DECISION AND ORDER REVERSING DENIAL OF LABOR 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.


I. BACKGROUND

On January 20, 2021, the Chicago National Processing Center (“Chicago NPC”) received an application from Employer requesting H-2A temporary labor certification for 20 Agricultural

In the Application (Section A.8.a), Employer described the job duties as:

Crops/Commodities:
Hay/straw.
Drive tractors and balers, and operate other mechanized farm equipment to plant, cultivate, and harvest grain, hay, and/or oilseed crops. Perform manual and mechanized tasks including but not limited to: bushhogging fields; disking; aerating; seeding (using mechanical drills and seeders); fertilizing, weed spraying, mowing, tedding, raking, baling, and stacking. Operate grain carts.
Mow, cut, and weed fields. Prepare and/or clear land for planting using mechanized or hand equipment to remove trash, rocks, or other debris or material that may interfere with planting or harvesting activities. Level land by moving dirt and other materials. Equipment may include tractors, dozers, planters, mowers, plows, sprayers, cultivators, power shears, chainsaws, bobcats, skid loaders, high lifts, and trucks or other vehicles.
Manipulate controls to set, activate, and adjust mechanisms on machinery. Adjust speeds of cutters, blowers, and conveyors and height of cutting head. Clean, adjust, repair, and perform routine service on equipment (e.g., lubricating grease points, inspecting and maintaining fluid levels, checking belt and conveyor tensions, and maintaining tires, wheels, bearings, belts, and other wear parts). Repair or replace defective parts. Attach farm implements (e.g., plows, harrows, discs, sprayers) using hand tools. May assist with other general farm maintenance or repairs.
Install/maintain irrigation systems and water lines. Move and install irrigation pipes and equipment. Dig and maintain ditches. Install and remove levee gates.
Apply pesticides, herbicides, fungicides, and other crop protectants. Apply fertilizers, plant growth chemicals, conditioners, and other plant related treatments at the correct times depending on plant type, growth, climate and crop conditions.
Workers must operate all equipment properly and in a manner that protects operator, others, the employer’s products and property. Failure to comply with safety requirements and operating instructions may result in disciplinary action up to and including immediate termination.
Must wear assigned personal protective equipment when required. Must report for work daily wearing work clothing and boots or other durable foot wear. Workers wearing clothing inappropriate for work will not be permitted to start work.
Outdoor work required when plants are wet, or during light rain, snow, moderate winds, direct sun, high humidity and extreme temperatures. Temperatures in fields during working hours may vary. Workers may be required to work during occasional showers not severe enough to stop field operations.
Allergies to ragweed, goldenrod, honey bees, insecticides, herbicides, fungicides, or related chemicals may affect a worker’s ability to perform the job. Work is done outdoors for long periods of time and requires prolonged periods of standing and/or walking, repetitive movements, and frequent bending and/or stooping. Workers must be able to handle, lift, and carry heavy or bulky objects (product, containers) in accordance with the specified lifting requirements.
Employer-paid post-hire drug testing is required after a worker has an accident at work. Clean driving record required. Must have or be able to obtain driver’s license within 30 days following hire. Workers with appropriate licenses and a valid doctor’s certificate may be asked to drive other workers.
Supervisor(s) will provide instructions and directions to workers. Workers must be able to comprehend and follow instructions and communicate effectively to supervisors. Unusual, complex or non-routine activities will be supervised. Workers expected to perform basic duties in a proficient manner without close supervision.
Workers residing in employer-provided housing will be provided free transportation between housing and worksite each work day.

Assist with loading/unloading cattle on/off trailer. Moving cattle from field to field.

Employer’s Statement of Need described its need for agricultural labor tied to annually-recurring conditions like weather, daylight hours, and temperature. AF p. 114-15. Specifically, Employer described its history of using the H-2B nonagricultural visa program because its previous operations were focused on its commercial landscaping business. However, Employer now seeks H-2A workers to “assist with agricultural equipment operating in relation to the livestock side of the business.” According to Employer, its season begins mid-March and continues through mid-January of the following year. It cultivates grasses to use in hay production, and the germination is best at soil temperatures between 65-85 degrees Fahrenheit, “which in the area of intended employment occurs in March, as temperatures rise and daylight hours increase.” Employer described increasing production as weather conditions become conducive to grass growth, such that “crop production and related activities” begin to increase significantly and necessitate additional seasonal workers through conclusion of the harvest season, above Employer’s full-time, year-round workforce. Employer explained that at the end of the season, when temperatures and daylight hours begin to drop, crop production activities begin to decline and workers instead turn their attention to preparation for winter with “end-of-season clean-up tasks and winter maintenance,” as well as moving harvested hay into storage to sustain the farm until the next growing season. According to Employer, the end-of-season activities last until mid-January. Employer stated that mid-January to mid-March generally required no crop production activities and its routine farm maintenance and livestock feeding was managed by its full-time, year-round workers.

On January 25, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) letter to the Employer. Id. pp. 78-83. The NOD identified two deficiencies, one of which remains at issue concerning whether the job opportunity is seasonal within the meaning of 20 C.F.R. § 655.103(d). According to the CO, the job opportunity described on the ETA Form 790A, at Section A.8.a, indicated that the job duties for the requested position include the care of livestock, namely that the workers will “assist with loading/unloading cattle on/off trailer” and “moving cattle from field to field.” AF p. 81. The CO noted that Employer’s temporary need statement described its decision “to make use of the H-2A program for their cattle operation. The employer will utilize H-2A workers to assist with agricultural equipment operating in relation to the livestock side of the business.” Id. The CO observed that the “duties appear to reflect the day-to-day operations of a cattle farm which would be present at any time of the year.” Therefore, the CO
instructed Employer to provide additional information and documentation to establish its seasonal need. *Id.* The Employer’s response was to include:

1. A statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations through the entire year;
2. A detailed explanation as to the employer’s cattle operations including a monthly breakdown of duties related to the caring of the cattle;
3. A detailed explanation describing who performed the duties outline in its application for previous seasons;
4. Summarized *monthly payroll* reports for a minimum of three previous calendar years that identify, for each month and *separately for the full-time permanent and temporary employment in the requested occupation*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
5. If contractors or other entities were used by the employer to address the need, or portions of the need, described in this application, three years of contracts/receipts detailing the services provided and dates of said services must be provided. If family members or other individuals not directly employed by the employer were used, signed affidavits attesting to their work schedule and duties must be provided; and
6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

*Id.* pp. 81-82.

On January 25, 2021, the Chicago NPC received the Employer’s response to the NOD. *Id.* p. 31. The Employer asserted that it had presented job duties for seasonal workers performing a “*combination* of harvest activities and cattle duties.” *Id.* p. 32 (emphasis in original). According to Employer, the labor need is “tied to the production cycle for hay, which also coincides with the market demand for hay, which typically increases in the Spring when livestock operations (the primary consumers of hay) have the greatest need.” *Id.* Employer asserted that the NOD was arbitrary and capricious because it “inexplicably fixates on the presence of some job duties related to the feed and care of cattle” whereas the nature of the seasonal labor need depends on the “cultivation and harvest of hay, straw, and corn.” *Id.* Employer argued that despite year-round cattle operations, Employer presented a seasonal need that is an appropriate basis for seeking H-2A agricultural workers. *Id.* pp. 32-33.
Employer provided additional background regarding its business operations in farming, ranching, and commercial/residential landscaping. *Id.* p. 33. With a history in landscaping, Employer stated it recently began to expand and establish an agricultural operation. Employer established an emerging cattle-raising operation in the Fall of 2020, which currently consists of 200 acres of farm and ranchland. The farming operation focuses on cultivation of hay/straw (alfalfa and other asserted grasses) and corn. Employer described its crop production activities from Spring through Fall, describing a rotational grazing model, enclosure and maintenance of pastures, and harvesting, baling, and storing hay to sustain animals through winter. Employer stated it also breeds and cares for cattle. Within the period of its seasonal need, Employer anticipated a head count of about 100 cattle and an additional 75 calves. It described significant activities involving the selling of cattle in the Fall to bring cattle numbers back to pre-calving season levels, and increase in certain activities like “vaccinations, worming, banding, etc.” Employer said activities reduced to basic care and feeding in the winter and can be handled by year-round workers.

Employer attached Exhibit A, a chart of temperatures in the area of intended employment:

Mason Average Temperature

<table>
<thead>
<tr>
<th>Month</th>
<th>Temp. (min)</th>
<th>Temp. (max)</th>
<th>Temp. (avg.)</th>
<th>Precipitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>32 F</td>
<td>54 F</td>
<td>42 F</td>
<td>4.5”</td>
</tr>
<tr>
<td>February</td>
<td>35 F</td>
<td>57 F</td>
<td>45 F</td>
<td>3.7”</td>
</tr>
<tr>
<td>March</td>
<td>44 F</td>
<td>67 F</td>
<td>55 F</td>
<td>5.4”</td>
</tr>
<tr>
<td>April</td>
<td>52 F</td>
<td>77 F</td>
<td>64 F</td>
<td>5.9”</td>
</tr>
<tr>
<td>May</td>
<td>61 F</td>
<td>83 F</td>
<td>72 F</td>
<td>5.5”</td>
</tr>
<tr>
<td>June</td>
<td>71 F</td>
<td>92 F</td>
<td>81 F</td>
<td>3.0</td>
</tr>
<tr>
<td>July</td>
<td>73 F</td>
<td>93 F</td>
<td>83 F</td>
<td>-1.6”</td>
</tr>
<tr>
<td>August</td>
<td>73 F</td>
<td>93 F</td>
<td>83 F</td>
<td>3.9”</td>
</tr>
<tr>
<td>September</td>
<td>66 F</td>
<td>88 F</td>
<td>76 F</td>
<td>3.4”</td>
</tr>
<tr>
<td>October</td>
<td>53 F</td>
<td>78 F</td>
<td>64 F</td>
<td>3.7”</td>
</tr>
<tr>
<td>November</td>
<td>42 F</td>
<td>66 F</td>
<td>53 F</td>
<td>4.2”</td>
</tr>
<tr>
<td>December</td>
<td>35 F</td>
<td>56 F</td>
<td>45 F</td>
<td>5.6”</td>
</tr>
</tbody>
</table>

*Id.* pp. 38-39. Employer also included charts showing the average monthly temperature with heat index, average snowfall (0.2 inches in December, 2.3 inches in January, 1.8 inches in February, .8 inches in March, none in other months) and daylight hours year-round. *Id.* p. 39.

Employer stated that the winter weather is not conducive to planting and growing agricultural commodities, citing temperatures that decline significantly in its off season and snowfall between 1.8 and 2.3 inches on average. It also explained that daylight hours decline and remain minimal until Spring. For these reasons, Employer described a significant reduction in the work demands in the winter off-season associated with herding, pasture maintenance, rotational grazing, feeding due to the reduction in the number of cattle on the farm, the reduced work activities, and that no breeding occurs in winter. *Id.* pp. 33-34.

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1 This is the measurement contained in the chart provided in the Appeal File.
Employer stated that it could not provide historical employment/payroll data because it only recently established the agricultural operation (Fall of 2020). Employer presented several invoices and supporting documents (Exhibit B) showing its purchase of cattle in October and November 2020. *Id.* pp. 41-57. The invoices indicate the purchase of about 80 head of cattle.\(^2\) *Id.* 55-57.

Employer also submitted Exhibit C showing a chart of average growing degree-days for alfalfa and corn and literature describing successful alfalfa seeding establishment, ground temperature for planting corn, and soil temperature for seed sprouting generally. *Id.* pp. 59-65. Employer contends that alfalfa used in stray/hay production and corn are warm-season crops that do not germinate in cold temperatures or periods of reduced sunlight, such as winter months in Mason, Tennessee. *Id.* p. 34.

On February 17, 2021, the CO issued a Final Determination-Denial of Employer’s H-2A application. *Id.* at 3-8. The CO determined that Employer failed to demonstrate that the job opportunity in question represented a seasonal need as outlined in 20 C.F.R. § 655.103(d). The CO acknowledged the information submitted by the Employer in response to the NOD, including its description of its agricultural operations, weather information and seed germination information.

The CO first took issue with Employer’s position that its need it tied to warmer months and that temperatures decline significantly in its off-season (mid-January to mid-March). However, the CO noted that the average temperatures for Mason, TN, show that January is on average a colder month than February, and December (a claimed seasonal month) has temperatures on par with February (non-seasonal). *Id.* pp. 7-8. The CO also took note of information in Employer’s Exhibit C which pointed to a need for soil temperatures well above those found in March. *Id.* p. 8.

Finally, with regard to the cattle portion of its operation, the CO noted Employer’s recent establishment of its agricultural operation demonstrated by its evidence of a sizable purchase of cattle in the Fall of 2020. However, the CO concluded that a seasonal need for workers to assist in the cattle operations for the time period sought still had not been shown. *Id.* According to the CO, while the employer may have demonstrated a seasonal need “for a portion of the time period requested, it has failed to demonstrate that that need extends from March 15th through January 15th as requested.” *Id.*

II. ARGUMENT

Employer’s Brief

Employer first argues that its response to the NOD “dutifully explained the nature and timing of its seasonal labor need” and addressed “why its need for labor or services during a certain time of year ‘differs from other times of the year.’” *Employer’s Brief* at 5 (citing Matter of

\(^2\) Employer elsewhere stated that it anticipated having 100 head of cattle during the season at issue, which is generally supported by the invoice data, though Employer did not show it had yet attained the full number it anticipated. The undersigned agrees with the CO’s description of Employer’s cattle acquisition as “sizeable.” *See AF* p. 8.
Altendorf Transport, Inc., 2011-TLC-00158 (Feb. 15, 2011)). Specifically, the Employer explained that its labor need begins in March because the “cold weather subsides” and “planting activities begin for the employer’s crops/commodities.” Id. (citing AF p. 33). It is during this time that the “breeding season for the cattle begins.” Id. Employer requires seasonal workers during this time to “remain on staff in order to assist the full-time year round [sic] with end-of-season clean-up tasks and winter maintenance.” Id. Employer contends that its off-season begins in mid-January when there are “few remaining work activities on the farm.” Id. (citing AF p. 114). Employer avers that because its full-time, year-round workers are no longer needed for crop production activities, there is sufficient labor available to handle the ongoing cattle operations.

Employer further notes that the CO has not offered any explanation regarding the alleged insufficiency of the Employer’s evidence other than generalized conclusions. Employer argues that “generalized conclusions” have been repeatedly rejected as “cursory and superficial.” Employer relies on Matter of BTW Ostrich Farm, 2020-TLC-00078 (June 12, 2020); Matter of O'Bryan Composting, LLC, 2021-TLC-00003 (Nov. 5, 2020); and Matter of Samantha D. Craun dba Davis Brother Dairy, 2021-TLC-00058 (Jan. 15, 2021).

Employer next argues that the CO is “being disingenuous on several fronts.” Employer’s Brief at 7. First, the Employer submits that it provided a reasonable explanation for the seasonal need of workers extending into early January, namely that as warmer-month activities draw to a close, seasonal workers are still needed to assist with winter maintenance and moving the harvested hay into winter storage to sustain animals over the winter. Id. Employer argues that the fact that temperatures are too low for planting and harvesting activities is “precisely the point the Employer is trying to make.” Id. The farm cannot produce hay over the winter, and must store enough to sustain the farm during those months. Second, Employer argues that while the CO “appears to suggest that because temperatures in March are generally too low for optimal germination that no crop activities occur at the time” it neglects to consider that in order to germinate, the crops must be planted and the fields must be prepared for planting. Id. at 8. Employer asserts that workers are needed in March to “initiate these seasonal crop activities.” Id. Employer avers that the CO’s reasoning also neglects to consider Employer’s explanation that the breeding season begins in March. Id. (citing AF p. 33). Employer also notes it described an increase in cattle activity (such as breeding) in March to lend further support to its seasonal need beginning in March, regardless of crop germination. Employer contends that it “has clearly demonstrated that the number of cattle fluctuate in accordance with the breeding, calving, and sales cycles, nearly doubling in size post-calving and then returning to pre-calving levels after the sales season in the Fall.” Id. Third, Employer argues that the CO failed to view the crop and livestock explanations holistically. Id. The Employer has asserted that it is a combination of the crop and livestock activities that follow a seasonal pattern requiring labor levels far above those necessary for ongoing operations. Employer asserts that it is the “interplay between these activities that creates the fluctuations in the Employer’s work demands throughout the year.” Thus, Employer argues that the CO erroneously concluded that seasonal need was not established merely because some cattle operations are inherently year-round. Employer also contends that the CO recognized the inherent seasonal nature of crop production, given the temperature and weather considerations. Because the operations are intertwined, Employer submits that the CO unreasonably labeled some of Employer’s operations as year-round and some as seasonal as if these concepts are mutually exclusive.
The undersigned notes that Employer previously made the foregoing arguments in the Statement of Temporary Need (AF at 114-115) and in response to the Notice of Deficiency (AF at 32-34). The Certifying Officer did not submit a brief.

III. 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 submissions from the parties, which may not 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). An arbitrary act is one based on random choice or personal whim, rather than on reason or system, and a capricious act is one based on sudden and unaccountable changes in behavior. Lamar Advertising Co. v. Zurich Amer. Ins. Co., 473. F.Supp.3d 632, 641 (M.D. La. 7/20/2020). A decision is not arbitrary and capricious if the decision-maker examined “the relevant data and articulate(d) a satisfactory explanation for its actions including a rational connection between the facts found and the choice made.” Three Seasons Landscape Contracting Serv., 2016-TLN-00045, slip op. at 19 (June 15, 2016)(quoting Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Auto Ins. Co., 463 U.S. 29, 43 (1983)(citation and internal quotation marks omitted)).

To qualify for 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).
To determine whether an employer’s need is seasonal, “it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of 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 particular job at issue is 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 any 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 to question whether an employer’s need is temporary. *See Grand View Dairy Farm, 2009-TLC-00002* (Nov. 3, 2008)(finding that applying ten months as a threshold, where employer is given an opportunity to submit proof to establish the temporary nature of its employment needs, it is not an arbitrary rule).

Here, the CO’s finding that Employer had not established a seasonal employment need is arbitrary because the CO did not articulate a satisfactory explanation for rejecting Employer’s description of its seasonal need based on a combination of crop production and cattle operations. A rational connection is lacking between certain isolated facts found relevant by the CO and the determination that seasonal need was not established, particularly in light of the broader explanations and supporting documents provided by Employer in its Application, Statement of Need, and Response to NOD.

First, the CO did not satisfactorily explain the rationale for discounting Employer’s explanation for its need for seasonal workers through part of the winter season (up through mid-January). Next, the CO focused on crop operation and cattle operation as two separate considerations, when the Employer noted in its response to the NOD as well as its Statement of Temporary Need that its primary need relates to a combination of harvest activities and cattle duties. *AF* pp. 32, 114. Further, the CO appeared to focus on the year-round nature of some cattle duties instead of the seasonal labor need related to such duties.

Specifically, the CO found that the Employer did not adequately explain why its seasonal need lasts from March 15, 2021 to January 15, 2022, when the weather chart submitted by Employer as Exhibit A, shows that January is on average a colder month than February. Further, the CO focused on Exhibit C which recognized that corn and alfalfa germination is best in soil temperatures above those found in March. The CO’s rationale, however, ignores Employer’s explanation that its labor need is tied to the production cycle of hay, which typically increases in the Spring when livestock operations (the primary consumer of hay) have the greatest needs. *AF* p. 32. In the Statement of Temporary Need, Employer explained that its season:

…runs from mid-March through Mid-January of the following year. Most grasses used in hay production germinate best at soil temperatures between 65-85 degrees Fahrenheit, which in the area of intended employment occurs in March, as
temperatures rise and daylight hours increase. Production ramps up as outdoor weather conditions become conducive to grass growth. At this time, work demands associated with crop production and related activities begin to increase significantly, necessitating the addition of seasonal workers to supplement the employer’s full-time, year-round workforce. Seasonal workers are needed through the conclusion of the harvest season.

Id. p. 114. Employer also explained:

As temperatures and daylight hours begin to drop, crop production activities decline substantially and the employer prepares for winter. The employer needs the seasonal workers to remain on staff in order to assist the full-time, year-round workers with the end-of-season clean-up tasks and winter maintenance. Additionally, the employer must prepare and move the harvested hay into storage so that it can sustain the farm until the following hay season. These work activities conclude in early January.

Id. Employer submitted weather information supporting the trend toward coldest temperatures in December, January, and February, which the CO appeared to consider in isolation to question a seasonal need extending into early January, despite Employer’s description of some cold-weather activities that would continue until early winter (mid-January) to ensure that harvested hay was properly stored for winter use. Employer had presented job duties in its Application relating to the operation of tractors and balers and equipment related to harvesting crops. As for the season beginning in March despite temperatures that may not yet permit germination of seed, Employer submitted to the CO that the fields must be prepared for planting so that the crops would be seeded and ready for germination with the increase in soil temperatures. Employer described having 200 acres of farm and ranchland. Employer had also described such field preparation in its Application, describing the following job duties: “Prepare and/or clear land for planting using mechanized or hand equipment to remove trash, rocks, or other debris or material that may interfere with planting or harvesting activities. Level land by moving dirt and other materials.” AF, p. 109. In addition to crop activities, Employer also described cattle breeding activities early in the season, which the CO did not reference.

The undersigned finds and concludes that the CO failed to consider Employer’s full explanation for its seasonal agricultural operations (both crop and cattle activities) starting in March and extending into early January, with reduced activities that year-round workers can manage from mid-January to mid-March. Information in Employer’s exhibits to the CO regarding weather, temperatures, seeding, and the sizeable cattle acquisition supported Employer’s description of seasonal need when facts in the exhibits were not considered in isolation.

The CO originally identified an issue in the NOD with Employer’s description of cattle activities that the CO described as day-to-day or year-round activities not supportive of seasonal need. The CO did not repeat this finding in the Final Determination. Instead, the CO found that despite the sizeable purchase of cattle in the Fall of 2020, Employer had not proven the seasonal need for workers that is “limited to the time period sought.” AF p. 8. No specific rationale was
provided to support the CO’s finding, and thus I find that the CO’s determination in this regard is overly general and vague and fails to articulate a satisfactory explanation for this conclusion.

To the extent that the CO based this conclusion on the year-round nature of cattle farm activities, the undersigned also finds that the CO did not satisfactorily explain the rationale for concluding that the job duties did not demonstrate seasonal need.

BALCA has held that to determine whether an employer’s need is seasonal, “it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from the other times of the year.” *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport*, slip op. at 11. The “critical question is whether Employer’s need for labor is seasonal, not whether the job duties are seasonal.” *In the Matter of Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added); *Pleasantville Farms*, slip op. at 3.

In some cases, “the care and feeding of animals are presumed to occur on a year-round basis and therefore reflect a year round need for workers. However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis.” *Cowboy Chemical, Inc.*, 2011-TLC-00211, slip op. at 4 (Feb. 10, 2011) (reversing denial of certification because employer demonstrated seasonal need for animal breeders).

Despite the Employer’s description of a wide range of crop production activities to support cattle operations, and the intertwined nature of these operations, both of which see increased activity levels from March to January, the CO focused on a very limited portion of the job duties at issue: “Assist with loading/unloading cattle on/off trailer. Moving cattle from field to field.” A review of the job duties contained in the Application shows that these cattle duties represent very little of the many duties surrounding preparation, cultivation and harvesting of crops and commodities. *See AF* p. 109. Moreover, Employer described many increased work activities within the stated seasonal need such as breeding and calving season, significant activities involving the sell-off of cattle in the Fall to bring cattle numbers back to pre-calving season levels, and increases in certain activities like “vaccinations, worming, banding, etc.” Employer explained that activities reduced to a level of basic care and feeding in the winter that can be handled by year-round workers.

Relying on *Craun*, Employer argues that the “CO cannot focus on particular job duties” which may occur year-round, “in order to discount well-supported evidence and explanation regarding an employer’s seasonal need.” In fact, Employer submits that the present case is factually similar to *Craun*, where a farming and ranching operation required workers to perform a variety of duties related to both crop production and livestock care. *See 2021-TLC-00058* (Jan. 15, 2021). The employer in *Craun* provided a detailed explanation of when specific job duties were performed and why the labor need fluctuated throughout the year. The CO found a deficiency in the application because the job duties reflected day-to-day operations of a cattle farm and thus did not demonstrate seasonal need. The ALJ concluded that the CO did not provide a rational basis for rejecting Employer’s showing of seasonal need. The ALJ noted that there “may be an increased need to perform day-to-day tasks” for a season, and that, therefore, “it does not follow that because these tasks are performed to some degree throughout the year that there is no seasonal increase in need as well.” *Id.*, slip op. at 8. In *Craun*, the CO’s failure to “articulate why he discounted
Employer’s explanations of the harvest and detailed breeding and calving task descriptions” was a sufficient basis to reverse the denial of certification. *Id.; see also BTW Ostrich Farm*, 2020-TLC-00078, slip op. at 6-8 (rejecting as arbitrary CO’s rational for determining the employer failed to prove seasonal need where CO did not articulate satisfactory explanation, found job duties were year-round, and “did not acknowledge that Employer’s detailed description of the breeding season aligns with its period of requested seasonal need”).

Here, the undersigned concludes that the CO’s finding of the year-round nature of cattle operations, without considering the seasonal increase of said operations for several reasons articulated by Employer, is factually similar to the reasoning of the CO that was rejected in *Craun* and *BTW Ostrich Farm*. The CO’s reasoning here that some of the job duties listed were day-to-day tasks that would be performed year round does not alone disprove seasonal need in light of the Employer’s detailed narratives and explanations for same that are consistent with the remainder of the record before me. Thus, because the CO failed to provide a satisfactory explanation for his/her conclusions, the February 17 Application denial is arbitrary.

IV. CONCLUSION

Based on the foregoing analysis, I conclude the CO acted arbitrarily in denying Employer’s application for temporary agricultural labor certification under the H-2A program. I also conclude Employer has established that its need for labor is seasonal, as defined by 20 C.F.R. § 655.103(d).

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer’s determination is REVERSED. See 20 C.F.R. § 655.171(a). This matter is REMANDED to the Certifying Officer for further processing consistent with this decision.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

ANGELA F. DONALDSON
Administrative Law Judge