “the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the Certifying Officer's decision, or remand to the Certifying Officer for further action.” 20 C.F.R. § 655.171(a).

5 Frost Wines’ application states that its period of need is from February 15 to December 25, 2019, not December 15, 2019. AF 76.
Standard of review. The regulations are silent about the deference that the Board of Alien Labor Certification Appeals should accord to a certifying officer’s determination.6 When the certifying officer’s determination turns on the Employment and Training Administration’s long-established policy-based interpretation of a regulation, it would seem that considerable deference is owed to ETA. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (describing the deference courts give administrative agencies). In such cases, BALCA likely should not overturn a certifying officer’s reliance on the established policy interpretation unless it is arbitrary or capricious. Absent ETA’s long-standing, policy-based interpretation of a regulation, it would appear that BALCA should review the certifying officer’s denial de novo. On the present record, I need not determine the deference owed the certifying officer, for I would affirm his denial of the application on the less deferential, de novo review.

H-2A program requirements. The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; Salt Wells Cattle Co., LLC, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). An employer seeking certification under the H-2A program must establish that it has a temporary or seasonal need for agricultural labor or services. 20 C.F.R. § 655.161(a).

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.”

20 C.F.R. § 655.103(d).7

Frost Wines disputes the Certifying Officer’s determination that it hired three H-2A workers year-round in 2018. AF at 2. The payroll records show that Frost Wines is correct; none of the three workers whom the Certifying Officer cited were employed in August or September 2018. This particular conclusion of the Certifying Officer is erroneous. But that is not where the analysis ends.

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6 Before the current regulations went into effect on March 15, 2010, the prior regulations specified that the standard of review was “legal sufficiency.” 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted legal sufficiency to imply an arbitrary and capricious standard of review. See J and V Farms, LLC, 2015-TLC-00022, slip op. at 3 n.1 (March 4, 2016) (citing Bolton Springs Farm, 2008-TLC-00028, slip op. at 6 (May 16, 2008)). But the prior regulations never defined “legal sufficiency.” See id.; 20 C.F.R. § 655.112(a) (2008). The current regulations removed the reference to legal sufficiency and did not address the deference, if any, BALCA should accord to the Certifying Officer’s decision. See 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations’ silence leaves the question open and requires BALCA judges to find an appropriate standard of review.

7 Certifying officers employ a “ten-month rule” as guidance when they determine whether to “require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature.” Grand View Dairy Farm, 2009-TLC-00009, slip op. at 7 (Nov. 3, 2008). “The ‘ten month rule’ serves only as a signal that an employer may need to substantiate that its labor need is truly temporary.” Grasslands Consultants, LLC, 2016-TLC-00012, slip op. at 5 (Jan. 12, 2016). It is not determinative on a BALCA appeal.
In particular, Frost Wines did not establish a temporary need because it asserted a need continuing over 15 consecutive months, and it did not establish a seasonal need because it described nothing like “a short annual growing cycle or a specific aspect of a longer cycle [that] requires labor levels far above those necessary for ongoing operations.” See 20 C.F.R. § 655.103(d).

Temporary need. As to the temporary need, in two consecutive applications, Frost Wines made verified representations that it had a need for the requested workers that spanned – without interruption – the 15+–month period from August 29, 2018 through December 25, 2019. That exceeds the one-year regulatory limit. See 20 C.F.R. § 655.103(d).

Frost Wines failed to show extraordinary circumstances that would justify an exception to the one-year limit. As the Certifying Officer correctly concluded, the apparent error on the visas is irrelevant. The relevant facts are that Frost Wines submitted an application on which it verified that it had a need for temporary workers from August 29, 2018 through June 30, 2019. It submitted a second application that included a portion of the same time period and extended the period to December 25, 2019. Frost Wines thus verified a continuing need over more than 15 consecutive months for the workers whom it would describe as temporary. Nothing about the visas changes those facts.8

Seasonal need. Frost Wines argues that it has a seasonal need from February 15, 2019 to December 25, 2019. Again, this neglects that it asserted a need that began on August 29, 2018, and continued without interruption through December 25, 2019. That cannot meet any definition of seasonal.

Even if I were to look only at the period covered by the present application, Frost Wines’ particular needs cannot be squared with the regulation. In a very general sense, it could be argued that Frost Wines has described a pattern of activity that is “tied to a certain time of year” and requires more workers at that time than at other times.

But the regulation defines “seasonal” more specifically by giving examples. These are “a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.” Frost Wines is not required to show those exact examples; a similar showing could be sufficient. But the emphasis in the examples is that the period be tied to a certain time of year that is short (or no more than a part of a longer period), and that it require substantially more workers than needed for normal, ongoing operations.

Frost Wines’ need is a pattern. But, rather than being tied to a certain time of the year, the pattern spans almost the entire year. It is not an increase in need for workers associated with a short growing cycle or part of a longer cycle; rather, it is the entire annual cycle of the

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8 Frost Wines attempts to avoid this result by requesting that I cancel the certification that runs through June 30, 2019. I cannot cancel the certification; that would exceed the scope of administrative review. See 20 C.F.R. § 655.171(a) (BALCA may “affirm, reverse, or modify the Certifying Officer’s decision, or remand to the Certifying Officer for further action”). Moreover, as with the visas, it would not change the fact that Frost Wines has already verified that its would-be “temporary” need is for the entire 15-month period; it cannot erase that representation by having the certification cancelled.
company’s ongoing business operations. The tasks that Frost Wines includes in the supposed “seasonal” work comprise nearly all the work that the company does with respect to the product involved. Frost Wines does not describe a temporary need for substantially more workers than needed for normal, ongoing operations. To the contrary, it describes the number of workers that are needed throughout almost all of the year to perform all the normal, ongoing operations of the business. What Frost Wines describes is not a seasonal need for extra workers to perform additional work tied to a certain season or time of year; it is a seasonal need to lay off workers when operations slow from mid-December to mid-February each year. If Frost Wines’ application were approved, it would suggest that nearly all agricultural employers could hire their entire workforce as H-2A temporary or seasonal workers. The only exceptions would be the “permanent” employees who would still have duties while the land lays fallow after the crop had been harvested and taken to market and until operations resumed as spring approached. The need Frost Wines describes is essentially for all of its ongoing operations, not a seasonal increase that “requires labor levels far above those necessary for ongoing operations.” See 20 C.F.R. § 655.103(d).

Conclusion and Order

Frost Wines LLC has failed to establish a temporary or seasonal need for six vineyard workers under the H-2A temporary alien agricultural labor certification program. The Certifying Officer’s denial of Frost Wines’ application is AFFIRMED.

For the Board of Alien Labor Certification Appeals

STEVEN B. BERLIN
Administrative Law Judge