DECISION AND ORDER AFFIRMING CERTIFYING OFFICER’S DENIAL OF CERTIFICATION


On February 23, 2021, Dicke Farms (“Employer”) filed a request for expedited administrative review of the Certifying Officer’s (CO) denial of its application for temporary agricultural labor certification under the H-2A non-immigrant program. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. 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, peakload, or intermittent basis. Following the CO’s denial of an application under 20 C.F.R. § 655.164, an employer may request administrative review by the Office of Administrative Law Judges (OALJ). 20 C.F.R. § 655.171(a). In this expedited administrative review, the scope of the ALJ’s review is limited to the written record and any written submissions from the parties. New evidence (i.e., evidence not previously submitted to the CO) cannot be considered. 20 C.F.R. § 655.171(a).

2. Relevant Factual Background and Procedural History.

a. On or about August 30, 2018, Employer submitted temporary labor certification request # H-300-18248-326109. The submission requested certification of one H-2A worker for “Farmworker, Farm, Ranch, and Aquaculture Animal.”

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1 The file was docketed February 23, 2021. It was referred to the Covington District Office on February 24, 2021, and assigned to the undersigned ALJ on February 25, 2021.
2 See Administrative File (AF) 283-329.
3 See id.; with respect to timing, see especially id. at 327.
Minimum job requirements were listed as (i) high school diploma/GED, (ii) three months of farming experience, and (iii) a clean Motor Vehicle Record (MVR). \(^4\) No training was required. \(^5\) The job duties for the position were listed as “Precondition and maintain cattle: Monitor birthing of baby calves, hay all cattle, haul water to cattle, mix feed, monitor health. Put up electric fence. May haul cattle to market. Maintain equipment/feeding areas, monitor/maintain water system, remove/spread manure.” \(^6\)

The requested dates of need were October 1, 2018 to April 15, 2019. \(^7\) The request was certified on September 28, 2018. \(^8\)

b. On or about January 9, 2019, Employer submitted temporary labor certification request # H-300-19031-489530. \(^9\) The submission requested certification of one H-2A worker for “Farmworker, Agricultural Equipment Operators.” \(^10\)

Minimum job requirements were listed as (i) high school diploma/GED, (ii) three months of farming experience, and (iii) a valid driver’s license with a clean MVR. \(^11\) No training was required. \(^12\) The job duties for the position were listed as “Prepare, maintain and operate equipment for spring planting and fall harvest. Haul crops to market. Assist with mowing and maintaining field and property perimeters. Mowing, hauling and storing of summer forage harvest.”\(^13\)

The requested dates of need were March 25, 2019 to November 30, 2019. \(^14\) The request was certified on February 21, 2019. \(^15\)

c. On or about July 7, 2019, Employer submitted temporary labor certification request # H-300-19211-629565. \(^16\) The submission requested certification of one H-2A worker for “Farmworker, Farm, Ranch, and Aquaculture Animal.” \(^17\)

Minimum job requirements were listed as (i) high school diploma/GED, (ii) three months of farming experience, and (iii) a clean Motor Vehicle Record (MVR). \(^18\) No training was required. \(^19\) The job duties for the position were listed as “Precondition and maintain cattle: Monitor birthing of baby calves, hay all cattle, haul water to cattle, mix feed,
monitor health. Put up electric fence. May haul cattle to market. Maintain equipment/feeding areas, monitor/maintain water system, remove/spread manure.\textsuperscript{20}

The requested dates of need were October 1, 2019 to April 15, 2020.\textsuperscript{21} The request was certified on August 29, 2019.\textsuperscript{22}

d. On or about January 9, 2020, Employer submitted temporary labor certification request \# H-300-20017-261258.\textsuperscript{23} The submission requested certification of one H-2A worker for “Farmworker, Agricultural Equipment Operators.”\textsuperscript{24}

Minimum job requirements were listed as (i) high school diploma/GED, (ii) three months of experience, and (iii) a valid driver’s license with a clean MVR.\textsuperscript{25} No training was required.\textsuperscript{26} The job duties for the position were listed as “Prepare, maintain and operate equipment for spring planting and fall harvest. Haul crops to market. Assist with mowing and maintaining field and property perimeters. Mowing, hauling and storing of summer forage harvest.”\textsuperscript{27}

The requested dates of need were March 25, 2020 to November 30, 2020.\textsuperscript{28} The request was certified on February 24, 2020.\textsuperscript{29}

e. On or about July 12, 2020, Employer submitted temporary labor certification request \# H-300-20202-723798.\textsuperscript{30} The submission requested certification of one H-2A worker for “Farmworker, Farm, Ranch, and Aquaculture Animal.”\textsuperscript{31}

Minimum job requirements were listed as (i) high school diploma/GED, (ii) three months of experience, and (iii) a valid driver’s license with a clean Motor Vehicle Record (MVR).\textsuperscript{32} No training was required.\textsuperscript{33} The job duties for the position were listed as “Precondition and maintain cattle: Monitor birthing of baby calves, hay all cattle, haul water to cattle, mix feed, monitor health. Put up electric fence. May haul cattle to market. Maintain equipment/feeding areas, monitor/maintain water system, remove/spread manure.”\textsuperscript{34} This section also listed “Crops: corn, soybeans, alfalfa.”\textsuperscript{35}

\begin{flushleft}
\textsuperscript{20} Id. at 224.
\textsuperscript{21} Id. at 222.
\textsuperscript{22} Id. at 186.
\textsuperscript{23} See AF 131-185.
\textsuperscript{24} See id. at 170-172.
\textsuperscript{25} See id. at 173 and 180 (Addendum C). Addendum C also listed a requirement of “employment reference.”
\textsuperscript{26} See id.
\textsuperscript{27} Id. at 172.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 134.
\textsuperscript{30} See AF 76-130.
\textsuperscript{31} See id. at 115.
\textsuperscript{32} See id. at 118. The submission also listed the requirement of an employment reference. See id.
\textsuperscript{33} See id.
\textsuperscript{34} Id. at 117.
\textsuperscript{35} See id.
\end{flushleft}
The requested dates of need were October 1, 2020 to April 15, 2021. The request was certified on August 24, 2020.


Minimum job requirements were listed as (i) high school diploma/GED, (ii) three months of experience, and (iii) a valid driver’s license with a clean MVR. No training was required; however, the submission added for the first time a “lifting requirement” of 100 pounds. The job duties for the position were listed as “Prepare, maintain and operate equipment for spring planting and fall harvest. Haul crops to market. Assist with mowing and maintaining field and property perimeters. Mowing, hauling and storing of summer forage harvest.” This section also listed “Crops: corn, soybeans, alfalfa.”

The requested dates of need were March 25, 2021 to November 30, 2021.

The CO issued a Notice of Deficiency (NoD) for this application on February 3, 2021. The NoD stated that Employer’s submission failed to establish a need for temporary or seasonal workers. In particular, the NoD found that “[t]he job opportunity[,] described on ETA Form 790A, Section A, Items 3 and 4[,] coupled with the employer’s recent filing history shows the employer has a need for temporary workers in every month of the year.”

Employer responded to the NoD on February 4, 2021. In its response, Employer contended that it operates two “completely separate” businesses: a farm operation and a livestock operation. Employer stated that it required “Agricultural Equipment Operators” from “Spring through Fall,” and that “Farmworkers, Farm and Ranch Animals” [sic] are needed “during the late fall/winter months.” Employer’s response went on to describe various job duties attendant to the two types of work classifications.

36 Id.
37 Id. at 79.
38 See AF 54-75.
39 See id. at 60.
40 See id. at 63 and 70 (Addendum C).
41 See id. at 63.
42 Id. at 62.
43 See id.
44 Id.
45 Id. at 24. Similar notices of deficiencies were issued for some of Employer’s prior applications.
46 Id. at 26 (emphasis in original).
47 Id. at 15-22.
48 Id. at 16.
49 Id.
50 See id.
On February 16, 2021, the CO denied Employer’s labor certification request # H-300-21018-019044. The CO concluded that Employer did not demonstrate a seasonal or temporary need as required by 20 C.F.R. § 655.103(d). The reasons supporting the CO’s conclusion were that (i) the minimum job requirements were the same for each of Employer’s six separate applications, even though the applications encompassed two different job titles, (ii) the job duties for each of the two different job titles overlapped, and (iii) the same individual had been hired for the two different job titles in each of Employer’s five previous applications covering 2018, 2019, and 2020.

On February 23, Employer filed an appeal of the CO’s determination.

On March 1, Employer filed a brief in support of its appeal. The CO did not file a brief.

3. Applicable Law.

a. H-2A Program. The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the U.S. Department of Labor (DOL). An employer must certify that (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers. An employer must also establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.”

The issue before the undersigned is whether Employer has established a seasonal need for the position requested in its application.

As to seasonality, the Department’s H-2A regulations provide:

Definition of a temporary or seasonal nature. For purposes of this subpart, 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.
In determining whether the employer’s need for labor 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 other times of the year.\textsuperscript{59}

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 one year.\textsuperscript{60} A seasonal need has generally been interpreted to be ten (10) months or less.\textsuperscript{61}

When evaluating an employer’s Temporary Labor Certification (TLC) application, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.”\textsuperscript{62} In order to determine if the employer’s need for labor 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 other times of the year.\textsuperscript{63}

\textbf{b. Burden of Proof.} Throughout the labor certification process, the burden of proof in alien certification remains with the employer.\textsuperscript{64} 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.\textsuperscript{65} Consequently, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law.\textsuperscript{66} 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.\textsuperscript{67}

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (ALJ) may only render a decision “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 from amici curiae.”\textsuperscript{68}

4. Analysis. Employer first argued that its application should have been approved because its agricultural and livestock operations are “distinctly different.”\textsuperscript{69} Examination of the job requirements Employer listed for each application establishes that the worker filling those

\textsuperscript{59} Altendorf Transport, Inc., 2011-TLC-158, slip op. at 11 (Feb. 15, 2011).
\textsuperscript{60} 20 C.F.R. § 655.103(d).
\textsuperscript{61} See Grand View Dairy Farm, 2009-TLC-00002 (Nov. 3, 2008).
\textsuperscript{62} Sneed Farm, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added).
\textsuperscript{63} Altendorf Transport Inc., 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).
\textsuperscript{64} Id. at 13; see also 20 C.F.R. § 655.161(a).
\textsuperscript{66} 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).
\textsuperscript{68} Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”
\textsuperscript{69} AF, p. 16.
positions had overlapping duties which indicated one general farmworker position was artificially separated to create two positions. The table below outlines the job descriptions and requirements contained within Employer’s two most recent ETA-790A labor certification applications.

<table>
<thead>
<tr>
<th>ETA Case</th>
<th>Job Title</th>
<th>Job Description</th>
<th>Job Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-21018-019044 (CO denied certification for 3/25/2021 to 11/30/2021)</td>
<td>Farmworker (Agricultural Equipment Operator)</td>
<td>Prepare, maintain and operate equipment for spring planting and fall harvest; haul crops to market; assist with mowing and maintaining field and property perimeters; and mowing, hauling, and storing of summer forage harvest.</td>
<td>Valid driver’s license, clean motor vehicle record, high school diploma or GED, three (3) months of experience, and ability to lift 100 lbs.</td>
</tr>
<tr>
<td>H-300-20202-723798 (approved certification from 10/1/2020 to 4/15/2021)</td>
<td>Farmworker (Farmworker, Farm, Ranch and Aquaculture Animals)</td>
<td>Precondition and maintain cattle; monitor birthing of baby calves; haul all cattle; haul water to cattle; mix feed; monitor health; put up electric fence; haul cattle to market; maintain equipment and feeding areas; monitor and maintain water system; and remove and spread manure.</td>
<td>Valid commercial driver's license, clean motor vehicle record, high school diploma or GED, three (3) months of experience, and an employment reference.</td>
</tr>
</tbody>
</table>

Notably, the record establishes that the same job descriptions and job requirements listed in the above table have been “rotated” on a semi-annual basis for each of Employer’s labor certification applications in 2018, 2019, and 2020. Employer acknowledged the overlap in job duties in its response to the CO’s Notice of Deficiency by agreeing that “[t]hey may have some similar job requirements.” A review of the past three years’ applications, however, reveals that the overlap in job duties and responsibilities is significant.

Per the job descriptions provided by Employer, an agricultural equipment operator and a cattle farmworker are both required to (1) operate farm equipment, (2) monitor and maintain farm assets, (3) haul agricultural products such as hay and cattle, and (4) provide general unskilled services for farmland. Although both positions require similar skills and experience, one distinction is a commercial driver’s license requirement for an Agricultural Equipment Operator. Nevertheless, given that Employer’s job description states a livestock farmworker could be tasked with hauling cattle to market, this position would more likely than not also

70 AF, p. 62.
71 AF, p. 70.
72 AF, p. 117.
73 AF, p. 118.
74 AF, p. 17 (emphasis in original).
75 AF, pp. 107-08, 118.
require a commercial driver’s license, rendering the general job requirements for both farmworkers essentially identical.\textsuperscript{76}

Employer attempted to minimize the similarities between the job requirements in both applications by asserting that the responsibilities were entirely different.\textsuperscript{77} Employer contended the duties of an agricultural equipment operator pertain to the growing of crops during a specific time of year, and that the duties of a livestock farmworker pertain to caring for livestock in a separate part of the year. Yet, many of the job responsibilities for both positions include maintaining and operating farm equipment, hauling (either crops or cattle), and either feeding cattle or preparing feed for cattle. For example, per the job duties listed in Employer’s applications, a livestock worker may “haul water to cattle . . . [and] haul cattle to market” while an agricultural equipment operator may “haul crops to market.” A livestock worker may “hay all cattle . . . [and] mix feed,” while an agricultural equipment operator may mow, haul, and store the summer forage harvest (i.e., hay) for the cattle. Additionally, a livestock worker may “maintain equipment,” while an agricultural equipment operator may “maintain and operate equipment.” This substantial overlap in job duties indicates these occupations are not “completely separate,” as employer asserts.\textsuperscript{78}

Employer also contended in its response to the CO’s Notice of Deficiency that livestock work is seasonal because it is “tied to weather patterns.”\textsuperscript{79} Yet, the response also stated that after April, livestock “labor demands decrease.”\textsuperscript{80} A decrease in labor demand implies that a demand for livestock labor still exists after April, just to a lesser extent. For example, it is more likely than not that after April, a worker must still use agricultural equipment to mow, haul, and store hay that will be used as winter feed for the livestock. This conclusion is supported by Employer’s own job description for an “agricultural equipment operator,” which states that the worker will be required to mow, haul, and store summer forage harvest (i.e., hay), as well as the job description for a livestock worker, which includes “hay[ing] all cattle.”

It is Employer’s burden to demonstrate that its need is seasonal and not permanent. While it is possible Employer has other laborers to tend to its livestock during the “off season” between April and November, it is equally possible that a worker assigned as an agricultural equipment operator is also utilized to tend livestock after April, and that a worker assigned to livestock care operates agricultural equipment.

Moreover, the regulatory definition of “agricultural labor or services” recognizes the overlapping nature of agricultural and livestock farm work. The regulation defines “agricultural labor or services” as work:

\begin{equation}
\text{Employer stated in its brief that “One cannot reasonable conclude these two jobs are the same simply because they both require the same basic job requirements, i.e. valid driver’s license, clean MVR, and HS/GED.” Although Employer focuses heavily on the CO’s notation regarding job requirements, the CO also discussed responsibilities and a pattern of year-round need.}
\end{equation}

\begin{equation}
\text{AF, p. 16.}
\end{equation}

\begin{equation}
\text{Id.}
\end{equation}

\begin{equation}
\text{Id.}
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\begin{equation}
\text{Id.}
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\begin{equation}
\text{Id.}
\end{equation}
(A) On a farm, . . . in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, . . . feeding, caring for, . . . and management of livestock, . . .

(B) In the employ of the owner . . . of a farm, in connection with the operation, . . . or maintenance of such farm and its tools and equipment.81

The regulatory definition indicates, contrary to Employer’s assertion, that agricultural and livestock farm work may be encompassed within the same occupation. This is especially true in Employer’s case because the separate applications Employer has submitted over the past three years indicate a need for a worker who can raise and harvest agricultural products, raise, feed, care for, and manage livestock, and operate and maintain farm equipment.

Employer next contended that the CO’s determination should be overturned because it improperly focused only on the fact that the minimum job requirements for each position were the same: a high school education, a valid driver’s license and clean driving record, and three months of relevant experience. However, the CO’s determination also noted that “[a] review of Dicke Farms [sic] filing history, [sic] reveals that it previously filed multiple applications containing worksite locations in the same area of employment, with the same or similar duties for a period over 12 months.”82 Further, the CO stated that Employer’s dates of need in the current application “coupled with [Employer’s] recent filing history shows the employer claimed a ‘seasonal’ need for workers in every month of the year.”83 Thus, it was not only the identical minimum job requirements, but also Employer’s filing history and its demonstrated need for year-round help, that informed the CO’s determination.

In this regard, Employer also questioned the relevance of the CO’s request to provide the name of an H-2A worker on prior payroll reports. Employer stated, “I was fortunate enough to find a worker who met all job requirements for both positions on my farm, Ag[ricultural] Equipment Operator and Farmworker, Farm and Ranch Animals [sic]. Logically, I would not hire a different person when one person was qualified to perform in both job capacities.”84 Notably, however, when Employer provided the H-2A worker’s name, the CO found it significant that the same individual had been hired under each of the five preceding semi-annual applications, and that that individual had worked for Employer in every month of the year for the past three years.85

Employer further argued that its current application should be certified because each of its applications included different SOC (ONET/OES) codes/titles. Employer’s most recent application used SOC code 45-2091.00 (Agricultural Equipment Operators).86 Employer’s most recent previous application used SOC code 45-2093.00 (Farmworkers, Farm, Ranch, and Aquacultural Animals). This pattern was also established semi-annually in 2018 and 2019. The CO noted Employer’s argument but concluded the job requirements overlapped to the extent that

81 20 C.F.R. § 655.103(c)(1)(i)(A)-(B) (emphasis added).
82 AF, p. 11.
83 Id. (emphasis in original).
84 AF, p. 17.
85 See AF, p. 11.
86 AF, p. 29.
it was unclear how the occupations were different. While the SOC code is a helpful guide, differing SOC codes are not outcome-determinative. Employer’s argument that the use of different SOC codes proves a seasonal need is unpersuasive. Evaluating a TLC claim hinges on whether the employer’s needs are seasonal, not whether the duties are seasonal. 87

On this point, Employer urged that Vermillion Ranch Limited Partnership, 2014-TLC-00002 (Vermillion Ranch), which was issued December 5, 2013, should control the outcome in this case. Vermillion Ranch is not controlling, and is distinguishable on several key points.

First, the ALJ in Vermillion Ranch held a full evidentiary hearing. He took testimony from the CO in the case, from the employer, and from the employer’s expert witness (Dr. Wayne Burkhardt was identified as an expert in range management and range ecology). In this case, the undersigned is limited to consideration of the Administrative File and the brief filed by Employer.

Second, the employer in Vermillion Ranch testified in detail about the exact working conditions on its ranch during different times of the year, and how the weather affected its labor needs during those seasons. Further, the employer’s expert testified in detail about differing range and weather conditions during the seasons, as well as how those differing range and weather conditions affect the management of cattle. In this case, both the CO and the undersigned had only Employer’s brief description of how some aspects of livestock production (such as calving, worming, vaccination of animals, and monitoring overall livestock health) do not overlap with some aspects of agricultural production (such as growing crops). 88

Third, the employer in Vermillion Ranch testified that it had never before applied for the certification being appealed in that case (winter cattle herder). In this case, Employer applied semi-annually on a rotating basis for the two positions that were continuously filled by the same H-2A worker every year.

The fact that Employer has received certifications for identical applications multiple times in the past is not outcome-determinative, but it supports the CO’s finding of a pattern establishing a permanent labor need. Over the past three years, Employer has demonstrated a permanent need for farmworkers. Employer’s pattern of hiring the same H-2A worker for similar job requirements and responsibilities only emerged after several years of demonstrating consistent, repeated year-long need.

In its response to the CO’s NoD, Employer also cited four TLC cases that had been approved for two other employers to argue that the CO’s determination in Employer’s case was inconsistent. 89 Employer contended that because each of these cases showed approved applications for an Agricultural Equipment Operator and a Farmworker, the CO must have

87 Sneed Farm, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added).
88 See AF, p. 16.
89 The first two cited cases were for Crop Services -- H-300-19352-20460 (Agricultural Equipment Operator) and H-300-20280-86005 (Farmworkers, Farm and Ranch Animals [sic]). The other two cited cases were for Yackley Ranches -- H-300-20017-260930 (Agricultural Equipment Operators) and H-300-20275-853758 (Farmworkers, Farm and Ranch Animals [sic]). See AF, p. 17.
inconsistently analyzed Employer’s case in this instance. The argument fails because Employer did not provide any factual background from the four cited cases upon which comparison could be made to Employer’s case. The mere fact that other cases for other employers may have been approved for the same two occupations does not establish inconsistency in the CO’s decision regarding this case.

Finally, Employer cited in its brief to the undersigned a number of approved TLC cases in which there were purportedly similar job requirements to those presented in Employer’s current application.90 These cases were not cited in Employer’s NoD response; thus, they comprise new evidence. An ALJ may not consider new evidence in an expedited administrative review. Moreover, even if these cases were admissible evidence, Employer did not provide any of the facts from the cited cases to establish how or why these cases were approved. As such, they would not necessarily be persuasive, analogous, or controlling. Each case is considered on its own facts.

5. Conclusion.

The CO denied Employer’s temporary labor certification application # H-300-21018-019044 on the basis that Employer failed to demonstrate a temporary or seasonal need. The stated period of need in Employer’s application for this particular instance was less than ten months. However, the record as a whole establishes that Employer has submitted H-2A applications to employ the same farmworker in every month of the year for the past several years. As the CO explained, “the employer appears to be utilizing the H-2A program to meet its needs for ongoing operations.”91

The record as a whole establishes that Employer has not met its burden of showing it is entitled to temporary labor certification for this requested farmworker position. After reviewing the evidence considered by the CO and all legal arguments presented regarding the issue, I find that Employer has not provided sufficient information to overcome the deficiencies listed in the NoD. Further, the CO’s decision was not arbitrary because it was based on specific reasons tied to an examination of Employer’s filing history, which only developed over time.92

90 See Employer’s brief, pp. 3-5.
91 AF, p. 7.
92 Although Employer might argue the decision to deny his sixth application was a “sudden change” in light of the five previous approvals, the determination to do so was not an “unaccountable” change, because the CO explained his decision was based in part on examination of Employer’s filing history, which only developed over time.
6. **Ruling.** The Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED.**

**SO ORDERED** this day at Covington, Louisiana.

JOHN M. HERKE
ADMINISTRATIVE LAW JUDGE