In the Matter of:

DC INGE AGRICULTURE, LLC.

Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (DOL) at 20 C.F.R. Part 655. DC Inge Agriculture, LLC (“Employer”) timely filed a request for expedited administrative review of the denial of the temporary labor certification application by the Certifying Officer (“CO”). This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration (“ETA”).

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).

BACKGROUND

On April 26, 2021, Employer filed an application for H-2A labor certification with the ETA. (AF 70-98.) Employer requested certification of 30 “Farmworker and Laborer, Crop, Nursery, and Greenhouse” workers for an alleged period of seasonal need from March 1, 2021 to August 1, 2021. (AF 78.)

On May 3, 2021, the CO issued a Notice of Deficiency (NOD) noting four grounds of deficiency: (1) Emergency Situation (20 CFR 655.134(b); 20 CFR 655.130(b)); (2) Temporary Need (20 CFR 655.103(d)); (3) H-2A Labor Contractor- FLC Certificate (20 CFR 655.132(b)(2)); and (4) Labor Contractor- Surety Bond (20 CFR 655.132(b)(3) & 29 CFR 501.9). (AF 57-63.)
Concerning the first deficiency, the CO explained Employer submitted its application fewer than 45 days prior to its start date of need. Though Employer attached a document titled “Emergency Justification Statement” with its application, the CO found that the attached document contained erroneous information. Per the CO, the attached document was a duplicate copy of an agreement with a fixed site grower indicating the grower was providing transportation to workers. (Id. at 59.) The CO requested Employer either (1) provide a statement justifying good and substantial cause for a waiver to the filing time period or (2) amend the start date of need to no earlier than June 10, 2021, in order to be in compliance with Departmental regulations as set forth in 20 CFR §655.121(a)(1) and 20 CFR §655.130(b). (Id.)

Regarding the second deficiency, the CO explained that Employer had previously filed applications, which, when coupled with the application at issue, did not show a seasonal or temporary need. (AF 59-61.) The CO included a modification request to remedy this deficiency. Specifically, the CO stated Employer “must describe how its seasonal need 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.’ [E]mployer must therefore explain how its need should be viewed as seasonal, when [E]mployer has described a need for workers in every month of the year. [E]mployer’s explanation should be supported by documentary evidence supporting a seasonal need.” (Id. at 61.)

On the third deficiency, the CO stated that, per the regulations, “H-2A Labor Contractor[s] [like Employer] must provide a ‘copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration, if required under MSPA . . . identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC [Farm Labor Contractor].’” (AF at 62.) The CO explained Employer provided an agreement with a fixed-site grower where the grower was to provide transportation to workers. The CO added the agreement also stipulated that Employer would provide drivers to transport the workers. The CO explained that, although Employer provided a Farm Labor Contractor (FLC) and a Farm Labor Contractor Employee Certificate of Registration (FLCE) with its application, neither certificate included a driving authorization. The CO maintained it remained unclear if Employer had “authorized drivers to transport the requested 30 workers.” To cure this deficiency, the CO instructed Employer to “clarify the transportation arrangements between itself and the fixed-site grower . . . and if applicable provide sufficient authorized FLC or FLCE Certificates of Registration for drivers to transport the requested workers.” (Id.)

Pertaining to the fourth deficiency, the CO explained Employer failed to provide an original surety bond document as required by the regulations. (AF 62-63.) The CO provided the methods through which Employer could cure its deficiencies. (Id. at 63-64.)

On May 11, 2021, Employer responded to the NOD and enclosed (1) an emergency letter; (2) a chart in the body of Employer’s email indicating its applications were for different worksites and therefore unrelated;¹ (3) a transportation letter and (4) a surety bond. (AF 50-55.)

¹ The chart employer attached is not visible in the Appeal File. Nevertheless, the chart is replicated in the NOD. (See AF 46.)
On June 4, 2021, the CO issued a Final Determination denying Employer’s application for certification because Employer failed to establish that its job opportunity is temporary or seasonal in nature. (AF 39-47.) The CO stated that “[b]ased on [E]mployer’s requested dates of need and its previously established dates of need in the same area of intended employment (AIE), [E]mployer has not established how this job opportunity is temporary, rather than permanent and full-time, in nature.” (Id. at 43.) Citing to In the Matter of Grandview Dairy, 2009-TLC-00002 (2008), the CO explained that “10 months is a permissible threshold at which to question the temporary nature of a stated period of need.” (Id. at 42.) The CO added that it was also “well established that the CO’s assessment of an employer’s need is not limited to the parameters of the current application; rather, the CO may look at the situation as a whole, including aggregating the requested dates of need in the employer’s filing history.” (Id.) The CO provided the following explanation for why Employer’s current application, coupled with its previous applications, represented an on-going need in the AIE.

In [E]mployer’s Form ETA-9142A, [E]mployer indicates it is filing as a labor contractor under a seasonal need and requesting 30 workers within the AIE for Ivanhoe, North Carolina, which is the first work location listed in Section C of the Form ETA-790A. This location is in Sampson County, North Carolina near the Wilmington, North Carolina [Metropolitan Statistical Area].

The CO relies on information for the applicable MSA and calculation of estimated travel time between the place(s) of employment (i.e., the first work location or, if applicable, designated pick-up point) for the current H-2A application and H-2A applications in the employer’s filing history to evaluate the employer’s need for labor in the AIE.

The initial worksite in the current application is located at 494 Indian Hill Rd. Ivanhoe, NC near the Wilmington, North Carolina MSA which allows for a one hour and 37 minute commute time. Case H-300-19331-171196 is located at 13 Lightening Lane Garland, NC which is 29 minutes from the current application; and Case H-300-20231-774595 is located at 84 Blair Farm Roa Currie, NC, which is 18 minutes away from the current application. Based on this information, the CO considers each of the employer’s H-2A applications . . . to be within the AIE for the job opportunity offered in the current H-2A application.

(AF 43.) The CO also found that Employer’s current application and prior applications showed the same or similar need and denied the application, notwithstanding the “slightly different Standard Occupational Classification Codes (‘SOC’)” in the current and prior applications. (Id.) Per the CO, all the “applications include field maintenance and harvesting of berries and list similar lifting requirements (40, 50 & 52 pounds). Similarly, all applications do not require any experience, education, licensing or driving. As such, the applications do not appear to represent distinct job opportunities.” (Id. at 44.) The CO also included a chart illustrating how Employer’s need for labor was not temporary or not tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle. (Id.)
Per the CO’s Final Determination, Employer’s application was also denied because “Employer did not provide any supporting evidence, nor did it explain why it was unable to provide documentation that supports its seasonal need” even though such documentation was requested in the NOD. (*Id. at 46.*)

On June 10, 2021, the ETA received Employer’s Request for Administrative Review (“Request”). (AF 1-38.) In its Request, Employer reiterated that the need in its current application was distinct from the need in its previous application and provided copies of its work contracts and ETAs for its prior applications, to support its assertion that its need is seasonal. (AF 38.)

The undersigned issued a Notice of Assignment and Expedited Briefing Schedule on June 25, 2021. The CO and Employer were given until June 30, 2021 to submit written briefs. On June 30, 2021, the CO’s counsel emailed this Office to advise that the CO would not be filing a brief and would rely on the Final Determination. Employer did not file a brief.

**ISSUE PRESENTED**

The issue presented in this matter is whether Employer has met its burden of establishing 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 scope of review in H-2A cases is limited. The undersigned may consider the written record and any written submissions from the parties, which may not include new evidence. See 20 C.F.R. § 655.171(a). The standard of review is de novo. That is, the undersigned may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.3

**ANALYSIS AND FINDINGS**

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

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2 Employer indicates in its appeal that it included summarized monthly payroll report for 2020. Employer states that it did not have any activity in 2018 and 2019. (AF 2.) However, the record does not include a 2020 payroll report.

3 The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO’s decision. See 20 C.F.R. § 655.171(a). The undersigned finds persuasive the rationale articulated in *Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a). See also *E&A Farming*, 2019-TLC-00053, slip op. at 5 (May 29, 2019) (applying de novo standard).
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, it is an employer’s burden to demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161.

Employment is “temporary” where an 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).

Employer seeks certification for 30 “Farmworker and Laborer, Crop, Nursery, and Greenhouse” workers. (AF 76.) The CO determined the employment was not temporary or seasonal because Employer’s recent history of H-2A applications demonstrated a continuous need for laborers spanning more than a year, relying on the perceived similarity of the work to be performed and the AIE. In the NOD, Employer was informed of its burden to establish a temporary or seasonal need and was instructed to provide evidence to support its stated seasonal period of need. (AF 61.) Amongst other things, Employer was instructed to include,

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, Nursery, and Greenhouse, 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[.]

(Id.) Employer’s response to the NOD did not include such information. (Id. at 50-55.)

In its request for administrative review, Employer writes that it had no activity in 2018 and 2019 but attached payroll information for 2020. (AF 2.) After reviewing the record, the undersigned finds that Employer’s 2020 payroll record was not included in its request for administrative review of the CO’s Final Determination. Assuming arguendo Employer’s 2020 payroll record was included with its request for review of the CO’s Final Determination, the undersigned cannot consider it. An administrative review must be made on the basis of the written record, which may not include new evidence submitted on appeal. See 20 C.F.R. § 655.171(a). The record fails to show Employer’s 2020 payroll records were provided to the CO prior to the CO’s Final Determination at issue. (See AF 46.) Also, Employer failed to illustrate how its need
was seasonal when it responded to the NOD. Employer merely attached a table showing that it had different and unrelated worksites. The chart does not adequately illustrate how Employer’s current application is seasonal or temporary in nature. The table lists worksite addresses, case numbers for Employer’s current and prior applications, and dates of need. This information however does not demonstrate how Employer’s need for 30 laborers is seasonal, that is, tied to a certain time of year by an event or pattern.

As Employer did not provide the requested documentation to support its assertion, Employer has not met its burden of establishing that it has a seasonal need for temporary workers, and the CO properly denied certification. A denial of certification may be affirmed when an employer fails to submit payroll reports to establish the need for the requested worker. See generally Carol Rhodes, 2013-TLC00041 (July 5, 2013); Gomez Livestock, Etc., LLC, 2011-TLC-00029, slip op. at 3 (Nov. 17, 2010).

CONCLUSION

Based on the foregoing analysis, Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). The CO’s issuance of a Denial Letter for Employer’s application for temporary agricultural labor certification under the H-2A program was not an abuse of discretion to deny certification.

ORDER

The CO’s decision in the above-captioned H-2A temporary labor certification matter is AFFIRMED.

SO ORDERED.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge

Because the CO’s denial of certification is upheld based on Employer’s failure to submit requisite documents or provide an explanation for why its need is seasonal, it is not necessary to discuss the other deficiency cited in the CO’s Final Determination.