In the Matter of:

MANZANA LLC,

Employer

Appearances: Jacqueline M. Gordon, Esq.
Rhoades McKee
55 Campau Ave., NW, Suite 300
Grand Rapids, MI 49503
jgordon@rhoadesmckee.com
For the Employer

Karla Jackson Edwards, Esq.
Office of the Solicitor, ETLS
200 Constitution Ave., NW
Washington, D.C. 20210
Edwards.karla@dol.gov
ETLS-OALJ-Litigation@dol.gov
For the Certifying Officer

Before: ANGELA F. DONALDSON
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter 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), 1188, and the implementing regulations 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. 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). As set forth in more detail herein, Manzana, LLC (“Employer”) filed such an application for temporary labor certification.
On June 9, 2021, the Certifying Officer of the Office of Foreign Labor Certification, U.S. Department of Labor’s Employment and Training Administration, issued a Final Determination denying Employer’s application for temporary labor certification. On June 11, 2021, Employer sought administrative review under 20 C.F.R. § 655.171, asking for a de novo hearing. The Appeal File in this matter was received on June 24, 2021. A video hearing was held on June 28, 2021. The parties tendered exhibits, which were admitted, and introduced testimony at the hearing and subsequently filed post-hearing briefs.

I. BACKGROUND

Job Order JO-A-300-203510962216 and Application No. H-300-20351-962216

In mid-December 2020, American Color, a fixed-site grower, retained Manzana, a labor contractor, to provide labor to fulfill its 2021 seasonal needs. See Administrative File (“AF”) at 142, 178. American Color, a nursery located in Orange, Virginia, is primarily engaged in the production and growing of bedding and potted plants for wholesale distribution. Id. at 95, 188.

Manzana submitted a job order to the Virginia State Workforce Agency (“SWA”), seeking to employ 52 seasonal nursery and greenhouse laborers at American Color from 2/15/21 to 12/10/21 (No. H-300-20351-962216). Id. at 138, 155-58.

On December 22, 2020, the Virginia SWA identified several deficiencies with the job order, two of which have some relevance to the issues to be resolved in the present matter. Id. at 142, 149-54. As for the stated period of need, the SWA noted that American Color had posted a job at indeed.com, which stated a need for seasonal greenhouse laborer workers from “December through June.” Id. at 151. The SWA found that Manzana’s stated period of need, extending through December 2021, “adds an extra 5 months” to American Color’s stated period of need ending in June and no explanation was provided for the discrepancy. Id. Per the SWA, “Presumably the workforce needs of the fixed-site employer would determine the needs of the H-2A Labor Contractor.” Id. The SWA also identified deficiencies with two stated work requirements; specifically, the application included a requirement of 3 months of experience and the ability to lift 60 pounds. Id. at 151, 153. According to the SWA, American Color had not identified the experience requirement for its seasonal general greenhouse labor needs and also had not required lifting above 25 pounds. Id.

Manzana responded to the Notice of Deficiency (“NOD”) on December 25, 2020. Id. at 155. Manzana stated that it could not address with certainty why American Color placed a job posting at indeed.com for a shorter period of time but after consulting with American Color, the fixed-site grower had amended its job posting at indeed.com to remove the dates of need. Id. at 156. Manzana also noted that it had requested workers for a period of less than 10 months, which fit the generally accepted definition of seasonal or temporary need under relevant regulations. Id.

1 Under 20 C.F.R. §§ 655.121(a) and (b) and 655.134, prior to filing an application for temporary employment certification, the employer must first submit a job order to the SWA serving the area of intended employment. The SWA reviews the job order for compliance with the regulations and works with the employer to address any noted deficiencies. If any deficiencies are not resolved with the SWA, the employer may file an application for temporary employment certification.
Manzana stated that it requires 3 months of experience, which it described as a common work requirement among agricultural employers, and it provided several examples of agricultural job postings with prior work experience requirements. *Id.* Manzana further responded that the 60-pound job requirement was necessary for lifting “bags of fertilizer, pallets, and … large pots full of soil, boxes, etc.” *Id.* at 157. Manzana had found that requirement to be standard for similar contracts related to seasonal nursery and greenhouse work and thus included this requirement in all of its job contracts. *Id.* On December 30, 2020, the SWA denied the job order. *Id.* at 138-41.

On January 1, 2021, Manzana requested that the Chicago National Processing Center (“CNPC”) of the Office of Foreign Labor Certification, U.S. Department of Labor, accept its application for temporary labor certification. *Id.* at 142. Manzana explained that it had identified the period of need of 2/15/21 to 12/10/21 after consulting with American Color regarding its seasonal nursery and greenhouse work. *Id.* at 143. Manzana again explained that American Color had amended its indeed.com posting to remove the date of need starting in December, which Manzana now asserted was “made in error” by American Color’s human resources staff that had only recently been hired in September 2020 and was not sufficiently trained in American Color’s operations at the time. *Id.* at 143-44. Manzana also submitted that the job posted to indeed.com was intended to fill general positions throughout the nursery and greenhouse that included packing and shipping duties that were not part of the duties of any H-2A workers referenced in Manzana’s application. *Id.* at 144. According to Manzana, its application addressed job duties such as “field work, which includes planting, trimming and removing bare root and other plants, weeding the fields, irrigating plants, caring for trees, and other similar job duties.” *Id.* The duties also included “specific nursery and greenhouse duties such as sorting plants and placing them in the appropriate cribs, relocating plants throughout the nursery and greenhouse, generally planting, trimming, and harvesting plants in the nursery and greenhouse, and generally maintaining the nursery and greenhouse.” *Id.* Further, Manzana stated that its period of need of less than 10 months satisfied the relevant regulations and Department of Labor practices that generally accepted periods of 10 months or less as consistent with seasonal or temporary need. *Id.* at 144-45.

Manzana also repeated its position that it typically required 3 months of experience, and even though American Color did not previously include this job requirement, it had now contracted with Manzana and thus adopted the requirement. *Id.* at 145. Manzana pointed to prior Virginia job orders that it submitted with this requirement and which were approved. *Id.* at 146. Regarding the lifting requirement, Manzana repeated the same response it had made to the SWA regarding the workers’ need to lift items up to and exceeding 60 pounds and its inclusion of this requirement in prior approved job orders. *Id.*

On January 12, 2021, the CNPC issued a NOD, identifying deficiencies with the stated period of need and with the two work requirements of 3 months of experience and ability to lift 60 pounds. *Id.* at 171-77. These bases for the deficiencies reflected the same concerns previously identified by the SWA. *Id.* The Certifying Officer (“CO”) specifically noted that as to the job requirements at issue, the standard for appropriateness of a job qualification is the “normal and accepted practice among non-H-2A employers in the same or similar crop and area,” and thus
Manzana’s history of requiring 3 months of experience and ability to lift 60 pounds was not relevant given its status as an H-2A employer. *Id.* at 175-76.

In response to the NOD, Manzana authorized CNPC to amend the period of need to state a shorter season of 2/15/21 to 6/30/21 (instead of 12/10/21). *Id.* at 182. Manzana asserted that the amended period of need was “tied specifically to American Color’s seasonal need for labor for its spring flowering annuals and perennials season.” *Id.* at 179. It attached the following summary of American Color’s business history, activities, and schedule of operations throughout the year:

American Color, Inc., is engaged primarily in the production and growing of bedding and potted plants for wholesale distribution, principally to chain stores and nurseries throughout the Mid-Atlantic region. Due to the seasonal nature of growing plants, we employ seasonal employees during our busy growing seasons.

**Yearly Schedule of Operations:**

**January – June:** Growing a wide variety of spring flowering annuals and perennials

**July – September:** Growing fall flowering annuals (garden mums, pansies, asters, etc…) and growing hemp

**October – December:** Growing poinsettias and vintage mums

*Id.* at 184.

Manzana also attached American Color’s monthly payroll summary from January through December 2020:
Manzana also authorized the CNPC to delete the job duties previously listed and include an amended description of duties instead which focused on the “primary tasks” of attending to “spring flowering perennial and annuals field maintenance and related greenhouse/nursery work.” *Id.* at 179. Workers’ duties included “pulling weeds, picking up stones and roots, cleaning equipment, and other hand tasks.” *Id.* Specific details were also provided regarding company supervision; the potential effect of weather on workers’ schedules; a required orientation for rules, policies, and safety information; the need to perform repetitive movements, engage in extensive standing and walking, working on feet while bent for extended periods of time, and working in extremes of temperature; the need to frequently handle, feel, reach, climb or balance; the occasional need to stoop, kneel, crouch, or crawl; notification regarding the possible effect of allergies to ragweed, goldenrod, insect spray and chemicals; information on drug testing and following safety rules and instructions including ability to comply with pesticide warnings; and the potential that workers with legal drivers licenses may be needed to drive a vehicle to and from the field and may have to operate forklifts, dumpcarts and skidsteers. *Id.* at 179-80.

The amended duty description also included more details regarding the care of spring flowering annual and perennial plants. *Id.* at 180-83. In sum, these duties generally involved trimming and caring for bare root plants, boxing and placing plants on conveyor belts and stacking crates and trays onto pallets, general clean up and maintenance of greenhouse areas and fields, planting plants by hand or with machinery, sorting plants, driving equipment, applying pesticides, relocating and tracking plants with scanners, weeding plant beds, operating tractors and other farm equipment, and working with small plant cuttings. *Id.* The general description of tasks by month (February through June) included sowing seeds, sticking of URCs (unrooted cuttings), transplanting, watering, spacing, pruning, cleaning trays/floors, hanging greenhouse full of baskets, making carts, and getting outdoor beds ready to plant. *Id.* at 185.

Employer further authorized CNPC to remove the 3-month experience requirement and reduce the lifting requirement from 60 to 25 pounds. *Id.* at 183. The application was certified with the approved amendments. *See id.* at 39.

**Application No. H-300-21116-258128**

On April 26, 2021, Manzana submitted to the CNPC an application (No. H-300-21116-258128) for H-2A temporary labor certification for 52 Farm Laborers for the American Color worksite, which is the subject of the present request for administrative review.² *See AF at 68-112.* Manzana identified a period of intended employment from 6/28/21 to 12/10/21. *Id.* at 76.

In the application, Manzana described primary tasks of “duties associated with the growing and maintaining of healthy chrysanthemum and poinsettia crops.” *Id.* at 85. Manzana included a list of duties similar to those noted above in connection with its amended application for the workers approved for the spring flowering plant season, including details regarding company

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² Manzana explained that it had submitted a job order to the Virginia SWA on April 26, 2021, and the SWA advised it would be unable to complete its review within the required timeframe. Thus, it was instructed to proceed with filing the ETA 9142 (H-2A Application). *AF at 112.*
supervision; the potential effect of weather on workers’ schedules; a required orientation for rules, policies, and safety information; the need to perform repetitive movements, engage in extensive standing and walking, working on feet while bent for extended periods of time, and working in extremes of temperature; the need to frequently handle, feel, reach, climb or balance; the occasional need to stoop, kneel, crouch, or crawl; notification regarding the possible effect of allergies to ragweed, goldenrod, insect spray and chemicals; information on drug testing and following safety rules and instructions including ability to comply with pesticide warnings; and the potential that workers with legal drivers licenses may be needed to drive a vehicle to and from the field and may have to operate forklifts, dumpcarts and skidsteers. Id. Manzana also included the requirement of lifting up to 60 pounds. Id.

As for more specific details regarding the care of the particular crops, Manzana stated:

Workers will work on tasks associated with the growing and maintaining of healthy chrysanthemum and poinsettia crops. Workers may need to assemble carts, pull orders, and other similar tasks in connection with chrysanthemum and poinsettia crops. Workers shall plant chrysanthemum crops and pinch poinsettia crops. Workers shall work setting down, spacing, and moving of chrysanthemum and poinsettia crops.

Id.

On May 12, 2021, the CO issued a NOD that identified six deficiencies, two of which are at issue here, including whether Manzana’s stated need is truly seasonal within the meaning of 20 C.F.R. § 655.103(d) and whether each job qualification and requirement listed in the job offer are bona fide within the meaning of § 655.122(b). Id. at 35-45.

The CO noted that the dates of need for the job opportunity were 6/28/21 to 12/10/21, and the job duties were associated with the growing and maintaining healthy chrysanthemum and poinsettia crops. Id. at 38. However, in Manzana’s previous application (H-300-20351-962216), it originally requested dates of need of 2/15/21 to 12/10/21 and as the SWA noted, American Color had posted a similar job identifying seasonal need beginning in December of the previous year (2020). Id. As such, taken together, these jobs would create a year round need for greenhouse work at issue. Id. The CO further noted that in response to the deficiency, Manzana had amended the end of its date of need from 12/10/21 to 6/30/21, and the amended period of need was more consistent with payroll documents. Id. After certification of the previous application for need to 6/30/21, the CO observed that the instant application now asks for certification of the “same job opportunity at the same worksite location…for the same fixed-site grower” but now extended to 12/10/21. Id. at 39. The CO found that the payroll documentation did not support the need to 12/10/21. Id.

Manzana was instructed to respond with the following information:

1. A statement describing American Color’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to American Color’s nursery operations including a monthly breakdown of duties;

3. Summarized monthly payroll reports from American Color representing a minimum of three previous that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Nursery Worker, the total number of workers or staff employed, total hours worked, and total earning received. Such documentation must be signed by the employer attesting that the information being presented with compiled from the employer’s actual accounting records or system.

4. If contractors or other entities were used by American Color 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 provide; and

5. To the extent that Employer’s recommendation to American Color would create a period of need distinct from that previously evidenced by American Color’s payroll, it must provide a basis for that change.

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

Id. at 39–40.

In regard to the second deficiency under § 655.122(b), the CO noted that the 3-month experience requirement exceeded the normal and accepted qualifications required by employers that do not use H-2A workers. Id. at 41–42. The CO cited to the Virginia SWA’s denial letter, which referenced American Color’s job posting for similar laborers without any required experience. Id. at 41. The CO reiterated that the standard for determining the appropriateness of a job qualification is “what is normal and accepted practice among non H-2A employers in the same or similar crop and area.” Id. at 41–42. According to the CO, the burden of proof for justifying the acceptability of an occupational qualification which is questioned by the SWA and or CNPC rests with the employer. Id. at 42. Thus, further documentation was requested from Employer to establish the 3-month experience requirement as normal and accepted among non H-2A employers in the same or comparable occupation or crops. Id. Employer was instructed to either grant permission to remove the three-month experience requirement or submit documentation to support the requirement. Id.

The CO also noted the lifting requirement of 60 pounds in Manzana’s application. Id. at 42. However, the CO again noted the history of the SWA locating job listings by American Color which did not require lifting above 25 pounds. Id. The NOD explained that Manzana thus failed to demonstrate that the higher lifting requirement was bona fide. Id. The NOD requested that Employer either amend the lifting requirement to no greater than 25 pounds or provide evidence to show that it is normal and accepted for non H-2A employers to require the greater lifting requirement. Id.

Employer responded to the NOD on May 19, 2021. Id. at 22–34. Manzana described American Color’s schedule of operations as:
January: Pre-season preparation work
February to June: Growing spring flowering annuals/perennials
July to September: Growing fall flowering annuals
October to December: Growing poinsettias and vintage mums

According to Manzana, “American Color has a seasonal need for workers in the spring and early summer for the care and harvesting of spring flowering plants. American Color has a separate seasonal need from mid-summer to late fall for fall flowering annuals, such as chrysanthemums and poinsettias.” Id. at 22. Manzana thus asserted that American Color has “two separate seasonal needs,” one from spring to early summer for the care and harvesting of spring flowering plants and a second season from late summer to late fall for the care and harvesting of fall flowering plants. Id. at 23. Manzana attached documentation of the number of workers hired by American Color in 2018, 2019, and 2020, including the number of permanent and seasonal workers in these years. Id. at 23, 27-29. According to Manzana, American Color is now experiencing an increased need for seasonal workers, particularly for mid-summer to late fall, and attached a “Sales Projection” for 2021 showing projected increased sales of $2 million above 2020 sales from July to December. Id. at 23-24, 30-33. Manzana also asserted that the total requested seasonal need was approximately 10 months, which it argued is presumed to be seasonal under established precedent. Id. at 24.

Regarding job experience, Manzana submitted that it is a “different employer with different employment standards” than American Color. Id. at 25. Also, the present job at issue is for “a different type of seasonal work than previous job orders.” Id. Manzana identified at least 8 previous job orders for nursery workers that required at least 3 months’ experience. Id.

As for the lifting requirement, Manzana stated again that the job at issue differs from the position advertised on indeed.com by American Color and that there are “multiple nurseries with similar lifting requirements in the area,” citing 10 such job orders as non-exhaustive examples. Id.

In the Final Determination denying the application on June 9, 2021, the CO did not accept Manzana’s proffered explanations of seasonal need. Id. at 11-13. The CO stated that the nature of the need and not the difference in crops or commodities must be examined. Id. at 13. The CO found that although the specific crops being harvested may change throughout the course of the year, the employer has a “year round need for the same type of underlying labor,” and “[i]n effect, the employer’s need is not limited by a growing season or specific aspect of a longer cycle as the regulation requires.” Id. “Instead the employer is able to utilize the same job opportunity year round in accordance with the varying life cycles of the crops it chooses to produce.” Id.

Further, the CO found that the submitted payroll did not support Manzana’s request for workers from June to December. Id. at 15. The CO observed that when American Color’s annualized labor usage is assessed, the number of workers requested by Manzana (52) “would, if approved, create a ‘seasonal’ worker presence at nearly uniform levels for the entire year.” Id. The CO noted that the January labor needs at American Color (179 total workers in 2020) were on par with the other months, even though January was not within any of those stated periods of need. Id.

Concerning job requirements, the CO found that Manzana did not meet its burden of showing that the experience and lifting requirements were normal and accepted practice among non-H-2A employers in the same or similar crop and area. Id. at 16-18. The CO noted that
Manzana’s citation to its own hiring practices and the practices of other H-2A employers are not sufficient to meet this burden. *Id.*

II. EXHIBITS

**Employer’s Exhibit 1**

Exhibit 1 is the monthly payroll summary for 2018, 2019, and 2020. It is broken down by full-time employees and seasonal employees and includes the total number of employees, hours worked, and earnings for each month of the year.

**Employer’s Exhibit 2**

Exhibit 2 is a job posting from Indeed for a Greenhouse Assistant (Part-time) at George Washington’s Mount Vernon. It includes the job description, position responsibilities, and preferred qualifications.

**Employer’s Exhibit 3**

Exhibit 3 is a job advertisement from Cross Creek. The exhibit includes the open nursery positions as well as a description for each position.

**Employer’s Exhibit 4**

Exhibit 4 is a job posting for Shenandoah Growers for a Cutting Associate. The post describes the job, essential functions the employee would perform, the required experience, and required physical abilities.

**Employer’s Exhibit 5**

Exhibit 5 is a Form ETA-790A for a Nursery Worker in Virginia.

**Employer’s Exhibit 6**

Exhibit 6 is a Form ETA-790A for a Horticultural Worker in Virginia.

**Employer’s Exhibit 7**

Exhibit 7 is a Form ETA-790A for Farmworkers & Laborers in Virginia.

**Certifying Officer’s Exhibit 1**

Exhibit 1 is Employer’s Filing History and Schedule of Operations for American Color Inc. It includes descriptions of the type of planting activity that occurs at various times of the year. Additionally, the exhibit includes a breakdown of the number of employees and hours worked from 2018 to 2020.

**Certifying Officer’s Exhibit 2**

Exhibit 2 is American Color’s website. It includes pictures of American Color’s facilities as well as an overview of the plants American Color offers. Additionally, the exhibit includes the “Our Team” section from the website.
III. HEARING TESTIMONY

Ed Van Hoven

Mr. Van Hoven is the President and Owner of American Color. TR at 23. He has owned American Color for 23 years. Id.

Mr. Van Hoven testified that at certain times of the year, American Color needs more workers. He stated that the greenhouse “follows the seasons.” Id. at 24. According to Mr. Van Hoven, “from about mid-February till the beginning of December” the greenhouse is “extremely busy” but from “December, January, and the beginning of February, there is nothing to do.” Id. Mr. Van Hoven was asked to describe the work that occurs from mid-February to early December. He testified that the work begins with sticking cuttings and planting and continues into growing, watering, taking cuttings, clipping plants, spacing plants, and getting plants ready for shipment. Id.

In the spring, Mr. Van Hoven testified that the plants are grown in much smaller containers—“stuff that people plant in their gardens.” Id. at 24-25. He further testified that there is a lot more seeds and cuttings to handle. In the fall/winter, Mr. Van Hoven testified that American Color turns a crop of poinsettias for Christmas and chrysanthemums. He stated that the poinsettias must be in stores by December 5th to have a chance to sell. Id. at 25. Mr. Van Hoven stated that the workers “handle these two crops throughout the fall.” Id. Mr. Van Hoven stated that the difference between spring and fall is that in the spring, American Color can turn plants in three to five weeks versus in the fall/winter which are lengthy crops. Id. Mr. Van Hoven further testified that certain crops benefit from being hardened off outdoors. Id. at 26. He explained that the crops are grown inside and then move to the outdoor area before it is shipped. Id.

Mr. Van Hoven testified that American Color’s off-season is typically from December 15 to February 15. Id. at 27. Mr. Van Hoven was asked about the work mentioned on the website that occurs in the winter. Mr. Van Hoven explained that in the winter, American Color is “shipping out, packaging up and getting ready for shipment of the poinsettias.” Id. He stated that winter for American Color does not refer to January. Id.

Mr. Van Hoven was asked about Employer’s Exhibit 1, the payroll summaries and the difference between a full-time and seasonal worker. Id. at 28-29. Mr. Van Hoven testified:

Short answer is nothing, but the long answer is we hire everyone in here on a seasonal basis unless they’re management. So, we bring them in as seasonal with the understanding of as they—if they enjoy what they’re doing and we enjoy them doing what they’re doing, they automatically turn into full-time.

Id. Mr. Van Hoven was then asked about the payroll summary for January 2020, which showed employment of 170 workers even though it was during what he described as American Color’s off-season. Mr. Van Hoven clarified:

Leading up to the pandemic, it was becoming harder and harder to find people that were willing to work in any kind of farming environment, but also the greenhouse environment. So, what we found worked for us is as soon as we enter the off-season, mid-December, it was time to start hiring for our busy season or we simply would not have enough people to handle our work load when we got busy and we found
it to be our job to say, Okay, we’re going to have to create, we’re going to have to come up with something for these people to do to give them some hours” to lock in personnel.

*Id.* at 31. Mr. Van Hoven testified that he would not have as many workers in January if not for the personnel issues. Mr. Van Hoven was then asked about the kind of work performed in January. Mr. Van Hoven testified:

The only working they’re doing is cleaning the same window six times a day, sweeping the same floor six times a day. We’re cleaning our equipment which stays clean, but we’re suddenly cleaning our equipment. We take a large portion of time and offer up—we also run as a hobby a cattle farm so we move a lot of people that want hours over there to paint fences and do what not...So, we’ll move them over there and do some general farm work and there’s really nothing greenhouse related besides cleaning out the facilities.

*Id.* Mr. Van Hoven also explained that American Color will bring in their large plastics and large containers and have the workers label them. *Id.* at 33.

Mr. Van Hoven explained that American Color hires before the season starts. He testified that in Virginia, everyone follows the same seasonality trends and workers will go “to wherever is providing them a little bit of funds while it’s not busy because they know nothing is going on.” *Id.* at 37. Mr. Van Hoven testified that “100 percent” American Color’s seasonal need is from February to the end of November/beginning of December. *Id.* at 64.

Mr. Van Hoven was then asked about the column that says, “Vacation hours paid.” He explained that there are workers who stack up their vacation until the end but will still show on the payroll as being paid for working. *Id.* at 34.

When asked why the payroll records showed fewer full-time employees in 2019, Mr. Van Hoven testified when American Color’s gross sales increase, so does its labor needs. *Id.* Mr. Van Hoven explained that American Color has picked up $2 million worth of new accounts that start selling August 15. *Id.* at 35.

Mr. Van Hoven was then asked about the indeed.com advertisement posted in 2020. He explained:

We all make mistakes. We had a brand new or we have had—she has a little experience now, a new HR person. I either didn’t check it or I didn’t read it over properly, but basically it was just an error on our part. We corrected it as soon as it was made aware to use, but it’s totally misleading…

*Id.* at 37. Mr. Van Hoven was then asked to explain the errors in the advertisement. He stated:

Main error was speaking on our seasonality because I think within the Indeed advertisement was till June when we really definitely need them all the way through November and the second one was our weight requirements. Not at all true around here because we simply need to be able to lift more than 25 pounds we wrote in there.

*Id.* at 37-38.
Regarding the period of need that was initially stated to be February to December and shortened to June, Mr. Van Hoven testified that American Color and Manzana “consciously chose February to end of June to see how this all worked for us…” *Id.* When asked to clarify if he knew the application initially included a period of need from February 15th to December 10th, Mr. Van Hoven testified that he could not recall. *Id.* at 49.

Mr. Van Hoven was then asked about the schedule of operations provided to the CO on January 15, 2021, which described January to June as a period for growing a wide variety of spring flowering annuals and perennials and that from July to September, the focus shifted to growing fall flowers. *Id.* Mr. Van Hoven agreed that as of January 2021, that was American Color’s schedule of operations. *Id.* at 50. However, he stated that once poinsettias are shipped, American Color had “nothing here” in January. *Id.* Mr. Van Hoven also stated that it is incorrect to say that American Color does pre-season preparation work in January, unless one wants to “count cleaning windows and sweeping floors as preparation work.” *Id.* at 51. He stated unequivocally, “We do not have work in January,” while reiterating, “we’re letting them sweep floors and stick a sticker on a piece of plastic.” *Id.* Mr. Van Hoven again described essentially giving workers “hours and a paycheck” in January so that they will be on payroll “when we’re busy.” *Id.* at 52. Mr. Van Hoven attempted to explain the discrepancy between the petition and the true schedule of operations. He testified that the first petition “probably should have said February to June, not January to June because we are not growing a wide variety of anything in January.” *Id.* at 53.

Mr. Van Hoven testified that he used the $2 million increase in sales to project the number of H-2A workers needed for the fall. *Id.* at 56. Mr. Van Hoven explained that the sales are not done through typical contracts because there are no written contracts in agriculture; he did not believe he provided any documentation to support the alleged increase in sales. *Id.* at 56, 63. Specifically, Mr. Van Hoven did not recall if job orders from potential clients or job orders related to sales projections had been provided to the CO. *Id.* at 63.

Mr. Van Hoven agreed that, as reflected in payroll summaries, the total number of hours and number of employees was extremely high in January and December of 2020 compared to the previous months of August, September, October and November. *Id.* at 61. Mr. Van Hoven testified that in December there was still some greenhouse work happening, in that some poinsettias were still being shipped out, and then the “busy work” began. *Id.* at 68, 76. He felt that American Color was being penalized for “giving people hours when we have nothing to do,” and that doing so did not “take away from the seasonality of our business.” *Id.* at 76.

Mr. Van Hoven also stated that American Color pays its employees biweekly and this resulted in three payrolls in January and December 2020. *Id.* at 65.

Mr. Van Hoven disagreed with the CO that adding 52 workers would create a uniform number of workers from January to December, but instead would provide uniformity from February to the end of November/beginning of December. *Id.* at 80.

Mr. Van Hoven testified that workers need to be able to lift 60 pounds. *Id.* at 38. He explained that it’s “very hazardous to everyone” if a worker cannot lift that amount of weight. *Id.* He stated that any fertilizer bag is more than 50 pounds but more importantly, when American Color is preparing for shipment, everything goes on automated plant racks. *Id.* Mr. Van Hoven
testified that the plants have to be “well wet” and that with the average plant weight, the worker will need to be able to lift more than 60 pounds. *Id.*

Mr. Van Hoven was asked to explain his knowledge base for nursery work and how he may have personal knowledge of what other nurseries may require for non-H-2A workers. Mr. Van Hoven testified that American Color is the 20th largest operation in the world in greenhouse work. *Id.* at 40. He also stated that American Color is one of two largest growers in Virginia. *Id.* He also explained that a lot of the smaller growers will grow for American Color so he is aware of their requirements. *Id.* He explained that to his knowledge, everyone requires the same thing in this industry. *Id.* He further testified that lifting requirements have increased overtime but “it was never down to 25 pounds to begin with.” *Id.*

Mr. Van Hoven testified that American Color has not always required three months experience but “over the last couple of years, it’s highly beneficial if people come in with three months experience.” *Id.* at 40-41. Mr. Van Hoven stated that he would have to check with HR about when it started being a requirement. *Id.* at 41. Mr. Van Hoven explained that three months experience was required because of efficiency. He explained that new workers will go through a week’s worth of classes before they get started. *Id.* Mr. Van Hoven agreed that American Color has “preferences” when it comes to level of experience but the requirements can be relaxed when needed. *Id.* at 91.

Mr. Van Hoven testified that 2021 was the first year American Color employed H-2A workers. *Id.* at 42. Mr. Van Hoven was asked about the previous application for labor certification that was filed, which included the three-month experience requirement and the 60-pound lifting requirement that were subsequently removed. *Id.* at 44. Mr. Van Hoven stated that he did not know the extent of the modifications in the previous application. *Id.* at 46. Mr. Van Hoven denied knowledge of the job requirements of current H-2A workers. *Id.* at 47.

**Lawrence Williams**

Mr. Williams testified that he is the owner of Manzana. *Id.* at 99. He stated that Manzana provides H-2A labor for employers who need labor and was originally hired by American Color to provide labor from 2/15/21 to 12/10/21. *Id.* at 99-100. Mr. Williams clarified that Manzana will not be providing labor to American Color from mid-December to mid-February. *Id.* Mr. Williams stated that the current contract between Manzana and American Color is for the time period from 2/15/21, to 6/30/21. *Id.* at 110. However, Mr. Williams later stated that Manzana and American Color do not have a “contract.” *Id.* at 113. He stated that Manzana does “everything with handshake deals.” *Id.*

Mr. Williams was asked why Manzana agreed to remove the experience and lifting requirements from the job order submitted in 2020. He testified that Manzana “bartered down” to shortening the contract and taking away the requirements because of time constraints and “trying to get the petition through to have workers on time…” *Id.* at 100.

Mr. Williams testified that Employer typically requires 3 months of experience in nurseries for workers, as well as the 60-pound lifting requirement. *Id.* at 100-101. Mr. Williams testified that the 3-month experience requirement is included “basically for efficiency and safety amongst the crew.” *Id.* at 109. Mr. Williams further testified that the 60-pound lifting requirement is also included for safety reasons. *Id.* Mr. Williams testified that because Manzana agreed to remove the
requirements, the current H-2A workers employed at American Color came in without the experience requirement. *Id.* at 113.

When asked how Manzana initially identified a seasonal need from 2/15/21 to 12/10/21, Mr. Williams testified:

The initial meeting that I had with Mr. Van Hoven, I went to his place. We talked to see if we were going to be a fit and in those discussions, he—we were talking about dates of need. He was willing to pretty much bet the farm that he had some new contracts coming in. He was 99 percent sure that the need would be there. *Id.* at 113-14.

Mr. Williams testified that Mr. Van Hoven did not ask for year-round workers. *Id.* at 116. Mr. Williams stated that Mr. Van Hoven explained to him that American Color was “dead in the water for two months from mid-December until February 15th and there was really nothing to do other than just busy work.” *Id.* Mr. Williams testified that it was “probably an oversight” that the month of January 15 was included in the schedule of operations submitted to the CO. *Id.* at 117.

Mr. Williams denied having any information or documentation that a job advertisement from Employer’s exhibits was from a non-H-2A employer. *Id.* at 127. He acknowledged that the job requirements were implemented by Manzana, and he includes them in all of Manzana’s applications related to work at nurseries. *Id.* Mr. Williams testified that he did not know of any evidence or documents from non-H-2A employers that show that the three-month experience requirement is consistent with the normal and accepted qualifications by employers that do not use the H-2A program. *Id.* at 145-46. He further testified that he did not have any evidence from non-H-2A employer that shows the 60-pound lifting requirement is consistent with the normal and accepted qualifications required by employers that do not use H-2A workers. *Id.* at 147.

**IV. THE PARTIES’ POSITIONS**

**Employer’s Brief**

Employer argues that its actual need for labor “fits squarely into BALCA precedent for defining ‘Seasonal Need.’” *Employer’s Post-Hearing Brief* at 2. Employer avers that its workers will work at the nursery for less than ten months (February 15, 2021, to December 10, 2021) and will not work at the nursery from at least December 10, 2021, until mid-February 2022. *Id.* Employer asserts that this fits into the presumptively seasonal period recognized by certifying officers and discussed in *Matter of Grand View Dairy*, 2009-TLC-00002 (Nov. 3, 2008). In *Matter of Grand View Dairy*, the ALJ rejected a bright-line rule of ten-month need but allowed it “as a threshold at which the CO will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature.” *Id.* Employer further notes that subsequent BALCA decisions have held that “regardless of whether an Employer’s job opportunity is for ten months or eleven months, if the actual need is seasonal or temporary in nature, the Employer is eligible for the H-2A program.” Employer here argues that because its need is less than ten months, the Court does not need to reach that issue. *Id.* at 3 (citing *Matter of Grasslands Consultants, LLC*, 2016-TLC-00012 (ALJ Jan. 27, 2016).

Employer avers that there is no case law suggesting that a consistent need of less than 10 months is non-seasonal. *Id.* (citing cases). Employer states that the present matter can be
distinguished from Matter of JBO Harvesting Inc., 2021-TLC-00073 (March 22, 2021), because unlike the employer in JBO Harvesting, Employer here was only hired to provide labor at American Color for approximately 9.5 months a year and American Color’s need is fixed and consistent. Post-Hearing Brief at 3 (citing TR at 101).

Additionally, Employer argues that Mr. Van Hoven “clearly testified” that the different horticultural corps are closely tied to specific seasons. Id. at 4 (citing TR at 26-27). Employer asserts that it is clear American Color’s workers “are engaged in work of a seasonal nature tied to a certain time of year by the growing cycle, and that [Employer’s] H-2A workers…would likewise be engaged in seasonal work tied to that same certain time of the year by that same growing cycle.” Id. Furthermore, Employer notes that Mr. Van Hoven testified that American Color has a busy season from mid-February to mid-December, and an off-season in the remaining months or partial months. Employer argues that Mr. Van Hoven’s testimony explained any discrepancies in the payroll record, which indicates little fluctuation in staffing levels, when he testified to employing workers in January to perform non-seasonal work duties primarily to ensure that they do not leave for other jobs and that he has sufficient workers for the seasonal work. Id. (citing TR at 31-32). Employer argues that by using this fact to deny the application, “the CO is essentially punishing American Color for making all efforts to keep domestic workers employed even during its off-season rather than shutting down entirely and watching their domestic workers depart for other positions.” Id. at 5. Employer relies on Mr. Van Hoven’s testimony explaining that the payroll reports show the hours of labor in the month they are paid, not the month they are worked, which made it appear that less work occurred in November and more work happened in December, which is not the case. Id. (citing TR at 65-69).

Employer avers that the “Schedule of Operations,” which included operations in January “was speaking generally and not intended to mean planting or nursery work occurred in the off-season.” Id. (citing TR at 54-55). However, Employer maintains that even if American Color has a year-round need for workers, the need for these particular 52 employees is a “peakload” need. Id. at 6. To establish a peakload need, the employer “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.” Employer asserts that Mr. Van Hoven’s testimony establishes American Color also has a peakload need during specific parts of the year for these additional 52 H-2A workers. Id. (citing Matter of Haag Farms, Inc., 2000-TLC-00015) (Oct. 12, 2000). Employer states that although the payroll records in previous years do not show a significant peakload need for workers during the fall months, Mr. Van Hoven testified that American Color receives orders 12 months in advance and “currently has an extra $2 million of orders from July to December of 2021.” Id. at 6-7.

Employer next argues that its 3-month experience and 60-pound lifting requirements are consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Id. at 7. Employer relies on Mr. Van Hoven’s testimony based on his lengthy history of work experience in nurseries/greenhouses, all of which was outside the H-2A program until 2021. Id. at 8 (citing TR 24, 40-43). Additionally, Employer cites Mr. Van Hoven’s testimony that “in his substantial experience” it is normal and accepted to require 3-months experience and a 60-lb lifting requirement for nursery workers in Virginia. Id. (citing TR at 38-42). Employer re-iterates that Mr. Van Hoven “knows this due to his
deep knowledge of the industry and his experience buying from other nurseries, whose requirements he has personal knowledge of.” Id. (citing TR at 40-41).

Employer further argues that the CO cannot raise new reasons to justify the denial. Id. Employer states that it “anticipates” the CO will argue that the application should be denied because there is no written contract between American Color and Employer. However, Employer avers that because this issue was not raised in the denial, it is not properly before the Court. Id. However, Employer asserts that there is a written contract between American Color and Employer.

Certifying Officer’s Brief

The Certifying Officer argues that Employer has not shown a seasonal need. Certifying Officer’s Post-Hearing Brief at 5. The Certifying Officer asserts that Employer failed to provide any evidence or documentation regarding Employer’s seasonal need, not its client’s seasonal need. Id. at 6. Whether an H-2ALC’s client, i.e., the fixed-site grower, has a seasonal need for labor does not answer the question of whether the H-2ALC’s need for labor is seasonal. Id. (citing JBO Harvesting, Inc. 2020-TLC-00129, slip op. at 10 (Nov. 6, 2020); and Overlook Harvesting Co., LLC, 2021-TLC-00050, slip op. at 18 (Jan. 21, 2021)). Further, the Certifying Officer avers that the Employer’s contract with the client does not determine seasonal need. Id. (citing VJ Pimental Resources, LLC, 2020-TLC-00104, slip op. at 3, 4 (Aug. 25, 2020)(affirming the CO’s determination that “employer’s need is not limited by a growing season or specific aspect of a longer cycle as the regulation requires but only by the length and quantity of contracts that it chooses to enter into.”)).

The Certifying Officer argues that Employer has the burden to show its own seasonal need, its own labor levels, and its own ongoing operations under the regulation. Employer’s need is not seasonal because it is not tied to a certain time of year by an event or pattern. Rather, Employer tied its need to the agreement it has with American Color. Id. (citing TR at 100). The Certifying Officer notes that the Letter of Commitment between Employer and American Color states a need for 52 workers however, Employer has not provided any documentation regarding other contracts with other clients or Employer’s payroll to support the number of seasonal workers requested. Id. at 6-7. The Certifying Officer asserts that neither the administrative file nor the hearing testimony provided information regarding Employer’s seasonal need outside of American Color’s need. Id. at 7.

The Certifying Officer further argues that American Color’s payroll summaries provide additional evidence of a year-round need. Id. Employer provided payroll summaries for American Color that show labor levels during the months of its purported off-season, December and January. Specifically, the Certifying Officer notes that the number of workers paid in December and January of 2018, 2019, and 2020, are higher or comparable to such numbers from February through November. Id. (citing CX-1 p. 2; EX-1). Additionally, Mr. Van Hoven admitted that adding 52 workers from July to November would create similar labor levels as those from February to June. Id. (citing TR at 81). The Certifying Officer thus contends that American Color’s payroll records are insufficient to show seasonal need, since they do not reflect an off-season during December and January and do not show a seasonal need from July to December and. Id.

The Certifying Officer notes that during the hearing, Mr. Van Hoven stated that the payroll payment included payment of employees three times instead of two times in January 2020 and December 2020, without providing any documentation of same. Id. at 8-9 (citing TR at 65). The
Certifying Officer also argues that even if American Color paid employees three times in January and December 2020, the labor levels of December 2020 would be even higher when comparing workers paid in December 2019 to those paid in November 2019 and/or February 2020. *Id.* The Certifying Officer thus asserts that the payroll still confirms labor levels are uniform (or higher) in American Color’s alleged off-season. The Certifying Officer also avers that Employer has failed to provide sufficient documentation about its labor levels or ongoing operations but rather has provided information for its client. *Id.* at 10.

Further, the Certifying Officer states that it is “well-established that a need based on economics cannot properly be classified as ‘seasonal.’” *Southside Nursery, 2020-TLC-00157, slip op.* at 4 (Oct. 15, 2010). Here, the Certifying Officer asserts that Employer based its seasonal need on American Color’s sales projections. *Certifying Officer’s Post-Hearing Brief* at 10 (citing *AF* at 5, *TR* at 82). The Certifying Officer notes that neither Employer or American Color provided any “documents, emails, or sales orders to support” the position that American Color projects $2 million more in sales for July 2021 to December 2021. *Id.* (citing *TR* at 56-57, 63). The Certifying Officer argues that the ability to change production levels based on sales further shows that Employer’s need is not seasonal since it is not based on “a short annual growing cycle or a specific aspect of a longer cycle.” *Id.* at 10-11 (citing 20 C.F.R. § 655.103(d)). According to the Certifying Officer, need for additional seasonal workers does not necessarily equate to a seasonal need that fits the requirements of the H-2A Program. *Id.* at 11.

The Certifying Officer cites *Nature Fresh Farms USA, Inc., 2020-TLC-00079, slip op.* at 10 (June 19, 2020), in which the employer argued that the positions listed in its pending application and a previous application were distinct because one was a greenhouse position and one was a packing house position and thus, the duties were different. However, the ALJ noted the two positions’ duties overlapped, including cleaning duties, and found that the duties were similar enough to consider them within the same position. *Certifying Officer’s Post-Hearing Brief* at 11 (citing *Nature Fresh Farms*, slip op. at 10). The Certifying Officer contends that *Nature Fresh Farms* is factually similar to the case at issue here because the employer in Nature Farms changed its period of need from the first application to the next, and the ALJ found that it was appropriate for the CO to question the shifting dates. *Nature Fresh Farms*, slip op. at 10.

The Certifying Officer also argues that American Color’s operations and its employees’ job duties in January and December are comparable to the operations and job duties during the February to December time frame. *Certifying Officer’s Post-Hearing Brief* at 11. Mr. Van Hoven testified that during January, American Color’s employees are cleaning windows, sweeping floors, cleaning equipment, cleaning the facilities, doing general farm work at its cattle farm, sweeping the outside field, painting fences, and labeling UPC and barcode stickers. *Id.* (citing *TR* at 31, 33). Mr. Van Hoven admitted that American Color does cleaning work during January, as well as throughout the rest of the year because employees are “cleaning windows and sweeping floors…every day regardless.” *Id.* (citing *TR* at 51, 55). Although Mr. Van Hoven testified that employees have essentially nothing seasonal to do in January, the Certifying Officer argues that his testimony was contradicted by his company’s stated schedule of operations and its payroll records. *Id.* at 12. Additionally, the Certifying Officer argues that cleaning and general farm work are substantive job duties of greenhouse workers, as the workers’ duties are not limited to growing and harvesting flowers. *Id.* As such, the Certifying Officer contends that the duties performed by American Color’s employees in January are also done February through December. *See id.*
Overall, the Certifying Officer argues that the Employer’s previous application (H-300-2351-962216) and pending application (H-300-21116-258128), along with American Color’s descriptions of its workers’ job duties in January and December, establish a year-round need for the same type of work. Id. The Certifying Officer asserts that the following job duties described in the applications overlap with the job duties provided in Mr. Van Hoven’s Testimony:

- clean up work areas at the end of the day or midday;
- sweep with a broom and wipe down work areas;
- paint by hand or hand sprayer;
- scan barcodes;
- sweep the greenhouse floor;
- keep greenhouse facilities sanitized by using cleaning agents and spraying floors or matting with solution;
- assist in replacing greenhouse plastic;
- sweep, wash floors, paint, empty trash barrels, and clean;
- label products;
- clean bathrooms, mop, power-wash, and clean equipment;
- clean equipment and other hand tasks;
- perform unusual, complex, or non-routine activities; and
- experience unscheduled or unexpected interruptions in regular work.

AF at 127, 129, 130, 179, 181-83.

Furthermore, the Certifying Officer notes that American Color’s job posting with the Virginia SWA sought greenhouse workers from April to September 2019 and included duties such as “clean work areas, equipment and help maintain grounds.” Certifying Officer’s Post-Hearing Brief at 14 (citing AF at 113). American Color also sought greenhouse workers on indeed.com during 2020 and the posting included the duties of cleaning work areas, cleaning equipment, and helping to maintain grounds. Id. (citing AF at 115).

The Certifying Officer asserts that Employer provided American Color’s schedules of operations as recently as June 11, 2021, and it included pre-season preparation work and growing a wide variety of spring flowering annuals and perennials in January, as well as growing poinsettias and mums in December. Id. (citing AF at 3, 22, 184). Furthermore, American Color’s website details its products, provides its schedule of available flowers, and states “flowers are available throughout the winter months at American Color.” Id. (citing CX-2 at p. 4). The Certifying Officer argues that the previous and pending job applications, American Color’s job postings, as well as Mr. Van Hoven’s testimony about the cleaning duties in January, further establish the year-round nature of American Color’s operation. See id.

The Certifying Officer also argues that Employer failed to meet its burden to show the 3-month experience requirement and 60-pound lifting requirement were bona fide job requirements that were normal and accepted by non-H-2A employers. Id. at 14. The Certifying Officers relies on the Virginia SWA’s surveys confirming that these are not bona fide qualifications required by non-H-2A employers with workers in the same or comparable occupations. Id. (citing AF at 16, 49-55). The Certifying Officer notes that in 2019, American Color’s indeed.com job posting did not include any experience requirement and had a 25-pound lifting requirement. Id. at 13-14 (citing AF at 113). Further, in the previous application, Employer amended the application to delete the
experience requirement and changed the lifting requirement from 60 pounds to 25 pounds rather than provide supporting documents. *Id.* at 14 (citing *AF* at 183). Mr. Van Hoven testified that while “it’s highly beneficial” to have three months of experience, he was not sure if it was a requirement and would need “to check with HR.” *Id.* at 15 (citing *TR* at 40-41, 88-89, 91). Further, Mr. Van Hoven testified that employees without experience attend “a week’s worth” of training classes to become greenhouse workers. *Id.* (citing *TR* at 41). Finally, the Certifying Officer asserts that the Employer’s owner admitted that Employer has no evidence or documentation related to non-H-2A employers, as it concerns the job requirements at issue. *Id.* (citing *TR* at 127, 140-41, 145-47. Thus, according to the CO, the Employer here failed to meet its burden to show that these requirements are consistent with the normal and accepted qualifications required by non-H-2A employers.

V. DISCUSSION

The standard of review in H-2A cases 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 submission from the parties, which may include new evidence. 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.*

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-00815, slip op. at 4 (Feb. 8, 2011). To prevail, the employer must demonstrate that the CO’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. See *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014). The CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

A. Seasonal or Temporary Need

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.

To receive certification under the H-2A program, an employer must establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015).

According to the regulations:

[E]mployment 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) (emphasis added).

As for seasonal need, an employer must demonstrate “when the employer’s season occurs and how the need for labor or services during this time of year differs from other times of the year.” Fegley Grain Cleaning, 2015-TLC-67, slip op. at 3, (ALJ Oct. 5, 2015)(citing Altendorf Transport, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). The ALJ must determine if the employer’s needs are seasonal, not whether the duties are seasonal. Pleasantville Farms, LLC, 2015-TLC-00053, slip op. at 3 (June 8, 2015)(citing Sneed Farm, 1999-TLC-00007 (Sept. 27, 2999)). “Denial of certification is thus appropriate where the employer fails to provide evidence that it needs more workers in certain months than other months of the year.” Farm-Op Inc., 2017-TLC-00021, slip op. at 7 (July 7, 2017)(citing Lodoen Cattle Co., 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011)).

As the H-2A program is designed to fill only temporary or seasonal labor needs, the need for the particular position cannot be a year-round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). Ten months has been viewed as an acceptable threshold when ascertaining whether an employer’s need is temporary. See Grand View Dairy Farm, 2009-TLC-2 (Nov. 3, 2008) (finding that applying ten months as a threshold is not arbitrary where employer is given the opportunity to submit proof to establish the temporary nature of its employment).

In this case, Employer is an H-2A labor contractor (“H-2ALC”), not a fixed-site employer. The regulations provide that an H-2A labor contractor is “[a]ny person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association...who recruits, solicits, hires, employs, furnishes, houses, or transports” any H-2A worker. 20 C.F.R. § 655.103(b). As noted herein, the fact-finder must determine whether an employer’s needs are seasonal, and here the employer is the labor contractor, not whether the particular job at issue is seasonal. See JBO Harvesting, Inc., 2020-TLC-129, slip op. at 4-5 (Nov. 6, 2020).

In the application at issue, Employer based seasonal need from 6/28/21 to 12/10/21 on the needs of the fixed-site grower, American Color. Employer submitted that there are “two separate seasonal needs,” from “spring to early summer for the care and harvesting of spring flowering plants,” for which an amended application had already been approved, and “from late summer to late fall for the care and harvesting of fall flowering plants.” Id. at 23. The undersigned notes that before authorizing amendment of the first application, Employer had originally sought 52 workers for the American Color nursery for one purported season extending from 2/15/21 to 12/10/21. Id. at 138, 155-58. Employer authorized amending the season to close 6/30/21 instead of 12/10/21 when presented with a NOD that questioned whether the need was more year-round than seasonal, given American Color’s advertised job describing seasonal greenhouse labor from December through June. As it stands, Employer now takes the position that a second seasonal need exists,
from late June to early December, and also disputes any characterization of a year-round need when considering American Color’s operations and use of labor.

I find that Employer did not meet its burden of demonstrating that the need is “seasonal” under the regulations because the evidence does not show labor levels far above those necessary for ongoing operations are required during the stated period of need. 20 C.F.R. § 655.103(d).

The 2018-2020 payroll summaries do not demonstrate a seasonal need from 6/28/21 to 12/10/21. The 2020 payroll summary shows that the total number of full-time and seasonal employees ranged from 154 to 198 per month between January and June and began to drop in July where it remained lower through the end of the year, ranging from 113 to 139 employees per month in those 6 months. EX-1 at 1. The number of seasonal workers in particular started dropping in June to almost half the seasonal workers employed in May (May had 91 workers, June had 49, July had 32), and their numbers remained primarily in the 20’s and 30’s through the end of the year. Id. Such numbers of seasonal workers were typically about half of the number of seasonal workers employed in the first six months of the year. Thus, the 2020 payroll summary primarily shows increased use of labor consistently from January through June, and a decreased use of labor, particularly seasonal labor, from July through December. AF at 186; EX-1 at 1. Accordingly, the 2020 payroll summary does not reflect labor levels far above those necessary for ongoing operations. The 2018 and 2019 payroll summaries are similar, showing a tapering in the number of employees in June and July, sometimes significantly.3 EX-1 at 2-3.

Although the total number of employees and hours worked has historically been lower for American Color from July through December in 2018, 2019, and 2020, Employer presented 2021 a sales projection prepared by Mr. Van Hoven to support the application for 52 workers from 6/28/21 to 12/10/21. Mr. Van Hoven admitted that he did not recall providing any documentation, such as job orders, to support his projected increase of $2 million in sales in the latter half of 2021, compared to 2020 sales. More importantly, no testimony or documentary evidence explains how the projected sales were derived or how they correspond to the number of workers requested. A comparison of the sales summary from July through December 2020 with the sales projection for July through December 2021 reflects increased quantities of only some items in 2021, including 2 mums products in the “Fall Items” column, which resulted in exactly $1 million more in projected sales, and increased quantities of 3 poinsettia products in the “Winter Items” column, which also resulted in exactly $1 million more in projected sales.4 AF at 30-33. Mr. Van Hoven indicated that

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3 For example, in 2018, American Color employed 196 total workers and 117 seasonal workers in May, which dropped to 116 total workers and 38 seasonal workers in June. EX-1 at 3. The drop was not an anomaly; after June 2018, the total number of workers and seasonal workers remained much lower through December than the number employed in the first six months. Id.

4 The increased quantities of 2 of the mums products resulted in total projected sales of Fall Items of $4,214,557.94 in 2021, compared to $3,214,557.94 in 2020 (a difference of exactly $1 million). The projected increased sales for the “G2.5R Mum” was $750,000.00, and for the “Q3.0R Mum” the projected increase was $250,000.00. AF at 30, 32. No explanation was offered for why only these two products in the Fall Items category, which consisted of several other mums, asters and daisies, were projected to increase in this manner. The increased quantities of 3 of the poinsettia products resulted in total projected sales of Winter Items of $5,420,524.92, compared to $4,420,524.92 in 2020 (a difference of exactly $1 million). Like the Fall Items, only a few of the products accounted for the projected increase without explanation. Sales of 10” poinsettas were projected to increase by $500,000.00, “4PK-6.5’
the projection was based on orders that had been received 12 months in advance and that typically, no written contracts are created for such orders. TR at 56, 63. He also testified that he did not like the word “projections” but instead considered the numbers “a reality of our increased sale for this fall and winter crop.” Id. The document Employer provided, however, is titled “Sales Projection.” AF at 32. Overall, I find that the Sales Projection document combined with the testimony regarding projected 2021 business raised more questions than provided answers or explanations to support the Employer’s request for 52 H-2A workers, which would essentially be a continuation of the 52 workers employed as a result of the application that was certified.

Mr. Van Hoven did not adequately explain how the number of workers (52) was identified as necessary for the application at issue. He stated instead that he would rather have 80 workers but agreed to seek fewer workers with the understanding they may have to work more hours at times. AF at 115-16. At any rate, neither the number 80, nor the number 52, were explained, including whether they had any relationship to the number of labor hours necessary to cultivate a certain number of plants, meet a certain number of orders, or tend to a certain amount of field acreage or greenhouse space, whether due to historical or projected sales. Mr. Van Hoven testified in a conclusory manner, “I’ve been doing this a long time. We know how many people we need. We know when people are available. We know when they come in for work. We know how many we can officially hire. We needed 52 people.” TR at 55. When pressed further, he indicated only that they determined 52 workers were needed because of the $2 million increase in sales. Id. at 56. He could not explain why 52 workers were requested for February to June and again from July to December. Id. at 57. He admitted that adding 52 H-2A workers for July to early December would generally render his levels of staffing fairly uniform from February to the beginning of December. TR at 80-81. However, no evidence was offered to show that the increased sales from July to December would render the work activities more on par with the sales and activities during the first part of the year. Overall, the testimony regarding the need for labor based on projected or expected sales was unfortunately too conclusory and vague to be afforded any weight. Additionally, a seasonal or temporary need based on filling a number of customers’ orders that may exceed the capacity of permanent staff does not meet the regulatory standard. See JBO Harvesting, supra, slip op. at 5.

Further, a need is not seasonal if the employer can manipulate the season to fit the criteria of the temporary labor certification program. See Salt Wells Cattle Company, LLC, 2011-TLC-00185 (Feb. 8, 2011)(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 is not seasonal according to the definition established at 20 C.F.R. § 655.103(d)). An employer is required to justify a change in its dates of need to ensure it is not manipulating its “season” when it really has a year-round need. Pleasantville Farms, LLC, 2015-TLC-00053, slip op. at 3 (June 8, 2015). See also Katie Heger, 2014 TLC-00001 (Nov. 12, 2013)(denying certification where two applications covering entire year reflected poinsettias were projected to increase by $400,000.00, and 6” poinsettias were projected to increase by $100,000.00. AF at 31, 33.)
“same job title, job duties, job requirements and were filed by different but related parties for the same worksite”).

Here, Employer’s present application seeking 52 agricultural workers for the growing of fall/winter flowering plants (H-300-21116-258128) is essentially an extension of its prior application seeking the same number of laborers for growing spring flowering plants (H-300-20351-962216). This makes sense because Employer originally sought 52 workers for both periods of time without interruption. Although Employer now contends that there are two seasons, the evidence does not support its position. The job duties associated with the first application concerned attending to spring flowering perennial and annual plants and ranged from weeding to trimming, transplanting, tracking, boxing, placing on conveyors and pallets, planting by hand and machinery, sorting, applying pesticides, tracking, operating farm equipment, and engaging in general clean up and maintenance. AF at 179-83. The second application described essentially the same or very similar duties, even though the type of plant differed and included chrysanthemums and poinsettias instead of spring flowering plants. AF at 85. Workers were still expected to plant, water, space, transplant or move plants, and engage in general cleaning of work areas and fields. Although Employer chose to include far less detail regarding the tasks associated with “growing and maintaining healthy chrysanthemum and poinsettia crops,” it has not demonstrated that the same essential tasks to grow and ready such plants for sale and distribution to American Color’s clients differed significantly from the tasks associated with the job duties associated with the first amended application describing the tasks required from 2/15/21 to 6/30/21.

Also, much of the language concerning job duties was identical between the applications, as it concerned company supervision; the potential effect of weather on workers’ schedules; a required orientation for rules, policies, and safety information; the need to perform repetitive movements, engage in extensive standing and walking, working on feet while bent for extended periods of time, and working in extremes of temperature; the need to frequently handle, feel, reach, climb or balance; the occasional need to stoop, kneel, crouch, or crawl; notification regarding the possible effect of allergies to ragweed, goldenrod, insect spray and chemicals; information on drug testing and following safety rules and instructions including ability to comply with pesticide warnings; and the potential that workers with legal drivers licenses may be needed to drive a vehicle to and from the field and may have to operate forklifts, dumpcarts and skidsteers. Both applications sought 52 workers to work at the same site and on the same schedule of 6 days per week, 6 hours per day. The similarities among the positions suggests Employer has engaged in manipulation of the purported seasons to avail itself of the temporary labor certification program.

Employer also presented documents and testimony containing several inconsistent statements regarding American Color’s schedule of operations or activities throughout the calendar year. For example, Employer initially presented a schedule of American Color’s operations that included growing a wide variety of spring flowering annuals and perennials from “January – June.” AF at 184. Employer also submitted a written schedule that described January as the time for American Color’s “pre-season preparation work” and that growing spring flowering annuals and perennials extended from “February to June.” Id. at 22. Mr. Van Hoven stated to the contrary, however, that there is no “pre-season preparation work” in January. TR at 51. Mr. Van Hoven said
that there were more individuals employed in January 2020 because it was harder to find and retain workers “leading up to the pandemic.” *Id.* at 31. However, payroll summaries show a similar staffing trend in January of 2018 and 2019, as well, which cannot be explained by the pandemic. For example, more employees were on staff in January 2018 (143) than February 2018 (128). *EX-1* at 3. The number of employees in January 2019 (144) was also not significantly lower than February 2019 (153). *Id.* at 2.

The Employer has entered into a contract with fixed-site grower American Color and seeks laborers for American Color’s worksite for harvesting, picking, cleaning, stacking, and loading crops, and engaging in general labor such as cleaning equipment and greenhouse facilities. Although the job duties described in both applications may not be identical, BALCA has consistently held that the seasonal variations of a farm laborer position are not determinative of the Employer’s seasonal need but rather it is the need for the labor itself that must be considered in determining whether the Employer has proven a seasonal need. *See Mendez Farm, LLC, 2021-TLC-00110, slip op. at 6 (April 16, 2021); Nature Fresh Farms USA, Inc., 2020-TLC-00079 (June 19, 2020); Matter of Artee Corp., 181 I. & N. Dec. 3666, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); Sneed Farm, 1999-TLC-00007, slip op. at 4 (Sept. 27, 1999)(stating it is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal); see also William Staley, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009).* Here, Employer has not tied its alleged employment need to a certain time of year by an event or pattern, as required by 20 C.F.R. § 655.103(d), but instead has entered into a contract with the fixed-site grower that, at best, is seeking to fill an increase in customer orders that may exceed the capacity of its permanent staff. As noted herein, this does not satisfy the regulatory burden for seasonal or temporary need.

BALCA has consistently found that the CO can review the situation as a whole when determining temporary need and need not confine the analysis to the existing application. *See Haag Farms, 2000-TLC-00015 (Oct. 12, 2000).* To allow otherwise would provide employers with an opportunity and ability to continually shift their purported periods of need in order to utilize the H-2A program. An employer’s application for temporary labor certification is properly denied when the “consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer’s need does not differ from its need for such labor during other times of the year.” *Larry Ulmer, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014).* The consecutive nature of the current and previous application periods, the similarity of job requirements and duties throughout those periods, and the inconsistencies in the annual operations schedules and seasons offered by Employer and the fixed-site grower failed to show that Employer’s need for workers during the stated period of need is seasonal or temporary.

Accordingly, I find that the Certifying Officer’s denial of certification, based on Employer’s failure to show that the employment was seasonal or temporary, was reasonable and was not arbitrary, capricious, or otherwise not in accordance with the law. Therefore, the Certifying Officer’s determination is affirmed on this issue.
B. Bone Fide Job Requirements

The Immigration and Nationality Act ("INA") provides that "[i]n considering the question of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.” 8 U.S.C. § 1188(c)(3)(A). Similarly, 20 C.F.R. § 655.122(b) provides:

Job qualifications and requirements. Each job qualification requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

Although the regulations do not define “normal and accepted,” ALJs have interpreted the phrase as meaning less than prevailing but clearly not unusual or rare. See Westward Orchards, et al., 2011-TLC-00411 (July 8, 2011). The employer bears the burden of establishing that the requirement is normal and accepted. Id.

Employer mainly relies on Mr. Van Hoven’s testimony to establish that the job requirements pertaining to work experience (3 months) and lifting requirements (up to 60 pounds) are normal and accepted in this industry. Additionally, Employer argues that the certifications introduced at the hearing for various H-2A Virginia nurseries and farms show that the same SWA and CO had looked at what is normal and accepted by the same pool of non-H-2A Virginia agricultural and horticultural employers and had not concluded that these requirements not normal and accepted. In its brief, the CO argued that the Virginia SWA provided surveys that confirm these are not bona fide qualifications required by non-H-2A employers. The CO urges that it is important to consider that Employer’s owner, Mr. Lawrence Williams, admitted that Employer has no evidence or documentation related to such job requirements by non-H-2A employers.

I find that Employer has not established that these requirements meet the standard under 20 C.F.R. § 655.122(b). While Mr. Van Hoven described the advantage of hiring workers with experience and stated that he found it “highly beneficial,” to hire experienced workers, his testimony did not reflect that experience was a job requirement. TR at 40-41. He also stated that American Color provides training for its workers. Id. Overall, Mr. Van Hoven agreed that American Color has “preferences” when it comes to level of experience but the requirements can be relaxed when needed. Id. at 91. The evidence thus reflects that American Color, a non-H-2A employer, did not previously require 3 months of experience but instead accepted the requirement imposed by Manzana for the present application. AF at 145, 190. Manzana employs H-2A workers and thus its practices are not determinative of the issue.

Employer also did not establish that the lifting that would occur with chrysanthemum and poinsettia cultivation would be more than double the requirements associated with growing the spring flowering plants, and thus did not meet its burden. Mr. Van Hoven indicated that fertilizer bags weigh about 50 pounds, but he did not indicate that the use of such bags was unique to the fall/winter period of need. The lifting requirement for the spring flowering plant work was reduced to 25 pounds, and no evidence indicates that this prevented or interfered with successful
performance of the work. Although Employer introduced evidence of greater lifting requirements for other H-2A workers, the employment practices of H-2A employers do not address the regulatory standard.

I thus find that Employer has not met its burden of showing that these requirements are bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations or crops.

I further find that the Certifying Officer’s denial of certification, based on Employer’s failure to establish bona fide job requirements, was reasonable and was not arbitrary, capricious, or otherwise not in accordance with the law. Therefore, the Certifying Officer’s determination is also affirmed on this issue.

VI. ORDER

Based on the foregoing, it is hereby ORDERED that the Certifying Officer’s decision denying the Employer’s Application (H-300-21116-258128) is AFFIRMED.

For the Board

ANGELA F. DONALDSON
ADMINISTRATIVE LAW JUDGE