



Issue Date: 15 February 2011

BALCA Case No.: 2011-TLC-00158

ETA Case No.: C-10344-25770

In the Matter of:

ALTENDORF TRANSPORT, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Wendel Hall, Esquire
CJ Lake, LLC
Washington, DC
For the Employer

Gary M. Buff, Associate Solicitor
Stephen Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This case arises from a request for review of a United States Department of Labor Certifying Officer's ("the CO") denial of an application for temporary alien labor certification under the H-2A temporary agricultural labor certification program. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171(b). On January 26, 2011, the Office of Administrative Law Judges received the Administrative File from the

the CO. Upon receipt of the administrative file, a conference call was held on January 28, 2011 to schedule the de novo hearing. A telephonic hearing was held on February 4, 2011, and the parties were instructed to file legal briefs by February 10, 2011. The regulations require the ALJ to issue a decision within ten calendar days following the hearing. 20 C.F.R. § 655.171(b)(1)(iii).

STATEMENT OF THE CASE

Administrative File

On December 10, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for 50 custom grain haulers, classified as “truck drivers, heavy and tractor-trailer” by O*Net. AF 236-245.¹ The Employer stated that it had temporary seasonal need for the workers from January 28, 2011 to April 15, 2011. In its statement of temporary need, the Employer stated that it “seeks approval to hire foreign non-immigrant workers to perform seasonal agricultural work which is dependent on weather and growing seasons. Workers are not required to work in months outside the requested dates of need as there is no seasonal agricultural work to be performed. Employer anticipates an insufficiency of qualified U.S. workers to meet these seasonal labor needs.” AF 236. In describing the job duties, the Employer stated, in relevant part:

Tasks include driving heavy truck/trailer to transport crop from farm to elevator or other marketplace locations, and servicing/maintaining trucks, trailers and machinery as needed. Hauling will be performed both on-farm and over the road. Workers will be expected to be able to operate equipment involved with tasks or without direction. Minor activities associated with combining and machine digging associated with hauling duties may be offered infrequently.

Workers will assist in loading trucks with product weighing up to 60 pounds and lifting to a height of 5 feet.

[...]

¹ Citations to the 275-page Administrative File will be abbreviated “AF” followed by the page number.

Must have or be able to obtain within 30-90 days following hire appropriate driver's license with air brake endorsement to permit driving of trucks.

AF 245. Additionally, the Employer attached a 2011 itinerary, showing four job locations: 1) hauling soybeans, corn, wheat, and potatoes from January 23, 2011 through March 15, 2011 within a 150-mile radius of Minto, North Dakota; 2) hauling soybeans, corn, wheat, and potatoes from January 23, 2011-March 15, 2011 within a 150 mile radius of Grafton and Dreyton, North Dakota; 3) hauling corn and sunflowers from January 23, 2011 to January 30, 2011 within a 150 mile radius of Pierre, South Dakota; and 4) hauling winter wheat from January 23, 2011 to April 15, 2011 within a 100 mile radius of Haskell, Texas. AF 246.

On December 16, 2010, the CO issued a Notice of Deficiency ("NOD"), finding that the Employer had not established a temporary seasonal need for the workers. AF 212-215. Specifically, the CO found that Altendorf Harvesting, a company with the same federal employer identification number ("FEIN") as Altendorf Transport, had been granted certification for 100 agricultural equipment operators to perform the duties of transporting crop from farms to elevators and marketplaces from April 10, 2010 through December 31, 2010. AF 214. Therefore, the CO found that the Employer had a permanent, rather than temporary, need for workers to perform the duties that are the subject of this application. AF 214. The CO required the Employer to provide a detailed explanation why this job opportunity is seasonal or temporary rather than permanent in nature. AF 214.

The Employer responded to the NOD on December 27, 2010. AF 183-211. The Employer stated that Altendorf Transport is a separate entity from Altendorf Harvesting and the workers will perform distinctly different seasonal work activities. AF 183. In particular, the Employer stated:

Altendorf Harvesting has used the H-2A program to meet its seasonal labor need for agricultural equipment operator workers for harvesting/combining work for a number of years.

The Altendorf Harvesting H-2A labor certification has been filed under TEGL 16-06, Special Procedures for Processing H-2A Applications for Multi-State Combine Owner/Operators. The work activities [of] operating custom harvest equipment, including combining machinery, are performed

on farms during grain harvest seasons from early April through the end of each calendar year.

The instant application is for Altendorf Transport, a separate entity, which seeks labor certification approval for workers performing distinctly different seasonal work activities. These work activities involve driving heavy trucks hauling grain which has been stored on the farms where it was grown from the farm to first point of sale (ordinarily a grain elevator or agricultural co-operative). These work activities are performed largely if not exclusively from mid-January until mid-April.

Altendorf Harvesting needs workers to operate combining equipment to harvest grain crops and store the grain in on-farm storage. This work can only be performed during harvest season, which is always late spring through the end of the harvest in late fall.

Altendorf Transport requires workers to drive over-the-road trucks hauling its customers' grain from on-farm storage facilities to elevator or market after the harvest season is completed, which is always from late winter through early spring. The two functions are separate, distinct and occur at different times during the year.

It is our contention that it is the nature of the Employer's temporary labor need, not the question of whether an individual worker, or group of workers, are employed year-round, which controls in this instance. Thus, Altendorf Harvest's labor needs are separate and distinctly different than Altendorf Transport's labor needs.

[...]

Altendorf Transport's need for additional help is limited to the period between January and April. Work in driving trucks from farm to first point of commodity sale do not occur in months other than those for which certification is sought.

AF 183-184. The Employer argued that Altendorf Transport's truck drivers will be employed in North Dakota, South Dakota, and Texas from January 23, 2011 to April 16, 2011, while Altendorf Harvesting's truck drivers were employed in those states, plus Oklahoma, Colorado, and Nebraska from May through mid-December. AF 185. The Employer also submitted a copy of Altendorf Transport's payroll records for 2009 and 2010 for the position of "custom grain hauler." AF 195. Altendorf Transport's 2009 and 2010 payroll records, certified for their accuracy by the Employer's Administrative Assistant, Coleen Donelan, are summarized as follows:

Month	Number of Permanent Workers	Number of Temporary Workers
Jan. 2009	0	2
Feb. 2009	0	4
March 2009	0	4
April 2009	0	4
May 2009	0	3
June 2009	0	0
July 2009	0	0
Aug. 2009	0	0
Sept. 2009	0	0
Oct. 2009	0	0
Nov. 2009	0	3
Dec. 2009	0	5

Month	Number of Permanent Workers	Number of Temporary Workers
Jan. 2010	0	5
Feb. 2010	0	9
March 2010	0	10
April 2010	0	10
May 2010	0	3
June 2010	0	0
July 2010	0	0
Aug. 2010	0	0
Sept. 2010	0	0
Oct. 2010	0	0
Nov. 2010	0	8
Dec. 2010	0	9

AF 195. The CO denied the Employer's application on January 7, 2011, finding that the Employer had not established a temporary or seasonal need for the truck drivers. AF 179-182. The CO found that the job duties for Altendorf Harvesting's agricultural equipment operators were substantially similar to the job duties for Altendorf Transport's custom grain haulers. AF 182. The CO's denial provides:

In reviewing the job duties for Altendorf Harvesting it states, Operates self-propelled custom-class harvesting machine to harvest a variety of grain and oilseed crops. Adjusts the speeds of cutters, blowers, conveyors and header heights using hand tools. Changes cutting head, as appropriate for crop. Drives heavy truck to transport crop from field to elevator or storage area. Drives Transport truck to haul harvesting machinery between work sites. Services/maintains trucks, trailers and machinery, as required.

In reviewing the job duties for Altendorf [Transport] it states, Handling both manual and machine tasks associated with hauling grain and potato crops to market from on-farm storage facilities. Tasks include driving heavy truck/trailer to transport crops from farm to elevator or other marketplace locations and servicing maintaining/ trucks, trailers and machinery as needed. Hauling will be performed both on-farm and over the road. Workers will be expected to be able to operate equipment involved with tasks with or without direction. Minor activities associated

with combining and machine digging associated with hauling duties may be offered infrequently.

AF 182. Therefore, the CO determined that the Employer had year-round need for these duties to be performed, not a temporary need as required by 20 C.F.R. § 655.103(d). AF 182. On January 18, 2011, the Employer requested a de novo hearing and filed a motion for Expedited Response to Requests for Production of Documents and motion for summary judgment.² AF 1-178.

Subsequently, the CO transmitted the administrative file to this Office. The administrative file includes the evidence summarized above, as well as Altendorf Harvesting's and Altendorf Transport's H-2A filing history. AF 216-217. Although the job titles are not provided in the filing history, the dates of need are included. The filing history shows that Altendorf Harvesting was approved for applications H-2A workers from March 1, 2007 through December 31, 2007; November 12, 2007 through December 31, 2007; January 1, 2008 through April 1, 2008; March 14, 2008 through December 31, 2008; July 15, 2008 through December 31, 2008; January 1, 2009 through May 15, 2009, March 1, 2009 through December 31, 2009, December 18, 2009 through June 30, 2010; April 10, 2010 through December 31, 2010. AF 216-217. The filing history also shows that Altendorf Harvesting's application for workers from December 17, 2010 through June 30, 2011 was denied, as was the application at issue in this case, with stated dates of need from January 28, 2011 through April 15, 2011. AF 217.

De Novo Hearing

A de novo hearing was held on February 4, 2011. At the hearing, I admitted into evidence the Administrative File (AF) and declarations of Coleen Donelan and Janice Altendorf, a payroll report, and three charts as Exhibit 1. (EX 1). Ms. Donelan, who prepared the payroll reports that the Employer submitted to the CO with its NOD response, attested that she inadvertently made some mistakes when preparing the payroll summaries and that the 2009 and 2010 summaries previously submitted reflect a different

² During a telephone conference call on January 28, 2011, I denied the Employer's request for an expedited discovery due to the expedited nature of the H-2A appeal process, acknowledging the Department of Labor's objection that searching for the requested documents, of which the Department of Labor was not sure existed, would be overly burdensome.

occupation than the one at issue. EX 1, Donelan declaration (“Donelan dec.”). Ms. Donelan submitted corrected payroll reports for the occupation of “over-the-road truck driver,” summarized as follows:

Month	Number of domestic/ permanent workers	Number of foreign/ temporary workers	Total number of workers
Jan. 2009	0	6	6
Feb. 2009	2	7	9
March 2009	3	8	11
April 2009	1	7	8
May 2009	1	7	8
June 2009	1	2	3
July 2009	0	0	2
Aug. 2009	0	0	0
Sept. 2009	0	0	0
Oct. 2009	0	0	0
Nov. 2009	0	1	1
Dec. 2009	3	12	15

Month	Number of domestic/ permanent workers	Number of foreign/ temporary workers	Total number of workers
Jan. 2010	3	8	11
Feb. 2010	3	12	15
March 2010	3	14	17
April 2010	3	18	21
May 2010	2	17	19
June 2010	0	4	4
July 2010	0	6	6
Aug. 2010	0	4	4
Sept. 2010	0	4	4
Oct. 2010	0	4	4
Nov. 2010	5	11	16
Dec. 2010	3	15	18

EX 1. Ms. Altendorf's declaration stated that "Altendorf does have a permanent need for someone to perform the truck driving in question, the need peaks in the late fall and winter and then returns to a much lower base the rest of the year." EX 1, Altendorf declaration ("Altendorf dec."), ¶ 3. Ms. Altendorf stated that there is a substantially increased demand for transport services in the late-fall/winter "because farmers sell their stored crops as the market prices increase over the winter." EX 1, Altendorf dec., ¶ 7. Additionally, Ms. Altendorf's declaration provided that "While some of Altendorf's combine operators have Commercial Driver's Licenses, it does not have enough of them to meet the peak demand for transport from storage to market." EX 1, Altendorf dec., ¶ 8.

At the hearing, the Employer argued that it had established temporary need for labor on either a seasonal or peakload basis. Ms. Altendorf testified on behalf of the Employer and Ms. Gonzalez testified on behalf of the CO. Their testimonies are summarized below.

Ms. Janice M. Altendorf

Ms. Altendorf testified that Altendorf Harvesting is the same company as Altendorf Transport, and that Altendorf Harvesting does business within Altendorf Transport. Tr. 13-14. Ms. Altendorf is the owner and general manager of Altendorf Transport. Tr. 14. Altendorf Transport and Altendorf Harvesting provide custom combine and harvesting services. Tr. 17. In explaining how the truck drivers that are the subject of this application are different than the truck drivers that were the subject of the Altendorf Harvesting application, Ms. Altendorf testified that Altendorf Harvesting's truck drivers do local trucking to take the crop to local storage facilities. Tr. 17-18. In contrast, Ms. Altendorf stated that Altendorf Transport's "winter truckers," or "over-the-road truck drivers" are required to have a Class A commercial driver's license in order to take the grain from storage to market. Tr. 18-19.

Ms. Altendorf testified that Altendorf Transport has a need for over-the-road truck driving services right now, over and above what it normally needs, in order to take the crops from storage to market. Tr. 20. Ms. Altendorf also explained that the itineraries that the Employer submitted with its NOD response are projections of its over-the-road

hauling schedule, based on customers that it has harvested for, where it has put the grain into storage, and where the customers are planning to have the Employer take it to market for them. Tr. 21-22. Ms. Altendorf testified that sometimes the projections do not go as planned because of weather conditions, and that “[f]rom the time we project until we go to the field, a lot changes.” Tr. 24.

Ms. Altendorf testified that Altendorf Transport regularly employs approximately 30 workers to perform over-the-road trucking and always has approximately 50 trucks available. Tr. 24-25. Later in the hearing, Ms. Altendorf testified that it always has three to four trucks readily available for any crops that it was unable to transport to market during the winter cycle. Tr. 26, 93. Ms. Altendorf stated that the farmers decide when to sell their crops based on the commodities market. Tr. 27. Specifically, Ms. Altendorf testified that:

The farmers have a very tough job with their commodities anymore. They don't just grow the grain and sell it. They watch the markets continually every day. And your more stable farm operations still watch the markets. And if they are at a low, they will not sell. So they will either put [the crops] into their own storage. Or, they will find some local storage where they can hold the crop and watch the markets.

Tr. 27. Ms. Altendorf noted that she employs drivers who drive both harvesting equipment as combine operators and transport equipment over-the-road, but that not all of Altendorf Transport's custom harvester combine operators have commercial driver's licenses that would allow them to operate the equipment from storage to market. Tr. 35-37, 25-26. Additionally, Ms. Altendorf stated that because of the over-the-road driving duties, Altendorf Transport's workers must be able to obtain a Class A commercial driver's license with air brake endorsement within 30 to 90 days following hire. Tr. 38-39. A special license is not needed to operate a combine. Tr. 40.

Ms. Altendorf indicated that Altendorf Transport did not hire any domestic workers in January 2009 or July, August, September, October, or November 2010, even though it has a need for three or four trucks to be available for delivering over-the-road items, because there were no American drivers available. Tr. 91.

Ms. Marie C. Gonzalez

Ms. Gonzalez testified that when the Altendorf Transport application was received by the CO, the CO first conducted a review of the Employer's filing history to determine, besides other issues, the seasonality of the Employer's need. Tr. 46. The CO discovered that the Employer previously filed an application on February 23, 2010 under the name of Altendorf Harvesting, and so the CO pulled the Altendorf Harvesting case file. Tr. 47. The CO testified that the Altendorf Harvesting application requested workers to transport custom combine crops from fields to elevators or to storage areas. Tr. 47. The CO noted that both the Altendorf Transport application and the Altendorf Harvesting application required that workers have the appropriate driver's license with air brake endorsement. Tr. 47-48. The CO determined that based on these applications, the Employer had a true need for truck drivers for 27 days short of a full year. Tr. 49.

Altendorf Harvesting's application for 100 agricultural equipment operators was certified. Tr. 53. Ms. Gonzalez noted that these workers were performing the job duties on the Employer's 2009 and 2010 summarized payroll, but were not identified on the payroll reports. Tr. 53. Ms. Gonzalez testified that Altendorf Harvesting's certification for truck drivers was based on their need for truck drivers who were going to be transporting harvested crops to the elevators or storage areas. Tr. 54.

Ms. Gonzalez described a peakload need under the H-2A program as one in which an employer has permanent workers on a year-round basis but needs to supplement its permanent work force on a temporary basis due to a seasonal or short-term demand. Tr. 60. Ms. Gonzalez also testified that based on the Employer's payroll records, H-2A workers hired as temporary additions could become a part of the Employer's regular operations because the Employer has employed temporary workers for the past 12 months. Tr. 61-63. Ms. Gonzalez determined that based on the payroll records, the Employer is not actually supplementing its permanent work force with temporary workers, rather, it is employing temporary workers year-round, thereby becoming part of the Employer's permanent work force. Tr. 63-64.

DISCUSSION

In order to be eligible for H-2A temporary labor certification, an employer must establish that 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). The only issue before me is whether the Employer has established a temporary or seasonal need for workers. The applicable regulation at 20 C.F.R. § 655.103(d) provides:

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 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.

In determining whether a job opportunity that is the subject of an application is temporary, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009). Accordingly, in determining seasonal need, an ALJ must “determine if the employer's needs are seasonal, not whether the duties are seasonal.” *Sneed Farm*, 1999-TLC-7, slip. op at 4 (Sept. 27, 1999).

Therefore, in order to determine whether the Employer's need for labor is seasonal or temporary, it is necessary to establish when its season occurs and how the need for labor or services during this time of the year differs from other times of the year. This application is for 50 over-the-road truck drivers from January 28, 2011 through April 15, 2011. AF 236. The Employer's NOD response stated that taking the grain from the farms to a grain elevator or agricultural co-operative is “performed largely if not exclusively from mid-January until mid-April.” AF 183. The Employer added that “driving trucks from farm to first point of commodity sale do[es] not occur in months other than those for which certification is sought.” AF 184. However, at the hearing, Ms. Altendorf clarified that the Employer has a year-round need for three or four over-the-road truckers. Tr. 26, 93. The Employer argues that it has an increased need for

these workers during its peak season during late fall and winter. EX 1, Altendorf dec., ¶ 3. The Employer explained that its itineraries, which reflect a need from January 28, 2011 through April 15, 2011, are projections based on its needs for over-the-road truck drivers this winter. Tr. 21. Ms. Altendorf noted that a lot can change from the time that the Employer makes its projections until the time that it goes to the field. Tr. 24.

The Employer cannot predict when the farmers will sell their grain, and although the Employer has framed its projected need dates as based on the weather, it also depends on the price that the farmers can get at market. The trucking in this application is not related to the time of year that the grain is actually harvested, but rather when the stored grain is taken to market. The Employer has explained that the time the grain is taken to market relates to the time the farms decide to sell their crop, which is dependent on the commodities markets. Tr. 27. Based on this information, the Employer's increased need for over-the-road truck drivers is not tied to a certain time of year by an event or pattern, but rather depends on the price of the grain. Because the commodities market by nature is fluctuating and largely unpredictable, it does not appear that the Employer's need for over-the-road truckers is tied to a particular time of the year by an event or pattern.

Further, the similarities between the job duties also indicate that the Employer's increased need for over-the-road truck drivers does not only occur between January 28, 2011 and April 15, 2011. Altendorf Harvesting (which Ms. Altendorf testified is the same company as Altendorf Transport) was certified for 100 agricultural equipment operators (or "harvest truck drivers") from April 10, 2010 to December 31, 2010. Ms. Altendorf testified that the 100 "harvest truck drivers" did local trucking from the farm to local storage facilities and did not need a Class A commercial driver's license. Tr. 17-18, 40. Ms. Altendorf also testified that the over-the-road truck drivers, who are the subject of Altendorf Transport's application, will drive the crop from storage to market and are required to have a Class A commercial driver's license. Tr. 18-19. Thus, the Employer argues that these truck driving positions reflect separate needs for the performance of distinct duties.

This purported distinction is problematic for several reasons. The CO testified, and the Employer did not dispute, that Altendorf Harvesting's application included the requirement that the truck drivers obtain a Class A commercial driver's license, just like

Altendorf Transport's application. Tr. 47-48. Therefore, both applications reflect a need for workers with Class A commercial driver's licenses who will be doing over-the-road driving, and the Employer's need for additional over-the-road truck drivers is not simply tied to the months indicated in this application. The Employer needed 100 over-the-road truck drivers from last April to December as well.

Finally, there is a credibility issue as to whether the Employer is truly going to employ the truck drivers that are the subject of this application in over-the-road positions. The Employer's application specifies that "Hauling will be performed both *on-farm* and over the road." AF 245 (emphasis added). Additionally, the Employer indicated on its application that "[m]inor activities associated with combining and machine digging associated with hauling duties may be offered infrequently." AF 245. Moreover, the Employer requires that the workers in this application obtain the Class A commercial driver's license within 30 to 90 days after hire. AF 245; Tr. 38-39. However, this application is only for 77 days, discrediting the Employer's contention that only over-the-road truck drivers are the subject of this application.

It is the Employer's burden to establish eligibility for temporary labor certification. 20 C.F.R. § 655.161(a). Based on the above, the Employer has not demonstrated a seasonal need for 50 over-the-road truck drivers from January 28, 2011 to April 15, 2011, because the Employer has not established that its need for the over-the-road truck drivers is tied to a time of the year and requiring labor levels far above what is necessary for ongoing operations. Indeed, it appears that the Employer had an even greater need for truck drivers with Class A commercial driver's licenses from April 10, 2010 to December 31, 2010, its dates of need in the Altendorf Harvesting application.

Next, I turn to whether the Employer has established a peakload need for 50 over-the-road truck drivers from January 28, 2011 to April 15, 2011. The H-2A regulations do not specifically provide for an employer to establish its temporary agricultural need under a peakload theory, and Ms. Gonzalez testified that peakload need is rarely cited on H-2A applications. Tr. 64. Given that the H-2A regulations are silent as to the standard for establishing peakload need, I will turn the H-2B regulations.³ As a preliminary matter,

³ The Employer's attorney argued in his closing argument that the H-2B definition of peakload need is not applicable to the H-2A program, but did not offer any reason that this definition is not applicable to the H-

given the singular origin of the H-2A and H-2B programs, both of which require employment to be temporary in nature, I find no reason that the H-2B “peakload need” definition would be improper as applied to the H-2A program.⁴ In order to establish a peakload need, the employer “must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner’s regular operation.” 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

In determining whether the Employer has established a peakload need for these workers, I turn to Ms. Altendorf’s testimony and the Employer’s payroll records. Ms. Altendorf testified that Altendorf Trucking regularly employs about 30 over-the-road truckers at any given time of the year. Tr. 25. Later during the hearing, however, Ms. Altendorf testified that there is a year-round need for three or four over-the-road truckers. Tr. 93. The Employer’s payroll reports show that it has employed foreign temporary workers as over-the-road truck drivers from November 2009 to December 2010, 13

2A program or an alternative definition for “peakload need” for the H-2A program. Tr. 103. In his brief, the Employer’s attorney argues that it meets the H-2B definition of peakload need. Emp. Br. at 9-10. I note that for a short time, the H-2A regulations explicitly included a peakload need as one of the manners by which an employer could establish a temporary need. See 20 C.F.R. § 655.100(d)(3)(iii)(2009). It is difficult to derive significant meaning from this, however, because “peakload need” entered and exited the H-2A regulations without comment. See Proposed Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement*, 73 Fed. Reg. 8538, 8539 (Feb. 13, 2008) (no mention of “peakload need”); Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement*, 73 Fed. Reg. 77110, 77213 (Dec. 18, 2008) (definition of temporary includes “a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to § 655.110.”); Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6883 (Feb. 12, 2010) (no mention of “peakload need”).

⁴ The Immigration and Nationality Act (“INA”) of 1952, codified at 8 U.S.C. § 1101 *et seq.*, authorized a temporary foreign worker program referred to as the H-2 program, which covered both agricultural and nonagricultural workers. The 1986 Immigration Reform and Control Act (“IRCA”) amended the INA and subdivided the H-2 program into the current H-2A and H-2B programs on the basis of whether the temporary labor involved an agricultural position (H-2A) or a nonagricultural position (H-2B). In 1987, the Secretary of Labor revised the regulations governing temporary alien agricultural labor certification. See 52 Fed. Reg. 16770 (1987) (proposed rule, May 5, 1987); 52 Fed. Reg. 20496 (1987) (interim final rule, June 1, 1987). The rulemaking reveals that the Department’s interpretation of the word “temporary” under the H-2 provision is intended to be consistent with the common meaning of the word “temporary” and to have the same meaning for both H-2A and H-2B purposes. 52 Fed. Reg. 20496, 20497.

months, without interruption.⁵ EX 1. In six of these 13 months, it employed no permanent domestic workers. EX 1. Based on this documentation, it is clear that the Employer has not been using the temporary labor certification program merely to supplement its permanent over-the-road truck drivers on a temporary basis. Rather, it has used the temporary labor certification program to fill its permanent need for over-the-road truck drivers with temporary foreign workers. The Employer cannot meet its burden to demonstrate that it has a peakload need for 50 over-the-road workers because it has already been using temporary foreign over-the-road truck drivers for 13 months. Such a scenario is inconsistent with the entire temporary labor certification program. The employer has a year-round need for over-the-road truck drivers, and the Employer has not met its burden of demonstrating why it has either a seasonal or a peakload need from January 28, 2011 to April 15, 2011 for 50 over-the-road truck drivers.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

⁵ Moreover, given the overlapping job duties between Altendorf Harvesting's truck drivers and Altendorf Transport's truck drivers, and the fact that Altendorf Harvesting required workers to obtain a Class A commercial driver's license, this figure is in fact the minimum number of consecutive months that the Employer has used temporary over-the-road truck drivers. The Employer's filing history shows that it has received certification for H-2A workers from March 2007 through December 31, 2011, or 46 months, without interruption. AF 216-217.