In the Matter of:

FUN FARMS LLC,
Employer.

OALJ Case No. 2021-TLC-00108
ETA Case No. H-300-20279-857850

DECISION AND ORDER AFFIRMING DENIAL OF LABOR CERTIFICATION

Certifying Officer: Alejandra Dominguez
U.S. Department of Labor
Chicago National Processing Center

Appearances: Kimberly Adam-Boushie
Fun Farms, LLC
Picayune, Mississippi
For the Employer

Before: THEODORE W. ANNOS
Administrative Law Judge
This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act\(^1\) ("Act") and its implementing regulations\(^2\) ("Regulations"). Fun Farms LLC ("Employer") filed with the Board of Alien Labor Certification Appeals ("BALCA" or "Board") a request for expedited administrative review of the final determination issued by the Certifying Officer ("CO") in the above-captioned H-2A Application for Temporary Employment Certification.\(^3\)

**BACKGROUND**

On February 2, 2021, Employer filed an H-2A Application for Temporary Employment Certification ("Application") for one "Farmworkers and Laborers, Crop, Nursery, and Greenhouse."\(^4\) The Application stated a period of intended employment from March 1, 2021 to January 1, 2022.\(^5\) Employer described the duties and requirements as follows: "First the job will need to be able to construct a green house. Then help plant and care for fruits. Monitoring the temperatures and plant health. The job also entails caring for Donkeys with water levels, food and collection and storage of manure. Will need to be able to also work tractor for cutting and tilling."\(^6\) The additional crop or agricultural activities listed were (1) strawberries, (2) blackberries, and (3) "tractor work."\(^7\) The position required a GED and "experience with farming, animals, and tractors."\(^8\)

\(^2\) 20 C.F.R. Part 655, Subpart B.  
\(^3\) See 20 C.F.R. § 655.171(a).  
\(^4\) Administrative File ("AF") at 68-86.  
\(^5\) AF at 75. Throughout the AF, the CO repeatedly states that the period Employer requested was December 14, 2020 to December 14, 2021, and emphasizes that this is a 12 month period. AF at 7, 13, 21, 35, 46, and 57. However, the Application contained in the AF does not reflect that period of need, and clearly provides for a period of March 1, 2021 to January 1, 2022. AF at 75. If Employer initially requested December 14, 2020 to December 14, 2021 and later modified or amended their Application, those initial requested dates are not specifically reflected in the AF.  
\(^6\) AF at 75.  
\(^7\) AF at 83.  
\(^8\) AF at 76.
On February 26, 2021, upon consideration of the Application and Employer’s responses to a Notice of Deficiency ("NOD") and Notice of Required Modifications ("NRM"), the CO denied the Application ("Denial"), stating in relevant part:

Based on the employer’s requested dates of need, lack of filing history, and statement of temporary need, the employer did not demonstrate how this job opportunity is temporary, rather than permanent and full-time, in nature.

On February 8, 2021, the Chicago NPC issued a Notice of Deficiency (NOD) letter to the employer. Because the employer failed to establish a temporary or seasonal need as required by 20 CFR sec. 655.103(d), it was required to provide supporting evidence that a seasonal need exists. …

On February 11, 2020, the Chicago NPC received the employer’s response to the NOD. In the employer’s NOD Response, the employer stated that they are new hemp growers. However, the employer failed to list hemp as a crop anywhere in the application. Also, there are no job duties listed for the harvesting of hemp in the application (Section A, Item 8a of the ETA Form 790A).

Additionally, the job opportunity described in the application (Section A, Item 8a of the ETA Form 790A) indicates in the job duties for the requested position that the worker will be constructing a greenhouse. However, the employer has filed an application for one Farmworker and Laborer, Crop, Nursery, and Greenhouse job opportunity and not a construction laborer. Moreover, in the NOD Response, the employer mentioned that they need “his expertise.” This language indicated that the employer is determined to hire a specific H-2A laborer, versus a qualified, willing and able US worker.

Furthermore, the job opportunity described in the application (Section A, Item 8a of the ETA Form 790A) indicated the job duties for the requested position include the care and feeding of livestock (donkeys). These duties are not on their face seasonal or temporary in nature. Sufficient documentation to establish and support the employer’s seasonal need for workers was not provided as part of the H-2A application, nor in the employer’s NOD Response.

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9 See AF at 16, 18-25, 27-28, 30-62.

10 AF at 4-15.
The employer was issued a Notice of Required Modifications (NRM) on February 22, 2021. The employer was again tasked with providing supporting evidence that a seasonal need exists, just as it was in the NOD. On February 23, 2021, the Chicago NPC received the employer’s response to the NRM. In its response, … the employer again failed to provide a detailed explanation, as well as any supporting evidence of their need being a seasonal need. Furthermore, the employer again did not address the job duties of greenhouse construction, the harvesting of hemp, nor the caring of donkeys that is listed in their application (Section A, Item 8a of the ETA Form 790A). …

The employer did not establish that its job opportunity is temporary or seasonal in nature for its requested dates of need. Therefore, this application is denied for one Farmworkers and Laborers, Crop, Nursery, and Greenhouse job opportunity.¹¹

On March 1, 2021, Employer submitted an “Appeal” and statement of “Temporary Need,” arguing in pertinent part:¹²

... Temporary Need

We are NEW farms and do not have any records as stated before. We are farming HEMP and OTHER vegetables/fruits! I only stated Hemp doesn’t have a season. We have already started budding for Hemp that’s why I was trying for ASAP. Hemp is new to our state and surrounding states so the universities are having to study the seasons for our climate and how to grow! We are behind in the south with knowledge of this plant.

I am not sure how I didn’t put Hemp on the other form but it should have been there. Will you please update it for me or tell me how to do it. PLEASE Please also correct anything else you need to, I understand the application

¹¹ AF at 8-9, 14-15. The CO also denied the Application based on Employer’s failure to submit page A.2 of Appendix A to the Application, and because Employer mistakenly completed Section A on page A.1 of Appendix A, which is reserved for attorneys or agents. Because the CO’s denial is affirmed on other grounds, this deficiency is not addressed. See AF at 9, 15.

¹² AF at 1-3. This submission has no date, signature, or proof of receipt or delivery to the CO’s office. However, it is clear from the language of the submission that this is from Employer. Further, the CO noted that this submission was received on March 1, 2021 and is Employer’s “Request for Administrative Review.” AF at Case Index for ETA Case Number: H-300-20279-857850.
is for 10 months. We just need ASAP as said before we starting today March 1!

Please also remove feeding of animals.  

On March 5, 2021, the CO referred the case to BALCA, and on March 17, 2021, the case was assigned to the undersigned.

**LEGAL STANDARD**

The scope of review in H-2A cases is limited. I may only consider the written record and any written submissions from the parties, which may not include new evidence. The standard of review is de novo. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.

**DISCUSSION**

To qualify for the H-2A program, an employer has the burden to establish that it has a need for agricultural services or labor on a seasonal or other temporary basis:

- 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.

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13 AF at 3 (format and emphasis in original).

14 20 C.F.R. § 655.171(a).

15 The Act and Regulations are silent as to the appropriate standard of review to be applied on administrative review of a CO’s decision. I find persuasive the rationale articulated in *Crop Transport*, 2018-TLC-00027, slip op. at 3 n.4 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a).

16 20 C.F.R. § 655.161(a).

17 20 C.F.R. § 655.103(d).
Although a seasonal need has generally been interpreted to be 10 months or less,\(^{18}\) that is not a “bright-line” rule, and BALCA has held that 10 months should be used “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.”\(^{19}\)

Here, Employer has failed to meet its burden of establishing that it has a need for agricultural services or labor on a seasonal or other temporary basis. Notwithstanding the fact that hemp was not identified in the Application, Employer concedes that hemp does not have a season and that it needs services associated with its hemp production beyond 10 months.\(^{20}\) As for the greenhouse construction identified in the Application's job duties,\(^{21}\) Employer was requested in the NRM to address the need for a construction laborer despite its Application being for one Farmworker and Laborer, Crop, Nursery, and Greenhouse job opportunity.\(^{22}\) Employer altogether failed to provide any explanation in response to the NRM,\(^{23}\) and did not address the greenhouse construction in its Appeal.\(^{24}\) Similarly, in both the NOD and NRM, Employer was requested to address the “care and feeding of livestock (donkeys)” identified in the Application’s job duties, as “[t]hese duties are not on their face seasonal or temporary in nature.”\(^{25}\) Employer failed to provide any explanation in response to the NOD and NRM.\(^{26}\) In its Appeal, Employer requests to “remove feeding of animals” from the Application,\(^{27}\) which appears to be nothing more

\(^{18}\) Grand View Dairy Farm, 2009-TLC-00002 (Nov. 3, 2008).

\(^{19}\) Grassland Consultants, 2016-TLC-00012 (Jan. 27, 2016).

\(^{20}\) See AF at 1 (“Hemp doesn’t have a season.”); AF at 27 (“We understand we can only apply for 10 months now. However, we are new Hemp growers and will need services extended but will reapply.”); Farm-Op, 2017-TLC-00021, slip op. at 10 (July 7, 2017) (employers not permitted to “continually shift their purported periods of need in order to utilize the H-2A program.”); Pleasantville Farms, 2015-TLC-00053, slip op. at 3 (June 8, 2015) (“An employer is required to justify a change in its dates of seasonal need in order to ensure that it is not manipulating its ‘season’ when it really has a year-round need for labor.”); Sneed Farm, 1999-TLC-00007, slip. Op. at 4 (Sept. 27, 1999) (the inquiry is whether the “employer’s needs are seasonal, not whether the duties are seasonal.”)

\(^{21}\) AF at 75.

\(^{22}\) AF at 21.

\(^{23}\) AF at 16.

\(^{24}\) AF at 1-2.

\(^{25}\) AF at 21, 25, 46, 57.

\(^{26}\) AF at 16, 27-28, 41.

\(^{27}\) AF at 2.
than an attempt to manipulate the Application for the sole purpose of approval. Further, even if the “feeding of animals” is removed from the Application, Employer has still failed to explain how the remaining animal care duties – i.e. the “collection and storage of manure” – is seasonal or temporary in nature.

ORDER

Based on the foregoing, it is hereby ORDERED that the Certifying Officer’s denial is AFFIRMED.

For the Board:

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC

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28 See Scott Farms, 2011-TLC-00388, slip op. at 5 (April 14, 2011) (“A seasonal need is tied to the weather or a particular annual pattern, and an employer’s need for labor is not seasonal if an employer is able to manipulate its season to fit the criteria of the temporary labor certification program. ... An employer is required to justify a change in the dates of its established season.”) (citing Salt Wells Cattle Company, LLC, 2011-TLC-00185 (Feb. 8, 2011) and Thorn Custom Harvesting, 2011-TLC-00196, slip op. at 3 (Feb. 8, 2011)). See also Southside Nursery, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010).

29 AF at 75.