This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

Luis Alvarez ("Employer") applied for authorization to hire two hundred temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification denied the application. Employer appealed and requested a de novo hearing before an administrative law judge. However, after the undersigned set the matter for hearing, the parties jointly requested that the undersigned issue a decision on the record, which the undersigned granted. Accordingly, the matter is now properly before the Board of Alien Labor Certification Appeals (the “Board” or “BALCA”) pursuant to Section 655.171 for review of the Certifying Officer’s decision. Upon a review of the record and the relevant legal authority, the undersigned AFFIRMS the determination of the Certifying Officer.

I. Procedural and Factual Background

Employer is a Georgia farm labor contractor that provides farm labor to local farmers. (Administrative File “AF” at 1727, 1747-48.) On February 2, 2021, Employer submitted an H-2A Application for Temporary Employment Certification with the United States Department of Labor. The Certifying Officer in the Office of Foreign Labor Certification denied the application. Employer appealed and requested a de novo hearing before an administrative law judge. However, after the undersigned set the matter for hearing, the parties jointly requested that the undersigned issue a decision on the record, which the undersigned granted. Accordingly, the matter is now properly before the Board of Alien Labor Certification Appeals (the “Board” or “BALCA”) pursuant to Section 655.171 for review of the Certifying Officer’s decision. Upon a review of the record and the relevant legal authority, the undersigned AFFIRMS the determination of the Certifying Officer.

1 The chief administrative law judge may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.171. Chief Judge Henley designated a single member of the Board to hear this appeal.
Labor seeking certification for two hundred seasonal workers from March 19, 2021, to July 1, 2021. (AF at 1727, 1735 1742.) The SOC Occupational Code listed on the application is 45-2092.02, Farmworkers and Laborers, Crop. (AF at 1733.) The stated temporary need for the workers was that the work is seasonal in nature. (AF at 1727, 1747.) This seasonal need is based on the contract between Employer and Cogdell Berry Farm in Homerville, Georgia to harvest 350 acres of blueberries between March 19, 2021, and September 1, 2021. (AF at 1748.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency. (AF at 1715-21.) The Notice of Deficiency cited several deficiencies. (Id.) The Certifying Officer found that the record did not support a seasonal need, the worksite locations were not clear, the work of packing commodities in the packing house does not qualify as agricultural labor or services, and Employer failed to provide sufficient documentation related to the transportation of the workers. (Id.) Employer subsequently provided additional information in support of the application and confirmed that the end date of the need is July 1, 2021, and the workers would only be working at a single work location and not in the packing facility. (AF at 1645.)

The Certifying Officer denied the application on February 26, 2021. (AF at 1620.) The denial letter listed a single reason for the denial of the application, “employer did not demonstrate that the job opportunity represents seasonal need as defined at 20 CFR sec. 655.103(d).” (AF at 1625.) The Certifying Officer found that the need was not seasonal in nature because the current application, when considered in tandem with the two prior applications, demonstrates that the Employer is able to perform work in nearly every month of the year. (AF at 1622-23.)

After issuance of the denial, the Office of Foreign Labor Certification received over a thousand pages of payroll records from Employer. (AF at 13-1618.) Employer also submitted the work contracts for 2019 and 2020 and an amended contract for 2021. (AF 7-9.)

Employer appealed the denial to the chief administrative law judge on March 5, 2021. (AF at 2.) In its appeal, Employer requested a de novo hearing before an administrative law judge. (AF at 3.) The undersigned received the administrative file in this matter on March 15, 2021, and set the matter for hearing on March 24, 2021. The parties then jointly requested a decision on the record, which the undersigned granted on March 23, 2021. (Order Approving Joint Mot. Decision on R., Mar. 23, 2021.) Having reviewed the entirety of the administrative file, the undersigned now issues this decision.

II. Legal Standard

An employer may request an administrative review or a de novo hearing before an administrative law judge. 20 C.F.R. §§ 655.171. Regardless of the method of review sought by an employer, an administrative law judge is limited to affirming, reversing, or modifying the decision of the certifying officer, or remanding the matter to the certifying officer for further action. 20 C.F.R. § 655.171(a); 20 C.F.R. § 655.171(b)(2). The administrative law judge must specify the reasons for his or her determination in a written decision. Id.
III. Analysis

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform “agricultural labor or services, as defined by the Secretary of Labor . . .” 8 U.S.C. § 1101(a)(15)(H). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work needed. 20 C.F.R. § 655.103(a). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a).

An employer seeking certification for workers under the H-2A program must establish that the need for agricultural labor or services is of a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The regulations define both temporary and seasonal. 20 C.F.R. § 655.103(d). Section 655.103(d) provides:

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.

Id. The Certifying Officer denied the application on the ground that Employer failed to demonstrate that the need is seasonal.

Employer is a farm labor contractor who provides farm labor to farms in Georgia. On October 3, 2019, Employer entered a contract to provide farm workers to Cogdell Berry Farm from March 4, 2020, through July 15, 2020. (AF at 7, 1913.) Employer submitted an application for 142 H-2A workers, which the Certifying Officer accepted. (AF at 1831, 1849, 1902.)

On June 1, 2020, Employer and Cogdell Berry Farm entered another contract for Employer to provide 50 farm workers from October 1, 2020, through July 1, 2021. (AF at 8, 1824.) Employer submitted an application for 50 H-2A workers for this time period, which the Certifying Officer accepted. (AF at 1756, 1790, 1812.)

Employer and Cogdell Berry Farm entered a third contract on October 21, 2020, to provide 200 laborers from March 19, 2021, through September 1, 2021. (AF at 1756.) Thus, while the application only sought workers through July 1, 2021, the statement of need, as reflected by the employment contract with Cogdell Berry Farm, demonstrated a seasonal need from March to September. The amended contract dated February 6, 2021, alters the dates to March 25, 2021, through July 1, 2021. (AF at 9.)

The record before the undersigned demonstrates that Employer has failed to demonstrate that the 200 workers sought are the result of a seasonal need. Rather, it appears that Employer is in need of workers for at least eleven months out of the year on an ongoing basis. The Office of
Foreign Labor Certification previously granted Employer seasonal workers from March 4, 2020, to July 15, 2020, and from October 1, 2020 through July 1, 2021. The current application seeks workers from March 19, 2021, to July 1, 2021. Employer’s contract with Cogdell Berry Farm ran through September 1, 2021. Thus, the record reflects a need of workers in every month but September. Put another way, Employer is in need of ongoing, permanent workers to fulfill the contracts with Cogdell Berry Farm over the course of the entire year. Employer’s need is not seasonal.

This is not to say that Employer could not demonstrate that it needs an additional, temporary workforce on a seasonal basis tied to the dates of the blueberry harvest that is over and above the employment needed on a yearly basis for ongoing operations. For example, perhaps Employer needs fifty full time employees but additional seasonal workers to assist with a specific harvest. But the record before the undersigned reflects an ongoing need for laborers that is not tied to a specific season. In short, Employer has failed to demonstrate that the requested 200 workers are performing seasonal work. The undersigned AFFIRMS the decision of the Certifying Officer.

IV. Conclusion

The undersigned AFFIRMS the determination of the Certifying Officer.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge