This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification ("H-2A") program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.
BACKGROUND

On September 8, 2021, the Department of Labor’s ETA received an application for temporary labor certification from the Employer. AF 75-300. The Employer requested certification for 35 Farm Construction Laborers from October 23, 2021 to December 20, 2021, for a worksite in Graettinger, IA. AF 83-84. The nature of the temporary need was listed as seasonal. AF 98-101. The CO certified the Employer’s application on September 23, 2021.2

On November 19, 2021, the Employer submitted a request for extension of the certification, stating that due to supply chain delays caused by COVID-19, the completion of the project for which the certification was granted had been delayed from December 20, 2021 to March 15, 2022. Specifically, the Employer requested a partial long-term extension of the certification for 20 workers from December 21, 2021 to March 15, 2022. AF 15-28.

On November 29, 2021, the CO issued a Final Determination denying the Employer’s request for partial extension. In denying the request the CO referenced the Employer’s September 8, 2021 Executed Justification Letter, in which the Employer stated that the work required under the certification was seasonal and, for several reasons, could not be done during the coldest winter months, which were identified as January and February. Ultimately, the CO found that the Employer failed to “explain how its season had shifted,” thus justifying an extension into a period previously identified as inappropriate for the work identified in the original certification.

On November 29, 2021, the Employer requested a de novo hearing of CO’s denial. AF 1-8. However, at a December 10, 2021 conference call to schedule the hearing, the Parties indicated that they did not wish to have a hearing, and instead requested expedited administrative review. A briefing deadline of December 15, 2020 was established. The Employer and the CO both filed timely briefs on December 15, 2021.

DISCUSSION

The Employer requested review of the CO’s denial of its request for an extension. When an employer seeks an extension of the intended period of employment by more than two weeks, the request “must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions).” 20 C.F.R. § 655.170(b). A request for an extension also “must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer.” Id.

When a party requests an expedited administrative review, I must, “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 amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” 20 C.F.R. § 655.171(a). Although no standard of review is specified in the regulation, I review the CO’s denial to determine whether it is arbitrary.

1 References to the appeal file will be abbreviated with an “AF” followed by the page number.
2 The record also reflects additional procedural history that is not relevant to the disposition of this case.

In the instant case, the CO determined that the Employer did not meet the requirements for an extension under 20 C.F.R. § 655.170(b) because the Employer failed to adequately explain how its "seasonal" need had changed – or "shifted," in the words of the CO – since its initial application for certification. AF 13. Employer, however, asserts that its extension request of nearly three months should have been granted, arguing that the supply chain delays were outside Employer’s control or ability to predict, that its application was satisfactorily supported in writing, and that the CO’s determination that Employer had not explained how seasonal work was now possible, during a time when it was previously designated impossible, is irrelevant to the analysis.

While Employer’s argument holds some initial appeal as it relates to the plain language of the extension regulation, i.e., “the [CO] erroneously denied Employer’s request based on reasons outside of the regulatory requirements – specifically, that Employer did not explain how its season had shifted” – one cannot look at the extension request regulation in a vacuum. One must look to both the extension request and the underlying certification. Accordingly, as detailed below, I find that the CO did not act in an arbitrary or capricious manner when determining that granting an extension would contradict Employer’s original certification request. Nor do I find that the CO’s determination was an abuse of discretion or not in accordance with the law.

In its original certification, Employer indicated that the nature of its need was seasonal, and explained the job duties as follows:

On farms, build, repair and remodel livestock structures. Erect walls and trusses, install and repair feeders and help assemble feed lines, if needed. Install roof metal. Sheath roofs, walls, and repair ceilings. Clean-up site. Must be able to lift and carry 75 lbs for 75 yards. Workers will work on their feet, in bent, stooped, and crouched positions and on ladders up to 10 feet in height for a long period of time. Employees must be able to lift and carry materials or equipment with a weight up to 75 lbs for 75 yards frequently throughout the day. Must be able to tolerate the strong smell of manure. Work requires repetitive movements and extensive walking.

AF 83.

Regarding the seasonal nature of the job, Employer noted the following:

1. During the winter, the employer is required by farmers to drastically reduce or eliminate its presence on the farm to reduce the risk of disease transmission in livestock. Much like other viruses and bacterial diseases, these sicknesses spread far more in the colder months than the warmer months. The coldest months of the year in the area of intended employment are January and February, so the employer

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3 The CO recited that a “seasonal” need is one that 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 ....” 20 C.F.R. § 655.103(d).
must greatly reduce its labor force during those months to avoid being a vector of transmission of the diseases.

2. This work comes after concrete, which cannot be done during the coldest winter months when the ground is frozen.

3. The work itself is dangerous and/or not possible during the cold winter months due to construction and weather conditions. Therefore, this work is tied to a certain time of year, which is the warmer months; by an event or pattern, which is the warming of the weather, and requires labor levels far above those necessary for ongoing operations because the work drops off sizably in the winter months; thus, there is not work for H-2A workers during that time. This is discussed in more detail below.

AF 98-99.4

The CO, in her Final Determination, quoted paragraphs 2 and 3 above and highlighted that the work for which the employees were certified – per the Employer’s request – cannot be done during the coldest winter months (January and February per paragraph 1) because the ground is frozen and the work itself is dangerous and/or not possible. In sum, the CO denied Employer’s application because Employer “did not explain how its season shifted,” AF at 7, noting that “[b]y the employer’s own admission, performing the job duties listed in the application is unsafe for workers due to temperature. Moreover, the employer ties its seasonal need directly to weather and now the employer is requesting an extension of a portion of the workers that covers the coldest months of the year. The employer’s seasonal need and the ability for workers to perform the job duties listed are unclear.” AF 13-14

Employer argues in its brief that “[n]othing in the Employer’s Executed Justification Letter, as cited by the CO, conflicts with the requests in the extension request.” Employer’s Brief at 7. However, Employer entirely fails to address the question of worker safety in its brief, arguing only that the workers will not be pouring concrete, instead performing their job duties after the concrete has set. This does not negate the fact that by Employer’s own assertion that weather conditions in the coldest months are unsafe for workers. Employer further argues that the CO’s decision was based upon irrelevant factors – i.e., inconsistencies in its request for extension and original certification request. Employer explains that “[t]he CO demanding that Employer explain how its seasons has shifted, is irrelevant and goes beyond the legal requirement in § 655.170(b). The case here is like Matter of WM.F. Puckett, 2020-TLC-00119….” I find that argument unconvincing. Significantly, WM.F Puckett involved a case involving a peak load temporary need not seasonal need as is the case at hand. I find this case more akin to Texas Mariculture – Carancahua Bay LP, 2022-TLC-00014 (October 29, 2021), wherein the Board pondered that “if Employer is able to shift its need for labor by four months, this calls into question whether Employer’s need is truly

4 Employer further submitted an Expert Opinion letter from Michael E. Van Amburgh, a professor in the Department of Animal Sciences at Cornell University, stating that “[s]ince the winter months pose a higher risk of disease transmission among livestock, it is best that construction companies are not present until the risk decreases.” AF at 104. The Weather Report submitted showed December, January, and February to be the coldest months of the year. AF at 99.
seasonal.⁵” (Footnote in original) Id. at 3. The reasoning in Texas Mariculture is even more pronounced in this case specifically because the extension request in this matter contradicts the original certification request and potentially puts workers’ well-being in jeopardy. Thus, the CO’s determination that Employer failed adequately — or at all — to explain how its seasonal needs had changed (or “shifted”) is both relevant and important to the matter at hand, especially considering the use of worker safety as an original reason for the designation of a work season.

Overall, Employer has failed to show that the decision made by the CO was arbitrary or capricious. Employer failed to satisfactorily explain how work that was previously established to be dangerous or impossible during the coldest winter months due to risks to livestock and workers suddenly became feasible due to supply chain delays brought on due to the global pandemic. Based on that reason alone, I decline to find the CO’s determination to deny Employer’s request for extension arbitrary and capricious and not in accordance with the law. If I were I to entertain Employer’s other arguments,⁶ my determination would remain the same as discussed below.

Employer’s “supply chain” argument does not support its request for extension. Employer received certification on September 23, 2021, approximately 18 months into a declared global pandemic. Employer’s assertion that the delays were not foreseeable at this juncture runs contrary to its own evidence provided to the CO as well as many recent Board decisions. See, e.g. Cape Cod Caribbean Café and Bakery, Inc., 2022-TLN-00023, slip op. at 3 (Dec. 13, 2021) (affirming the CO’s denial of a waiver of filing timeline requirements because the effects of the pandemic on the labor market was not unforeseeable by the employer at the time it filed its application.); Underwood Brothers, Inc., 2022-TLN-00025 (Dec. 9, 2021) (affirming the CO’s denial of the long-term extension request based on the COVID-19-related labor shortage); Rite Stuff Foods, Inc., 2021-TLN-00059 slip op. at 2-3 (July 30, 2021) (holding that “while COVID-19, in general, might constitute a pandemic health issue, it does not give carte blanche to ever employer to circumvent the filing requirements” and affirming the CO’s denial of the waiver of the filing timeframe requirements); NV Produce Inc., 2021-TLC-00242 (Sept. 30, 2021) (finding—even absent the requirement to establish extraordinary circumstances—pandemic-related delays were not unforeseeable and affirming denial of an extension request based on the delayed arrival of the employer’s temporary workers to the U.S.). At this juncture, supply chain issues are not and were not unforeseeable. What was foreseeable was that supply chain issues could be an issue that would make it impossible for Employer’s seasonal workers to complete their work in a safe and timely manner.

CONCLUSION

Based on the foregoing, the CO did not err in denying certification in this matter.

⁵ “[E]mployment 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.” § 655.103(d). In other words, seasonal employment is “employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.” William Staley, 2009-TLC-00060 (Aug. 28, 2009).

⁶ That the CO did not issue a NOD prior to denial is irrelevant, as a NOD is not required in consideration of an application for extension of certification.
ORDER

In light of the foregoing, **IT IS HEREBY ORDERED** that the Certifying Officer’s Final Determination is **AFFIRMED**.

For the Board:

CARRIE BLAND
Associate Chief Administrative Law Judge