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Office of Administrative Law Judges
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Issue Date: 23 February 2015

BALCA Case No.: 2015-TLC-00015
ETA Case No.: H-300-14357-603369

In the Matter of:

PEPPERCO-USA, INC.,
Employer

Chicago National Processing Center

Certifying Officer: John T. Rotterman
Chicago National Processing Center

Appearances: Wendell V. Hall, Esq.
CJ Lake, LLC
For the Employer

Vincent C. Costantino, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
For the Certifying Officer

Before: **PAUL C. JOHNSON, JR.**
District Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (“the Act”), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On January 19, 2015, Pepperco-USA, Inc. (“Employer” or “Pepperco”) filed a request for a de novo hearing on the Certifying Officer’s denial of its application for temporary agricultural labor certification under the H-2A non-immigrant program. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent

basis. Following the CO's denial of an application under 20 C.F.R. § 655.164, an employer may request a de novo hearing before a judge of the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.171(b). That regulation requires that, if requested by the Employer, the hearing be held within five business days of the receipt of the Office of Foreign Labor Certification (OFLC) administrative file. The administrative file was received on January 27, 2015, and in a conference call held on January 28, counsel for Employer requested that the hearing be held on February 6, 2015, thereby waiving the five-day requirement. The hearing was conducted on February 6, 2015 by telephone. The OFLC appeal file was admitted into evidence as Department of Labor Exhibit 1, along with Employer's Exhibits (EX) 1-3 and 5 and DOL Exhibits (DX) 2-16. A ruling on the admissibility of EX 4 was deferred until it could be admitted through witness testimony; however, no witness referred to EX 4 and it was not later offered for admission. Accordingly, EX 4 is not admitted. The parties submitted timely written post-hearing briefs.

STATEMENT OF THE CASE

On December 23, 2014, the United States Department of Labor (the "Department"), Employment and Training Administration ("ETA"), received an ETA Form 9142 *Application for Temporary Labor Certification* ("Application") from the Employer. AF 262-272.¹ In this Application, the Employer requested H-2A labor certification for 60 "Farmworkers and Laborers, Crop, Nursery and Greenhouse" positions from February 7, 2015 to November 30, 2015. The Employer represented that the "Nature of Temporary Need" was "Seasonal" in Section B, Item 8 of ETA Form 9142). In Section F, subsection a, Item 5 (continued on an attachment), the Employer described the following job duties:

Workers will cultivate, harvest, grade and pack peppers to meet specific demands. Twisting and pruning will consist of twisting the string around the stem and removing weaker shoots making sure to twist to the proper height and tightness and removing excessive shoots/growth on the plant and removing abnormal and side fruit; flowers or fruit are not to be trapped, replace broken or missing heads while leaving the side shoot. Workers must twist all plants making sure none are forgotten or missed. Use flags and clips as required. For picking workers will be required to pick the correct ripeness ensuring fruit is not punctured, sliced or damaged. Workers must pick all fruit at harvest time making sure to not pick any broken or cut plants and remove all rotten fruit from plants. Fruit is not to be bruised due to care[e]less handling or being thrown on the floor. Fruit pruning

¹ Citations to the 1127-page appeal file will be abbreviated "AF" followed by the page number.

requires taking off excess fruits and deformed fruits for proper fruit load, removal of fruit on side shoots, deformed, damaged or diseased fruit as instructed. Remove broken heads/plants. The first twist will include twisting the string around the stem, twisting to proper height and tightness while making sure flowers and fruit are not trapped between string and plant. Flag pruning will consist of pruning the side shoot on a leaf along with all the requirements for fruit pruning. Workers will be required to hang string which consists of tying twine to the crop wire using a machine that measures the length of string for you, tie/hang string/twine to crop wire, hang string at required spacing while making sure that string/twine is at required length. To tie plants workers will need to tie string to the plant at proper tension and proper height below 1st split or 1st node. Workers will harvest fruit according to color, grade, size and weight, identify any quality or disease issues, and make sure there is not any damage to fruit or containers. Workers will scout for bugs, implement and set IPM corrective action, and assist with growing pest and disease management activities.

Workers will grade and sort according to company specifications in regards to size, color, appearance, and quality to meet specific customer demands; discarding inferior or defective products and/or foreign matter and place only acceptable products in packaging containers for further processing; place products in containers according to grade; measure, weigh and count products and materials; examine and inspect containers, materials and products to ensure that packing specifications are met; remove completed or defective products, placing them on conveyors or in specified areas such as allocated bins at loading docks. Additional duties may include[:] loading materials and products into package processing equipment; stack boxes on pallets, lift boxes or crates as required; clean, sanitize and disinfect containers, materials, supplies or work areas using cleaning solutions and hand tools supplied by the company. Additional duties may be included and assigned as the needs arise.

Will play an [integral] part in all food safety activities to maintain and meet SQF and USDA certifications.

Operational specifications can and will change during the season due to crop market conditions. Workers will be expected to conform to the specific instructions provided for each day's work schedule. Instructions and general supervision will be provided by the General Manager, Pack House Manager, Head Grower, Labor Manager, Crop Supervisors or any other designated personnel assigned to lead work groups. Daily individual work assignments, crew assignments, and location of work will be handled via your area assigned Labor Manager/Head Grower/ Supervisor/Lead personnel as they assess their crop and operational needs. Workers may be assigned to varying work duties throughout the day. The work rules of conduct/discipline attached to this clearance order are the expected standards under this job order.

The training period for worker[s] to acclimate to the greenhouse environment, physical demands of the crop work activities, and familiarize themselves with the job specifications is three weeks or 18 working days. Within these three weeks the worker will demonstrate proper harvest methods in the following manner.

Week 1: the worker must reach the minimum work requirements by 50%;

Week 2: the worker must reach the minimum work requirements by 75%; and

Week 3: the worker must reach the minimum work requirements by 100%.

Moving forward after the three (3) week training period, the worker must continue to maintain the minimum requirements and slowly increase their work speed as they are more comfortable with the job task and understand the entire task.

AF 264, 273-274.

On December 30, 2015, the CO issued a Notice of Deficiency (“NOD”), notifying the Employer its application for temporary employment certification could not be accepted for consideration due to five deficiencies, and gave the Employer five business days to submit modifications to its application. AF 237-244. The modifications identified by the CO were (1) verification of the FEIN submitted with the application, (2) demonstrating that the job opportunity was seasonal or temporary, (3) clarification whether the Employer would require both pre-hiring background checks and pre-hiring drug testing, (4) providing written permission for the CO to change the name of the Employer on the ETA Form 790 attachments from “Maroa Farms, Inc.” to “Pepperco-USA, Inc.,” and (5) correction of a discrepancy between production standards in the Employer’s employee handbook and those listed in the ETA Form 9142 and ETA Form 760 attachments.²

With respect to the Employer’s failure to establish that the nature of its need is seasonal or temporary, as required by 20 C.F.R. § 655.103(d), the CO described the deficiency as follows:

The job opportunity, described on ETA Form 9142, Section B Items 5 and 6 and ETA Form 790 Item 9, indicates the employer’s dates of need are from February 7, 2015 through November 30, 2015. However, different dates of need have been established by Maroa Farms, which operates at the same greenhouse on North Fillmore Rd. in Coldwater Michigan, and has the same point of contact (Christopher Gill) as Pepperco. In addition, a recent article in *The Daily*

² Because the CO ultimately denied certification only on the Employer’s failure to demonstrate seasonal or temporary need, the other four bases of the NOD will not be discussed in this Decision and Order.

Reporter,³ points to common ownership of Maroa Farms and Pepperco by Mastronardi Produce (Reid, 2014) [citation omitted]. The previously certified application for Maroa Farms established a period of need of October 5, 2014 through June 5, 2015 and. [*sic*] The present application deviates significantly from that period of time. Taken together, the filings produce a period of need of in excess of one year.

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date of Need</u>	<u>Ending Date of Need</u>
H-300-12356-96833	Maroa Farms, Inc.	Certified – Full	02/12/2013	11/30/2013
H-300-14232-134188	Maroa Farms, Inc.	Certified – Full	10/5/2014	06/15/2015
H-300-14357-603639	Pepperco-USA, Inc.	Received	02/7/2015	11/30/2015

Although the employer has filed as two distinct business entities, the interlocking nature of these entities and operations renders the fact of separate corporate forms inconsequential. Separate corporate forms cannot be used as a proxy for temporary need.

The duties in each application fall within the SOC (O*Net/OES) occupation code and title for 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse and, as such, represent the same job opportunity for purposes of the H-2A program. The applications list similar job duties and requirements, no minimum education a 30 pound lifting requirement and the same training period. The employer’s worksites, experience requirement and similar job duties indicate there is a full time need for at least 60 Farmworkers at this location. Therefore, based on the employer’s requested dates of need, and the previously established dates of need, the employer has failed to demonstrate that it has a temporary or seasonal need for Farmworker and Laborer job opportunities from February and November.

AF 240-241.

To remedy this deficiency, the CO instructed the Employer either to (1) explain in detail why the Employer’s dates of need had changed from October through June to February through November, or (2) explain the difference in business operations between Maroa Farms and Pepperco. AF 241.

The Employer responded to the NOD on January 5, 2015. AF 212-220. The response included information regarding the four bases for denial ultimately abandoned by the CO, and images purporting to show the separation of facilities between Pepperco and Maroa Farms. In

³ Citation omitted.

addition, the Employer submitted the following statement concerning the temporary nature of its need for H-2A workers:

In the explanation for this deficiency, the Department is seeking further clarification regarding the difference in business operations between Maroa Farms, Inc. and Pepperco-USA, Inc. Although common ownership exists between these two corporations, contrary to the concern raised, there does not exist any interlocking nature of the business for these entities.

First, Maroa Farms, Inc. and Pepperco-USA, Inc. operate out of separate greenhouses and have completely separate infrastructure designs, each specific for the crop which will be grown inside the respective greenhouses...Maroa Farms Inc. is located at 270 North Fillmore Road and Pepperco Inc. is at 220 North Fillmore Road. The facilities are therefore separate and distinct greenhouse operations.

Pepperco-USA, Inc. has a completely stand alone irrigation, heating, screening, harvesting and logistic infrastructure separate from that of Maroa Farms Inc. This facility was specifically designed to grow peppers, rather than tomatoes which are grown at Maroa Farms, Inc. Maroa Farms does NOT grow peppers. Growing peppers requires a different process for doing some of the activities which may seem similar to those of tomatoes. Just a few significant differences between the facilities and greenhouse operations:

- Different irrigation hose/emitters to dose different amount of water;
- Different cultivation gutter and irrigation drainage system;
- Different UV disinfection system;
- Pepperco does not have a grow pipe but has a top heat pipe;
- Two energy curtains as opposed to one in Maroa Farms since peppers do not respond well to intense light/heat;
- Custom pepper picking bins and automated guided vehicles for greenhouse transportation;
- Harvest area automation all custom designed for this facility and bell peppers; and,
- No artificial light.

The application from Pepperco-USA, Inc., is not attempting to change Maroa Farms Inc.'s season but is establishing the season for Pepperco-USA, Inc. In addition to the separate specially designed infrastructures of each company, the companies have two completely separate business models. As explained in its application, Pepperco-USA, Inc.'s peak growing season occurs from February-November. In December and January, a cleaning and sterilization process takes place due to the susceptibility of this crop to issues such as thrips, which requires sterilization of the greenhouse in December and January every year. This is in order to stay on course for limiting any potential use of pesticides. This is

contrary to the season for Maroa Farms, Inc. which is mainly concentrated in the September to June time frame for all its plantings as well as interplantings.

AF 216-217.

On January 13, 2015, the CO denied the Employer's application. AF 206-210. The denial was based on the CO's determination that the Employer failed to establish that the nature of its need was temporary, as required by 20 C.F.R. § 655.103(d). In particular, the CO found that the Employer's explanation of the differences between the operations of Pepperco and Maroa Farms failed to establish that the need was temporary. In so finding, the CO repeated verbatim the language from the Notice of Deficiency quoted on pp. 4-5, *supra*, and added the following two paragraphs:

The employer was asked to explain why its job opportunity is seasonal or temporary. This explanation was to provide in detail as to why its date of need have significantly changed from its established season of October through June to its current request of February through November; or must explain the difference in business operations between Maroa Farms and Pepperco-USA.

While the employer provided an explanation as to the differences in business operations, crops produced and physical locations between Maroa Farms and Pepperco, the employer also indicated in its response that the two entities are in fact run by the same people and are, in effect, the same company; with a year round need. Additionally, both job opportunities fall within the same SOC (O*net/OES) occupation code and title for 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, have similar job duties and requirements and are within a minutes' [sic] drive of one another.

AF 210. The CO concluded that "[t]he employer failed to explain why its job opportunity is seasonal or temporary in nature. Therefore, the employer's Application for Temporary Employment Certification is denied.

By letter dated January 19, 2015, the Employer requested review of the CO's denial. AF 11-201. In its letter, the Employer stated that

HEARING

The telephonic hearing was conducted on February 6, 2015. In addition to receipt of the documentary exhibits discussed above, five witnesses testified.

1. Summary of Witness Testimony

John T. Rotterman⁴

Mr. Rotterman was the certifying officer who denied the Employer's application for temporary labor certification. Pepperco's application indicated that it was requesting certification for a seasonal need, but did not check the box for intermittent or other temporary need. When the CO receives an H-2A application, he looks to see whether it fits under either seasonal or other temporary need, and did so in this case. He did not review Pepperco's application in isolation, but in combination with one earlier certified for Maroa Farms. He asked Pepperco to explain why it would be appropriate to view its application as distinct from that filed by Maroa, and in his view it was not. In his opinion, Pepperco cannot be viewed in isolation, but must be evaluated in the context of the parent company's other requests.

Mr. Rotterman agrees that Maroa Farms and Pepperco grow different crops, with different requirements for production. However, Maroa Farms and Pepperco had similar job requirements listed on their Forms 9142, with each saying that they required the same experience with their specific crop, and each saying that they would train the employees. Pepperco did explain that it does not grow peppers during December and January due to low light conditions, but the difference between the pepper growing cycle and the tomato growing cycle aren't really relevant to whether the workers are in the same job opportunity.

Inasmuch as Pepperco is part of the same company and under the same control as Maroa Farms and Mastronardi, Pepperco did not have a temporary need. Although there are different crops, the same occupation is involved. For the purpose of assessing temporary need, the positions described in Pepperco's application are the same as those described in Maroa Farms's application. If Maroa Farms did not exist, then Mastronardi would have a temporary need for workers at Pepperco. When Maroa Farms's application was filed, it was the only filer from Mastronardi and its application showed a temporary seasonal need.

"Employer" is defined in the H-2A regulations as a person or entity that has an employer relationship with a temporary worker, that has a FEIN, and has a place where workers can be

⁴ Mr. Rotterman's hearing testimony regarding the reasons that Pepperco's application was denied will not be summarized, as it is irrelevant to this de novo hearing. Furthermore, given the time constraints in issuing a decision, the summary will not be as thorough as anyone would like. I did, however, listen closely to the entire testimony and have read the transcript of the hearing testimony in its entirety.

referred for purposes of hiring. Pepperco has a FEIN, is seeking to establish employment relationships with temporary workers, and has a place to which the workers can be referred. If Maroa Farms did not exist, Pepperco would have its own temporary need. If Pepperco were located in Georgia, it would have its own temporary need because it is in a different area of intended employment. Different recruitment would be done, and a different market test would be done that would allow for both entities to have a temporary need as they are two different jobs. But Maroa Farms and Pepperco do not have different job opportunities, because they are part of the same operation. If each were looked at in isolation from the other, each would have temporary jobs, but there is no room to do that in the H-2A program.

Pepperco's response to the Notice of Deficiency indicated that Maroa Farms and Pepperco have separate greenhouse operations, with greenhouse at different locations. The greenhouses have different facilities and work with different crops. The response also explained how each structure is set up specifically to work in different crops and had different seasonal needs. Mr. Rotterman had no reason to believe that the two greenhouses do not work in different crops. It is not safe to assume that Pepperco will not be doing its own hiring separately from Maroa Farms, because of common point of contact between Maroa and Pepperco would make it a related or intertwined process. The common point of contact provided some evidence that there was a relationship between Maroa Farms and Pepperco. Whether Maroa Farms and Pepperco had separate payroll functions was not relevant to the consideration, and there was no evidence about whether the scheduling of work between Pepperco and Maroa Farms was handled separately or together. Nor is it part of the decision whether work scheduling and production processes for Pepperco and Maroa Farms are handled together or separately, or whether their human resources functions were separate or not, because separate corporate structures cannot be used as a proxy for temporary need. It is important to prevent adverse effects on the domestic labor market to determine whether each job is legitimately temporary. There have been a number of cases in which companies have set up separate corporations to deliberately or inadvertently avoid the restriction of temporary need. There is no evidence that Pepperco acted in bad faith or intentional wrongdoing by operating in its corporate form, but bad faith or intentional wrongdoing is not required for a determination of permanent need. Some of the exhibits refer to the Maroa Farms and Pepperco greenhouses as a single operation, and whether there are differences in management or not, they are viewed by the parent company as one operation. But even if they

are distinct, there is still common ownership and control, and Pepperco's application can't be viewed in isolation. If they operate independently, but are both wholly owned subsidiaries of the same entity, they can't be viewed as separate. The dispositive fact is common ownership and control, because the CO has to ensure there is no adverse effect on the domestic labor market and it would be an adverse effect for a temporary job to be filled in lieu of what should be a permanent job.

Maroa Farms and Pepperco both filed applications for temporary labor certification for workers in SOC code 45-2092, which is the occupation of "farmworkers and laborers, crops, nursery, and greenhouse." Pepperco was issued a Notice of Deficiency and responded, and its response showed a high degree of familiarity with the operations of both Pepperco and Maroa Farms. The greenhouses for Maroa Farms and Pepperco are very close to each other, and both applications listed Christopher Gill as their point of contact, and each identifies him as the Director of Greenhouse Operations for their facilities. Both applications listed similar job duties and requirements, with a 30-pound lifting requirement and the same training period.

Viewing Pepperco in isolation in this case would undermine the requirement that jobs in the H-2A program be temporary. There is a separate program for recruiting and hiring permanent labor, which has a different labor market test. The permanent labor program would be the appropriate way for an employer to bring in labor on a permanent basis. It makes a difference to the worker looking for a position, because the pool of workers looking for temporary work is very different from the pool of workers looking for permanent work. There are differences in terms of benefits or just the security of having a permanent job.

Pepperco's application stated that the Employer was seeking applicants with three months of experience in harvesting peppers or in hydroponic farm activities with similar crops. Maroa Farms's application for the current season stated that it was seeking applicants with three months of experience in harvesting tomatoes or in hydroponic farm activities with similar crops. In Maroa Farms's application, the employer stated that "Employer will train." In Pepperco's application, Pepperco stated that "Employer will train." That means that the employer will train the employee in their particular procedures. Mr. Rotterman interprets the answers to mean that anyone who had three months of experience in either job would be able to do the other.

Christopher J. Gill is listed on Pepperco's application as Pepperco's director of greenhouse operations, and on Maroa Farms's application as Maroa Farms's director of

greenhouse operations. Mr. Gill certified the SWA job order on both applications as director of greenhouse operations for the respective employers, Maroa Farms and Pepperco. Mr. Gill signed the interstate clearance orders for both Pepperco and Maroa Farms, and is listed as the point of contact for both employers on the housing license inspection reports. Signing the interstate clearance orders obligates the employers to certain regulatory requirements in dealing with migratory workers, and indicates control in the individual locations. Mr. Gill also made and initialed changes in the Maroa Farms operating handbook, indicating a level of control as well as responsibility for ensuring compliance with OSHA standards. That Mr. Gill made the notations and changes in the operations handbook indicates a high degree of involvement and control in the application process, and subsequent administration of workers who are hired.

After denying Pepperco's application, Mr. Rotterman reviewed additional information, particularly that in DX 5-15, and determined that all of the information supports the conclusion that was reached in the denial.

Whether a particular job involves peppers or tomatoes could have an impact on the prevailing wage determination.

The O*NET classifications provide a Specific Vocational preparation, within which is listed job levels. The entry-level job level for SOC code 45-2092 is 0-3 months' experience, and both Maroa Farms and Pepperco asked for workers with experience that would place them at the top of that SVP level.

If both Maroa Farms's and Pepperco's applications were certified, it would be illegal to move workers between the two employers, and Maroa Farms could not grow peppers and Pepperco could not grow tomatoes.

There is no prohibition on an employer filing multiple applications, provided that taken together the need is still temporary or seasonal. If the need altogether came to 12 months, the CO would look at the nature of the jobs requested to see if they should be considered separate jobs.

David Einsteadig

Mr. Einsteadig is outside counsel for Employer, as well as for Maroa Farms, its parent company, Mastronardi Produce-USA, Inc. ("Mastronardi"), and a number of other subsidiaries of Mastronardi. Mastronardi is primarily involved in the distribution of fresh produce throughout the United States. It is the 100% owner of both Maroa Farms and Pepperco. Maroa Farms began operations in Illinois, and is an Illinois corporation; however, after its greenhouse in Illinois was

severely damaged by storms, its operations were moved to Coldwater, Michigan in 2011. Prior to beginning operations in Michigan, Maroa Farms purchased 82 acres of property from the city and six acres from a commercial developer, for a total of about 88 acres. The company built a 27-acre greenhouse, and became operational at the end of 2011. It built a second 27-acre greenhouse in 2014. The company has a total of 50 growing acres of hydroponic tomatoes.

Pepperco was formed in the spring of 2014 for the purpose of growing and selling peppers, when Mr. Einsteadig assisted in corporate formation, filing articles of incorporation and the like. Pepperco purchased about 100 acres of land previously owned by three separate entities, with the purchase being negotiated by officers of Mastronardi. Pepperco and Maroa Farms are two separate entities, operating separately with separate invoicing, infrastructure, financing, and payments. Maroa Farms has a master lender and a subsidiary lender, and Pepperco is not a party to those arrangements. Mastronardi is a guarantor of the Maroa Farms loans.

Maroa Farms and Pepperco are both subsidiaries of Mastronardi, which distributes Maroa Farms's product and will distribute Pepperco's product. Mastronardi is owned by a Canadian corporation. Mastronardi, Maroa Farms, and Pepperco all have the same registered agent in Michigan, Avec O'Brien, who is located at Mastronardi's offices in Livonia, Michigan. The registered agent is at a high corporate level because Mastronardi wants to be sure to know when a lawsuit has been served, as deadlines for response commence upon service.

Paul Mastronardi is Pepperco's president; its secretary and treasurer is Marne Safrance, its chief operating officer is Kevin Safrance, and its chief finance officer is Stephen Attridge. The day-to-day operations will be the responsibility of Pepperco's general manager and head grower; the president and other officers are not involved in the day-to-day operations of the subsidiaries. Each has a separate and distinct management team.

Kevin Safrance

Mr. Safrance has been Mastronardi's chief operating officer for six years. Before assuming that position, he had worked as a vice president for operations and in sales. His responsibilities as chief operating officer involved running the corporate operations and those of 14 operating companies. When Pepperco is operating, it will have a general manager, a human resources team, a head grower, two head labor supervisors, assistant growers, manager of the packing facility, and a food safety manager, all of whom will be different from the personnel at Maroa Farms, although the latter has a similar management structure. Mr. Safrance has offices in

Kingsville, Ontario and Livonia, Michigan. He is in Livonia once or twice a week; Livonia is about 2½ hours from Coldwater, and Kingsville is even farther away. He visits each of Mastronardi's subsidiaries about five times per year. Mr. Safrance is chief operating officer of Maroa Farms and Pepperco, as well as Mastronardi. Paul Mastronardi is president of all three entities. Mr. Safrance is in charge of profit and loss for all three companies; he creates reporting structures and reviews reports to see if there is a need to address anything. If there is a decrease in production, he will talk with the Chief Growing Officer at Mastronardi, who will talk to the head grower at the facility. He sees himself as a consultant, but the head grower has the ultimate call on what action to take.

Every Mastronardi subsidiary is a separate entity with its own management team. Pepperco is separate from Maroa Farms in hiring, payroll, scheduling, accounting, safety training and compliance, and human resources. They have separate bank accounts, financial structure, board meetings, insurance policies, training, and supervision of workers. Maroa Farms and Pepperco have 100% separate land and facilities. Maroa Farms's products are picked up by truck and delivered to Mastronardi's warehouse; the truck could be owned by another Mastronardi subsidiary, or a contract truck, or it could be used by a third party for direct pickup from Maroa Farms. Pepperco will arrange its own transportation separately from Maroa Farms. Maroa Farms produces about 25-30 million pounds of tomatoes on 57-58 acres, and has never grown peppers.

Pepperco was formed in 2014 as a separate entity, rather than an expansion of Maroa Farms, because a retailer, Meijer, had a need for peppers. The company will grow only peppers, and is expected to produce \$10-12 million per year in revenues, which represents about 1% of Mastronardi's revenues. Maroa Farms produces about 3%.

Christopher Gill is the Director of Greenhouse Operations for Mastronardi, and acts as the liaison with the town and the contractor to get facilities operational, and then hands the keys over to the local management team. He did so for Pepperco, and did it for Maroa Farms as well. He served in that capacity while Maroa Farms's second greenhouse was being constructed, even while its first was operational.

Pepperco's greenhouse is still under construction, and will be for another few weeks. The company has a seasonal need for farm labor to work with peppers. Mastronardi's customers include all 25 of the biggest retailers in the United States, plus another 100 retailers.

Michael DiBernardo

Mr. DiBernardo is an economic development specialist with the Michigan Department of Agriculture and Rural Development. His responsibilities include working with industry to expand Michigan agriculture. He is familiar with hydroponic greenhouses as part of his job, and with Mastronardi Produce-USA. He worked with Mastronardi when the company was looking into sites in Michigan, and re-connected with the company when it decided to start growing in Coldwater. The Michigan agricultural economy is a \$101 billion annual industry, with almost 300 different agricultural varieties, employing about a million people. Mastronardi is a large-scale operator and large-scale employer.

Different agricultural products require different skills and experience, each being unique in safety, handling, and pay. Each product requires a unique skill set.

Mr. DiBernardo is aware of the H-2A program, and that most agricultural operations in Michigan do not use the program to its full capacity. If the industry were unable to access the H-2A program, it would have a major impact because there is not enough domestic workforce in Michigan. Additionally, it would have an impact because the increasing yields require more labor. It is common for large operations to create subsidiaries, each for a different crop.

Mr. DiBernardo agrees that a worker with the required experience in hydroponic growing could be trained to work either with tomatoes or peppers. He does not agree that after training in one product, he could work in growing the other.

Michigan would rather have permanent than temporary employees, but the state workforce is not large enough to fulfill the demand.

Antoine Janssen⁵

Mr. Janssen is the Chief Growing Officer for Mastronardi LTD, who oversees the growing process at Mastronardi's farms. He visits each farm 2-3 times per month, verifying the procedures with the growers to ensure proper climate, fertilization, irrigation, and the like. He is originally from Holland, where he earned a college degree, and immigrated to Canada in 1993. Before joining Mastronardi LTD, he was a crop advisor, consulting with different farms and companies.

⁵ Mr. Janssen testified at length about the differences between growing peppers and growing tomatoes. The majority of his testimony will not be summarized, as there is no dispute between the parties about those differences.

Mr. Janssen is familiar with Pepperco, which will grow only bell peppers hydroponically. In a hydroponic greenhouse, seedlings are transferred from the soil into a medium and raised. Pepper plants are brought into the facilities when they are 38-40 days old and planted in the medium. Greenhouse workers hang strings from above the plants. A pepper plant grows 4-5 heads, which are reduced to two heads after three weeks. The farmworker twists the plants, meaning that they tie the string around the plants to support them. The plant's branches are chopped back because they take energy from the plant, and because the branches may break from the weight of the peppers. Peppers are grown only to the main stem. A pepper plant needs a certain amount of light each day, and there is not enough light in December or January to support it. The pepper greenhouse does not have artificial lighting, because pepper plants do not respond well to it. Peppers are slow-growing, and artificial lighting cannot overcome the need for natural light. During December and January, the pepper greenhouse is sterilized to eliminate pests and diseases, so that the next crop can have a fresh start. The pepper growing season cannot be manipulated by changing the light levels in the greenhouse.

Hydroponic greenhouses are all the same, with adjustments for specific crops. Some have artificial light.

Tomatoes are grown in a very different manner from peppers. The plants grow up to 14 meters high, and they are soft compared to the woodier pepper plants. Tomatoes are grown under high-energy sodium lights to imitate "mother nature"; the lights are on for 18 hours a day, and the plants rest during the six hours of darkness. The farmworkers' duties for growing tomatoes are not similar to the duties for growing peppers.

Mr. Janssen hires the head growers for each Mastronardi farm, and will do so for Pepperco. Maroa Farms changed its dates of need for foreign farmworkers between 2012 and 2014 because the facility doubled in size, adding a second greenhouse, and the company instituted a new way of growing with a new schedule and new strategy.

2. Exhibits

a. Employer's Exhibits

EX 1 is a transcript of the January 29, 2015 deposition of the certifying officer, John Rotterman. His testimony is summarized as follows⁶:

To the best of his knowledge, the appeal file is complete. It includes the denial letter, which makes the key arguments as to why Pepperco's application was denied. There could have been additional documents that are publicly available, such as information from the Pepperco website and information about the Coldwater city council meetings. Although that information was not included, it would not have changed the arguments for denial. To Mr. Rotterman, it was not a question of having all information, but only sufficient information, to make a decision, and it is an employer's burden to show that it has a temporary need.

There are regulations that specify the terms and conditions under which an employer can employ foreign workers on a temporary basis. The regulations require a farmer to advertise the availability of the need for labor, to prepare an application for temporary labor certification, and to prepare a Form 790 job order. The job order describes the particular tasks and activities that the farmer needs, and it relates to a specific job at a specific place during a specific time. In the H-2A process, apple picking and corn picking would be considered the same job opportunity because they would be classified in the same SOC. But a farmer with a need for apple pickers would not necessarily also have a need for corn harvesting.

Wages in the H-2A program are set by governmental standards, and must be at least the minimum wage. For wage purposes, it is important to distinguish what the principal crop being produced is. Within a given SOC, there are a great many distinct but similar crops in the occupation. Diversified crop farms have one need. SOC 45-2092.02 broadly refers to harvesting fruits and vegetables by hand, and not to any specific crops. Although watermelons and oranges are different crops, harvesting them is the same occupation. But if the watermelons were grown in Alabama and the oranges in Key West, Florida, there would be distinct job opportunities because they are not in the same area of intended employment. To determine whether opportunities are in the same area of intended employment, the CO looks at the surrounding MSAs (metropolitan statistical areas) and normal commuting distance; so for purposes of the H-2A program, peppers and tomatoes would be distinct needs if the peppers were raised in Indiana and the tomatoes were raised in Georgia. They would not be distinct needs if the peppers and

⁶ As with Mr. Rotterman's hearing testimony, his deposition testimony as to the reasons that Pepperco's application was denied will not be summarized, as it is irrelevant to this de novo hearing, and this summary will include only highlights of his deposition testimony. I have, however, read the deposition transcript in its entirety.

tomatoes were grown at opposite ends of the Chicago MSA because as a matter of regulation, the distance would be a normal commute.

There is no regulation that defines job opportunity, but the regulations require that each job opportunity entail a commute that is normal to one area of intended employment. A job opportunity is considered to be full-time employment at a place in the United States to which United States workers can be referred. If U.S. workers referred to a pepper farm to work there, that would be a job opportunity if taken in isolation. If there were a tomato farm down the road, within the same area of intended employment, whether it is a different place for workers to be referred would depend on whether it is the same employer. Two separate corporations are not necessarily separate employers; there are many applications where there is not a great deal of separation between nominally distinct employers, and the CO determines that there is no distinction.

In this case, the Pepperco application did offer full-time employment, and there is a place to which U.S. workers can be referred. Likewise, the Maroa Farms application offered full-time employment to a place where U.S. workers can be referred. But the issue is not whether there is a job opportunity; the issue is whether the job is temporary. For the Pepperco application to be for a different job opportunity than the Maroa Farms application, it would have to be in a different area of intended employment.

That the NOD response showed a detailed understanding of the operations of both Maroa Farms and Pepperco is an indication that they are the same company with a year-round need. A less detailed response would not necessarily show that they are separate companies, but would have to be analyzed. The response did not explicitly say that they are the same company with a year-round need, but that is a conclusion that can be drawn. The response did concede that common ownership exists between the two companies. The NOD response displayed a great deal of knowledge of both operations, common ownership was conceded, the pepper and tomato operations are across the street from each other, they have the same greenhouse supervisor, and the same person is signing for housing in many applications. In addition, there are similar job duties described in the Maroa Farms and Pepperco applications, and one filer – Christopher Gill. All of these factors are evidence that Maroa Farms and Pepperco are the same company.

Mr. Rotterman has never seen a directive from the Secretary of Labor requiring use of SOC codes in the H-2A program. The SOC user guide states that it was designed solely for

statistical purposes. That disclaimer does not mean that it can't be used in other ways. As far as the SOC codes are used, Mr. Rotterman cannot say what the difference is between an occupation and a job. That BLS may be using the SOC codes for different purposes does not limit the CO's use of them, and Mr. Rotterman is not aware of any instance in which his use of SOC codes was problematic. He is also not aware of any limitations that need to be taken into account when analyzing the SOC code in the H-2A program. The SOC O*NET/OES occupational code entered in Box 4 of Pepperco's ETA 790 was entered by the state workforce agency or the employer; at a minimum, the employer did not dispute it.

Mr. Rotterman has no reason to doubt any of the statements made by Dr. Ron Goldy of Michigan State University or by Jamie Clover Adams, director of the Michigan Department of Agriculture and Rural Development found at pages 39-41 of the appeal file. Ms. Adams' statement that the tomato and pepper farms are "completely independent and separate facilities" is imprecise in light of the fact both applications were signed by the same person as greenhouse supervisor. That the facilities were separate in the sense that workers could not access the facilities in which they did not work is not relevant to whether the need is temporary.

Whether Pepperco and Maroa Farms operate out of physically separate greenhouses is not relevant to whether they operate the same greenhouse for purposes of the H-2A program. They have the same greenhouse supervisor, and the common control of the greenhouses makes them effectively the same for H-2A purposes. Pepperco's application identified a need from February 7 to November 30 of 2015, and if their application were viewed in isolation with no filing history from a company with common ownership and control, then Pepperco would have a temporary need.

There is no evidence that Mastronardi created its corporate structure with any intent to evade the requirements of the H-2A program. There is also no evidence that Mastronardi was being untruthful when it described the separate nature of Pepperco's operations from Maroa Farms's operations in response to the Notice of Deficiency. That description does not, however, show that Pepperco's need is temporary. If Maroa Farms did not exist, then Pepperco would have established a temporary need. If Pepperco were spun off from the Mastronardi corporate structure, and Mastronardi had no financial interest in Pepperco, and if there were be no fiduciary obligation by the spinoff to the parent company, zero interconnectivity, zero common control, and zero common ownership, the Pepperco's need would be assessed individually.

EX 2 is a chart depicting the organization structure of Mastronardi Produce-USA, Inc. The chart shows that Mastronardi is the 100% shareholder of eight subsidiary corporations, including Maroa Farms and Pepperco.

EX 3 is the *curriculum vitae* of Mike DiBernardo, who testified at the hearing.

EX 5 is an email chain among various ETA employees discussing the Pepperco application. The discussion shows that an ETA employee questioned whether Pepperco's need was temporary because Maroa Farms had been previously certified using the same worksite. Mr. Rotterman asked for additional information regarding "facially obvious commonalities," and was told by another ETA employee that Maroa Farms and Pepperco shared common ownership. Upon being provided with additional information from the employer asserting that the greenhouse operations were separate and distinct, Mr. Rotterman stated that "they've also managed to establish...that the two entities are unequivocally run by the same people and are, in effect, the same company, with a year round need."

b. Department of Labor Exhibits

DX 1 is the appeal file in this matter.

DX 2 is a printout of information from the O*NET Center website describing the O*NET Resource Center.

DX 3 is a printout from the ETA website describing the O*NET Data Collection Program.

DX 4 is a printout from O*NET Online with the Details Report for SOC Code 45-2092.00, Farmworkers and Laborers, Crop, Nursery, and Greenhouse. The report describes the duties of that occupational code as follows:

Manually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; or cleaning, grading, sorting, packing, and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities.

DX 5 is a copy of a web page from the Michigan Department of Licensing and Regulatory Affairs, showing that Pepperco-USA, Inc. was incorporated in Michigan on April 17, 2014 as a domestic profit corporation, and identifying its resident agent as Avec O'Brien. The registered office address is 28700 Plymouth Road, Livonia, Michigan.

DX 6 is a copy of a web page from the same department, showing that Maroa Farms, Inc. is an Illinois foreign profit corporation, incorporated or qualified on April 18, 2011, and identifying its resident agent as Avec O'Brien. The registered office address is 28700 Plymouth Road, Livonia, Michigan. Page 2 of the exhibit lists the directors and officers as Don Mastronardi (Director), Paul Mastronardi (President), Marne Safrance (Secretary and Treasurer), Kevin Safrance (Chief Operating Officer), and Steve Attridge (Chief Financial Officer). The registered agent shown on page 2 is Vincent P. Grywacz, a different individual from that named on page 1, but with the same address as that listed for Avec O'Brien.

DX 7 is a copy of a web page from the same department, showing that Mastronardi Produce-USA, Inc. is a Michigan corporation incorporated or qualified on November 4, 2005, and identifying its resident agent as Avec O'Brien. The registered office address is 18700 Plymouth Road, Livonia, Michigan. Page 2 of the exhibit lists the directors and officers as Paul Mastronardi (Director and President) and Marne Safrance (Secretary and Treasurer). Page 2 also lists Avec O'Brien as the resident agent, with the same Livonia address as is on page 1.

DX 8 is a screen capture of <http://www.sunsetgrown.com/about-us/>, containing an "about us" section with information about the Mastronardi family. That information is, in its entirety:

Talk About Roots

Ours span 60 years to the founding of the greenhouse industry. Before Grandpa Umberto Mastronardi came along, there were no commercial greenhouses in North America. He pioneered the industry to provide consumers with fresh greenhouse grown vegetables. After four generations, the Mastronardi family still owns and manages what is now the leading greenhouse vegetable company on the continent, growing and selling world-class tomatoes, peppers and cucumbers.

In the spirit of Grandpa Mastronardi, we continue to pioneer new greenhouse technology, sustainable growing practices, and the protection of old-world produce varieties, so we can deliver some of the best flavors to tables across North America.

DX 9 is a screen capture of a different section of the same website, entitled "Sunset Facilities." The text of that section reads:

SUNSET© Locations

What started in the 40s as a small commercial greenhouse is now 2,000+ acres of state-of-the-art facilities from Canada to the United States to Mexico and Central America. All facilities are staffed with SUNSET© quality control personnel. We

consider every distributor and grower to be a vital member of the SUNSET© family.

We currently have SUNSET© growing and/or distribution locations in Kingsville, Ontario; Livonia, Michigan; Salinas, California; Lakeland, Florida; Maroa, Illinois; Brush, Colorado and Irapuato, Guanajuato, Mexico.

DX 10 is a screen capture of a different section of the same website, entitled “In the News.” The text of that section is:

SUNSET© Introduces Pepperco USA

Kingsville, ON (January 11, 2015) Starting off the new year, Mastronardi Produce is proud to announce their latest greenhouse venture, Pepperco USA.

As the largest greenhouse pepper company in North America, family-owned, employee operated Mastronardi Produce has quietly grown their acreage and capacity in Coldwater, Michigan since completing Phase II of their greenhouse operation this past summer.

“After the recent completion of Phase II, we decided to carry on expanding our Coldwater greenhouses to 100 acres,” stated CEO Paul Mastronardi. “We’ve already established a strong demand for our Michigan grown tomatoes from retailers and were overwhelmed with the response from consumers. We’re anticipating even more enthusiasm for local SUNSET© peppers this Spring.”

Greenhouse builders Havecon Projects and Stolze wrapped up Phase II this past August and have been working through the winter to complete Pepperco. At 41 acres, Mastronardi’s greenhouse is the first large scale pepper greenhouse in the US.

Since opening their Coldwater facility in 2012, Mastronardi Produce has been leading the industry with advanced greenhouse technology to combat frigid Michigan winters and bring fresh, summertime flavor to the Midwest in a sustainable way.

“Because of the strategic location of Coldwater, we’re able to reduce food miles and deliver a vine-ripened product,” said Joe Sbrocchi, VP of Business Development. “With such close proximity to a number of distribution centers, we’re able to harvest, pack and ship our produce to our clients’ doors the same day, which ensures our consumers are getting the freshest product possible.”

The state of the art greenhouse will begin harvesting Spring 2015. Stay tuned for more SUNSET© expansions!

DX 11 is a printout of an article dated January 12, 2015 from the website of “The Packer,” entitled “Mastronardi opens U.S. pepper greenhouse”. The article reads:

Mastronardi Produce expects to begin harvesting peppers at a new U.S. greenhouse this spring.

Pepperco USA is a 41-acre facility in Coldwater, Mich., also the site of tomato greenhouse for Kingsville, Ontario-based Mastronardi, which markets under the Sunset brand, said Daniela Ferro, communications director.

The company's Coldwater facility, which opened in 2012, will have 100 acres with the addition of Pepperco USA, a facility owned and operated by Mastronardi, Ferro said.

Pepperco, which for now will focus on bell peppers only, is Mastronardi's first U.S. pepper operation, Ferro said.

"We've already established a strong demand for our Michigan-grown tomatoes from retailers, and we're overwhelmed with the response from consumers," Paul Mastronardi, chief executive officer, said in a news release. "We're anticipating even more enthusiasm for local Sunset peppers this spring."

DX 12 is a printout of an article dated January 13, 2015 from FreshFruitPortal.com, in substance similar to Exhibit 10.

DX 13 is a printout of an article dated January 14, 2015 from producenews.com, which is in substance similar to Exhibits 10 and 12.

DX 14 is a copy of the minutes of the Coldwater, Michigan city council meeting of March 14, 2011. The minutes show that Christopher Gill, Director of Greenhouse Operations for Mastronardi Produce,

...provided an overview of the corporation itself and of the proposed project slated for Coldwater. Mastronardi is a family owned company and has been in existence for 50 years. Collectively the company controls over fourteen hundred acres worth of greenhouse hydroponically grown produce – pesticide free. The greenhouses are fed through pressure irrigation that water is then recycled and fed through and back into the growing operation – 100% of all the water is recycled. There are two greenhouse facilities in the United States – one in Brush, Colorado and Maroa, Illinois, three in Canada; and also operate a distribution center in Livonia, Michigan. Mr. Gill addressed the concerns of the migrant worker program stating the other facilities have operated successfully within the program. This site plan has a bunk house to support a migrant worker program. In May or June, when one of the structures has been completed, Mastronardi will host an open house and job fair. Depending upon those results, the company may or may not have to utilize the migrant program. They will hire locally as many as possible and fill in with the migrant program. Mastronardi works very closely with State and Federal programs supplying the workers and they have to adhere to the same high standards as permanent employees of the company. The dormitories are not

co-habitational and families are not brought in along with the workers. The workers stay for a maximum of ten months – it is a definitive worker program, not segue for living in the U.S. Mastronardi is very proactive in the community: sponsoring sports teams, donating produce to the schools, involved in local charities, as well as working with the academic community.

Discussion followed regarding:

- Lighting.
- Local labor and base salary – crop maintenance.
- Dormitories.
- Investment of the company into the community, personal property tax, electric consumption, (PILOT payments to City).
- Other local opportunities – suppliers etc.
- Local contractors.

DX 15 consists of copies of several documents relating to the establishment of Pepperco in Coldwater. The first document is the agenda for a City of Coldwater Planning Commission meeting held on June 2, 2014. “New Business” included the following items:

RZN 14-01A request from PepperCo-USA to conduct a public hearing and consider a recommendation to rezone approximately 105 acres of property located on N. Fillmore and Stickney Roads from Coldwater Township zoning to the City of Coldwater D-2 Heavy Industrial zoning district classification.

SPR 14-03 A request from PepperCo-USA for site plan review of a 1,253,159 sq. ft. (28.8 acre) greenhouse and processing facility to be located on 105 acres of property located at 220 N. Fillmore Rd.

The second document in DX 15 is the Coldwater Planning Commission minutes for the meeting of May 5, 2014. “New Business” includes the following

RZN 14-01 A request from Maroa Farms (Mastronardi Produce-USA, Inc.) to schedule a public hearing for Monday June 2, 2014 at 5:30 pm in the Council Chambers of the Henry L. Brown Municipal Building, One Grand Street, Coldwater, MI to rezone approximately 105 acres of property located on N. Fillmore and Stickney Roads from township zoning to the City of Coldwater D-2 Heavy Industrial zoning district classification.

A motion to schedule the requested public hearing was made, seconded, and unanimously passed.

The third document is a rezoning application from PepperCo-USA, Inc. dated May 22, 2014, submitted to the City of Coldwater. In response to the question whether the proposed zoning was compatible and appropriate with the existing condition of surrounding properties, the

applicant stated “This project is to construct additional greenhouses that are compatible with those immediately to the north that are constructed or under construction for more efficient operation.” In response to the question whether the proposed zoning was compatible and appropriate with future land use of the surrounding properties, the applicant stated “Yes,” and explained “This will be compatible with the greenhouse operations on the land immediately to the north.” The reason for the zoning application was “To expand upon and continue the greenhouse operations on the property immediately to the north and to create a more viable and economically feasible business operation.” The applicant stated that the rezoning request should be granted because “The combination of the greenhouses to be constructed on this site will create a more efficient and economically feasible project with additional jobs being created.” The application was signed by Christopher Gill as the authorized representative of Pepperco.

The fourth document is a notice of the public hearing conducted on June 2, 2014, representing the purpose as considering the Zoning Amendment petition from “Maroa Farms (Mastronardi Produce-USA)” to rezone 105 acres of property on North Fillmore Road. Attached to the notice are two photographs; the first is dated May 28, 2014, taken from above, and is of the land to be rezoned if the application for rezoning was approved. The second attached photograph was similar, but zoomed out and including more property in its depiction.

The sixth document is a staff report dated May 29, 2014 to the Coldwater city planning commission, recommending approval of the rezoning request. The report characterizes the request as coming from PepperCo-USA, Inc.

The seventh document is a site plan review application submitted by Christopher J. Gill as representative of PepperCo-USA, Inc. The proposed development was described as “Continuation of construction of greenhouses built and under construction on the adjoining properties immediately north of this proposed site plan.” The applicant said the total area of the property was 105.22 acres, and that approximately 110 individuals would be employed and there would be 117 parking spaces. Attached to the application is a photograph dated April 28, 2014 depicting the area to be developed, entitled “Mastronardi Produce Phase 3.”

The eighth document is a staff report to the Coldwater planning commission regarding the site plan for Pepperco’s 40-acre greenhouse. The report described the project as follows:

PepperCo-USA, Inc., has a purchase agreement for approximately 105 acres of agricultural and wooded land at 220 North Fillmore Road. PepperCo-USA’s parent company owns approximately 90 acres which have been developed as a 60

acre greenhouse directly to the North at 270 North Fillmore Road. A one-story farmhouse with detached garage exists on the site and will be demolished and much of the woodland will be cleared. The northwest portion of the property contains protected wetlands which will be preserved. A 40 acre greenhouse will be constructed serviced by a 117 space parking lot. The development is projected to provide 110 permanent jobs....

The staff recommended approval of the proposed site plan, conditioned on the satisfaction of a number of contingencies that are not relevant to this matter.

The ninth document is a Violation Notice from the Michigan Department of Environmental Quality, citing Maroa Farms for two violations of air quality regulations. The Notice was addressed to Mr. Christopher Gill as Director of Greenhouse Operations for Maroa Farms at 270 North Fillmore Road in Coldwater.

DISCUSSION

Seasonal or Temporary Need

The H-2A regulations provide that “employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” 20 C.F.R. § 655.103(d). “It is 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). In order to determine if 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*, ALJ No. 2011-TLC-158, slip op. at 11 (Feb. 15, 2011).

The Need Is Not Seasonal

I find as an initial matter that the Employer has not met its burden to show that its need was “seasonal” as defined in the regulations. A growing season of 10 months does not qualify as a “short” growing season, and the need for workers for the entire 10-month period demonstrates that there is no “specific aspect of a longer cycle” at issue here. Additionally, if “season” refers

to calendar seasons (as suggested in some of the case law), the 10-month period requested covers part or all of all four seasons, and the need is not tied to any particular one of them.

The Need Is Not Temporary

In this case, the CO argues that Maroa Farms and Pepperco are in effect one entity with overlapping needs that overlap and combine to require workers for a period of more than one year, the need for farmworkers was therefore not temporary. Employer disagrees, arguing that Maroa Farms and Pepperco were separate in every respect, other than common ownership: they had separate facilities, separate payrolls, separate growing seasons, different work requirements for employees in Maroa Farms's tomato operations from workers in Pepperco's pepper operations. Thus, argues the Employer, it has established a need for workers for less than one year, and the need is therefore temporary.

The parties do not dispute that if Maroa Farms and Pepperco had separate owners, but operated in the same way that they do (or will, once Pepperco starts operating), they would have separate temporary needs. The parties do not dispute that Maroa Farms and Pepperco, having common ownership, would have separate temporary needs if they operated in different areas of intended employment. In this case, they operate in the same area of intended employment and share common ownership. The issue is whether their needs should be considered a single need for purpose of the H-2A program, in light of alleged common ownership and control.

Whether two companies' operations are so interconnected that they can be considered a single entity has been addressed in several recent cases. Upon review of the cases, it is clear that resolution of the issue requires an intensely fact-specific inquiry.

In *The Fingerling Company*, ALJ No. 2013-TLC-017 (Jan. 18, 2013), the employer requested temporary labor certification for workers to raise catfish fingerlings for sale, characterizing its need as "seasonal." The CO denied certification on the grounds that certification had recently been granted for another company to raise adult catfish from the fingerling stage, and the second company, although a legally distinct entity, shared a worksite address, phone number, email address, mailing address, and farm manager, and that the duties of the employees in the two operations were similar. Upon administrative review, the administrative law judge determined, based on the employer's payroll records, that the employer's actual need was for permanent full-time workers. The payroll records demonstrated 11 months of employment with no

change tied to a season. The ALJ did not reach the issue whether the two companies were interlocking.

In *Anthony Mock*, ALJ No. 2015-TLC-008 (Dec. 30, 2014), the employer requested temporary labor certification for workers to tend and care for cattle during the cold weather months. The CO denied certification because certification had been granted to an entity with a similar name, using the same worksite address, for workers in the same SOC code, performing similar job duties, for different periods of need. The CO determined that because of those similarities, the two employers were considered a single interlocking entity for purposes of the temporary labor certification program, and that the need of the single entity was for more than one year and therefore not temporary. On administrative review, the administrative law judge reversed the CO's determination. In doing so, the ALJ noted that

the CO's conclusion that the two operations were "interlocking" or "intertwined," cannot be sustained if those terms are to be given any real meaning. The evidence is uncontradicted that the two companies are separate legal entities. The Employer's assertion that the two companies keep separate payrolls, maintain separate FEIN numbers, receive separate farm subsidies, and do not share ownership, employees, or assets has not been seriously challenged. Absent 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.

...
[T]here is no evidence of shared ownership, shared employees, shared duties, or even a shared history. As noted, according to the Employer, the two operations came into existence in different decades. Clearly this is a case in which the scrutiny and request for additional information by the CO was warranted given the shared Mock name and work address. Beyond whatever suspicion these circumstances may have aroused, however, there is nothing in the record to demonstrate that the two farming operations are "interlocked" or "intertwined" in any business or legal sense. Indeed, everything in the record suggests otherwise. Unless mere suspicion aroused by a shared address is sufficient to treat two companies as the same for the purpose of labor certification, the undersigned cannot find that it was reasonable to deny certification upon the basis that the Employer and Mock Farms should be treated as one farming operation.

Id., slip op. at pp. 6-7.

In *JSF Enterprises*, ALJ No. 2015-TLC-009 (Jan. 22, 2015), the employer requested temporary labor certification for the position of Farmworker. The CO denied the application on the grounds that the employer was one of four entities in south Texas owned by members of the same family, and that the entities were interlocking so that they were a single entity for purposes of the H-2A program. After a de novo hearing, the administrative law judge affirmed the denial of certification for several reasons. First, the facts established that a single individual exercised a

substantial degree of control over all four entities, including the signing of legally binding documents with respect to all of them. Second, the ALJ found that the same individual made business decisions with respect to all the entities, in light of the familial relationships among them. Third, that individual admitted that the entities shared the workers for whom they obtained temporary labor certification when necessary, or when their temporary labor certification period ended. The ALJ found that “[The individual] 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” and that “JSF Enterprises cannot be readily discerned from the three other interconnected entities owned by [the individual] and his family.” The ALJ concluded that the four businesses operated as a single interconnected entity with a single, year-round need for farmworkers. The need was therefore neither seasonal nor temporary.

In *Larry Ulmer*, ALJ No. 2015-TLC-003 (Nov. 4, 2014), the employer requested temporary labor certification for two agricultural equipment operators. The CO denied the application on the basis that another employer sharing Larry Ulmer’s address had applied for temporary labor certification for agricultural equipment operators for two other periods of need, with the total exceeding one year. The CO found that the applications contained the same worksite location and experience requirements, listed similar job duties, and spanned a period of more than one year, and concluded that there was a full time need for agricultural equipment operators at the location listed on the Employer’s application. On administrative review, the administrative law judge affirmed the denial of certification, concluding that the two employers operated as a single entity, and that the

...consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the Employer’s need does not differ from its need for such labor during other times of the year; the need is year round.

In *Cressler Ranch Trucking, LLC*, ALJ No. 2013-TLC-007 (Nov. 26, 2012), the Employer requested temporary labor certification for one farm machine operator for the period of December 15, 2012 to June 1, 2013 with duties including the hauling of harvested crops. The CO denied the application because the applicant owned another entity in the same location that had applied for, and received, certification for two farm machine operators for the period June 1, 2012 to December 15, 2012 with duties of harvesting crops. The CO determined that because the statements of temporary need for each entity were identical, the applications described the same job opportunity – one which lasted for over a year and was therefore not temporary. On

administrative review, the administrative law judge affirmed the denial of certification, finding that the statements of temporary need were in fact identical and that:

the consecutive nature of the current and previous application periods taken with the Employer's statements of need demonstrates that the Employer's need does not differ from period to period in order to establish a temporary need. Employer's need is year-round.

In *Altendorf Transport, Inc.*, ALJ No. 2013-TLC-026 (Mar. 28, 2013), the Employer filed an application for temporary labor certification for 24 agricultural equipment operators for the period of March 11 through December 31, 2013. The CO denied certification because the Employer's need, when combined with the need of another employer (VDI) whose application, also for 24 agricultural equipment operators, had been certified, created a need for more than a year, and the need was not temporary. The CO determined that Altendorf and VDI were so interconnected and the respective agricultural jobs were so similar that Altendorf had failed to establish that its job opportunity was temporary, rather than permanent and full-time, in nature. On administrative review, the administrative law judge affirmed the denial of certification, finding that the two entities shared a common registered agent, a common telephone number, and a common location. Of further note, VDI was incorporated a mere two days after Altendorf had requested a de novo hearing on the denial of an earlier, similar application for temporary labor certification. The ALJ inferred, therefore, that the two entities were created and operated to circumvent the requirements of the H-2A program.

In *Katie Heger*, ALJ No. 2014-TLC-001 (Nov. 12, 2013), the Employer filed an application for temporary labor certification for two agricultural equipment operators for the period from December 1, 2013 through February 15, 2014. The CO denied certification because the Employer's need, when combined with the certified application from another employer who was the applicant's brother for two agricultural equipment operators for the period from February 15, 2013 through December 1, 2013, created a sequential need of more than a year, and was therefore not a temporary need. The CO determined that the two employers were interlocking and could not be considered as separate employers. On administrative review, the administrative law judge affirmed the denial of certification, finding that the evidence available to the CO supported his determination that the two employers were so interlocking that their combined need was not temporary. The factors entering into the determination that the employers were interlocking included: (1) the work for the two employers took place at the same

address; (2) the two businesses sought to certify the same number of workers for the same occupation; and (3) the H-2A applications required the same qualifications and very similar work duties, all of which support the conclusion that the labor need was at a single location for a period of need that was not temporary. Although the employers had separate FEINs, that was not sufficient to show that, as a factual matter, the two businesses functioned as the same farming operation.

If Pepperco's application could have been considered separately from Maroa Farms's application, there is little doubt that it would have been certified. The CO testified as much. It is clear, and the parties do not dispute, that the two businesses are legally separate entities, with separate FEINs, financing, accounting, banking, contracting and the like. They will, when Pepperco commences operating, have separate management teams, including separate general managers, human resources teams, head growers, and lead growers. They grow different crops, with different requirements necessitating different skills from the fully-trained workers. They operate separate greenhouses with separate utilities. Those who work at Maroa Farms cannot work at Pepperco, both because of the need to prevent the spread of plant disease/contamination and because it would be illegal to share employees under separate temporary labor certifications. These factors, however, are not sufficient to show that it has established a temporary need for workers in its pepper-growing hydroponic greenhouse.

Both Pepperco and Maroa Farms are wholly-owned subsidiaries of Mastronardi Produce-USA, Inc. Thus, they have common ownership.

All three entities have the same president, the same secretary/treasurer, the same chief operating officer, the same director of greenhouse operations, and the same registered agent. When Pepperco was created, it was publicized as part of the Mastronardi product group, which characterized its establishment as an expansion of the Mastronardi presence in Coldwater, Michigan. Mastronardi represents that each of its facilities is staffed with Mastronardi personnel. The SOC code selected for each application is the same, and the required qualifications (substituting the word "pepper" for "tomato") are the same. The legally binding documents in the applications, including a commitment to provide adequate housing and to comply with OSHA requirements, were signed by the same individual on behalf of both entities. When rezoning efforts were undertaken with the city of Coldwater, the documentation indicated that the

applications were made by Pepperco, Maroa Farms and/or Mastronardi, indicating a commonality among the businesses.

More important, control over both Pepperco and Maroa Farms is exercised by Mastronardi. The chief operating officer common to Mastronardi and to each subsidiary visits each subsidiary several times a year to check on performance. Significantly, the chief growing officer for Mastronardi visits each subsidiary at least twice a month to ensure that the crops are being properly tended. When asked what would happen if the head grower at a facility was not performing up to standard, Mr. Janssen testified that he would try to address the problem at the facility and, if that did not solve the problem, would elevate it to the corporate level. That the corporate level has a say in such personnel matters is indicative of its control over the operations of its subsidiaries. Equally important, that Mr. Janssen has not had to elevate such a personnel matter shows that his advice is followed at the facility level – i.e., that he, as a Mastronardi employee, has a degree of control over local operations at the facility level. Likewise, Mr. Janssen personally hires the head grower at each subsidiary, again indicating a substantial degree of control.

I note, further, that all company witnesses called by Pepperco in support of its application identified themselves as employees of Mastronardi, and not as employees of either Pepperco or Maroa Farms. Similarly, Pepperco's response to the Notice of Deficiency shows close familiarity with Maroa Farms's operations. This supports the conclusion that the combined needs of Pepperco and Maroa farms are in actuality a single need of Mastronardi.

It has been clearly established by the testimony and exhibits that Pepperco's need cannot be considered separately from that of Maroa Farms. The two facilities are not truly separate entities for purposes of the H-2A program. They are interlocked in terms of ownership, management, and control, and their needs combine to establish a need for farmworkers of more than a year. Pepperco's need therefore does not qualify as temporary. I find, therefore, that Pepperco has not met its burden to show that its need for farmworkers is temporary.

ORDER

The denial of Employer Pepperco-USA, Inc.'s application for temporary labor certification is AFFIRMED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ,JR/jcb
Newport News, VA