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Issue Date: 22 January 2015

BALCA Case No.: 2015-TLC-00009
ETA Case No.: H-300-14316-824668

In the Matter of:

JSF ENTERPRISES,
Employer.

Certifying Officer: John T. Rotterman
Chicago National Processing Center

Appearances: Wendel V. Hall
Washington, D.C.
For the Employer

Vincent Costantino, Assistant Counsel for Litigation
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S
DENIAL OF TEMPORARY LABOR CERTIFICATION**

This matter arises under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (collectively, H-2A program). It is before the undersigned on JSF Enterprises' ("Employer") request for a hearing pursuant to 20 C.F.R. § 655.141(b)(4). Per the agreement of the parties, a hearing was held in Covington, Louisiana via teleconference on January 12, 2015. At that time, the Certifying Officer ("CO") offered four exhibits, which were received into the record. For reasons stated

below, the undersigned **AFFIRMS** the determination of the Certifying Officer to deny the application for temporary labor certification.

STATEMENT OF THE CASE

I. Procedural History, Contentions of the Parties, & Jurisdiction

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a certification that—

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a).¹

The implementing regulations at 20 C.F.R. Part 655, Subpart B set forth a multi-step process by which this certification—known as a “temporary labor certification”—may be applied for and granted or denied. First, the petitioning employer must file a job order with the State Workforce Agency (“SWA”) serving the area of intended employment. 20 C.F.R. § 655.121. The SWA will review the job order for compliance with the regulations and, if it finds the job order acceptable, post the job order on its intrastate clearance system and begin the recruitment. 20 C.F.R. § 655.121(b), (c). If the SWA does not locate able, willing, and qualified workers to fill the positions for which the employer seeks certification, the employer may file an *Application for Temporary Employment Certification* (ETA Form 9142A) with the U.S. Department of Labor (“DOL”), Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”). A CO in the OFLC will review the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. If the application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the CO will notify the employer within seven calendar days. 20 C.F.R. § 655.141(a).

On November 12, 2014, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with ETA’s Chicago National Processing Center (“CNPC”) for the position of “Farmworker.” The period of intended employment was to begin January 5, 2015 and continue through July 1, 2015. (AF 75-84).²

¹ The Secretary of Labor delegated the authority to make this determination to the Assistant Secretary for the Employment and Training Administration, who in turn delegated it to the Office of Foreign Labor Certification. 20 C.F.R. § 655.101.

² In this decision, citations to the Appeal File, Transcript, and Exhibits will appear as follows: Appeal File: (AF ___); Transcript: (Tr. ___); and DOL Exhibits: (DOL EX- ___, p. ___).

The CO issued a Notice of Deficiency on November 19, 2014, which informed Employer that, in accordance with Departmental regulations at 20 C.F.R. § 655.103(d), the job opportunity was not on a seasonal or other temporary basis. (AF 56-60). Seasonal or temporary is defined as:

[Employment 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, 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. § 656.103(d).

The CO concluded that Employer's point of contact, Gary Jackson, applied for temporary labor certification under several different business names, while being involved as owner or manager with each of these entities. These entities included the following businesses: JSF Enterprises, Gary & Karen Jackson Farms, Triangle J Farms, and Jackson Seminole Farms, LTD. The CO determined that Gary Jackson's businesses have a year-round need when tied together due to his involvement in all four entities and the dates of "temporary labor" listed. In addition, the CO pointed out that the various entities shared business addresses and phone numbers. (AF 56-60).

The job duties listed among the businesses were also similar in that they all involved the harvesting of similar crops, the hauling or storing of crops, and general farm duties. As such, the CO found that the duties in each application fell within the SOC occupation code and title for a 45-2091 Agricultural Equipment Operator, representing the same job opportunity for purposes of the H-2A program. The CO requested that Employer explain why the job opportunity was seasonal or temporary and instructed Employer to provide details as to the differences in the various business operations. (AF 56-60).

On December 1, 2014, Employer responded to the Notice of Deficiency. Employer stated that the CO gave no indication as to where it drew its information. Employer then went on to indicate the owners, the worksite addresses, and the type of crops grown by each of the four businesses. Specifically, Gary Jackson is the sole owner of Triangle J Farms, which has a worksite address of Hwy 83 West FM 769, Denver City, Texas 79323 where all farming duties are performed. Triangle J Farms has been mostly engaged in the production of peanuts and cotton. (AF 33-55).

Gary & Karen Jackson Farms is 50% owned by Gary Jackson and 50% owned by Karen Jackson. Gary & Karen Jackson Farms operates at a worksite address of 412 SW 23rd, Seminole, Texas 79360 where all farming duties are performed, and it is involved in the production of cotton, peanuts, corn, wheat, sorghum, barley, and oats. (AF 33-55)

JSF Enterprises is 50% owned by Gay Nell Jackson, 25% owned by the Jamie Lee Jackson Trust, and 25% owned by the Andrea Michelle Jackson Trust. JSF Enterprises operates

out of a worksite address of 2421 B County Road 214, Seminole, Texas 79360 where all farming duties are performed, and it is engaged in the production of cotton, peanuts, carrots, watermelons, and chilies. (AF 33-55).

Jackson Seminole Farms, LTD is 49% owned by Gay Nell Jackson, 24.5% owned by the Jamie Lee Jackson Trust, 24.5% owned by the Andrea Michelle Jackson Trust, and 2% owned by J.O. and Gay Nell Jackson, LLC. Jackson Seminole Farms, LTD operates out of a worksite address of 998 County Road 245, Seminole, Texas 79360 where all farming duties are performed, and over the past several years has been involved in the production of mainly cotton, peanuts, wheat, and sorghum. (AF 33-55).

Employer argued that because each of these four separate farming entities are under different and separate ownership, they cannot be considered the same entity utilizing the H-2A program for year-round labor. Additionally, Employer averred, each of the four farming businesses possess its own FEIN for tax purposes, files its own taxes, owns or controls its own worksite, owns its own equipment and supplies, employs its own temporary and permanent workers, produces its own crops, and maintains its own assets, finances, and bookkeeping systems. Employer also points out that some of the entities are 96.8 miles from each other, further evidencing the distinctiveness of each of the businesses. Each entity was started separately from 1982 to 2005 before any of them began to utilize the H-2A program, which Employer believes makes it unreasonable to think that the entities were formed to circumvent the regulations. Employer conceded that the businesses were managed out of the same business office and that Gary Jackson handled administrative affairs for all four entities, but it claimed this was due to the close-knit nature of the Mennonite community of which its members were a part. (AF 33-55).

Lastly, Employer stated that JSF Enterprises' harvesting season lasted from December through February of one year (harvesting) and February through July of the next year (planting). Employer added, "Please also note that because of the warm weather that southwest Texas receives year-round many of these crops have a fair amount of flexibility as to when they can be planted and harvested." Employer also listed various corrections it would like to make to its H2-A application. Employer wished to correct the part of the application that lists Gary Jackson as the owner of JSF Enterprises; Gary Jackson is instead the administrative manager. Employer wished to correct an inaccurate worksite address on the ETA Form 9142, which should be instead 2421 B County Road 214, Seminole, Texas 79360. (AF 33-55).

On December 10, 2014, the CO denied JSF Enterprises' application for temporary alien labor certification in a Notice of Denial. In his denial, the CO reiterated much of the same reasons for denial as was in the Notice of Deficiency. The CO did state, however, "**For purposes of the H-2A program, the four employers are filling the same need on a year round basis. The corporations function as one for purposes of the H-2A program.**" The CO also concluded that while Employer did provide more information as to the ownership structure of each of the four entities, it still appeared that the businesses are run cooperatively. Employer's attempt to differentiate the businesses through ownership roles, worksite locations, and types of crops harvested was deemed insufficient. (AF 25-32).

The CO pointed out that Employer instead highlighted the close relationship between the entities through its explanation of the tight bond of the members of the Mennonite community. Specifically, the CO noted that Employer acknowledged its administrative control over all four entities:

Gary Jackson and his employees are responsible for the management of administrative functions, including the filing of H-2A applications, for four companies with varying degrees of common ownership and familial connectivity. For purposes of the H-2A program, this shared control and ownership renders the creation of separate corporate forms inconsequential.

(AF 25-32).

Next, the CO stated, “**Each application seeks to fill the same job opportunity.**” The job duties each temporary laborer would complete all fall within the occupation code and title for a 45-2091 Agricultural Equipment Operator, as defined by the regulations. In addition, the Employer’s worksite, experience requirements, and substantively identical job duties indicate a year-round need for Agricultural Equipment Operators. Moreover, the entities also harvest many of the same crops (e.g., peanuts and cotton). (AF 25-32).

Likewise, the CO determined that while the Employer states that some worksites are as much as 96 miles apart, they are all in Seminole, Texas and fall within the same “area of intended employment;” therefore, they all represent the same job opportunity and create a permanent need for the same work in what is essentially the same entity. (AF 25-32).

Finally, the CO notes that “[E]mployer has control over its period of need.” By stating that the warm weather of southwest Texas allows Employer to have flexibility in choosing its growing seasons, **Employer conceded that its operations do not have a truly seasonal need defined by the regulations.**³ As such, Employer fails to state a need for temporary laborers obtained through the H-2A program. (AF 25-32).

On December 16, 2014, Employer requested *de novo* review of the Notice of Denial dated December 10, 2014. Employer proffered the same arguments put forth in its response to the Notice of Deficiency dated November 19, 2014. (AF 1-24). On January 5, 2015, the Office of Administrative Law Judges (“OALJ”) received the Appeal File in this case requesting *de novo* review. A hearing was held on January 12, 2015 via teleconference with the parties. At the hearing, DOL offered four exhibits; Employer offered no additional exhibits. The parties submitted post-hearing briefs on the brief due date of January 15, 2015.

The undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171(b)(2). The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). The employer, therefore, must demonstrate that the Certifying Officer’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying

³ See pp. 2-3 of this opinion & 20 C.F.R. § 656.103(d) for the regulatory definition of “seasonal” and “temporary”.

established facts and/or legally impermissible. *See Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).

When an employer requests a *de novo* hearing, the procedures in 29 C.F.R. part 18 apply, except that: (1) the appeal will not be considered to be a complaint to which an answer is required; (2) the ALJ will ensure that the hearing is scheduled to take place within 5 business days after the ALJ's receipt of the administrative file, if the employer so requests, and will allow for the introduction of new evidence; and (3) the ALJ's decision must be rendered within 10 calendar days after the hearing. 20 C.F.R. § 655.171(b)(1). The ALJ's decision may affirm, reverse, or modify the CO's determination, or remand to the CO for further action. 20 C.F.R. § 655.171(b)(2). The ALJ's decision is the final decision of the Secretary. *Id.* In light of the foregoing standards, the undersigned will discuss the merits of this case below.

II. The Testimonial Evidence

John Rotterman

Mr. Rotterman was the CO in the present matter and has supervised the preparation of the Appeal File, which is complete and contained all of the information that was considered before denying JSF Enterprises's application. (Tr. 12-13). Mr. Rotterman testified that he has no personal knowledge of any of the information in the November 28, 2014 letter sent to CNPC by Employment USA, DOL Exhibit 4, DOL Exhibit 3, or DOL Exhibit 2. (Tr. 15-16). He stated that based on the record, Gary Jackson's businesses had a degree of control over JSF Enterprises and Jackson Seminole Farms, LTD. His only knowledge of the association is what is in the record, and he takes as true the signed attestations in the record of Mr. Jackson. (Tr. 16).

On cross examination, Mr. Rotterman testified that to make a judgment on whether an application is granted, the application is assessed for compliance with the scope of the regulations. (Tr. 17). The application, case history, and any information in the CO's database on the entity is considered. (Tr. 17-18). The state workforce agency may be asked for more information, and the CO may undertake independent research using the Internet or public information. (Tr. 18). For each application that comes in, information about the business is logged into the case processing system including certain facts, FEINs, business addresses, points of contact, and ownership and/or control. (Tr. 19-20). The CO checks the entity for matches to any other businesses based on this information. (Tr. 20).

In the present case using this system check, Mr. Rotterman found related files between Jackson Seminole Farms, Gary & Karen Jackson Farms, Triangle J Farms, and JSF Enterprises. These entities had the same or similar point of contact, location, address, job requirements, and crops and commodities. (Tr. 20). Mr. Rotterman determined there was no temporary need for labor based on these similarities given the overlapping control of the entities. (Tr. 21, 23). While ownership sometimes differed between the entities, they shared a common "managerial interest" because Mr. Jackson was either an owner or manager of the businesses. (Tr. 23-24). Mr. Rotterman testified that the entities were either owned by Mr. Jackson, or considered owned by him for purposes of the H-2A program, which meant that they were all interlocking businesses. (Tr. 29). Nothing else was submitted in the case that would change Mr. Rotterman's mind that Mr. Jackson had control and management over the four common entities. (Tr. 32).

Mr. Rotterman testified that the temporary labor application for Gary & Karen Jackson Farms was denied for the same reasons based on a lack of temporary need for labor. (Tr. 33). In regards to Jackson Seminole Farms and JSF Enterprises, Mr. Rotterman stated he did not know who owned or was involved in the trusts that had ownership interests in the entities. (Tr. 34-35). He testified it would be a reasonable assumption to assume Mr. Jackson's children were the beneficiaries of the trust. (Tr. 35). He presumed Karen Jackson to be a spouse or sister of Gary Jackson. (Tr. 37). Mr. Rotterman pointed out that page 5 of DOL Exhibit 4 showed JSF Enterprises as a d/b/a for Triangle J Farms, and Gary Jackson was listed as the President of JSF Enterprises/Triangle J Farms. In addition, "JSF Enterprises" and "Jackson Farms" were listed as trade names for Triangle J Farms. (DOL EX. 4, p. 5; Tr. 45). Mr. Rotterman testified that page 6 of DOL Exhibit 4 was a screen shot of the Jackson Seminole Farms website, which had a title at the top reading "Gary & Karen Jackson Farms." (DOL EX. 4; Tr. 46). He stated the high degree of connectivity between the entities compelled him to view the businesses as one entity across all the filings. (Tr. 48).

On re-direct examination, Mr. Rotterman testified he was aware that mistakes had been made in JSF Enterprises' application when Mr. Jackson was referred to as "owner" and that JSF Enterprises' response to the Notice of Deficiency sought to correct that mistake. (Tr. 52-53). He added that the CNPC did not make the amendment because the application did not go forward. (Tr. 53). Mr. Rotterman conceded that Internet information was not always correct, and that its veracity and reliability had to be established. He agreed that some of the information in DOL Exhibit 4 was taken from outside websites named Manza.com and "buzzfile." (Tr. 55).

On re-cross examination, Mr. Rotterman testified that page 6 of DOL Exhibit 4 was a website design hosted by Gary Jackson, the individual who is owner and manager of the organizations involved. (Tr. 58). Kevin Opt was the agent that filed the application on behalf of JSF Enterprises. (Tr. 59).

Kevin Opt

Kevin Opt works for Employment USA, which is an H-2A and H-2B agency. (Tr. 64-65). Employment USA assists H-2A employers through the certification process. JSF Enterprises was one of those clients. The most recent application that Employment USA assisted JSF Enterprises with was not approved. (Tr. 65). The CNPC issued a Notice of Deficiency in connection with the application, which claimed that JSF Enterprises and three other farming operations were all owned by Gary Jackson and were all interlocking and seeking permanent employment rather than temporary employment. Mr. Opt testified that Employment USA helped to prepare a response to the Notice of Deficiency, and they gathered information by making phone calls to JSF Enterprises and collecting documents. (Tr. 66).

Mr. Opt stated that Mr. Jackson was mistakenly listed as "owner" as opposed to "administrative manager" on the application. (Tr. 67). He had no reason to believe that any of the information that he was given by JSF Enterprises was not true, nor did he have reason to believe that the facts communicated in the response to the Notice of Deficiency with respect to Gary & Karen Jackson Farms and Jackson Seminole Farms were not true. (Tr. 68-69). He has

never prepared an application for Jackson Seminole Farms or Gary & Karen Jackson Farms. (Tr. 69).

On cross-examination, Mr. Opt agreed that the information for the JSF Enterprises application came directly from Gary Jackson and other staff members that worked in his office. (Tr. 69).

Gary Jackson

Gary Jackson is the sole owner of Triangle J Farms, which is currently involved in the production of watermelons. Mr. Jackson testified that Triangle J Farms is a separate entity from JSF Enterprises, Gary & Karen Jackson Farms, and Jackson Seminole Farms. (Tr. 74). Triangle J Farms operates west of Denver City, Texas. Mr. Jackson stated he has no ownership interest in JSF Enterprises, but he manages the company, which is his mother's farm. He has not received a management fee in over two years, but he tries to advise her and make sure her interests are taken care of. He stated Neil Penner is the "field manager" of JSF Enterprises who does "most" of the hiring. (Tr. 75). Ninfa Arrezola is the secretary, and she sends employment applications to Penner. Penner does the firing. (Tr. 76).

Mr. Jackson stated that referring to him as the "administrative manager" of JSF Enterprises was a "mistake". (Tr. 76). He described his role with JSF Enterprises as "advis[ing] Neil and [his] mom and the trustees what [he thought] need[ed] to be done." He stated that the owners of JSF Enterprises had the right to ignore his advice, but his mother knows that he has her best interests at heart. Mr. Jackson has no ownership interest in Jackson Seminole Farms. His role with that business is essentially the same as his role with JSF Enterprises as "advisor" because "it's mainly owned by [his] mom." (Tr. 77). He testified that each of the four entities had their own bank accounts, credit lines, and equipment, and each filed its own tax returns. (Tr. 77-78). He stated it would be incorrect to refer to the four business entities as "Gary Jackson's businesses." (Tr. 79).

When asked to give an overview of the operations of JSF Enterprises, Mr. Jackson stated that "their" land (the owners') was with Jackson Seminole Farms in Gaines County, Texas, while the operations of Gary & Karen Jackson Farms were in Seminole County, Lee County, Yoakum County, and Culberson County, Texas. (Tr. 79-80). He stated that some of the addresses of the farms were up to 96.8 miles apart or farther. (Tr. 80). Mr. Jackson testified that the four entities were not created as a way of circumventing the H-2A program and that JSF Enterprises had a temporary need for labor. (Tr. 81). He explained that temporary labor is crucial to JSF Enterprises, as the needs of the company and growing seasons change from year to year. (Tr. 81-82).

Mr. Jackson testified it is a mistake that he is listed as owner on the JSF Enterprises application and the Jackson Seminole Farms application, but he is 50% owner of Gary & Karen Jackson Farms. (Tr. 82). He again stated that all four entities were separate. (Tr. 82-83). Mr. Jackson insisted that Triangle J Farms did not do business as JSF Enterprises, and Jackson Farms was not a trade name for Triangle J Farms. (Tr. 83-85). The website www.jacksonfarms.com was developed by Mr. Jackson's daughter, and she did not realize that "there [were] different

names.” “She was just naming it after her dad and putting some stuff up there.” (Tr. 85). Mr. Jackson affirmed that his business had a need for H-2A workers, and the need changes from year to year based on the contracts acquired. (Tr. 85-86).

On cross-examination, Mr. Jackson stated he had no interests in the trusts involved in the four entities. (Tr. 86-87). When asked who the beneficiary of the Jamie Lee Jackson Trust was, Mr. Jackson replied, “[T]hat’s family members, my mother’s grandkids.” He next clarified that “[his] mother’s grandkids” were indeed his own two daughters. Mr. Jackson stated that while the trustee and Penner handled most matters, he would get involved because of his affection for his mother and family. The Andrea Mitchell Jackson trust is owned by his daughter or his “mom’s granddaughter.” His daughters are in their thirties, and they have no involvement in the farms; the trustees control their share. (Tr. 88). Karen Jackson is his wife. (Tr. 89).

Mr. Jackson testified the day-to-day operations of JSF Enterprises are usually run by Penner. (Tr. 89-90). When Jackson’s father passed away, his mother inherited the farm, which is her only means of income. As such, Mr. Jackson tries “to make sure it’s running” so she has enough money for retirement. (Tr. 90). Before his father passed away, his mother had little involvement in the farm. When asked whether he had a deciding voice in which contracts to sign or major purchases to make, Mr. Jackson stated, “It might be right, sir. I do try to take care of my family.” Mr. Jackson is listed as the recruitment contact for hiring, but Penner does the actual interviews. (Tr. 91). His involvement with Jackson Seminole Farms is much the same as his involvement with JSF Enterprises. (Tr. 92).

Penner is involved with all four organizations in terms of crops, workers, personnel, and mechanical purchases. (Tr. 92-93). If necessary or if someone “is in a bind,” he moves around equipment and workers between the entities. (Tr. 93). Mr. Jackson conceded that sometimes Triangle J Farms’ workers would move to work on JSF Enterprises, but they usually stayed at Triangle J Farms. (Tr. 94). Mr. Jackson also admitted that once the JSF Enterprises labor certification ends, some of the same JSF Enterprises’ workers may transfer to work at Triangle J Farms upon its certification. (Tr. 95).

On re-direct examination, Mr. Jackson stated that Dave Davis is the trustee at JSF Enterprises. (Tr. 96). He works at an accounting company in Seminole, Texas, and he has experience running farm trusts. (Tr. 96-97). He testified that he received no financial compensation from advising his mom in association with JSF Enterprises. (Tr. 97). Again, Mr. Jackson stated that temporary laborers would be shared between entities at times, but “we do [keep them separate] to the best of our ability.” Mr. Jackson clarified that he meant “I” instead of “we.” (Tr. 100).

On re-cross examination, Mr. Jackson stated that Neil Penner ran the day-to-day operations of JSF Enterprises, but as a courtesy he runs decisions by Mr. Jackson first. The two “work as a team.” (Tr. 102-103). When asked what would happen in the situation where he and Penner disagreed on a matter, Mr. Jackson stated he did not know that that has ever happened. (Tr. 103). He stated he did not want to speculate on something that has never happened before. (Tr. 104).

DISCUSSION

I. Credibility

I have considered and evaluated the rationality and internal consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. Gary Jackson's testimony has given me significant insight into the persuasiveness of Employer's argument. Overall, I find that Mr. Jackson mischaracterized the relationship between the four entities and each of the owners. He referred to his own daughters as "his mother's grandkids," and he frequently failed to answer questions either affirmatively or negatively. In explaining his evasiveness, he stated that he declined to "speculate" on certain situations which routinely arise in everyday business matters. I find that Mr. Jackson attempted to downplay his contribution to the activities of all four businesses, and he characterized his involvement with some of entities as simply looking out for family members. I question whether the "mistakes" he made on his applications were indeed mistakes or convenient misrepresentations; Mr. Jackson offered no explanation for his error of naming himself as owner of JSF Enterprises. In addition, during his testimony, Mr. Jackson insisted he was the "administrative manager" of JSF Enterprises, which is inconsistent with designating himself as owner in his temporary labor application.

II. Analysis

In determining whether the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-00158, slip op. @ 11 (Feb. 15, 2011). Accordingly, it must be considered whether the employer's need for labor or services during its specified "season" differs from its need for such labor or services during other times of the year. *The Fingerling Company*, 2013-TLC-00017, slip op. @ p. 4 (Jan. 18, 2013). The relevant inquiry is not whether the job opportunity itself is temporary, but whether the employer has established that its need for labor is of a temporary or seasonal nature. *Cressler Ranch Trucking LLC*, 2013 TLC-00007 (Nov. 26, 2012).

In *The Fingerling Company*, the employer applied for 15 H-2A temporary laborers to be employer from January 7, 2013 through November 3, 2013. The CO issued a Notice of Deficiency regarding the application upon noticing that the employer listed the same job duties, worksite address, phone number, email address, mailing address, and farm manager as another employer, Bear Creek Fisheries, that had applied for and received labor certification under the H-2A program for six temporary laborers to be employed from October 29, 2012 through August 26, 2013.⁴ The CO believed these similarities indicated that the job opportunity was for permanent employment rather than seasonal or temporary. The CO requested that the employer provide a detailed explanation as to why the job opportunity was seasonal or temporary and submit supporting evidence. *The Fingerling Company*, slip op. @ pp. 2-4.

⁴ Note that the opinion lists the ending date of employment as "August 26, 2012." The undersigned has assumed that "2012" is a typographical error due to the fact that the dates of employment would not make sense as written in the opinion.

The employer conceded that its company had a close administrative relationship with Bear Creek Fisheries, but it insisted that they were separate and distinct companies because they each had their own FEIN numbers,⁵ different seasonal needs, separate payroll records, individual workers' compensation insurance, separate bank accounts, and the ownership of different fishing ponds. The employer also attempted to distinguish the job duties of each entity stating that Bear Creek Fisheries grew "food fish," and The Fingerling Company cultivated "catfish fingerlings," which required more attention and care than "food fish." Finally, in its explanation of why the employment sought was temporary, the employer simply provided its original application and bolded the words "seasonal changes." *Id.*

The CO denied the application, stating that the employer failed to sufficiently explain how its job opportunity was seasonal. In addition, the CO found that The Fingerling Company and Bear Creek Fisheries were using separate corporate structures "as a proxy" to establish a seasonal, rather than temporary need. Specifically, the CO stated:

The fact remains that the two companies are filling the same need on a year round basis. Both Companies engage in feeding and maintaining ponds and levees for the growth of catfish. *By dividing catfish production operations between two separate, but closely related entities, the two companies seek to hire H-2A seasonal workers for the same job opportunity, year round, within one area of intended employment.*

Id. @ 4 (emphasis added).

The Administrative Law Judge ("ALJ") found that the employer failed to establish a seasonal need for agricultural services or labor. The employer failed to explain why its "season" differed from that of its "neighbor," Bear Creek Fisheries: the employer only explained why raising catfish fingerlings is more work intensive than raising catfish for food. The ALJ affirmed the denial of the CO. By operating as virtually the same entity, Bear Creek Fisheries and The Fingerling Company had a need for permanent, rather than temporary employment. *Id.* @ 5.⁶

⁵ The fact that two entities have separate FEINs is not dispositive in establishing that they are separate companies for purposes of the H-2A program. *See, Katie Heger, 2014-TLC-00001, slip op. @ 5 (Nov. 12, 2013)* ("However, the fact that the Employer has obtained its own FEIN and goes by the name 'Katie Heger' instead of 'Steven Heger' does not establish that the two businesses are not so interlocking that they essentially function as the same farming operation."); *see also, Altendorf Transport, Inc., 2013-TLC-00026, slip op. @ 8 (March 28, 2013).*

⁶ Other ALJs have been presented with the same issue and facts as the instant matter and *The Fingerling Company*. They have found that the CO's denial was correct because the entity applying for H-2A temporary labor certification was the same as another entity who sought certification, and as a result, the labor was not seasonal or temporary in nature. *See e.g., Katie Heger, 2014-TLC-00001 (Nov. 12, 2013); Altendorf Transport, Inc., 2013-TLC-00026 (March 28, 2013); Larry Ulmer, 2015-TLC-00003 (Nov. 4, 2014); D&G Frey Crawfish LLC, 2012-TLC-00009 (Oct. 19, 2012); DS Farms GP, 2013-TLC-00005 (Nov. 14, 2012).*

Like the employer in *The Fingerling Company*, JSF Enterprises has failed to establish a seasonal or temporary need for labor. The four entities, JSF Enterprises, Jackson Seminole Farms, LTD., Gary & Karen Jackson Farms, and Triangle J Farms, fill the same need on a year-round basis because of the interlocking nature of the businesses and regardless of the distinction in crops each harvests.

First, Mr. Jackson exercises a great deal of control and involvement with JSF Enterprises. He is listed as the owner on the JSF Enterprises H-2A application (AF 81; Tr. 25); he is one of the two contacts for hiring at JSF (AF 87; Tr. 25-26); he signed the Job Order certification as the JSF owner (AF 90; Tr. 27); he signed the Intrastate/Interstate Clearance Order certification as the JSF owner (AF 95; Tr. 27); and he made the regulatory assurances for various aspects required for the H-2A program, including the housing assurance and the workers' compensation policy assurance (AF 96-98; Tr. 28-29). Mr. Jackson executed an Agency and Indemnity Agreement contracting Employment USA, LLC to act for and be compensated by JSF for its work on the H-2A program. (AF 118-119; Tr. 29). All of these actions taken by Mr. Jackson have legal ramifications and bind the business in some way. A review of the applications of Gary & Karen Jackson Farms and Jackson Seminole Farms demonstrate that Mr. Jackson maintains the same control and management over those entities. (*See* DOL EX-2 & DOL EX-3).⁷ Based on this information and Mr. Jackson's involvement in the other businesses as owner and "administrative manager," the entities are run cooperatively and are one for the purpose of the H-2A program.⁸

Despite the documentation that shows the interconnecting nature of the entities, Mr. Jackson also has a role in the business activities of the organizations. He conceded that due to the nature of the familial relations between the owners of the entities, he is very sensitive to the control and management decisions that must be made, such as entering into contracts and hiring and firing consultations. (*See, e.g.*, Tr. 77, 90, 91). To further demonstrate the connection between all of the entities, Mr. Jackson admitted that H-2A workers from one company would work for another when necessary or when their temporary labor ended. (Tr. 93-95, 100).

⁷ In regards to Gary & Karen Jackson Farms, Gary Jackson is listed as the owner on the H-2A application (DOL EX-2, p. 46; Tr. 36); he is listed as a contact for hiring (DOL EX-2, p. 48; Tr. 36); he signed the Job Order certification as owner (DOL EX-2, p. 52; Tr. 36); he signed the Intrastate/Interstate Clearance Order certification as owner (DOL EX-2, p. 54; Tr. 36); and he made the required regulatory assurances for the H-2A program for housing and workers' compensation (DOL EX-2, pp. 55-58; Tr. 37). In regards to Jackson Seminole Farms, Gary Jackson is listed as owner on the H-2A application (DOL, EX-3, p. 9; Tr. 38-39); he is listed as a contact for hiring (DOL EX-3, p. 11; Tr. 39); he signed the Job Order certification as owner (DOL EX-3, p. 15; Tr. 40); and he made the required regulatory assurances for the H-2A program including the housing assurance and the workers' compensation assurance. (DOL EX-3, pp. 17-23; Tr. 40-42).

⁸ There is also information online which supports the position that the differently named entities are intimately connected. However, as it is difficult to determine who authors information from the Internet, I do not give this information persuasive weight. (*See* DOL EX-4).

Employer's argument that each of these four business entities have separate addresses, banking activities, credit lines, FEINs, and tax filings is unpersuasive, as is its assertion that they should be considered individually because they each harvest different crops. The above-described case law establishes that these differences do not govern whether multiple organizations are separate entities for purposes of the H-2A program. The cultivating of different fish was insufficient to establish independent entities in *The Fingerling Company*, as is the harvesting of different crops in the present matter.

Moreover, Employer admits that the changing contractual circumstances of the companies and the consistent year-long temperatures in southwest Texas allow it to manipulate its growing seasons. These economic and weather-related circumstances further support the conclusion that JSF Enterprises' labor needs are not seasonal or temporary, per the regulatory definition. Specifically, JSF's needs, viewed in combination with the other three similar entities, are not tied to a certain time of year by an event or pattern and do not require labor levels above those necessary for ongoing operations. 20 C.F.R. § 655.103(d). Case law also establishes that economic concerns, such as contractual fluctuations, cannot be the basis for temporary labor certification. *South Side Nursery*, 2010-TLC-00157, slip op. @ 4 (Oct. 15, 2010).

Finally, Employer's reliance on *Anthony Mock* is misguided. In that case, the ALJ held that there was no evidence of shared ownership, shared employees, shared duties, or a shared history between the two entities in question. In addition, the two entities came into existence in different decades. While the two organizations did have a shared business name and work address, they did not interlock or intertwine in any business or legal sense. Instead, the ALJ noted that they worked "side by side" instead of together. "Absent the evidence that the two operations function as alter-egos, there is no basis to draw the conclusion that they constitute one business as opposed to two." *Anthony Mock*, 2015-TLC-00008, slip op. @ 6-8 (Dec. 30, 2014). In contrast, JSF Enterprises cannot be readily discerned from the three other interconnected entities owned by Gary Jackson and his family. Given the abundance of evidence proving that Gary Jackson maintains control over the entities' activities, and they function as one farming operation, JSF cannot be compared to *Mock*. For example, Mr. Jackson signs off on various legal documents for at least three of the four entities, he controls the growing seasons of the organizations, he is consulted on the hiring and firing of workers, and he dictates what contracts will be entered into, all of which demonstrate that JSF and the other entities are intertwined in a business sense.

Considering that JSF Enterprises, Gary & Karen Jackson Farms, Triangle J Farms, and Jackson Seminole Farms, LTD appear to function as a single business entity and have identified overlapping dates of need that are neither seasonal nor extend for less than one year; are for the same work; and are in the same area of intended employment, I find that the CO's denial was proper in this matter. Thus, the "seasonal or temporary" need for laborers in this case merges into a single year-round need for Agricultural Equipment Operators.

ORDER

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

ORDERED this 22nd day of January, 2015, in Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge