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 found at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis.

On July 15, 2021, Catfish Wireless LLC (“Employer”) requested expedited administrative review under 20 C.F.R. § 655.171(a) of the Certifying Officer’s July 6, 2021, Final Determination in the above-captioned H-2A temporary labor certification matter. The Appeal File in this matter was received on July 30, 2021.

BACKGROUND

The Employer filed an H-2A Application for Temporary Employment Certification (“Form 9142A”) requesting to hire foreign workers to perform agricultural work on a temporary or seasonal basis. (AF 72).¹ The Employer filed an H-2A Agricultural Clearance Order (“Form 790A”) requesting three Farm Workers, Aquaculture with a stated period of need beginning on August 1, 2021 and ending on December 15, 2021. (AF 80).

In its Form ETA-790A, the Employer described the specific job duties that the worker would be required to perform, these duties included the following:

¹ Citations to the Appeal File are abbreviated as “AF” followed by the page number.
Various tasks relating to the production of catfish including but not limited to: seining, equipment maintenance, grading levees, cutting grass, buoy maintenance, paddle wheel maintenance, feeding, weed-eating etc. Prepare ponds for fingerlings: drain ponds to allow them to dry out by exposure to air. Remove aquatic weeds and level bottom to facilitate seining. Fill the ponds with water. Unload fingerlings and place in ponds. Monitor and correct oxygen levels in pond water, observe fish behavior and physical condition. Monitor water temperature, quality and oxygen levels in all ponds especially at night. Maintain pond areas by removing weeds, grass, etc. Monitor ponds for disease and predatory birds. Harvest food fish from ponds and loads fish onto trucks for transport. Wades in the pond to position net using a foot to keep the mud line of the net on bottom. Feed fish [hand or mechanical feeder].

Performs typical farm and pond maintenance levee repair and maintenance, control predators, pull weeds, mow grass, clean and store equipment, etc. [sic] uses seines, dip nets, waders, gloves uses oxygen meter and/or chemical test kit.

(AF 80).

On June 16, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) on the basis of 20 C.F.R. § 655.103(d), finding Employer’s description of the nature of the job opportunity was not “seasonal” on its face. (AF 64). The CO explained, “the employer has included duties that are related to the production of catfish in man-made ponds, which is not on its face seasonal in nature.” (AF 64). In its application, the Employer submitted a statement of temporary need, which stated:

This year (2021) we require 3 temporary workers from August 1, 2021—December 15, 2021 for care of fish ponds and farm maintenance. Because of the filing timeline we are not able to file this year for the total 10 months that we need workers. For the year 2022 we will need workers from mid-February—mid-December. Mid-December to mid-February is our off season and extra help is not needed.

(AF 64). Despite the clear recitation that extra help was only needed for a total of ten (10) months, the CO found that Employer’s statement of temporary need “indicated” the Employer will need workers in every season of the year for 2022. (AF 64). The Employer was instructed to provide supporting documentation to demonstrate a seasonal need for agricultural services. (AF 64).²

² The CO requested the Employer to provide, among other things, a statement describing the employer’s business history, activities, and schedule of operations; documentation from industry leaders describing the seasonality of the employer’s business; summarized monthly payroll for the previous three calendar years; and other evidence and documentation to justify the dates of need being requested for certification. (AF 64-65).
The Employer responded to the CO’s request for additional supporting evidence and documentation. In response, the Employer described its catfish aquaculture operations in Alabama’s “Black Belt” region. (AF 2, 9).

In its statement, the Employer explained the optimum water temperatures for catfish growth is between 70 to 85°F, and the best months for growth are from April through October. (AF 2). From mid-February through mid-December, the Employer requires additional workers to assist the farm in the growing and harvesting of catfish. (AF 4). The additional workers are needed during warmer months to help the permanent staff monitor the ponds for oxygen content, feed and observe fish behavior, to weed and remove debris from the ponds, and, among other things, to keep levees in good condition to allow machinery and equipment access to the ponds. (AF 4). As the temperature drops, catfish feeding activity decreases (less than 65°F) and feeding activity essentially stops at temperatures below 50°F. (AF 2). Thus, Employer explained that it does not require additional workers during its off-season, from mid-December through mid-February. (AF 4).

The Employer provided payroll records for 2018, 2019, and 2020, and a Schedule of Operations for each month, denoting the duties performed by permanent and temporary employees. (AF 13, 24-28). The payroll records indicate Employer did not employ temporary workers during 2018. (AF 24-25). In 2019, the payroll records show temporary workers were employed during July, August, and September. Temporary earnings in 2019 accounted for 11.8% of total earnings in July, 12.4% in August, and 11.9% in September. (AF 26). In 2020, the Employer employed temporary workers in April, May, June, July, August, September, October, and December. (AF 28). Temporary earnings in 2020 accounted for 17.1% of the year’s total earnings. (AF 28). The records also indicate Employer retained 4-5 permanent workers throughout that year and added 1-2 temporary workers between April and December 2020, an increase of 20%-50% depending on the month.4

In addition, the Employer submitted news articles discussing the catfish operations in the Alabama region, along with applications for temporary workers from similar catfish farming operations that show a temporary need for workers from mid-February through mid-December. (AF 9-11, 15-16, 17-22). These articles were not all specific to Employer’s farm but showed how comparable catfish farming operations were conducted on an annual basis.

The Employer’s Schedule of Operations included the following duties5:

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3 “Black Belt” refers to the regions unique black soil and abundant fresh water. (AF 9).
4 The records show an increase in number of employees of 20% from April through July 2020; 25% in August 2020; 50% in September 2020; 25% in October 2020; 0% in November 2020 and 25% for part of December 2020.
5 AF 13 (levees incorrectly spelled in original).
On July 6, 2021, the CO denied certification on the basis of 20 C.F.R. § 655.103(d), finding the Employer’s response failed to prove that its need for labor was temporary or seasonal. (AF 33-39). The CO based his determination on several factors. First, the Employer’s statement of temporary need indicated that in 2022 it will require temporary workers from mid-February through mid-December. Again, despite a clear recitation to the contrary, the CO explained, “[t]he employer indicated that in 2022 it will need workers every season of the year.” (AF 33). Second, the Employer’s response to the NOD included an article from the Alabama Living Magazine, which stated, in part, “[t]he typical growing season for catfish lasts about 18 months, with major growth months being June through September.” (AF 34). The CO found the claimed “growth months” of June to September do not support the Employer’s claimed seasonal need of February to December. (AF 34). Third, the CO noted:

The article also points to the hotter months not requiring as much labor stating, “While warming temperatures could lead to hotter summers in which the fish would eat less, warmer winters might offer two months more of premium feed time.” [sic] and “But when water temperatures rise into the 90s for periods of time, the fish will not eat as consistently, and feeding levels per day will drop off.” [sic] These qualifying statements do not support the employer’s February through December requested season; which includes all summer months. (AF 34-35).

Fourth, the Employer’s Schedule of Operations shows “seine fish, feeding fish, and repair equipment” occurring in every month of the year. The CO explained that the listed duties are also included as part of the permanent job description in the employer’s application; therefore, the Employer’s job opportunity is not seasonal, or tied to a certain time of year. (AF 35).

Lastly, the CO interpreted the payroll records as not supporting the Employer’s claimed season of February to December. (AF 35). Specifically, the payroll records in all three years showed a higher number of hours worked by permanent employees during January of each year than in some of the claimed seasonal months. (AF 35).
The Employer disagrees with the CO and has appealed to the Board of Alien Labor Certification Appeals (“BALCA”).

**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 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).

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:

> 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.

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

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6 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 articulated 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)).
differs from other times of the year.” *Fegley Grain Cleaning*, 2015-TLC-00067, 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, 1999)). “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).

Employers may seek certification for H-2A workers to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in 26 U.S.C. § 3121(g), as defined in the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(f), which incorporates agriculture as defined the Agricultural Marketing Act 12 U.S.C. § 1141j(f), and as defined in the Internal Revenue Code of 1986, 26 U.S.C. § 3121(g). 8 U.S.C. § 1101(a)(15)(H)(ii)(A). Agricultural labor includes all service performed—

On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife. 26 U.S.C. § 3121(g)(1) (emphasis added). In its 1969 Revenue Ruling, the IRS explained:

The term “wildlife,” as used in sections 3121(g) and 3306(k) of the Code, includes all animals belonging to a species or class generally considered wild regardless of the element or elements that they inhabit. Inasmuch as the frogs and fish belong to a species generally considered wild, they are properly classified as wildlife.

Rev. Rul. 69-364 (1969). Agricultural services involved in raising, feeding, and caring for frogs and fish on a farm constitute agricultural labor. The IRC definition of agricultural labor has been incorporated into the H-2A regulations. 20 C.F.R. § 655.103(c)(1)(i)(A). During its modernization of the H-2A regulations in 2010, the Department of Labor explained:

In 2008, changes to FLSA regulations at 29 CFR part 708 and 29 CFR part 788 addressing Christmas tree production were published simultaneously with the H-2A regulations. These changes to FLSA regulations did not change the

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applicability of H-2A to Christmas tree production. The H-2A definition of agricultural labor or services includes the IRC definition of this term. . . . Therefore, such activities come within the scope of H-2A.

The NPRM proposed the removal of a clarifying sentence stating that an occupation included in either the IRC or the FLSA definition is considered agricultural labor or services even though the occupation does not appear in both definitions. This means that if the work is within the scope of either the IRC or the FLSA definition of agriculture, then the work is within the scope of the H-2A program. Although the Department believed that this principle was clear and the provision superfluous, several commentators found it useful.\(^8\)

Under 29 CFR Part 780, the FLSA regulations define the general scope of agriculture. Section 780.109 defines fish farming activities as agricultural activities. Specifically, the regulations state:

\[
\text{Unlike the specifically enumerated operations, the phrase “farming in all its branches” does not clearly indicate its scope. . . . The determination may involve a consideration of the principles contained in §780.104. For example, fish farming activities fall within the scope of the meaning of “farming in all its branches” and employers engaged in such operations would be employed in agriculture.}
\]

29 C.F.R. § 780.109 (Determination of whether unlisted activities are “farming.”)

Here, the CO’s finding that Employer failed to establish a seasonal or temporary employment need is based on the application of law to “facts” that are materially inaccurate. A rational and logical connection is lacking between certain isolated facts and interpretations found relevant by the CO and the determination that seasonal or temporary need was not established, particularly in light of the explanations and supporting documents provided by Employer in its application, statement of temporary need, and response to the NOD.\(^9\)

In his denial, the CO concluded, without sufficient explanation or rationale, that the production of catfish in man-made ponds is, on its face, not seasonal. (AF 33). BALCA has found seasonal need in a range of agricultural operations: man-made nurseries South Side Nursery, 2010-TLC-00157 (Oct. 15, 2010); Pope’s Plant Farm, Inc., 2014-TLC-00012 (Jan. 9, 2014); cattle herding/livestock Vermillion Ranch Ltd. P’ship, 2014-TLC-00002 (Dec. 5, 2013); oyster fishery Ward Oyster Co., 2014-TLC-00028 (Feb. 19, 2014); vineyards Adelsheim Vineyard, LLC, 2014-TLC-00049 (Mar. 7, 2014); crawfish farming D & G Frey Crawfish LLC, 2012-TLC-00099 (Oct. 19, 2012)(denied on other grounds). The CO’s statement is unsubstantiated by evidence and unsupported by law or BALCA decisions.

\(^8\) Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule, 75 Fed. Reg. 6888 (Feb. 12, 2010).

\(^9\) The employer bears the burden of showing that its need for workers is temporary or seasonal. The burden does not differ with regard to the type of agricultural labor or services to be performed. If catfish farming/aquaculture meets the statutory definition of agricultural labor or services, the burden is on the employer to show that its need for temporary workers is seasonal. In as much it would with livestock, nurseries, and other traditional and non-traditional concepts of agriculture.
The CO appears to have defined the H-2A’s seasonal requirement as meaning the annual seasons caused by the Earth’s tilted rotation around the sun throughout the year. In the Employer’s statement of temporary need, the Employer explained:

For the year 2022 we will need workers from mid-February—mid-December.
Mid-December to mid-February is our off season and extra help is not needed.

(AF 33). From that statement, the CO arrived at the conclusion, “[t]he employer indicated that in 2022 it will need workers every season of the year.” (AF 33). The CO clearly misstates the Employer’s need for workers in 2022. Moreover, the CO’s explanation improperly and erroneously imports an annual seasonality test that is neither required by statute nor regulation.

The appropriate test is whether the employer’s need for workers is seasonal, not whether the employer’s operations fit squarely into the four annual seasons: spring, summer, fall, and winter. On the contrary, 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.

Indeed, 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).

Further, the CO improperly relied on a quotation from a news article submitted by the Employer in its response to the NOD. The CO found the statement, “[w]hile warming temperatures could lead to hotter summers in which the fish would eat less, warmer winters might offer two months more of premium feed time,” did not support the Employer’s February through December requested season, which includes all summer months. (AF 34-35). That news article is based upon an improper hypothetical, which is itself based upon speculation and conjecture. As such, it is not sufficient evidence to form a factual or logical basis that this Employer does not have a seasonal requirement, especially when the article is not related to the Employer’s specific catfish operation. (AF 15). As the Employer explained in its request for appeal, these statements are mere assumptions and predictions, not reality. (AF 14).

The Employer’s response included temporary need statements filed from three comparable nearby catfish operations. All three employers’ stated periods of need which begin in February and end in November. (AF 17-22). This evidence comports with the Employer’s explanation that the season for catfish production runs from mid-February through mid-December.
In the NOD and denial, the CO identified catfish farming activities occurring in every month of the year. The CO therefore concluded the duties listed by Employer show that the Employer’s job opportunity is not seasonal, or tied to a certain time of year. The CO focused narrowly on certain listed job duties that included: seine fish, feed fish, and repair equipment. The Employer’s Schedule of Operations, however, shows additional duties are performed only during the months of March through November: repair pond levees, repair roads, check oxygen, spray and clip pastures. Again, the critical question is whether the Employer’s need for labor is seasonal, not whether the job duties are seasonal. Sneed Farm, 1999-TLC-000007. The Employer explained that while H-2A workers may perform some job duties that are listed as year-round to assist permanent workers, the Schedule of Operations “specifically indicated that their main duties will be to operate equipment to repair pond levees and repair roads.” (AF 12). The Employer further explained these repairs must be completed in the dry summer months. It described, “[m]ovement of large trucks and harvesting equipment can rut and damage levee tops that are excessively wet and lack protective cover such as gravel. In winter months equipment may not even be able to reach ponds because of the poor condition of access roads or levee tops.” (AF 3). Thus, despite the Employer’s description of the range of aquaculture production activities to support catfish operations, the CO improperly focused on a very limited portion of the job duties. To the extent that the CO also based this conclusion on the year-round nature of catfish production operations, the Court finds that the CO did not satisfactorily explain the rationale for concluding that the job duties did not demonstrate seasonal need.

In his denial, the CO found the Employer’s payroll records did not support the Employer’s “claimed seasons of February to December.” (AF 35). Specifically, the CO found the Employer did not offer an explanation that on the previous three years, the non-seasonal month of January consistently showed more use of labor than the Employer’s claimed seasonal months. (AF 35).

The CO’s rationale, however, ignores the Employer’s explanation that its labor need is tied to the production cycle of catfish aquaculture, which typically increases in the spring and summer months as the temperature rises. (AF 2) (best months for growth are April to October; pond maintenance and levee repair is performed during the dry summer months). The Employer explained:

While fish hibernate during winter months and require less care, when spring arrives and the temperature rises they require feeding and care on a daily basis.

(AF 8). Further, the Employer provided an explanation as to why January consistently reports higher labor usage. The Employer explained this confliction, stating:

Monthly summary payroll reports do not take into account that some employees do not come to work every day. It is beyond the employers control as to who shows up for work. Employees tend to take more time off from work during the summer months. These monthly reports do not show time taken for vacations, sick time or holidays.

(AF 23). Moreover, the Employer specifically explained, “Catfish Wireless LLC also provides some long time permanent employees “guaranteed” pay during the off season,
for example, our oxygen checker would receive very little compensation during January for work as an oxygen checker. We offer other employment opportunities during the winter months.” (AF 23).

Although the H-2A regulations are silent as to the standard for establishing peak load need, BALCA has held, given the singular origin of the H-2A and H-2B programs, there is no reason that the H-2B “peak load need” definition would be improper as applied to the H-2A program. Altendorf Transport, 2011-TLC-00158 (Feb. 15, 2011). In order to establish a peak load 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.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The Employer’s payroll records show that in 2019, it employed temporary workers during July, August, and September. (AF 26). In 2020, the Employer employed temporary workers from April through October. (AF 28). The Employer explained that permanent workers typically take vacation or time off during the summer months. In addition, the Employer noted the summer months are when it performs levee repairs and weed control because the ground is dry. (AF 2). The Employer explained it requires additional workers during the warmer months to assist its permanent staff because during the spring and summer months, pond areas must be kept clean and free of grass, weeds, and other debris; and oxygen levels must be adequately checked, which is especially important during the hot summer months. (AF 2). Further, the Employer’s need for labor increases as the temperature rises because “when spring arrives and the temperature rises they [catfish] require feeding and care on a daily basis.” (AF 8). When the catfish reach sellable size, additional workers are needed during the seining process and to load them onto transport trucks. This, Employer explained, is time sensitive because fish are transported live to the processing facilities. (AF 2). Conversely, “fish hibernate during winter months and require less care;” therefore, additional workers are not needed from mid-December through mid-February. (AF 2, 8).

The Court finds and concludes that in addition to the aforementioned mistakes of fact and law, the CO improperly interpreted Employer’s full explanation for its seasonal aquaculture operations, especially the Employer’s explanation of its peak load need for additional workers to supplement its permanent staff beginning in mid-February and extending into early December, with reduced activities that year-round workers can manage from mid-December to mid-February. Employer’s explanation, pay roll records, and data related to similarly situated catfish producers support the Employer’s description of seasonal need when facts in the exhibits are not considered in isolation.

Accordingly, the CO erred in denying certification.
ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer’s **DENIAL** of labor certification in the above-captioned matter is **REVERSED**. This matter is **REMANDED** to the Certifying Officer for further processing consistent with this decision.

For the Board of Alien Labor Certification Appeals:

**DAN C. PANAGIOTIS**
**ADMINISTRATIVE LAW JUDGE**