In the Matter of:

MIDWEST AG ELECTRIC INC.,
Employer.

DECISION AND ORDER REVERSING THE DECISION OF THE CERTIFYING OFFICER

This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

Midwest Ag Electric Inc. ("Employer" or “Midwest Ag”) applied for authorization to hire six temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification denied the application on July 16, 2021. Employer appealed and requested a de novo hearing before an administrative law judge.

The matter came before the undersigned for hearing on August 19, 2021. At the hearing, the undersigned admitted into the record Employer’s Exhibit ("EX") 1 and the Certifying Officer’s Exhibits ("CX") 1-5. Shannon Vandersyde and Kyle Farmer both testified at hearing. The matter is now properly before the Board of Alien Labor Certification Appeals (the “Board” or “BALCA”) pursuant to Section 655.171 for review of the Certifying Officer’s decision. Upon a review of the record and the relevant legal authority, the undersigned REVERSES the determination of the Certifying Officer.

1 The chief administrative law judge may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.171. Chief Judge Henley designated a single member of the Board to hear this appeal.
I. Procedural and Factual Background

Employer is a Minnesota farm labor contractor that specializes in agricultural equipment installation. (Administrative File “AF” at 20, 138, 161.) Midwest Ag specializes in installing equipment and components in livestock confinement structures in the upper Midwest. (AF at 20, 161; Hr’g Tr. 10:21-11:4.) Most of these structures are used for raising pigs and poultry. (Hr’g Tr. 11:1-2.) Shannon Vandersyde has owned Midwest Ag for the last ten years, and he has twenty-one years of experience in the industry. (Hr’g Tr. 10:20-25.)

Employer’s business involves installing various equipment, such as feed lines, heaters, and gating inside livestock confinement structures. (AF at 161; Hr’g Tr. 19:3-10, 20:4-9.) Employer does not build the structure itself; its work is limited to finishing the inside of the structure by installing all the necessary equipment needed for raising livestock. (Hr’g Tr. 19:19-20:9, 22:6-11, 24:3-11.) Other contractors excavate the ground, pour the concrete slab, and frame the structure. (Hr’g Tr. 14:3-5, 19:19-20:3, 22:6-11.) Typically, it takes the other contractors approximately sixty days once they start pouring the concrete before Employer’s work crew can enter the newly constructed structure and begin installing the necessary equipment. (Hr’g Tr. 20:20-23, 21:3-4, 22:12-17; AF at 20, 161.)

On June 21, 2021, Employer submitted an H-2A Application for Temporary Employment Certification with the United States Department of Labor seeking certification for six seasonal construction workers from August 10, 2021, to April 1, 2022, for work in Minnesota. (AF at 144, 146-47, 154.) The temporary workers would install equipment for livestock buildings, including water lines, feed lines, gating, fans, conduit, wires, fixtures, and ventilation equipment. (AF at 146; Hr’g Tr. 12:13-15.) These temporary workers would not work with live electricity. (AF at 20; Hr’g Tr. 25:6-20.) Employer offered a wage of 14.72 an hour. (AF at 146.)

Midwest Ag also employs permanent employees. (Hr’g Tr. 11:12-13; AF at 21; EX 1.) These permanent employees come in once the temporary workers install the equipment and do the finishing electrical work for the project. (Hr’g Tr. 12:15-18, 25:12-15; AF at 20, 161.) The permanent employees also oversee the work of the temporary workers. (Hr’g Tr. 12:15-18.)

Employer’s application states that its temporary need for workers is seasonal in nature. (AF at 138.) As justification for the seasonal need, Employer indicates in its application that the six workers are needed to meet an increase in demand during Employer’s busy time of year. (AF at 161.) Employer explained that:

our work typically slows down in the months of May and June because we are about 60 days behind the rest of the contractors in the agricultural construction industry. Therefore, the work that we perform fluctuates based upon the agricultural construction work cycle and therefore, is seasonal in nature.

(AF at 161.) According to Employer, it is unable to find a sufficient number of “available, hard-working, dependable laborers” for the period of need. (Id.)
Employer started utilizing the H-2A program to supplement its permanent workforce in December 2018. (Hr’g Tr. 11:22-23.) The Office of Foreign Labor Certification previously certified Employer for four electrical and electronic repairers from December 18, 2019, to January 27, 2020 (CX 4); four construction laborers for December 24, 2019, to January 27, 2020 (CX 3); sixteen farm laborers from July 5, 2020, to October 15, 2020 (CX 2); and eight construction laborers from October 16, 2020, to December 31, 2020 (CX 1). Employer also utilized temporary workers from December 2018 to February 2019. (EX 1, at 1-2.)

Employer also submitted an application for six farm laborers for a period of need from January 1, 2021, to March 19, 2021. (AF at 407-53.) Employer, however, withdrew this application on December 3, 2020, because the scheduled projects for which Employer needed the temporary workers were delayed. (AF at 407-08.) Mr. Vandersyde explained at the hearing that Employer had a job in Northern Minnesota that he believed would be ready for his crew during this time period, but that the other contractors could not get the facility constructed in time because of the weather. (Hr’g Tr. 21:15-22:2.) As a result, he withdrew the application. (Hr’g Tr. 22:2.) In addition to the application for six workers pending before the undersigned, Employer filed another application on June 22, 2021, seeking sixteen farm laborers from August 8, 2021, to April 1, 2022, for similar work installing equipment in Iowa. (AF at 321-406.)

In support of its application for six workers, Employer submitted several Farm Labor Agreements for the installation of electrical work in structures. (AF at 167-71.) Work for two of the three contracts was expected to be completed prior to the August 10, 2021, date of need for the temporary workers. (AF at 167, 169-70.) However, the agreements state that the schedule is “subject to weather, property, and growing conditions.” (AF at 167, 169-70.) According to Mr. Vandersyde the dates listed in the agreements were only estimates, and the projects did not begin on the starting date listed in the agreement. (Hr’g Tr. 42:12, 44:17-46:4.) These and other projects were delayed because of the COVID related supply disruption for construction materials and other supplies needed to complete the project. (Hr’g Tr. 42:12-18.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency. (AF at 125-30.) The Notice of Deficiency cited several deficiencies. (AF at 127-30.) The Certifying Officer found that the record did not support a seasonal need, the application did not include a copy of a written assurance with its surety bond, and the application failed to demonstrate that Employer had sufficient authorized drivers to transport the six workers. (Id.) As to the issue of seasonal need, the Certifying Officer found that:

The duties listed in the application can be performed indoors and year-round. Furthermore, the employer’s Statement of Temporary Need fails to adequately explain how the employer’s need for temporary labor is seasonal. Therefore, it remains unclear as to how this job opportunity is tied to a certain time of year by an event or pattern. (AF at 127-28.)

Employer subsequently provided additional information in support of its application. (AF at 18-123.) In addition, Employer adjusted the ending period of need from April 1, 2022, to
January 31, 2022. Employers submitted the requested information related to the surety bond and the drivers. (AF at 19, 95-123.)

As to the deficiency related to temporary or seasonal need, Employer further explained that its work was seasonal because it “only occurs immediately after the construction of a new or remodeled livestock confinement.” (AF at 18.) According to Employer, these livestock confinement can only occur in Iowa during the winter months of the year because of the need to pour concrete and excavate the worksite during the warmer months. (AF at 18. However, Employer also states that some of the activities, such as laying out electrical components prior to installation, occur outside, and that it is unsafe to perform these activities outside in the winter. (AF at 18.) Employer notes that the buildings themselves are unheated, and it can be unsafe to work in the buildings for extended periods of time in the winter. (AF at 18.) Based on the weather data submitted by Employer, the three coldest months in Granada, Minnesota are December, January, and February. (AF at 23.)

In addition, Employer contends in response to the Notice of Deficiency that it is unable to perform work in the coldest winter months because of the risk of transmission of disease to the livestock. (AF at 19.) Employer submitted the letter of Professor Michael Van Amburgh, a professor in the Department of Animal Science at Cornell University, in support of its position. (AF at 30-94.) Dr. Van Amburgh opines that construction companies should not be present around livestock in the winter months due to the high risk of disease transmission. (AF at 31.) Again, these statements conflict with other statements in the application stating that Employer’s busiest time of year is August to January. (See, e.g., AF at 20-21.) Finally, Employer stated that the work was temporary in addition to seasonal because its need is less than a full year. (AF at 18-19.)

Employer indicated that the additional temporary workers are needed to supplement its permanent workers. (AF at 21.) Both temporary and permanent employees do the same type of work, but the permanent employees fix and maintain equipment during the slower spring months and finish working on any lingering jobs. (AF at 21.) Employer also submitted its 2019 and 2020 payroll hours in support of its seasonal need in response to the Notice of Deficiency. (AF at 27-29.)

At hearing, Mr. Vandersyde elaborated on the seasonal need for laborers. He explained that Midwest Ag’s work runs on a yearly cycle tied to the weather. (Hrg Tr. 20:16-21:8.) Agricultural contractors cannot excavate the ground or pour concrete without incurring significant additional costs in the coldest winter months in Minnesota, so they generally do not pour concrete for the slabs for these types of livestock facilities from December to May. (Hrg Tr. 20:16-19, 21:3, 32:25-33:7, 35:16-23; AF at 20.) Because it takes approximately sixty days from the start of pouring concrete until Employer’s crew can install the equipment inside the facility, Employer has a peak workload from around August to January every year. (Hrg Tr. 37:3-10; AF at 20-21.)

2 The July 2, 2021, correspondence from Kyle Farmer, Esq. and the July 2, 2021, statement from Mr. VanderSyde both state that the start date for the application is April 1, 2021. (AF at 18, 20.) However, it is clear that this is a typographical error. Employer only intended to amend the end date, not the start date of the application. (Hrg Tr. 16:3-18.) Employer would not amend the start date of its application to a date three months in the past.

3 The reference to Iowa, as opposed to Minnesota, was another clerical error contained in the response to the Notice of Deficiency.
The payroll data submitted by Employer at hearing in support of its applications shows a significant peak in hours worked in December 2018, which corresponds with the start date of additional temporary workers. (EX 1, at 1.) For 2019, hours peaked in November with reduced total hours from February through July. (EX 1, at 2; AF at 28.) August through January were Employer’s busiest months in 2019. (EX 1, at 2; AF at 28.) January 2020 was Employer’s business month of 2020. (EX 1, at 3; AF at 25.) March and April were the slowest months of 2020. (EX 1, at 3; AF at 25.)

The Certifying Officer denied the application on July 16, 2021.4 (AF at 4.) The Certifying Officer denied the application on the grounds that Employer failed to set forth a temporary or seasonal need. (AF at 6-11.) As to the issue of seasonal need, the Certifying Officer found that:

The employer states that its need is seasonal and can only be performed during the warmer months because concrete cannot be poured during the cold winter months. However, the employer’s filing history reveals two previous applications were filed in 2021 in Iowa (H-300-21160-384473) and Minnesota (H-300-20297-886762) with dates of need that extended into the winter months (January through March).

(AF at 8.) These prior applications referenced by the Certifying Officer were for the period January 1, 2021, to March 19, 2021, and August 8, 2021, to April 1, 2022. (AF at 9, 425, 330.) The Certifying Officer also considered and rejected the claim that Employer is unable to perform its work in the winter because of the transmission of disease because it conflicted with the prior application dates that spanned the coldest months in Minnesota. (AF at 9.) In addition, the Certifying Officer found that the 2020 payroll data contradicted Employer’s contention in the Statement of Temporary Need that its work slows down in May and June. (AF at 10.)

Employer appealed the denial to the chief administrative law judge on July 23, 2021. (AF at 2.) In its appeal, Employer requested a de novo hearing before an administrative law judge. (AF at 2.) The undersigned received the administrative file in this matter on August 2, 2021, and set the matter for hearing on August 9, 2021. The parties then requested that the undersigned reschedule the hearing for August 18, 2021, or August 19, 2021, and waived their right to a hearing within five business days of receipt of the administrative file by BALCA. Accordingly, the undersigned granted the parties’ motion and continued the hearing to August 19, 2021.

The matter came before the undersigned for hearing on August 19, 2021. At the conclusion of the hearing, the undersigned closed the evidentiary record and allowed the parties an opportunity to submit closing briefs. The parties having submitted closing briefs, this matter is ripe for adjudication.

4 The Certifying Officer also denied the application for sixteen construction laborers several days later on July 23, 2021. (AF at 184-93.) Employer appealed that decision, and the matter proceeded to hearing before another member of BALCA. (CX 5.) On August 23, 2021, Judge Markley issued a Decision and Order affirming the Certifying Officer’s denial of Employer’s application, finding that Employer failed to meet its burden of demonstrating a seasonal need. Midwest Ag Electric Inc., 2021-TLC-00201 (Aug. 23, 2021).
II. Legal Standard

An employer may request an administrative review or a de novo hearing before an administrative law judge. 20 C.F.R. § 655.171. Regardless of the method of review sought by an employer, an administrative law judge is limited to affirming, reversing, or modifying the decision of the certifying officer, or remanding the matter to the certifying officer for further action. 20 C.F.R. §§ 655.171(a), (b)(2). The administrative law judge must specify the reasons for his or her determination in a written decision. Id. The regulations also require that the administrative law judge issue the decision within ten calendar days of the hearing. 20 C.F.R. § 655.171(b)(1)(iii).

III. Analysis

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform “agricultural labor or services, as defined by the Secretary of Labor. . . .” 8 U.S.C. § 1101(a)(15)(H); see also Hispanic Affairs Project v. Acosta, 901 F.3d 378, 382 (D.C. Cir. 2018). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work needed. 20 C.F.R. § 655.103(a); Overdevest Nurseries, L.P. v. Walsh, 2 F.4th 977, 980 (D.C. Cir. 2021); Mendoza v. Perez, 754 F.3d 1002, 1007 (D.C. Cir. 2014). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a); Overdevest Nurseries, 2 F.4th at 980.

An employer seeking certification for workers under the H-2A program must establish that the need for agricultural labor or services is of a temporary or seasonal basis. 20 C.F.R. § 655.161(a); Hispanic Affairs Project, 901 F.3d at 382 (“By law, H-2A visas may issue only if the employer’s need for the worker is temporary or seasonal.”). The regulations define both temporary and seasonal. 20 C.F.R. § 655.103(d). Section 655.103(d) provides:

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

Id. The Certifying Officer denied the application on the ground that Employer failed to demonstrate that the need is seasonal or temporary.

As an initial matter, the undersigned recognizes that Employer submitted contradictory statements and evidence in support of its application before the Office of Foreign Labor Certification in response to the Notice of Deficiency. As Mr. Vandersyde made clear in both his written statements submitted to the Office of Foreign Labor Certification and his testimony at hearing, the work of Midwest Ag peaks in the winter months and slows down in the spring. The
payroll records support this testimony. The total hours of Midwest Ag’s employees, both temporary and permanent, peaked in December in 2018, November in 2019, and January in 2020. (EX 1.) Mr. Vandersyde testified that the season around the holidays is often his busiest. (H’g Tr. 37.3-10.)

This seasonal increase in work is tied to the yearly weather pattern in Minnesota that influences the agricultural construction industry. Employer’s work installing the equipment in the livestock structures begins approximately sixty days after the initial step of building a new livestock confinement structure – the excavation of the ground and pouring of the concrete slab for the structure. And it is these initial steps that create the seasonal nature of Employer’s work because the agricultural construction contractors cannot pour concrete slabs during the winter months in Minnesota. As a result, the work of Midwest Ag peaks in the winter and slows down in the spring until the other contractors can start pouring concrete again and begin the process of constructing new livestock structures for Employer to outfit with the required equipment.

Despite the statements of Mr. Vandersyde, Mr. Farmer, on behalf of Midwest Ag, states in response to the Notice of Deficiency that “the vast majority of the duties on this application . . . are actually performed outside, which is unsafe to do in the coldest winter months.” (AF at 18.) He also notes the unsafe winter working conditions inside the structures. (Id.) Similarly, Employer submitted the letter of Professor VanAmburgh in support of the seasonal nature of Employer’s work, which indicates that Employer cannot perform work in the winter months because of the risk of disease transmission to the livestock. (AF at 19.) The response to the Notice of Deficiency goes on to state that “Employer’s need for labor is also greatly diminished as farmers do not allow as many (or any) construction laborers on the farm during the winter months to protect against the transmission of disease to the livestock.” (AF at 19.) These statements conflict with the statements of Mr. Vandersyde, the payroll data, and Employer’s history of H-2A applications that all show a pattern of an increased need for labor during the winter months. It is not surprising that the Certifying Officer denied this application based on the contradictory statements contained in the response to the Notice of Deficiency.

However, considering the record de novo, and with the benefit of having the hearing testimony of Mr. Vandersyde and the additional evidence submitted by both sides, the undersigned finds that Employer has met its burden of demonstrating a seasonal need from August 10, 2021, to January 31, 2022, despite the inconsistent statements from Mr. Farmer and Professor VanAmburgh contained in the record. In short, the undersigned finds Mr. Vandersyde’s hearing testimony credible as to Midwest Ag’s seasonal need for the amended dates of need.

The three years of payroll data submitted by Employer also demonstrates that Employer’s work is tied to a seasonal pattern that demands a significant increase in labor over the application’s amended period of need from August 10, 2021, to January 31, 2022. The record reflects that Employer’s work begins picking up around July or August and peaks in the winter, before bottoming out in spring or early summer. (EX 1.) This seasonal pattern repeats itself each year.

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5 The 2019 payroll hours in particular show the clear pattern described by Mr. Vandersyde. (EX 1, at 2.)
6 The 2019 payroll data, free of any impact from COVID-19 disruptions that would be present in 2020, shows the clear seasonal need consistent with the testimony of Mr. Vandersyde. (EX 1, at 2.) As Mr. Vandersyde explained in the hearing before Judge Markely, COVID-19 delayed his typical work cycle. (CX 5, at 25.) The supply chain, price,
in tandem with the transition from fall to winter to spring in Minnesota. Mr. Vandersyde testified that this same work cycle has played out each year over the course of his two decades in the industry.

While Employer can continue its work of installing equipment in the newly constructed livestock structures during the winter months, the work that is a necessary precursor to installing the equipment cannot continue in the coldest winter months in Minnesota. As Mr. Vandersyde explained, agricultural contractors typically do not excavate and pour the concrete slabs necessary for the livestock structures from December to May. The undersigned finds this testimony credible. Employer is directly impacted by these weather limitations because the work of Midwest Ag begins approximately sixty days after the pouring of the concrete slab. If contractors stop pouring the concrete slabs in December, then Employer will have little to no work installing equipment from March until August (sixty days after the contractors start pouring concrete again in May). Although Employer does not pour the concrete, and, as the Certifying Officer correctly points out in its closing brief, Employer is a step removed from the seasonal limitation that creates Employer’s yearly cyclical work cycle, Employer has demonstrated that it has a need for seasonal employment under Section 655.103(d).

The Certifying Officer relies on the undersigned’s prior decision in W.S.C., LLC, 2020-TLC-00087 (Jul. 13, 2020) (Alford, ALJ) in support of its position that Employer has not demonstrated a seasonal need. In W.S.C., the undersigned affirmed the denial of an application for fifty workers to perform bolting and assembling of a steel storage tank in Tennessee, finding that W.S.C., LLC (“WSC”) failed to demonstrate that its work was seasonal in nature. Id. at 5. WSC argued in its application that its work was seasonal because concrete cannot set when the temperature is below freezing, and it has to install the tank on a concrete base. Id. at 3. But unlike the situation here, WSC failed to come forward with any reliable evidence to demonstrate that its need for temporary workers to bolt and assemble steel tanks was seasonal because of the yearly weather cycle in Tennessee.

In contrast to the situation in W.S.C., which did not go to hearing, Mr. Vandersyde provided credible testimony as to the seasonal nature of Employer’s work and its increased need for labor during this period of seasonal demand. At hearing, Mr. Vandersyde explained how this seasonal pattern of work repeats itself year after year in the agricultural construction industry in Minnesota. The record before the undersigned demonstrates the seasonal nature of Employer’s work that is tied to the yearly freeze-thaw cycle of winters in Minnesota. The seasonal nature of Employer’s work, as the payroll records, testimony of Mr. Vandersyde, and former certified applications demonstrate, requires labor levels for Employer that are above those necessary for ongoing operations in the spring when Employer is not outfitting livestock structures.

Finally, in reaching this decision, the undersigned has reviewed the opinion of Judge Markley, who found that Employer failed to demonstrate a seasonal need for the sixteen temporary workers it sought in Iowa. Unlike Judge Markley, however, the undersigned finds no reason to discredit the testimony of Mr. Vandersyde. Upon a review of the record and the relevant legal authority, the undersigned REVERSES the determination of the Certifying Officer and

and work disruptions from COVID-19 in 2020 are well documented and need little discussion from the undersigned in this decision.
REMANDS this matter to the Office of Foreign Labor Certification for the issuance of the amended application.

IV. Conclusion

The undersigned REVERSES the determination of the Certifying Officer and REMANDS this matter to the Office of Foreign Labor Certification for the issuance of the amended application.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge