DECISION AND ORDER REVERSING 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 its 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, if the Secretary of Labor first certifies (a) there are not sufficient domestic workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services in question; and (b) the employment of foreign workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. section 1188, subsection (a).

In this case, Nels, LLC dba Clarion Locker (“Employer”) requests administrative review, under 20 C.F.R. § 655.171, subsection (a), of the Certifying Officer’s (“CO”) denial of an alien agricultural labor certification (“H-2A”) application. Employer seeks authority to hire four butcher/meat trimmers to work from September 26, 2021, through December 15, 2021.

Under 20 C.F.R. section 655.171, subsection (a), I decide this appeal “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amicus curiae” (emphasis added). I received the administrative record on September 29, 2021. There were no other submissions from either party. This decision and order is based on the administrative file.
Furthermore, this decision and order is issued within five business days after receipt of the ETA administrative file as required under 20 C.F.R. § 655.171(a).¹

**STATEMENT OF THE CASE**

On August 18, 2021, Employer applied for certification to employ four H-2A butcher/meat trimmers from September 26, 2021, until December 15, 2021 (AF p. 68) at worksites in Iowa (AF p. 76).² The CO issued a Notice of Deficiency on August 25, 2021 (AF, pp. 121-130), to which Employer responded (AF pp. 86-114). Employer also submitted amended Forms 790, 790A, and 9142A (AF pp. 65-85). On September 14, 2021, the CO denied the application (AF pp. 58-59) on the grounds Employer had not established a “temporary need” (AF pp. 60-64).

**Discussion**

Under 20 C.F.R. section 655.103, subsection (d),

For the purposes of this subpart, employment is of a seasonal nature when 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.

The record shows Employer harvests whole carcass animals on-site of local farms, with on-farm mobile butcher service for custom processing. By performing these services on-site, farmers raising the animals need not transport their animals for slaughter. Employer provides these services from March through mid-December each year (AF pp. 12, 23, 31, 61).

¹ Before the current regulations became effective on March 15, 2010, the regulatory standard of review was “legal sufficiency.” 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted “legal sufficiency” to imply an “arbitrary and capricious” standard of review. See *J and V Farms, LLC*, 2015-TLC-00022, slip. op. at 3, n. 1 (Mar. 4, 2016) (citing *Bolton Springs Farm, 2008-TLC-00028*, slip op. at 6 (May 16, 2008)). But the earlier regulations did not define “legal sufficiency.” See id.; 20 C.F.R. § 655.112(a) (2008). The current regulations omit the reference to “legal sufficiency” and do not address the deference, if any, BALCA should give to the Certifying Officer’s decision. See 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations’ silence leaves the question open, and requires BALCA judges to determine an appropriate standard of review. In this case it makes no difference, since I would reach the same result even under an “arbitrary and capricious” standard.

² The relevant “season,” according to Employer, “is from March 1 · December 15th” (AF, p. 12). This is Employer’s first H-2A application, and it is intended to cover Employer’s needs only for the remainder of the 2021 calendar year (Id.).
In its response to the Notice of Deficiency, Employer states “the job duties of this position are always performed outdoors and on farms” (AF pp. 90) (emphasis added). Outdoor conditions in the work area in the last half of December, and in January and February, are frequently too cold for the work to be performed safely (AF p. 91). The CO does not dispute either of these representations. And, in support of the denial, the CO alleges no other deficiency in the application apart from Employer’s alleged failure to establish “temporary need.”

Instead, the CO characterizes Employer’s business model as “a preference and a choice made by the employer” because the described job duties “could be occurring at any time of the year” (AF p. 61). The CO admits the months of January, February, and December are among the coldest of the year, but observes November and March are cold months as well (AF p. 63). All of this leads the CO to conclude “butchering/slaughtering services can occur during any time of the year as long as the temperature does not pose negative health risks to the workers” (Id.).

The CO concludes

While the employer is attempting to claim that its need is seasonal, it does not appear that the season is being dictated by anything other than the employer’s preference on when to butcher and slaughter meat. This appears to be a controlled setting that can be manipulated by the employer and is not truly seasonal by definition.

(Id.).

The record before me does not support this ultimate conclusion. The CO seems to assume, without supporting evidence in the record, that Employer can simply move its mobile slaughtering and butchering service indoors whenever it chooses to do so (AF, p. 63); or perhaps, contrary to the evidence presented, go right on slaughtering animals outdoors regardless of the weather, with a full complement of year-round employees.3 What the record shows instead is that Employer’s entire business model is based on providing an on-site service to farmers at their business location, and that the service is always performed outdoors. What is more, the record shows the service is not, cannot, and should not be performed when the weather is too cold, as the weather in January and February often is. For purposes of 20 C.F.R. section 655.103, subsection (d), the employment is tied to the coldest months of the calendar year, and lasts less than, rather than more than, one year.

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3 Employer tacitly admits it may sometimes slaughter animals during January and February, but points out “there are far fewer days with warm temperatures in January or February. Thus, there are far fewer days this work could be performed. Therefore, during the months that are not January or February, the employer requires ‘labor levels far above those necessary for ongoing operations’ because there are far more warm days, which are conducive to this kind of work” (AF, p. 8). No where does the CO question this assertion.
For this reason, on the record before me, the CO's denial is arbitrary and capricious, and I must reverse it under any potentially applicable standard of review.

Accordingly, I reverse the denial of the application, and remand the application to the CO for further processing.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge