In the Matter of:

SPEEDLING, INC.,

Employer.

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises from a request by Speedling, Inc. (Employer) for administrative review of the Certifying Officer’s (CO) decision to deny an application for temporary alien 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. Part 655, Subpart B.

On May 18, 2021, Employer submitted a letter requesting the Board of Alien Labor Certification Appeals (BALCA) to review the CO’s denial of certification in the above-captioned H-2A temporary labor certification matter. The matter was docketed on May 24, 2021, and the appeal file was transmitted the same day. I, Administrative Law Judge Larry W. Price, did not receive the appeal file until May 26, 2021, when I was assigned to the case.

Per the regulations, an ALJ must either (1) hold a hearing within five business days of receiving the administrative file and render a decision within ten calendar days after the hearing, or (2) conduct expedited administrative review and issue a written decision within five business days after receiving the administrative file. (20 C.F.R. §§ 655.171(a)–(b)).

For the reasons set forth below, the CO’s denial of certification will be reversed.

Statement of the Case

On April 15, 2021, Employer submitted an Application for Temporary Employment Certification, requesting certification for two (2) First-Line Supervisor or Agricultural Crop and Horticultural Worker job opportunities to work from July 1, 2021 through April 30, 2022. (AF at 60).1

On April 20, 2021, the CO issued a Notice of Deficiency, citing three deficiencies. (AF at 41–46). First, the CO alleged that Employer failed to establish temporary seasonal need as required by 20 C.F.R. § 655.103(d). The CO pointed to Employer’s previous applications and stated that

1 Throughout this Decision and Order, I will use “AF” to signify the Administrative File, followed by a corresponding page number.
Employer has a “history of filing for the same job opportunity for this location in every month of the year.” The present application and previous applications, the CO wrote, included similar job duties, and collectively covered every month of the year. Thus, the CO concluded that Employer’s need is not tied to a certain time of the year. To remedy this deficiency, the CO instructed Employer to provide documentation that supports its temporary need, including monthly payroll reports, monthly staffing levels, business history and operations, etc. (AF at 43–45).

Second, the CO stated that Employer’s inclusion of a drug test and background check was deficient under 20 C.F.R. § 655.122(b) because Employer did not (1) specify whether the tests would be given before or after hiring an applicant, or (2) explain how the results of the tests would be used as a lawful job-related reason for rejecting a U.S. worker. The CO gave Employer the opportunity to remedy the defect by removing the tests from their qualifications or amending them to be conducted after hiring with an explanation of job-relatedness. (AF at 45–46).

Third, the CO noted that Employer failed to explain how workers will have access to grocery stores in order to purchase food to prepare in the Employer-provided kitchens. To remedy this deficiency, the CO required Employer to amend its application to explain how workers would have access to grocery stores. (AF at 46).

On April 23, 2021 Employer sent, and on May 4, 2021 the CO received, Employer’s response to the Notice of Deficiency. Employer described its business as a greenhouse company that produces young plants of vegetables and ornamentals. In 2021, Employer explained, it took on two new types of businesses: foliage and business to consumer internet sales. COVID-19 impacted farmers who purchased their vegetables, but homeowners began purchasing plants to grow in their gardens and homes. It is due to this new side of the business that Employer requested that workers begin in July, rather than October as it had in the previous year. Employer disagreed with the CO’s statement that it has previously requested workers in every month of the year, stating that June has never been included as a busy month for their company. Instead, Employer explained that a previous application’s date range was set to end on June 1 because it was the last day of the last work week in May. (AF at 22–23).

Employer authorized the Chicago National Processing Center to amend its application forms to include new language for background checks, drug tests, and access to grocery stores. (AF at 29).

On May 17, 2021, the CO issued a Final Determination denying certification of Employer’s application. The only remaining deficiency was Employer’s alleged failure to establish a seasonal and temporary need as required by 20 C.F.R. § 655.103(d). The CO again argued that Employer has a history of filing for the same job opportunity in every month of the year with only two or three off-season months per year:

H-300-18250-069275² — one worker from October 29, 2018 to June 1, 2019

H-300-19224-275058 — two workers from October 14, 2019 to May 31, 2020

² Employer’s two previous applications are reproduced in the appeal file. The application associated with ETA Case Number H-300-18250-069275 starts on page 68 and ends on page 205. The application associated with ETA Case Number H-300-19224-275058 starts on page 206 and ends on page 476.
H-300-21099-211483 — two workers from July 1, 2021 to April 30, 2022
(AF at 9).

Additionally, the CO argued that the job opportunities list similar duties, which include seeding, transplanting, and shipping plants:

H-300-18250-069275 — planning and organizing the placement of plants into our greenhouses -seeding -movement of plants from one stage of growing to another -sticking of unrooted cuttings into media for rooting -transplanting seedlings into pots - quality control checks -shipment of both ornamental and vegetable trays along with ornamental flowering pots.

H-300-19224-275058 — Planning and organizing the placement of plants into our greenhouses -Seeding -Movement of plants from one stage of growing to another -Sticking of unrooted cuttings into media for rooting -Transplanting seedlings into pots - Quality Control Checks -Shipment of both Ornamental and Vegetable seedlings and potted crops Planning and organizing the placement of plants into our greenhouses 45% Seeding 5%. Movement of plants from one stage of growing to another 5% Sticking unrooted cuttings into media so they will grow roots 5% Transplanting seeded plants or rooted cuttings into pots 5% Quality control checks 5% Shipment of both ornamental and vegetable trays of seedlings and flowering crops 30% Work will be from 7:00 am until 5:00 pm Monday through Friday, with two 30 minute breaks.

H-300-21099-211483 — Perform and Supervise a crew of 15 25 employees to complete the following: Seeding - seed plant trays filled with peat moss. Will be trained to use our seeding machines. Foliage harvest cuttings, stick cuttings in soil media, placing trays in the greenhouse. Able to learn requirements for approximately 50 different varieties. Assist in packing & shipping once the crop has grown. Business to Consumer Able to hand seed 80+ varieties of plants into stabilized soil media. Monitor crops in the germination chambers & remove when ready for placement into the greenhouse. Maintenance Replace greenhouse plastic and able to work in hot greenhouses repairing benches (with instruction).

(AF at 9–10). Thus, the CO argued, Employer’s history of requests that cumulatively span each month of the year for similar job duties fails to establish that the need is tied to a particular time of year. (AF at 10).

The CO stated that Employer’s request for only one or two additional workers demonstrates that the Employer’s labor need is not “far above those necessary for ongoing operations,” as is required by the regulations. (AF at 11).

Next, the CO addressed Employer’s response to the Notice of Deficiency. Employer wrote the following:

As a grower of young plants from seed and cuttings, ours is the first link in the chain to market. The crops we produce take anywhere from 4 to 17 weeks to
produce, depending on the genus. In turn, our customers replant our starts into larger containers and grow them to flowering. They will start shipping to the big box stores in March and will continue through late May. We also grow some ornamental products and transplant into larger containers for the customer and they are shipped directly to stores. To meet these schedules, we start seeding at the end of December and continue to build inventory into the spring and ship through May. For the fall we start seeding in July and ship from late August through end of November.

We expect heavy spring shipping to continue through the end of May (end of April sowings). We anticipate heavier shipping at the end of July as people start planting their fall gardens. Due to these new product/service we moved the start date for this application from October (in the past) to July this year. We have requested that they start at the beginning of July so we have their help with supervision when we are growing the products.

(AF at 12). The CO contends that Employer’s description tied its need to two types of businesses—foliage and business to consumer—which Employer claims caused the requested start date to be moved from October to July. Despite this, the CO concluded that Employer’s operations, however internally categorized, still represent the same need for purposes of the H-2A program. (AF at 11–12).

Finally, the CO argued that Employer’s monthly payroll data did not support its alleged seasonal need because off-seasonal months showed more use of labor than some seasonal months. Employer’s lack of explanation for why this is. The payroll data for years 2018, 2019, and 2020 are reproduced below, with Employer’s current asserted seasonal months highlighted in grey:

<table>
<thead>
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<th>2018 Payroll</th>
<th>2019 Payroll</th>
<th>2020 Payroll</th>
</tr>
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<tbody>
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<td>Hours</td>
<td>Month</td>
</tr>
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</tr>
<tr>
<td>February</td>
<td>13106.75</td>
<td>February</td>
</tr>
<tr>
<td>March</td>
<td>26377.25</td>
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</tr>
<tr>
<td>April</td>
<td>15222.00</td>
<td>April</td>
</tr>
<tr>
<td>May</td>
<td>10581.00</td>
<td>May</td>
</tr>
<tr>
<td>June</td>
<td>4428.75</td>
<td>June</td>
</tr>
<tr>
<td>July</td>
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</tr>
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</tr>
<tr>
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</tr>
<tr>
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</tr>
<tr>
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<td>November</td>
</tr>
<tr>
<td>December</td>
<td>8854.00</td>
<td>December</td>
</tr>
</tbody>
</table>

(AF at 12).

On May 18, 2021, Employer filed a request for appeal of their most recent application. Employer explained that it had only previously had one H-2A worker during the fall of 2018 through the spring of 2019, via their application numbered H-300-18250-069275. The end date on the application for that worker was June 1, 2019, but in fact, Employer’s H-2A employee left in
April because Employer’s season ended early. Employer does not keep employees longer than needed, so long as they meet their obligations under the regulations. (AF at 3).

Employer was unable to recruit employees to fill positions under their second application, number H-300-19224-275058. Employer asserted that if it had found employees, it would have sent those employees home early again unless there was unexpected business in May. On the present application, Employer set their end date as April 30, 2022 because it noticed that its heaviest workload decreased by early May the previous year. Additionally, although Employer stated that its busy season does not begin until the middle or end of July, it listed its start date as July 1, 2021 to allow time to train employees before the season hits. (AF at 3–4).

**Discussion**

When an employer requests administrative review of an unfavorable decision made by the CO, the administrative law judge must affirm, reverse, modify the CO's decision, or remand to the CO for further action, and specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Neither the statute nor regulations supply a standard of review. Under BALCA precedent, the CO’s decision will be upheld unless that decision is arbitrary, capricious, or otherwise not in accordance with law. *GreenTop Acres*, 2020-TLC-00088, slip op. at 4 (July 8, 2020) (citing *J&V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (March 4, 2016)).

To qualify for the H-2A program, an employer must establish 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). Section 655.103(d) defines both “temporary” and “seasonal;” it states:

> 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).

Here, the CO concluded that Employer failed to demonstrate a temporary or seasonal need. The CO argued that Employer’s H-2A application history cumulatively includes start and end dates that span every month of the year. Employer contests that assertion, stating that the month of June has never been in its stated season. Employer acknowledged that in its first application its stated end-date was June 1, 2019, but argued that it only assigned that date because it was the last day of the final work week in May. What is more, the employee hired under that application process left in April, rather than on June 1, due to Employer’s seasonal need ending early. The next year, Employer experienced a similar early end to the season. Although it had not successfully hired an H-2A worker under its second application, Employer accommodating for this trend in its third application, which requests an end date in April. I do not find Employer’s recalibration of its seasonal timeframe to end a month earlier, consistent with recent years, to be suspicious.

Moreover, Employer argues, its operations have changed and have impacted its seasonal need. Employer explained in its response to the Notice of Deficiency that since its most recent
application, it has taken on two new business operations: foliage and direct to consumer internet sales, driven by demand during the COVID-19 pandemic. For fall shipments of ornamental plants, which take between four and seventeen weeks to produce, Employer must begin seeding in July to meet shipping deadlines that span from late August to November. Likewise, for spring shipments, Employer seeds in December and will continue to ship products through May. Additionally, Employer explained that it expects heavier shipping in July as people start planting their fall gardens. I find that Employer’s explanation of its shift in business model and further explanation of seeding and shipping months clearly establishes a need that begins in July and lasts through April.

Finally, the CO argues that Employer’s payroll data showing the number of hours of labor used each month since 2018 does not support Employer’s current need. This conclusion fails to adequately consider Employer’s new operations that result in at least a somewhat different season, and the impact that COVID-19 had on the 2020 data.

I am to uphold the CO’s decision unless it is arbitrary, capricious, or otherwise not in accordance with law. GreenTop Acres, 2020-TLC-00088, slip op. at 4 (July 8, 2020) (citing J&V Farms, LLC, 2016-TLC-00022, slip op. at 3 (March 4, 2016)). Here, the CO determined that Employer failed to establish a seasonal need. Employer explained in its response to the CO that it is now in the business of direct-to-consumer internet sales, and begins seeding in July to meet demands through November and in December to meet demands through May. Although Employer’s season has changed from its previous applications, so has its business model due to the impact of COVID-19. I find that Employer clearly established a need from July to April, thus tying its need “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.” 20 C.F.R. § 655.103(d). Therefore, Employer has met its burden of establishing a seasonal need. Accordingly, Employer’s application should be approved.

ORDER

Based on the foregoing, IT IS ORDERED that the Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is REVERSED. The case will be REMANDED to the CO for further processing.

SO ORDERED.

LARRY W. PRICE
Administrative Law Judge

LWP/KRS/jcb
Newport News, Virginia