DECISION AND ORDER


On August 6, 2021, the Office of Administrative Law Judges docketed a request for de novo hearing from Midwest Ag Electric Inc. (“Employer”) on its challenge to the denial of an application for temporary labor certification issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification matter. On August 9, 2021, I issued a Notice of Assignment and Notice of Hearing and Scheduling Order, setting this matter for a formal hearing to be held telephonically on August 13, 2021. Both parties submitted prehearing statements as provided under the Notice; neither party submitted exhibits. At the hearing, the Administrative File (“AF”) was admitted as Joint Exhibit 1. Employer called one witness to testify: Mr. Shannon VanderSyde, the owner of Midwest Ag Electric, Inc. The CO did not call witnesses. The parties presented their closing arguments at the hearing. The hearing transcript (“TR”) was filed on August 16, 2021.1

Pursuant to 20 C.F.R. § 655.171(b), this decision and order is rendered within ten days after the hearing.

1 The morning of the hearing, Employer filed a Motion to Consolidate this matter with a separate case pending before ALJ Alford. That motion was denied on the record at the hearing.
**Procedural History and Summary of Facts**

On June 22, 2021, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (“Application”). (AF 149-233). The Employer operates as an H-2A Labor Contractor. (AF 149). The Employer’s Application requested certification for 16 Construction Laborers for the period beginning August 8, 2021 and ending April 1, 2022. (AF 157). The Employer indicated a seasonal need. (AF 149). The job duties included the following services: “Install equipment for livestock building including water lines, feed lines, gating, fans, conduit, wires, fixtures and ventilation equipment. Small concrete and carpentry installation repairs.” (AF 157). An addendum to the job duties stated, among other requirements, that “[w]orkers are expected to work outside in all weather conditions including cold, snow, rain, and heat. Temperatures may range from -20 to 110 F. Workers may be required to work during rain and snow conditions that are not severe enough to stop operations.” (AF 174). The Employer listed 36 work sites, each requiring 16 workers with a begin date of August 8, 2021 and an end date of April 1, 2022. (AF 165-168).

With its Application, the Employer submitted a copy of the Farm Labor Agreement between itself and farm company Quality Ag to “install electrical for site inside and outside barns,” along with the ingress/egress agreements between Quality Ag and 33 work sites. (AF 177-215). The Farm Labor Agreement with Quality Ag is signed by the owner of Midwest Ag Electric Inc., Shannon VanderSyde, and states: “Work is expected to commence on 08/08/21 and end on 04/01/22, subject to weather, property and growing conditions.” (AF 177.) The Employer also submitted five Farm Labor Agreements with Heartland Builders Co., along with ingress/egress agreements for those five work sites; four of those agreements also stated that work was “expected to commence on 08/08/21 and end on 04/01/22, subject to weather, property and growing conditions.” (AF 216-225).²

On June 29, 2021, the CO issued a Notice of Deficiency. (AF 135-141). The Notice of Deficiency (NOD) identified three deficiencies in the Application and the modifications needed for consideration of the Application. First, the CO noted that the job opportunity “must be on a seasonal or other temporary basis,” and stated that the job duties “outlined in the application are not on their face seasonal in nature.” (AF 138). The CO restated the Employer’s Statement of Temporary Need, as follows:

The work that we perform occurs on a cycle which is dependent upon the completion of other tasks by other contract workers. For instance, for a typical livestock confinement project, the concrete work is completed first, then the construction of the livestock confinement takes place, and finally, approximately 60 days from the start of the project, our part of the work comes last with the installation of the equipment inside of the barn. After all the livestock confinement components are installed, an actual electrician/electrical engineer will install the more complicated wiring, electrical panels and complete the electrical set-up of the building with live electricity.

² The fifth Farm Labor Agreement applied to a work period from June 7-18, 2021, before the dates of need in this Application. (AF 218).
Based on the above work cycle, our work typically slows down in the months of May and June because we are about 60 days behind the rest of the contractors in the agricultural construction industry. Therefore, the work that we perform fluctuates based upon the agricultural construction work cycle and therefore, is seasonal in nature.

(AF 138). Having considered this statement and found it deficient, the CO stated in the NOD:

The duties listed in the application can be performed indoors and year-round. Furthermore, the employer’s Statement of Temporary Need fails to adequately explain how the employer’s need for temporary labor is seasonal. Therefore, it remains unclear as to how this job opportunity is tied to a certain time of year by an event or pattern. Because the employer failed to establish a temporary or seasonal need as required by 20 CFR sec. 655.103(d), it is now required to provide supporting evidence that a temporary need exists.

(AF 139).

The CO required the Employer to “explain why its job opportunity is seasonal rather than permanent in nature. The employer must also submit documentation to support its seasonal need.” (AF 139). The CO required Employer to submit (1) “A statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year; (2) A detailed explanation as to the activities of the employer’s permanent workers in this same occupation outside the requested period of need; (3) Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, Carpenters, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and (4) Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.” (AF 139).

Second, the CO identified a deficiency with regard to the required surety bond, and provided instructions for addressing this deficiency. Third, the CO identified a deficiency with the Employer’s Farm Labor Contractor (FLC) Certificate of Registration, and provided instructions for addressing this deficiency. (AF 139-141).

The Employer filed a response to the NOD on July 2, 2021. (AF 22-132). The Employer stated in its response that it wished to “adjust their season to April 1 to January 31. As such, the employer authorizes the CNPC to adjust the end date on this application to January 31, 2022 and gives their permission to amend any affected sections of the pending applications.” (AF 22). The Employer asserted that its need was “both temporary and seasonal”:

This need is seasonal because the work described on this application only occurs immediately after the construction of a new or remodeled livestock confinement. The construction of livestock confinements in Iowa can only occur during the
warmer months of the year because the worksites cannot be excavated and concrete cannot be poured during the cold winter months. As such, the work in this application is only performed after construction, which is “tied to a certain time of year by an event or pattern”, when the weather gets warmer. The work performed on this application is tied to a certain time of year by event or pattern for multiple years, all of which are related to weather. Please see the attached weather report for the Area of Intended Employment. The employer’s need is directly consistent with the attached Payroll Reports for 2019 and 2020.

(AF 22). Employer also contended that “the vast majority of the duties on this application … are actually performed outside, which is unsafe to do in the coldest winter months.” (AF 22). Further, because the structures are not yet wired for heating and air conditioning, even the work performed inside the structures is “still very cold and would result in unsafe working conditions for the workers over long periods of time.” (AF 22). Therefore, Employer argued, “the work performed on this application is directly tied to the weather and the sequence in which the work must be performed.” (AF 22). Employer asserted that it “is also unable to perform this work because of the risk of transmission of disease to livestock, which is present in the coldest winter months and coincides with the time of construction.” (AF 23). Thus, Employer argued, “the Employer’s need for labor is also greatly diminished as farmers do not allow as many (or any) construction laborers on the farm during the winter months to protect against the transmission of disease to the livestock.” (AF 23).

Enclosed with the response was a letter from Mr. VanderSyde, the owner of Midwest Ag Electric Inc. (AF 24-25). Mr. VanderSyde explained that his business “started about fifteen years ago as an electrical subcontractor wiring swine confinement structures”; was incorporated in 2011; and has expanded over the years “into installing feed equipment, gating, and other components of livestock confinement structures.” (AF 24). Regarding a temporary, seasonal need for H-2A workers, Mr. VanderSyde stated:

[T]he work that we perform occurs on a cycle which is dependent upon the completion of other tasks by other subcontractors and weather patterns. For instance, for a typical livestock confinement project, the concrete work is completed first, then the construction of the livestock confinement takes place, and finally, approximately 60 days from the start of the project, our part of the work comes last with the installation of the equipment inside of the barn. In addition to the above, the concrete work also cannot be completed in temperatures colder than 50 degrees Fahrenheit. Therefore, in the Midwest, the concrete work must be completed before the coldest winter months and according to the construction schedule explained above. Moreover, the work to be performed follows the actual construction of the livestock structure. After all the livestock confinement components are installed, an actual electrician/electrical engineer will install the more complicated wiring, electrical panels and complete the electrical set-up of the building with live electricity.

(AF 24). Mr. VanderSyde continued:
We would like to adjust our seasonality so that it starts April 1 and ends January 31. Thus, we request to change the end date of this certification to January 31, 2022. This request is based on an influx of contracts during the warmer months. As you can see from the attached payroll reports, our workload spikes from August through November once the swine confinements have been completed by the other contractors up to the point where we come in to install the electrical components.

(AF 24).

In addition to Mr. VanderSyde’s letter, the Employer submitted a chart showing average temperatures by month for Rockwell City, Iowa (AF 26-27); 2020 payroll reports showing total hours worked by month (AF 29) and total hours worked by employee (AF 30); 2019 payroll reports showing total hours worked by month (AF 32) and by employee (AF 33); and a letter written by Professor Michael Van Amburgh, dated June 14, 2021, stating that “construction companies should not be present, or if they are required to be present it should greatly reduce the number of workers on the worksite, during the winter months due to the high risk of transmission of diseases” to livestock.³ (AF 35-37).

The Employer also addressed the surety bond and FLC Certificate issues. (AF 23; AF 99-132).

On July 23, 2021, the CO issued a Final Determination. (AF 3-13). The letter stated that the Employer’s Application for temporary labor certification under the H-2A program was denied. (AF 4). It stated that after review of the Employer’s Application and its NOD response, “the employer failed to establish that its need is seasonal or temporary in nature.” (AF 6). The CO recounted information from the Application, the NOD, and the Employer’s response to the NOD. (AF 6-10). The CO stated that the Employer’s request to amend its dates of need (from 8/8/21-4/1/22 to 8/8/21-1/31/22) “adds doubt to the already questionable claim of seasonal or temporary need by the employer,” because the Employer “provides no explanation as to why … its original claimed period of need is being shortened by approximately three months.” (AF 10). The CO also observed that despite the Employer’s contention that the job is seasonal “as the work can only be performed during the warmer months because concrete cannot be poured during the cold winter months,” the Employer’s filing history showed two recent applications (plus the instant application) with “dates of need that extended into the winter months (January through March).” (AF 10). With regard to the Employer’s argument that its need is seasonal because there is a greater risk of livestock disease transmission in the winter, the CO stated: “While the transmission of disease to livestock may increase in the winter, it is unclear why the fixed-site growers entered into contracts with the Midwest Ag Electric Inc. to construct confinements during the winter months.” (AF 11). Regarding the documentation of the average temperatures in Rockwell City, Iowa, the CO stated it “shows that the coldest months in Iowa are January, February, March and December.” (AF 11). The Employer’s payroll report for the year 2020 “shows that the highest month of temporary need is in January, which directly contradicts the employer’s statements that work cannot be performed during winter months. January, per the documentation that the employer has provided, is the coldest month in Iowa.” (AF 12). The CO

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³ A letter confirming Professor Van Amburgh’s employment and his 60-page CV were also submitted. (AF 38-98).
found that the Employer failed to establish a seasonal need for temporary labor, and denied the Application.

The Employer requested a de novo hearing by letter dated July 30, 2021. (AF 2). The Administrative File was received by OALJ on August 6, 2021, and the matter was set for hearing on August 13, 2021. As noted above, at the telephonic hearing held August 13, 2021, the Administrative File was admitted as JX-1.

Mr. VanderSyde, the owner of Midwest Ag Electric, Inc., testified at the hearing. He stated that he started the company on April 1, 2011, and that the company “only perform[s] electrical and install of equipment on livestock buildings, mainly hogs. Some chickens and turkeys also, but just – that’s all we do is ag, ag-type work, farm [work].” (TR 9). His company performs work in the “upper Midwest,” including Iowa, Minnesota, Missouri, South Dakota, and Nebraska. (TR 9). The company typically employs 20-30 full-time U.S. workers, and has also employed H-2A workers for the last three years, typically from August through February. (TR 9-10). The company employs H-2A workers during that time period “based on the construction”; over his 20-year history of running the business, the busy season always hits in August, “and we are just trying to get everything done before it gets too deep into the winter up here.” (TR 10). The “concrete guys get done about December, and we’re usually about 60 days behind them” to complete the electrical work. (TR 10-11). When the busy season ends, the company relies on its permanent U.S. workers “until the new construction season picks up,” “which for us is August.” (TR 11).

Mr. VanderSyde stated that the job opportunity for which H-2A workers are sought is seasonal “because of the concrete”; because the farm structures can’t be built until the concrete is poured, “there’s nothing for me to do for new construction during those winter months, based on no – there’s no concrete in the ground.” (TR 11.) Their work depends upon the concrete having been poured, and until that happens, there’s no work available for his company. (TR 11-12). Concrete is not poured in the wintertime because “it would freeze before it cured,” and because “they can’t dig” through the frost to dig a hole for the concrete, as it is “not financially feasible.” (TR 12).

The steps of the construction process for the farm buildings are as follows: first, the concrete is poured; “then the slabs come in, which creates the floor”; then the framers come in, to frame the building; and then his company comes in, to install the lights and switches, wire the fans, install the gates, feed lines, and water lines, and complete the “finishing aspects of that barn.” (TR 12).

The company filed an Application for 16 H-2A workers through its attorney, as it had done in the past, to cover approximately 36 work sites. (TR 13). Mr. VanderSyde worked with his attorney to respond to the CO’s Notice of Deficiency. (TR 13). While the CO ultimately denied the Application for failure to establish a seasonal need for temporary labor, Mr. VanderSyde “absolutely” believes he has a seasonal need. (TR 14). His Applications have been approved in the past, without the Department of Labor questioning whether the need was seasonal. (TR 14).
The Application originally stated dates of need from August until April. In response to the NOD, “we shortened it up to January 31st.” (TR 15). His intended dates of need for this Application are August 8, 2021 through January 31, 2022. (TR 16).

Mr. VanderSyde provided payroll records in response to the NOD. Those records show that his permanent workers work “about 4,500 hours per month” during the course of the year. (TR 17). That number fluctuates, but “not a whole lot.” (TR 17). In 2020, the company’s H-2A workers worked an average of 2,000 hours per month. (TR 17). The work flow is pretty steady, but it gets “a little busier towards Christmas and, you know, January,” as they try to “get everything wrapped up to the deadline dates.” (TR 17-18). Every year it is that way. (TR 18).

Mr. VanderSyde feels this year has a busier workload than last year, because with “COVID and stuff” last year, some work “kind of piled up” and this year will be “tremendously busier than last year,” “[b]ased on the contracts that have been put in front of me.” (TR 18-19). He reiterated his belief that “August through January is our extremely busy months,” and stated he “depends on these H-2A workers to get the jobs complete on time.” (TR 19).

On cross-examination, Mr. VanderSyde agreed that his Application requested 16 workers from August 8, 2021 through April 1, 2022, and that in response to the NOD, he requested to change the dates of need to April 1 through January 31. (TR 20). Now, through his hearing testimony, he requests dates of August 8, 2021 through January 31, 2022. (TR 20).

Mr. VanderSyde has another application pending for H-2A workers in Minnesota. (TR 21). In that case, which was decided by a different CO, he also originally requested workers for dates of need from August 2021 through April 1, 2022, but changed his request in response to an NOD and now requests approval for August 2021 through January 31, 2022. (TR 22-23). Mr. VanderSyde also filed a past application for six workers in Minnesota from January 1, 2021 through March 19, 2021, but “that job got delayed” on the concrete, and “got pushed back until the ground thawed.” (TR 24). He “shifted that back until August through January due to the delay of the job.” (TR 24). However, that job was originally scheduled for work to be performed from January 1 through March 19. (TR 24).

Regarding the 2020 payroll records, Mr. VanderSyde stated that they show a decrease in hours worked from August through November because “the world of COVID hit, and, you know, absolute prices of everything went through the roof, and everybody delayed everything on me last year.” (TR 25). The payroll records for 2019 and 2020 show that January had the highest number of hours worked because January “is typically a very busy month, trying to get everything wrapped up.” (TR 26). The time period from Thanksgiving through the end of January is normally, based on his “20-year history of this, the worst time imaginable because it is just busy. The weather is changing, we’re trying to get everything done and wrapped up, typically.” (TR 26). The construction business is affected by many variables, including weather, which “is a huge one.” (TR 26-27).

On redirect and recross, Mr. VanderSyde testified that he also has an H-2A Application pending for workers in Minnesota, at a lower number of job sites and for less workers, and that application also was denied, for the same reason. (TR 30). The Minnesota application had the
same “error” with regard to the requested dates and had a similar request to amend the dates of need. (TR 30).

The withdrawn application for January through March 2021 requested six workers for one job site. (TR 31). The job got delayed “due to the weather restrictions of not being able to pour concrete during the frozen ground and, you know, snow and stuff, got pushed back ....” (TR 31). The contractor had been optimistic that weather wasn’t moving in as quickly as previous years, and that he could get the concrete poured in the month of December, but they couldn’t get it done because the weather turned. (TR 34). That work is now included in the application for H-2A workers in Minnesota for August through January 2022. (TR 33). The Employer’s work schedule is dictated to a large degree by the contracts that the Employer gets, and it is also dictated by “when the weather turns and the ground freezes, which changes a little bit from year to year.” (TR 34).

At the conclusion of the hearing, the Employer argued that it has demonstrated a seasonal need for H-2A workers, from August through January 31, 2022. The Employer argued there was a “typographical error” in the response to the NOD that made it request amended dates of need from April through January, and in fact, the Employer requests temporary workers from August through January, which “matches up with the Employer’s prior H-2A filings.” The Employer contended its payroll data from 2019 and 2020 reflect this period of seasonal need, and the “historical usage” shown by the hours worked by permanent employees versus temporary employees “indicates that the employer does have a seasonal or temporary need.” The Employer argued: “The employer has testified to those months of the year where they have additional work and therefore require additional labor, and their historical usage of the program and their payroll reflects that.” Therefore, the Employer requested that the CO’s denial of the Application be reversed and the Application remanded for further processing and approval.

The CO argued that it is the Employer’s burden to establish a seasonal, temporary need, and the Employer has not met that burden here. The CO contended that the Employer’s statement that its work is tied to a seasonal pattern that ends in January cannot be reconciled with its application for H-2A workers from January through March 2021. The CO argued that the instant request for H-2A workers from August 2021 through January 2022 is not supported by the Employer’s payroll records, which are not consistent with the Employer’s claims and representations. The number of hours worked “actually dropped between August and November and then shot back up in January and then shot back down again in February and March.” If the 2020 numbers were affected by COVID, it was not fully explained “how COVID would have made that happen.” The CO contended “there’s just too many questions here,” including the various changes to the dates of need, for the Employer to have met its burden of establishing a seasonal need in accordance with the regulations.

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4 The Employer requested leave to submit an evidence summary pursuant to Federal Rule of Evidence 1006, “providing a further chart breaking down the spreadsheet hours for permanent workers versus visa workers.” (TR 40). That request was denied. (TR 44).
DISCUSSION

Pursuant to 20 C.F.R. § 655.171, an employer in an H-2A case “may request an administrative review or de novo hearing before an ALJ of a decision by the CO.” When an employer requests a de novo hearing, the hearing “will allow for the introduction of new evidence.” 20 C.F.R. § 655.171(b). “The ALJ’s decision must be rendered within 10 calendar days after the hearing.” Id. The ALJ “must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action,” and must “specify the reasons for the action taken.” 20 C.F.R. § 655.171(b)(2).

The H-2A nonimmigrant visa program permits employers to hire foreign workers “to perform agricultural labor or services, as defined by the Secretary of Labor in regulations” within the United States on a temporary basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The regulations define a temporary or seasonal need as follows:

**Definition of a temporary or seasonal nature.** For the 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.

20 C.F.R. § 655.103(d).

It is an employer’s burden to show that certification is appropriate. 20 C.F.R. § 655.161(a). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361.

The issue in this case is whether the Employer has established a temporary, seasonal need for the 16 Construction Laborers requested, for the amended period of need from August 8, 2021 through January 31, 2022. Upon consideration of the record before me, I find that the Employer has not carried its burden to demonstrate that its need for the requested Construction Laborers is seasonal as defined under 20 C.F.R. § 655.103(d).

First, I find that Employer did not adequately explain why its dates of need had changed from its original and revised statements in this Application. As Mr. VanderSyde testified, he established this company in 2011 and has been in this business for twenty years. He testified that the busy season always hits in August, and wraps up about 60 days after the concrete work ends in mid-December. This would coincide with his amended dates of need of August 8 through January 31. But, his credibility in this regard is adversely affected by contradictory claims made elsewhere. When this Application was filed, Mr. VanderSyde stated dates of need of August 8, 2021 through April 1, 2022 (AF 157), and the Employer’s H2A Administrator signed a Declaration that she had read and reviewed the application and it was true and accurate (AF 154). Similarly, Mr. VanderSyde signed a certification that the clearance order and its addenda were true and accurate (AF 164), and the work site lists (AF 165-68) and Farm Labor
Agreements (also signed by Mr. VanderSyde and Ms. Vargas, the H-2A Administrator) (AF 177, 216, 220, 222, 224) all state work dates of August 8, 2021 through April 1, 2022. If it were true that Mr. VanderSyde’s twenty years of experience showed that the increased workload always wrapped up by January or February because the concrete workers could not dig holes and pour concrete in the winter, he would not have contracted for and certified dates running through April 1, 2022. Likewise, the withdrawn application for H-2A workers for a period from January through March 2021 runs counter to the claim that history and experience dictate that the work cannot be performed during the winter months. In other words, while Mr. VanderSyde attempted to justify the new requested dates of August 8 through January 31, he never sufficiently explained why, if those justifications are true, he and his H-2A Administrator certified in June 2021 (just two months ago) that work would be performed at 36 job sites through April 1, 2022, making his increased need for labor run through April 1, 2022.5

Second, the evidence of the average temperature in Rockwell City, Iowa, does not support the Employer’s contentions regarding the timing of its work. If concrete can’t be poured when the temperature is colder than 50 degrees (AF 24), and the temperature in the area to which this Application applies reaches a maximum of 47 degrees in March and an average of 49 degrees in April (AF 27), and the Employer’s work comes approximately 60 days after the concrete is poured (AF 24), then the Employer’s work could not begin until mid-June. Likewise, with temperatures falling below 50 degrees again in October (and steadily below 50 degrees in November), the work would wrap up by the end of December. But that is not the period requested by the Employer, in its Application, in its response to the NOD, or at the hearing.

Moreover, even if the concrete companies and their workers could not work in the months with temperatures falling below 50 degrees, it has not been established that the Employer and its workers cannot perform their electrical work in those months. The Employer stated that the electrical work comes approximately 60 days after the start of the construction project, which begins with the concrete pouring. However, there is no evidence that the electrical work must come exactly 60 days later; it can come any time thereafter, even after the concrete companies have stopped pouring for the winter (assuming such a stoppage actually occurs). The 60 days represents the time it typically takes for the floor and framing to occur; once those steps are completed, the Employer can perform the electrical work at any time, whether right away (i.e., approximately 60 days after the concrete was poured) or later (i.e., 90 days or 120 days after the concrete was poured). Thus, any seasonal limits on the work of the concrete companies does not transfer to create a seasonal limitation on the Employer’s work.

The Employer’s other arguments for why it cannot work in the winter months—the increased likelihood of transmission of disease to the livestock that requires limiting the number of workers onsite, and the cold temperatures in the unheated barns—similarly fail to establish a seasonal period of need for the Employer. With regard to disease transmission to livestock,

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5 I also reject the argument that the Employer’s response to the NOD, listing requested dates of April 1 to January 31, was a “typographical error” or mistake. That time period appears in both the response written by counsel for Employer (AF 22) and Mr. VanderSyde’s own letter to the CO (AF 24). Together, these letters show that it was the Employer’s intention, at the time the letters were written, to claim a season running from April 1 to January 31 year after year (not only with regard to the current application). Thus, I find the testimony and arguments at the hearing, claiming an increased workload from August through January, are not consistent with the “seasonality” claimed in the Employer’s response to the NOD either.
while that may be a legitimate concern, it was not invoked by any of the parties to the contracts at issue here. The Farm Labor Contracts between the Employer and the farm companies allow for the Employer’s work to be performed from August 8, 2021 to April 1, 2022, which includes the winter months. There is no limitation on the number of workers and no statement or reservation made about the transmission of diseases to livestock. Similarly, the ingress/egress agreements make no mention of such a concern and impose no limitation on the number of workers who may come onto the job sites, or when they may come. With regard to the cold temperatures in unheated barns in the winter, the Employer’s Application specifically states that the H-2A workers are expected to work in cold temperatures and snow:

Workers are expected to work outside in all weather conditions including cold, snow, rain, and heat. Temperatures may range from -20 to 110 F. Workers may be required to work during rain and snow conditions that are not severe enough to stop operations.

(AF 174).

For all of these reasons, I find the Employer’s documentation does not support its claimed seasonal period.

Third, the payroll reports do not demonstrate a recurring seasonal need from August 8 through January 31. The payroll reports showed the following total hours worked per month in 2020:

<table>
<thead>
<tr>
<th>Months within claimed period of need:</th>
<th>Months outside claimed seasonal demand:</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 2020: 10,179.50 hours</td>
<td>Feb. 2020: 5,011.25</td>
</tr>
<tr>
<td>August 2020: 7,459.75</td>
<td>March 2020: 3,011.75</td>
</tr>
<tr>
<td>Sept. 2020: 5,944.00</td>
<td>April 2020: 4,281.00</td>
</tr>
<tr>
<td>October 2020: 6,189.50</td>
<td>May 2020: 6,381.50</td>
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<tr>
<td>Nov. 2020: 5,385.00</td>
<td>June 2020: 5,361.00</td>
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<tr>
<td>Dec. 2020: 6,499.00</td>
<td>July 2020: 7,815.75</td>
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</tbody>
</table>

While March and April were the slowest months of the year, May and July were busier than September, October, and November (indeed, July was the second busiest month of the year), and June and November had very comparable hours worked. The total number of hours worked shows some fluctuation throughout the year 2020, but with the exception of January (an outlier at over 10,000 hours worked), it does not show a requirement for “labor levels far above those necessary for ongoing operations” from August through December.

For the year 2019, the payroll reports showed a range of hours from 4077.50 to 5638.75 for the months outside the alleged seasonal period, and showed a range of hours from 9,178.50 to 13,506.25 for the months within the claim seasonal period. While these numbers do show the sort of increased demand that might establish a seasonal need, it has not been established that these numbers are typical or recur from year to year. Critically, it has not been established that this pattern or these numbers are likely to occur this year. This results from the Employer’s failure to follow the instructions of the CO in the NOD. The NOD directed the Employer to
provide summarized monthly payroll reports for a minimum of three calendar years. (AF 139). The Employer submitted reports for only 2019 and 2020. As those two years show very different numbers, and do not establish a set seasonal pattern, they do not satisfy the Employer’s burden to establish its seasonal need for temporary labor during the requested months. Similarly, the NOD directed the Employer to “submit an explanation of exactly how the document(s) supports its requested dates of need” if that would not be clear to a lay person. (AF 139). In its response to the NOD, however, the Employer did not submit any explanation for the significant variance in hours worked by month between 2019 and 2020. At the hearing, Mr. VanderSyde testified that “[t]he world of COVID hit, and, you know, absolute prices of everything went through the roof, and everybody delayed everything on me last year.” (TR 25). I find this explanation inadequate, for a few reasons. It is both vague and clearly exaggerated: everybody did not delay everything, and the Employer had more hours worked in each month from March through July 2020 than it did in March through July 2019, despite the COVID-19 pandemic spreading through the United States beginning in March 2020. The testimony is unclear as to when the “prices of everything went through the roof,” and notably, whether prices and/or workload have returned to normal. This country is still in the “world of COVID,” and if work continues to be delayed or otherwise affected as Mr. VanderSyde testified, then the timing and extent of any increased demand to come this year is uncertain. These issues present important questions, which tie directly to the question of whether the payroll reports establish a seasonal need for increased labor from August 8, 2021 through January 31, 2022, and unfortunately, those questions have not been adequately addressed through the Employer’s evidence. I find the Employer’s evidence regarding payroll and hours worked has not established a seasonal period of need from August 8 through January 31.

For all of these reasons, I find the Employer has not satisfied its burden of establishing a seasonal need for temporary H-2A workers for the dates requested. Thus, I find that the Application should be denied. Therefore, after de novo review, I find and conclude that the CO’s denial should be affirmed.

ORDER

For the foregoing reasons, it is hereby ORDERED that the Certifying Officer’s denial of the Employer’s application for H-2A temporary labor certification is AFFIRMED.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA