This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. 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. . . .”\(^1\) 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.\(^2\)

\(^2\) 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.\(^3\) Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.\(^4\) A certifying officer in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the certifying officer denies certification, an employer may seek administrative review or a de novo hearing before the Board of Alien Labor Certification Appeals (BALCA).\(^5\)

**STATEMENT OF THE CASE BEFORE THE CERTIFYING OFFICER**

Employer Ostrom Mushroom Farm, LLC (Ostrom) “produces approximately 12 million pounds of . . . mushrooms every year.” The mushrooms are “handpicked daily, refrigerated immediately and on the road to [Ostrom’s] customers within hours after harvesting.” (Administrative File (AF) 1551). On November 15, 2021, Ostrom filed an Application for Temporary Employment Certification including supportive documents. (AF 1530-78). Ostrom asserts that it has “new customer agreements [that] will temporarily increase [its] production needs by 50” percent. Ostrom is “requesting 70 additional harvesters” “to comply with the contractual agreements through August 15, 2022.” (AF 1551).

In support thereof, Ostrom states that it “acquired 3 new clients whose orders will increase [its] production needs by an average of 100,000 pounds per week.” Ostrom asserts that the “new customer accounts will put [its] production needs far above [its] normal level up until August 2022.” (AF 1551). With its application, Ostrom included agreements to sell mushrooms to Kroger until July 31, 2022, (AF 1555-57); to Mountain Meadow Mushrooms until August 11, 2022, (AF 1573); and to Albertsons Companies until August 22, 2022, with a buyer’s option to extend for an additional year, (AF 1576-78). Additionally, Ostrom included a letter from Danmark Produce Inc. informing Ostrom that it may purchase 10 to 15 percent more mushrooms from it during 2022 than in previous year. (AF 1574).

By letter dated November 22, 2021, the Certifying Officer (CO) issued a Notice of Deficiency (NOD). (AF 1510-15). In the NOD, the CO stated that it is “unclear how this job opportunity is temporary in nature.” (AF 1514). The CO noted that Ostrom had previously been denied Temporary Employment Certification in ETA case number H-300-21274-618686, (see AF 1579-637), with a beginning date of need of December 4, 2021, and an ending date of July 31, 2022. (AF 1512).\(^6\) The CO noted that in its previous application Ostrom wrote:

\(^{3}\) 20 C.F.R. § 655.103(a).
\(^{5}\) 20 C.F.R. § 655.171.
\(^{6}\) BALCA has found that the CO can review the situation as a whole when determining temporary need and need not confine the analysis to the existing application. See Haag Farms, 2000-TLC-00015 (Oct. 12, 2000).
Currently we employ 68 harvesters. Out of those 68 harvesters, many of them are not able to harvest the pounds required. Our weekly loss has been around 100k pounds weekly. In order to maintain our company it would be necessary as we have exhausted all sources of recruitment and have not been able to hire and retain additional employees. We have this need since our business relocated and we have acquired new customers. The new customers require us to produce more and we do not have the ability to do so with our current employees. Labor in our new area has been inconsistent and hard to find. Considering there are many local fruit companies that employ seasonally and often times paying higher rates. It has been very challenging if not nearly impossible to keep consistent workers that are looking for employment year round. Since January, we have had a turnover of 162 employees. Many of these employees were not yet meeting the pound requirements and also were not willing or able to complete the training period.

(AF 1513). The CO noted that Ostrom wrote in the current application:

The new customer accounts will put our production needs far above our normal level up until August 2022. Ostrom Mushroom Farms has the capability to meet this increased, temporary demand. However, the realization of this is entirely dependent on securing sufficient harvesting labor. Our new customer agreements will temporarily increase our production needs by 50% therefore we are requesting 70 additional harvesters to fulfill these orders.

(AF 1513).

The CO stated that Ostrom “has not established how this job is ‘Other Temporary Need’, [sic] rather than permanent and full-time, in nature,” and that Ostrom’s “statements of need both imply the need for workers is year round, and not tied to a certain time of year by an event or pattern or temporary in nature. The statements of need do not sufficiently demonstrate how the employer has a seasonal or temporary need for additional mushroom harvesters during the dates requested.” The CO also noted that the “duties are not on their face seasonal or temporary in nature as mushrooms can be farmed all year long.” (AF 1514).

Lastly, the CO stated that “[i]t is unclear if the employer intends to continue to service this new work beyond its requested dates of need and illustrates an ongoing operation with an annually repeated need throughout the year. Therefore, it is unclear how this job opportunity is temporary in nature. The employer must provide additional information and documentation to establish it qualifies as ‘Other Temporary Need.’” (AF 1514).

7 Ostrom indicated that the “Nature of Temporary Need” is “Other Temporary Need” rather than “Seasonal” on its H-2A Application for Temporary Employment Certification. (See AF 1530).
The CO informed Ostrom that, in accordance with 20 C.F.R § 655.142, it could submit a modified application within five business days from the date it received the NOD. (AF 1510). The CO informed Ostrom that in the modified application it “must provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature.” (AF 1514).

On November 22, 2021, Ostrom submitted a response to the CO’s NOD. (AF 14-1509). In its letter, Ostrom stated that it is “applying to the temporary labor program due to a temporary increase in [its] production needs.” Ostrom wrote:

We have taken three accounts that will last no longer than 8 months and will not be servicing the accounts past the month of August. The orders and/or agreements with these companies will require us to nearly double our current production team to produce an additional 12,000 pounds of mushrooms per week to fulfill our one-time commitments. Our agreements with them will not be renewed and will not be ongoing.

We understand that mushrooms are presumed to operate year-round however our temporary need is due to an unexpected increase in production needs that is above/beyond for our current staff to meet. We also would like to add that our regular harvesting department is fully operational and harvest an average of 160,000 pounds per week. We are asking to access the H2A program for this one-time, non-recurring event that will not exceed a year. Our agreements with these new clients have an end date on or before the end of August 2022 and therefore we seek to access the guest worker program to supplement our labor needs for this timeframe. After the month of August our production needs will begin to decrease and therefore, we would no longer have a need for any additional labor.

(AF 14).

On December 8, 2021, the CO denied Ostrom’s Application. (AF 3-9). The CO noted that Ostrom failed to provide summarized payroll records for three previous calendar years as requested in the NOD. Further, the CO noted that Ostrom “provided a contract with Albertsons that includes an option for the buyer to contract an additional year.” (AF 8). The CO found that Ostrom’s “statements of need both imply the need for workers is year round, and not tied to a certain time of year by an event or pattern or temporary in nature. The statements of need and provided contracts do not sufficiently demonstrate how [Ostrom] has a seasonal or temporary need for additional mushroom harvesters during the dates requested.” And the CO noted that “these duties are not on their face seasonal or temporary in nature as mushrooms

8 Ostrom stated that it “switched payroll programs and therefore [was] not able to access payroll records for the years prior.” (AF 14).
can be farmed all year long.” The CO found that Ostrom’s “explanation failed to demonstrate a temporary need for H-2A workers in accordance with 20 CFR 655.103(d)” and denied Ostrom’s application for “70 Agricultural Field Worker job opportunities.” (AF 9).

PROCEDURAL HISTORY ON APPEAL

In a letter dated December 15, 2021, Ostrom appealed the CO’s decision and requested a de novo hearing before the Office of Administrative Law Judges (OALJ). (AF 2). On January 10, 2022, the OALJ assigned this matter to me for decision. On January 10, 2022, I issued Notices of Docketing and Hearing and Prehearing Order acknowledging Ostrom’s appeal and setting this matter for hearing on January 18, 2022. On January 18, 2022, Ostrom filed a Request to Convert Previously Filed Request for De Novo Hearing to Request for Administrative Review. And, on January 18, 2022, I issued an Order Granting Request to Convert Previously Filed Request for De Novo Hearing to Request for Administrative Review cancelling the hearing and setting the briefing deadline to January 28, 2022. Ostrom and the CO filed briefs on January 28, 2022.

DISCUSSION AND APPLICABLE LAW

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge under Section 655.171(a), the judge may consider only the written record and any written submissions from the parties (which may not include new evidence). The judge must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. The burden of proof to establish eligibility for a labor certification is on the petitioning employer. The CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law.

To qualify for the H-2A program, an employer must establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.” The Department’s H-2A regulations define these terms as follows:

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

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9 20 C.F.R. § 655.171(a).
10 Id.
12 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). Unlike the present case, when an employer appeals a denial and requests a de novo hearing, the parties are permitted to present additional evidence on the matter and the presiding judge “must independently determine if the employer has established eligibility for temporary labor certification.” David Stock, 2016-TLC-00040 (May 6, 2016).
13 20 C.F.R. § 655.161(a).
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.\textsuperscript{14}

To determine an employer’s need for labor for temporary work, the fact-finder must look at the whole situation and not narrowly focus on the specific job at issue.\textsuperscript{15} An employer’s needs cannot be temporary if they continually reoccur.\textsuperscript{16}

In ETA case number H-300-21274-618686, Ostrom wrote that “[t]he new customers require [it] to produce more and [it] do[es] not have the ability to do so with [its] current employees.” Ostrom stated that its loss has been around 100,000 pounds per week. And Ostrom stated that “[i]t has been very challenging if not nearly impossible to keep consistent workers that are looking for employment year round.” Ostrom asserted that it “desperately need[ed] temporary help . . . to maintain the cost of production and to meet the needs of [its] newly acquired customers.” (AF 1612). Ostrom included its charted sales projections from October 2021 to July 2022. (AF 1629). The predictions show an overall rise in predicted sales in pounds.

As summarized above, in the current application Ostrom asserts that its need is temporary because it “ha[s] taken three accounts that will last no longer than 8 months and [that it] will not be servicing the accounts past the month of August.” In support thereof, Ostrom stated:

Please refer to New Client signed agreement:
1.) Mountain Meadow Mushrooms service agreement with an end date of August 11, 2022, not to be renewed.
2.) The Supply agreement with Albertsons has end date of August 22, 2022, also not to be extended.
3.) Lastly, our Kroger award/agreement has an end date of July 31, 2022.

(AF 14). Ostrom “agrees that harvesting is presumed to be year-round however [its] one-time/nonrecurring need is due to temporary commitments with these new clients.” Ostrom asserts that the “agreements with the[ companies] will not be renewed and will not be ongoing.” (AF 14).

The “Kroger – Mushroom Award” states that “[t]he following is the awarded volume and price for the [Dec 13, 2021 – July 31, 2022] timeframe.” (AF 1502). The agreement to sell mushrooms to Mountain Meadow Mushrooms states that it “shall have duration of 8 months

\begin{footnotesize}
\textsuperscript{14} 8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d).
\textsuperscript{16} See Little Wicomico Oyster, 2018-TLC-00029, slip op. at 7 (Nov. 1, 2018); William Staley, 2009-TLC-00060, slip op. at 5 (“[A]n employer’s need to have job duties performed is ‘temporary’ [when it is] of a set duration and not anticipated to be recurring in nature”).
\end{footnotesize}
beginning on December 10, 2021 and ending on August 11, 2022.” (AF 1508). Neither agreement addresses the continuation of sales after the end date. But neither agreement precludes such a possibility. The Albertsons Companies agreement states a term form December 23, 2021, to August 22, 2022, with a buyer’s option to extend for an additional year. (AF 1505).

Ostrom has provided no support for its assertion that these agreements will not be renewed; or that there will not be a continuing relationship moving forward with these new accounts. Moreover, the Albertsons Companies agreement is subject to extension at Albertsons Companies’ discretion, not Ostrom’s. Additionally, the letter that Ostrom included from Danmark Producers, Inc. notified Ostrom that it may be purchasing 5,000 to 9,000 pounds of additional mushrooms per month during all of 2022. (See AF 1522). Ostrom has provided no support for how it determined that Danmark Producers, Inc’s increased demand will fall to pre-2022 levels after 2022.

Based on Ostrom’s representations in this and its previous application, I find that the CO’s decision to deny Ostrom’s application for temporary labor certification was not arbitrary and capricious. Ostrom failed to demonstrate that its need for additional employees is temporary in nature, and not merely that it has new customers resulting in higher overall production needs that may continue into the future. The contracts provided by Ostrom have specified expiration dates, but Ostrom does not adequately explain why the demand from its new customers will cease upon expiration of the contracts; it does not explain why it and its new customers will not enter in new contracts upon expiration of the current contracts. The combination of multiple new contracts from different clients coupled with increased demand from current client(s) does not create a temporary need, but combine together to create at least the possibility of increased permanent need for Ostrom.

Because Ostrom has not demonstrated a temporary need for H-2A workers it is not entitled to temporary labor certification.

ORDER

Based on the above, it is hereby ORDERED that the CO’s determination denying Employer Ostrom Mushroom Farm, LLC’s application for temporary labor certification is AFFIRMED.

17 In its brief, Ostrom argues that “[t]he CO fails to explain how an ‘option’ to renew a contract leads to a conclusion that Ostrom does not presently have a temporary need for labor.” (Empl. Br. at 9). Ostrom’s argument misses the point. The issue with the buyer’s option to renew is that it calls into question whether Ostrom’s stated need for workers will last less than one year. Ostrom’s assertion that “the mere possibility of future business is irrelevant to the present application” is incorrect. (See id. at 10).

Perhaps there may have been a way for Ostrom to convince the CO that its need was temporary. For instance, it could have presented a reasonable plan to increase its permanent workforce to meet its new demand by the end of the contract periods. However, this of course is pure speculation as Ostrom did not present such support for its application, so the CO had no opportunity to consider the same.
SO ORDERED.

For the Board:

Jason A. Golden
Administrative Law Judge