



Issue Date: 07 September 2017

BALCA CASE NO.: 2017-TLC-00027

ETA CASE NO.: H-300-17200-717055

In the Matter of:

KONA HAVEN USA CORP,
Employer.

**DECISION AND ORDER AFFIRMING DENIAL
OF EMPLOYER'S H-2A APPLICATION**

This matter arises under the labor certification process for temporary agricultural employment of non-immigrant workers in the U.S. under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B, (collectively the "H-2A program").

On August 24, 2017, Kona Haven USA Corp. ("Employer") filed a letter requesting administrative review pursuant to 20 C.F.R. § 655.171(a) challenging the Notice of Deficiency letter issued by the Employment and Training Office, Chicago National Processing Center ("NPC") on August 8, 2017. This Office received the Administrative File ("AF") on August 31, 2017. The U.S. Department of Labor, Office of the Solicitor, on behalf of the NPC Certifying Officer ("CO") filed a brief on September 6, 2017 ("CO's Brief"). Employer did not file a brief on appeal.

This Decision and Order is based on the written record, which consists of the Appeal File, the request for review, and the CO's Brief. 20 C.F.R. § 655.171(a). As explained below, this Decision and Order affirms the denial and denies Employer's request for relief.

Background

On August 1, 2017, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with the Chicago NPC for one temporary foreign worker as a "Coffee Farm Worker" for the period of October 2, 2017, to July 1, 2018. AF at 53-55. Under "Statement of Temporary Need," in the Form 9142A, Employer averred that seasonal agricultural work was dependent on weather and growing seasons, and that "[w]orkers are not required in months outside the requested dates of need as there is no seasonal agricultural work to be performed." AF at 53.

On August 8, 2017, the CO issued a Notice of Deficiency because Employer had not demonstrated how the job opportunity is temporary in nature.¹ AF at 42. The CO noted that Employer had previously had the same job certified for a period of May 8, 2017, through February 7, 2018 (ETA case number H-300-17059-080657). AF at 42, 192. The CO stated that in the current Form 9142A (ETA case number H-300-17200-717055), Employer “requested workers for the same worksite(s), similar job, and requirements.”² AF at 42. The prior application also stated that “Workers are not required in months outside the requested dates of need as there is no seasonal agricultural work to be performed.” AF at 187. The CO therefore found that the current job opportunity, coupled with Employer’s recent filing history, indicated that Employer’s dates of need were from May 8, 2017, through July 1, 2018, a period of over 1 year. AF at 42. The CO then cited *Lancaster Truck Line*, 2014-TLC-00004 (2013), where the judge dismissed changes in seasonal duties as demonstrative of a temporary need, stating that “[t]he distinction between the seasonal duties, however, does not make Employer’s need seasonal. The record demonstrates that Employer has consistent need for workers whose job duties change according to the farming requirements of the season, but whose work is required year-round.” AF at 42-43 (quoting *Lancaster Truck Line*, slip op. at 5). The CO then directed Employer to explain why its job opportunity is seasonal or temporary. AF at 43.

On August 10, 2017, Employer responded to the Notice of Deficiency, stating that the worker it had hired related to case number: H-300-17059-080657 was not admitted because the U.S. embassy in South Korea denied his visa. AF at 13. Employer also described the harvest season as “late August through April,” which is also “the busiest season for a coffee farm.” AF at 12. Employer stated that April through August is the “prep season,” during which workers “cultivate the coffee cherries” as well as work on “other prepping duties.” *Id.* Employer stated that it “needs an average of 2-3 employees and needs more employees during the harvest season.” *Id.* Employer explained that after it was unable to hire the foreign worker due to the U.S. embassy’s visa denial, it filed a new application for temporary employment. AF at 13. Employer explained:

The employer is in immediate need for one more employee because the coffee harvest season has already started; this season will last till late April next year. Employer added two more months (May and June) of employment outside of the harvest season, as the first two months of the prep season also require high level of labor from various prepping works.

Id.

On August 16, 2017, the CO issued a Notice of Denial (“Denial”) on the grounds that Employer had not established how the job opportunity was temporary or seasonal in nature as required by 20 C.F.R. § 655.103(d). AF at 4-9.

In its letter requesting an expedited administrative review, Employer argued that the employment need is not year-round but temporary in nature. AF at 1. Employer stated that the instant case number H-300-17200-717055 is to replace the previous case number H-300-17059-

¹ The CO also cited three other areas of deficiencies, AF at 43-44, which are not at issue on appeal as the denial was based only on Employer’s failure to establish a temporary need, AF at 6.

² In fact, the job description, requirements, and worksite are identical. *Compare* AF at 55-56, 62 to AF at 189-190, 207.

080657, and that it requested dates of October 2, 2017, to July 1, 2018, “to cover the previous requested employment period.” *Id.* Employer contended that the requested period is not a year round need but “covers the actual coffee harvest season.” *Id.*

In its brief on appeal, the CO argues that Employer’s explanation of its seasonal temporary need “rests on a clearly false statement that there is no seasonal agricultural work outside of the requested dates of need.” CO’s Brief at 3. This is because the statement that “[w]orkers are not required in months outside the requested dates of need [October 2 to July 1] as there is no seasonal agricultural work to be performed,” indicates that “there is no seasonal agricultural work to be performed in July, August, or September.” *Id.* The CO asserts that Employer’s previous applications and its response to the Notice of Deficiency that agricultural work continues in July and August, and that September is part of its busiest season, *see* AF at 12, shows that it has a need for agricultural work all year. *Id.* at 3-4.

The CO also argued that even if Employer had not made this “false statement,” it has not demonstrated that its need “is tied to a certain time of year by an event or pattern.” *Id.* at 4, citing *Farm-Op Inc.*, 2017-TLC-00021 (July 7, 2017). The CO provided the following table to show that Employer has shifted the timing of its averred seasonal need:

Months of Averred Need, 2017-2018

	3	4	5	6	7	8	9	10	11	12	1	2	3	4	5	6
Coffee Season ³																
Application 1 (Withdrawn) ⁴																
Application 2 (Withdrawn) ⁵																
Application 3 (Certified) ⁶																
Application 4 (Current)																

CO’s Brief at 4.

Finally, the CO argued that Employer also has not demonstrated that it “requires labor levels far above those necessary for ongoing operations” during the requested period of need. CO’s Brief at 5, citing 20 C.F.R. § 655.103(d). Employer stated in its response to the Notice of Deficiency that it “needs an average of 2-3 employees and needs more employees during the harvest season,” AF at 12, but the CO noted that Employer stated the harvest season ends in April, while the requested

³ “Starting late August through April, which is the busiest season for a coffee farm, farm workers pick ripe cherries From April through August is the prep season. To manage above mentioned job duties, the employer needs an average of 2-3 employees and needs more during the harvest season.” AF at 12.

⁴ H-300-16321-992403, Dates of Need 03/10/2017-03/09/2018, Withdrawn. Referenced in Denial, AF at 8.

⁵ H-300-17006-300977, Dates of Need 03/10/2017-12/09/2017, Withdrawn. Referenced in Denial, AF at 8.

⁶ H-300-17059-080657, Dates of Need 05/08/2017-02/07/2018, Certified. AF at 111-250.

dates extend to July. *Id.* The CO therefore contends that Employer did not establish that it has a particular season in which it needs additional workers, and it submitted “absolutely no evidence that its need for workers actually does increase during the harvest season.” *Id.*

Discussion

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge (“ALJ”) under § 655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.*

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). The CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

To qualify for the H-2A program, an employer must establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015). According to the regulations:

[E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. 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).

To determine whether an employer’s need 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.” *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). The ALJ must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal. *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015). “Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year.” *Farm-Op Inc.*, slip op. at 7 (citing *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011)). Similarly, “[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Id.* If “[t]he consecutive nature of...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.” *Lodoen Cattle Co.*, slip op. at 4.

An employer is required to justify a change in its dates of need in order to ensure it is not manipulating its “season” when it really has a year-round need for labor. *Pleasantville Farms, LLC*, slip op. at 3. An employer may also not continually shift its periods of need in order to utilize the H-2A program. *Farm-Op Inc.*, slip op. at 10. In *Farm-Op Inc.*, the ALJ noted that:

Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected. *See, e.g., Salt Wells Cattle Co., LLC*, 2010-TLC-00134 (Sept. 29, 2010). In other words: “An employer’s ability to manipulate its ‘season’ in order to fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).” *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011).

Farm-Op Inc., slip op. at 7-8.

Here, Employer has not established that its employment need is seasonal or temporary. First, Employer’s statements in its response to the Notice of Deficiency and on the two application forms are contradictory. As noted by the CO, Employer averred on the current Form 9142A that “[w]orkers are not required in months outside the requested dates of need as there is no seasonal agricultural work to be performed,” with the requested dates of need being October 2, 2017, to July 1, 2018. AF at 53. However, Employer’s previously certified application contained this same phrase, but stated that the requested dates of need were May 8, 2017, to February 7, 2018. AF at 192. Employer has not sufficiently explained these discrepancies. In response to the notice of Deficiency, Employer stated that the coffee harvest season lasts from late August through April, and that it requested the two extra months in the most recent application “outside of the harvest season” because “the first two months of the prep season also require high level of labor from various prepping works.” AF at 12-13.

While the nature of the need must be seasonal, not the nature of the particular job, the record shows that Employer’s need goes beyond its harvest season of late August to April. Therefore, Employer has not tied the alleged employment need to a certain time of year as required by 20 C.F.R. § 655.103(d) (“employment is of a seasonal nature where it is tied to a certain time of year...”), and the CO’s determination that the employment need was not seasonal in nature was in accordance with the law. A change in the dates for a seasonal need must be “supportable or warranted.” *Pleasantville Farms, LLC*, slip op. at 3 (citing *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010)). Employer has not supplied sufficient justification for the change in dates, and its assertion in its request for administrative appeal that the dates of October 2, 2017, to July 1, 2018 cover the “actual coffee harvest season” is insufficient.⁷

Further, although Employer asserted that the harvest season is “the busiest season for a coffee farm,” and it “needs more employees during the harvest season,” it did not submit any

⁷ Employer’s assertion that the instant application H-300-17200-717055 is to replace the previous application H-300-17059-080657 is also unavailing as it does not address the change in purported seasonal need.

evidence that it “requires labor levels far above those necessary for ongoing operations.” 20 C.F.R. § 655.103(d). Therefore the Employer did not meet its burden to show that it needs more workers in certain months than in other months of the year. *Farm-Op Inc.*, slip op. at 7; *Lodoen Cattle Co.*, slip op. at 5.

In addition, the CO may properly consider Employer’s previously certified dates of need when determining whether a need is temporary. *Farm-Op Inc.*, slip op. at 10. The previous certification (ETA case number H-300-17059-080657) shows that Employer’s averred dates of need were for May 8, 2017, to February 7, 2018. AF at 192. The job description, title, requirements, and work location listed on the two applications are identical. Therefore, the CO’s determination that the employment need spanned from May 8, 2017, to July 1, 2018, was not arbitrary or capricious. See *Lodoen Cattle Co.*, slip op. at 4. As this time period is greater than 1 year and there are no alleged “extraordinary circumstances,” Employer has not shown that the employment need is temporary in nature according to the regulations. 20 C.F.R. § 655.103(d).

Finally, the facts in this case suggest that Employer shifted its purported period of need in an attempt to utilize the H-2A system to fulfill a permanent need. In *Salt Wells Cattle Co., LLC*, 2011-TLC-00185, slip op. at 4, the ALJ found that although the employer argued that its need for workers was “tied to a particular time of the year,” its filing history proved otherwise. Here, likewise, Employer’s filing history evidences a year-round need for workers. Employer argued that its need is not year-round and that it requested the dates of October 2, 2017, to July 1, 2018 “to cover the previous requested period.” AF at 1. However, this explanation does not address the contradictions in its previous statements, nor its filing history. Considering the entirety of the evidence, Employer has not shown that its need is temporary or seasonal, and the evidence suggests its need is actually permanent.

Accordingly, I find that the CO’s denial of certification based on Employer failure to show that the employment need was seasonal or temporary was reasonable, and not arbitrary, capricious, or not in accordance with law.

ORDER

Based on the forgoing, it is hereby ORDERED that the Certifying Officer’s denial decision is AFFIRMED.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge