In the Matter of

BARRY HOWTON TRUCKING
DBA HOWTON FARM,

Employer.

DECISION AND ORDER
AFFIRMING THE DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations presented at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Employer timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Administrative File\(^1\) forwarded by the Employment and Training Administration ("ETA"), and the written submissions of the parties.

STATEMENT OF THE CASE

The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On May 11, 2021, the Certifying Officer (CO) received an application from Barry Howton Trucking (Employer) for two Crop Farmworkers and Laborers.\(^2\) (AF 27-47.) According to both parties, the beginning and end dates initially requested on the application were July 5, 2021 to May 5, 2022.\(^3\) (AF 18; AF 13.)

\(^1\) In this Decision and Order, the Administrative File is referred to as “AF.”
\(^2\) SOC# 45-2092.02: Farmworkers and Laborers, Crop.
\(^3\) The ETA form 9142A provided in the AF appears to be an amended version, with June 26, 2021 to April 26, 2022 beginning and end dates. (AF 35.) However, the CO references the July 5, 2021 to May 5, 2022 in the NOD (AF 18), while the Employer’s response to the NOD acknowledges the July 5, 2021 start date, requesting that the CO amend the application on their behalf. (AF 13.)
On May 17, 2021, the CO issued a Notice of Deficiency (NOD) finding *inter alia* that the Employer failed to establish that its job opportunity is seasonal or temporary pursuant to 20 C.F.R. §655.103(d). The CO explained that the Employer’s dates of need have changed since the Employer’s previous application, for which the Employer failed to provide an adequate explanation for the date change. Accordingly, the CO asked the Employer to explain why its job opportunity is seasonal or temporary, to provide a detailed explanation as to why its dates of need have changed from its established season and to submit payroll records separately for full-time permanent and temporary employment in the requested occupation. The CO determined that based on the filing history, the Employer has requested a need during every month except May.

Further, the CO observed that:

the employer provided a statement of temporary need with its application that states, “[t]emporary need is due to the seasonal crop the employer grows for their business.” However, the filing history is inconsistent with this statement, as the employer has requested workers to perform the same job duties at the same worksite location in every month of the year.

Additionally, the CO noted that:

[i]n Section A.3 of the ETA form 9142A, the employer lists its need type as seasonal,” (AF 19.) Seasonal is defined as “employment [that] 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 CFR § 655.103(d). The CO concluded that “it remains unclear as to how the employer’s job opportunity is seasonal while requesting workers in every month of the year.”

Accordingly, the CO requested further information from the Employer to establish its seasonal need. Specifically, the CO requested the following modifications:

The employer must provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature.

The employer’s response must include:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year, for all cold-weather states in which it operates;

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4 The NOD specifically states that “If you file a modified application, and it does not address all the modifications listed in this notice, we will not be able to accept it for consideration.” (AF 16.)
2. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Farmworkers and Laborers, Crop the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;

3. If contractors or other entities were used by the employer to address the need, or portions of the need, described in this application, three years of contracts/receipts detailing the services provided and dates of said services must be provided. If family members or other individuals not directly employed by the employer were used, signed affidavits attesting to their work schedule and duties must be provided; and

4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. 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 dates of need being requested for certification.

Note: If the submitted document(s) and its relationship to the employer’s need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF 19-20.)

On May 18, 2021, the CO received the Employer’s response to the Notice of Deficiency (NOD). In response, the Employer stated:

The employer would like to request to amend the dates of need to reflect the dates of need for the previous years of 6/26/2021 to 4/26/2022. The employer got a late start on the application process this year so that is the reason for the 7/05 start date but please amend the end date to reflect 6/26/2021 as in previous years.

(AF 13.)

On May 21, 2021, the CO issued its final determination denying the Employer’s request for two Farmworkers and Laborers. (AF 7-12.) The CO determined that the Employer failed to show a seasonal or temporary need. Id. The CO reasoned that based on the Employer’s

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5 The Employer was probably requesting an amendment of the beginning date to June 26, 2021.
prior applications, May appears to be the only month where the Employer has not requested workers. (Id.) The CO found that:

While this amendment request is consistent with the dates of need in previous years, this did not cure the deficiency. Rather than explain and substantiate its need, the employer is instead seeking to limit its requested period of need so as to create the appearance of eligibility for the H-2A program. Indeed, the employer did not offer any evidence to support its claimed seasonal need as was requested in the NOD.

In addition, it appears the employer had originally extended its end date due to its late start in filing. However, irrespective of when an application is filed, the time period associated with its seasonal, as is required by the regulation, should remain fixed. The employer offered no explanation as to why it had also shifted its end date of need from seasons into the month of May.

(AF 12.)

The CO included the following table of Employer’s previous and pending H-2A applications for crop farmworkers and laborers:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Employer</th>
<th>Status</th>
<th>Beginning Date of Need</th>
<th>Ending Date of Need</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-19119-984992</td>
<td>Barry Howton Trucking</td>
<td>CERTIFIED</td>
<td>6/26/2019</td>
<td>4/26/2020</td>
</tr>
<tr>
<td>H-300-20108-496098</td>
<td>Barry Howton Trucking</td>
<td>CERTIFIED</td>
<td>6/26/2020</td>
<td>4/26/2021</td>
</tr>
<tr>
<td>H-300-21126-292328</td>
<td>Barry Howton Trucking</td>
<td>RECEIVED</td>
<td>7/05/2021</td>
<td>5/05/2022</td>
</tr>
</tbody>
</table>

Accordingly, the CO denied certification.

By letter dated May 21, 2021, the Employer requested an expedited administrative review. (AF 1-6.) On May 26, 2021, this case was assigned to the undersigned. The Administrative File was received on June 2, 2021. In an Order dated June 2, 2021, I provided the parties three business days after the filing of the Administrative File to submit a brief. Neither party submitted a brief. The record is closed and the case is ready for decision.

The only issue before me is whether the Employer established a temporary or seasonal need for the positions listed in its applications, as defined by 20 C.F.R. § 655.103(d). This decision is based on the Administrative File, the arguments of the parties, and the applicable laws and regulations.
Scope of Review

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge (“ALJ”) under §655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The Employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Any additional evidence filed with the Notice of Appeal that was not previously filed with the CO cannot be considered. BALCA may affirm, reverse, modify, or remand the CO’s decision based only on the administrative file and “after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.” 20 C.F.R. 655.171. BALCA must uphold the CO’s decision unless the Employer proves that the decision was arbitrary, capricious, or not otherwise in accordance with the law. Mapleview Dairy, LLC, 2020-TLC-00013, slip op. at 4 (Dec. 4, 2019). It is also settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. See, e.g., Garber Farms, 2001-TLC-00006 (ALJ May 31, 2001) citing 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures).

Temporary Need

The issue before me is whether the Employer’s need is temporary and seasonal in nature. To succeed on an H-2A application, the Employer must establish “the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” § 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.” § 655.103(d).

The fact-finder must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal. Pleasantville Farms LLC, 2015-TLC-00053, slip op. at 3 (June 8, 2015). Therefore, “it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year.” Fegley Grain Cleaning, slip op. at 3 (citing Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year. Lodoen Cattle Co., 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011). As a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates for a seasonal need in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. See, e.g., Southside Nursery, 2010-TLC-157, slip op. at 4 (ALJ, Oct. 15, 2010); Thorn Custom Harvesting, 2011-TLC-196, slip op. at 3 (ALJ, Feb. 8, 2011).

Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program have been rejected. See, e.g., Salt Wells Cattle Co., 2010TLC-134 (ALJ, Sept. 29, 2010). In Salt Wells Cattle Co., LLC, the ALJ explained:
An employer’s ability to manipulate its “season” in order to fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).

2011-TLC-185 (ALJ, Feb. 8, 2011). In order to determine if the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year. Altendorf Transport, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011).

Here, the Employer has not established that its employment need is purely seasonal. As noted by the CO, the Employer’s past certified applications assert a need for temporary crop harvesters and laborers from May 26th to April 26th. Even if I accepted the Employer’s argument that the beginning and end dates provided on the application were entered in error due to a later processing date, the Employer did not resolve all of the deficiencies identified by the CO in the NOD. The Employer did not provide the justification for the requested seasonal dates in order for the CO to make a final determination certifying the application. Rather, the Employer merely requested that the application be amended by the CO to match the beginning and end dates on previous certified applications.

Accordingly, I find that the CO’s denial of certification, based on the Employer’s failure to show that the employment need was seasonal or temporary, was reasonable and not arbitrary, capricious, or otherwise not in accordance with the law. Accordingly, the Employer has not established a seasonal need for labor, as defined in § 655.103(d).

**ORDER**

In light of the foregoing, it is **HEREBY ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

LARRY S. MERCK
Administrative Law Judge