

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 21 March 2017

BALCA Case No.: 2017-TLC-00013

ETA Case No.: H-300-17030-827776

In the Matter of:

RAINBROOK FARMS, LLC
Employer

Certifying Officer: Lynette Wills
Chicago National Processing Center

Appearances: Stephanie M. Rosin, Esq.
Signature Staffing, Inc.
For the Employer

Leticia Sierra, Esq.
Office of the Solicitor
Washington, D.C.

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

**DECISION AND ORDER REVERSING THE DENIAL OF
CERTIFICATION**

This matter arises out of a request for administrative review of the Certifying Officer's denial of an H-2A temporary labor certification application filed by Rainbrook Farms, LLC (Employer). The current request is Employer's eighth request since early 2015 and the statuses those requests are displayed below:

HISTORY OF H-2A REQUESTS BY EMPLOYER

Case Number	Employer Name	# of Workers/ SOC	Status	Beginning Date of Need	End Date of Need
H-300-15030-331689 ¹	Rainbrook Farms, LLC	99 45-2092	Certified	3/20/2015	12/31/2015
H-300-15069-550961 ²	Rainbrook Farms, LLC	99 45-2092	Certified	4/25/2015	7/01/2015
H-300-15218-668862 ³	Rainbrook Farms, LLC	99 45-2092	Certified	10/01/2015	6/30/2016
H-300-16036-906459 ⁴	Rainbrook Farms, LLC	99 45-2092	Withdrawn	4/10/2016	12/31/2016
H-300-16053-907203 ⁵	Rainbrook Farms, LLC	99 45-2092	Certified	4/10/2016	12/31/2016
H-300-16208-160780 ⁶	Rainbrook Farms, LLC	99 45-2092	Denied	10/01/2016	6/30/2017
H-300-16229-696370 ⁷	Rainbrook Farms, LLC	99 45-2092	Denied	10/11/2016	3/15/2017
H-300-17030-827776 ⁸	Rainbrook Farms, LLC	99 45-2092	In-process	4/01/2017	7/01/2017

STATEMENT OF THE CASE

On 30 Jan 17, the Certifying Officer (CO) received the Employer's Form ETA 9142 Application for Temporary Employment Certification for 99 farmworkers and laborers for Employer's farm in South Florida. On 6 Feb 17, the CO rejected the

¹ AF 1952-2043

² AF 1865-1951

³ AF 1784-1864

⁴ AF 1691-1783

⁵ AF 1584-1690

⁶ AF 1120-1583

⁷ AF 566-1119

⁸ AF 1-565

application and issued a Notice of Deficiency (NOD) to inform the Employer that its application failed to meet the criteria for acceptance. The NOD noted seven deficiencies and identified the modifications required for acceptance. Most relevant to this appeal, the CO identified a failure to establish the Employer’s temporary need for workers and requested further information and documentation to demonstrate Employer’s temporary need.⁹

On 8 Feb 17, the Employer emailed the Chicago TLC office providing clarification as to why these workers should be considered seasonal and temporary, describing the laborers needed: “The requested workers will begin working on April 1st for the pickling cucumber harvest in early spring, and sometime late spring they will be needed for peppers. They will work the summer doing field maintenance in preparation for the fall harvest, and will also help with peppers when needed.” Employer included the monthly payroll records maintained by Employer for Jan 2015 through Feb 2017.

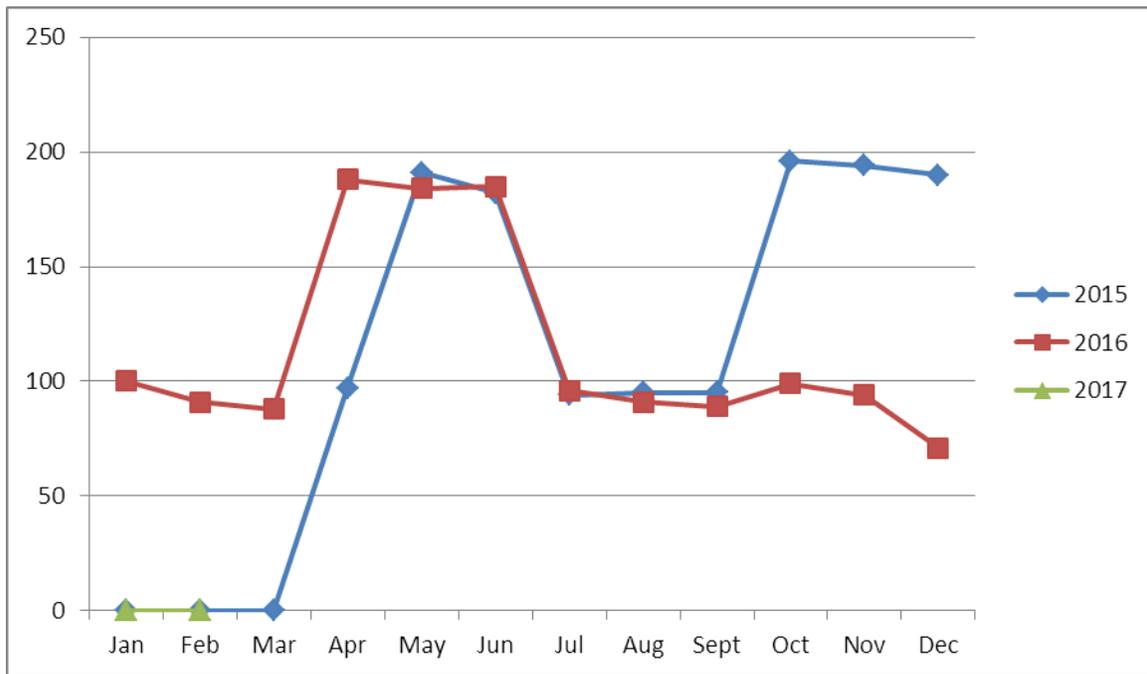


Figure 1: Number of Temporary Employees by Month, Jan 2015 – Feb 2017 According to Employer’s Payroll Records¹⁰

On 9 Feb 17, Employer emailed the Chicago TLC office giving written permission to cure deficiencies by amending five items, not at issue here, in the ETA Form 9142.

On 15 Feb 17, the CO again rejected Employer’s application and denied Employer’s request on the basis that Employer had not established how this job

⁹ AF 471-72

¹⁰ AF 20

opportunity is temporary, rather than permanent and full-time, in nature. The CO then provided the history of Employer's eight requests, the dates covered by each request spanning from 20 Mar 15 through present, and the status of the request.¹¹ The CO concluded that Employer did not establish a temporary need as required by 20 CFR 655.103(d), and denied the application.

Employer then requested administrative review of the CO's denial on 15 Feb 17. Employer argued that this second denial for lack of evidence proving a seasonal and temporary need was administratively blocking them from using the H-2A program, when Employer has not been debarred from the program. Employer contested the finding of a lack of evidence proving a seasonal and temporary need and Employer argued that "the need this year is fundamentally different than the need workers last year, since there was a huge lack in the product produced for the Spring/Summer harvest". Employer additionally argues that "the crop production and harvesting for the distinct crop types and activities are *recurrent on an annual basis*" [emphasis in original]. Employer provided clarification that the requested workers would begin on 1 Apr 17 for the pickling cucumber harvest in early spring, sometime in late spring would be needed for peppers, and then would work the summer doing field maintenance in preparation for the fall harvest and would also help with peppers when needed. Employer emphasized that "the period of need being requested in the present application is **ONLY three (3) months**" [emphasis in original] and that Employer's need has been drastically affected by the lack of workers.

On 2 Mar 17, the Office of Administrative Law Judges (OALJ) received the Administrative File (AF) from the CO. The parties were afforded three business days after receipt of the AF in which to submit briefs. The CO filed its brief on 24 Feb 17. The Employer filed its brief on 3 Mar 17.

In its brief, Employer reiterated the arguments presented in its request for administrative review and further stated that a review of the historical record shows that Employer's need consistently increases at certain times of the year.¹² Employer noted that it has employed approximately 90 additional employees during the months of April, May, and June.¹³ Additionally, Employer emphasizes that the nature of its temporary need is "seasonal" and Employer has shown that the increase in need "is tied to a certain time of year by an event or pattern", specifically, harvesting crops in April, May, and June. In his brief, the CO argued that Employer's period of need and filing history combine to suggest it has a permanent, year-round need for the services or labor, rather than a temporary need as required by 20 CFR 655.103(d).

¹¹ AF 11-12

¹² AF 20

¹³ *Id.*

ALJ'S PREVIOUS DECISION¹⁴

Employer requested administrative review of the prior certification request that was denied by the CO.¹⁵ While that issue with Employer was decided before the ALJ in September 2016, where the CO's denial was affirmed, the request in that case differs in both nature and duration.

The two-fold nature of the previous request related to the seasonal nature of the planting and cultivating jobs which Employer was requesting to fill and the intermittent weather phenomenon, El Niño, which recurs once every 2-7 years.¹⁶

Employer previously argued that its need was distinguishable from the prior applications and was a seasonal need, because its [then] current need for foreign labor was related to the cultivation and planting season versus the harvesting season. The ALJ did not agree because internal inconsistencies within the application itself weighed against Employer's argument.

The second part of Employer's position in the previous case was that "the extreme weather conditions caused by El Niño... created extraordinary circumstances leading to an extended season for 2015-2016."¹⁷ Employer argued that it needed additional labor resulting from the El Niño phenomenon, but the ALJ did not agree:

*[W]hile El Nino may have constituted an extraordinary weather occurrence that altered the ordinary vegetable farming season in 2016, I do not find that this factor alone establishes that Employer's need is temporary or seasonal. Employer's application estimates that, without the impacts of El Nino, its need for labor would have been abbreviated by one month. A one-month pause in Employer's operations does not cure the deficiencies. . . . [I]t is the Employer's burden to establish eligibility for the H-2A program, and the Employer failed to do so. . . .*¹⁸

The ALJ concluded that El Niño and the resulting change in labor needs were not unforeseen, determined that the duration of the request was not temporary or seasonal and, accordingly affirmed the CO's denial of the request.¹⁹ The nature of the instant request is the regular annual harvest season.

¹⁴ *Rainbrook Farms, LLC*, 2016-TLC-00076.

¹⁵ AF 566-1119

¹⁶ AF 588

¹⁷ AF 566

¹⁸ *Rainbrook Farms, LLC*, 2016-TLC-00076, at 7.

¹⁹ *Id.*

The duration of the previous request by Employer from 11 Oct 16 to 31 Mar 17 was about 6 months, three of which are historically periods of greater labor need for Employer – October, November, and December – and three of which are not – January, February, and March. Here, however, the three-month duration of the request – April, May, and June – are months that Employer historically has had greater labor needs due to annually harvesting crops.

While the history of overlapping certifications is being used to show Employer’s established timing of greater labor needs, the fact that the current certification will NOT overlap with an existing certification is the critical factor in approving Employer’s instant application. Had either of the two previous requests (October 2016 through March 2017 and October 2016 through June 2017) for 99 workers been approved, the analysis in the instant case would be much different, and I would likely reach a different outcome entirely. In that sense, it is the denial of Employer’s earlier application that weighs in Employer’s favor in this case.

THE CO’S DENIAL IN THE INSTANT CASE

To determine a petitioner’s need, the fact finder must look at the situation as a whole and not narrowly focus on the employer’s instant position.²⁰ Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than other months of the year.²¹ However, where an employer had put forth evidence that it needed more workers in certain months than other months of the year, and the CO did not even acknowledge the employer’s detailed explanation of its temporary need, the CO’s denial was arbitrary and capricious.²²

Here, the specific nature and duration of the instant request, along with the ALJ’s denial of the previous request, warrant more than just a rubber-stamped denial based solely on observing the start and end dates and SOC occupation code of all of Employer’s aggregated requests.²³ Employer’s situation as a whole includes more than a start and end date – it also includes the historical fluctuations in Employer’s payroll employees from month to month, and a recognition of cyclical patterns within that timeframe.

The CO has presented a list of all Employer’s requests, and notes that the same number of laborers requested in the instant case have been previously requested on

²⁰ See *Haag Farms, Inc.*, 2000-TLC-15 (Oct. 12, 2000); *Bracy’s Nursery*, 2000-TLC-11 (April 14, 2000) (proper to look at all H-2A applications to determine the true nature of employer’s “seasonal” business).

²¹ *Lodoen Cattle Company*, 2011-TLC-109 (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof).

²² See *Cowboy Chemical, Inc.*, 2011-TLC-211 (Feb. 10, 2011) (citing *Blondin Enterprises, Inc.*, 2009-TLC-56, slip op. at 3-4 (July 31, 2009); *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (May 16, 2008)).

²³ AF 5-6

numerous occasions, leading to a year-round constant need of the same 99 laborers.²⁴ While the CO's skepticism is not unwarranted, the CO does not mention the cyclical ebb and flow of Employer's workers, the possibility that Employer does have an annual period of increased labor needs, or the multiple time frames where these 99 requested laborers have overlapped, specifically, in April, May, and June of 2015; October, November, and December of 2015; and April, May, and June of 2016; when Employer was approved to have 198 H-2A workers.

Accordingly, I will examine Employer's instant request, in light of Employer's whole situation, to determine whether the CO's denial was proper.

DISCUSSION

Due to the prior denial, Employer has had zero H-2A workers since January 2017. Though this lack of workers was only due to the denial of a previous request, it did break the chain of Employer's continuously certified H-2A workers that started in March 2015. Employer's payroll records and history of certification requests will still be used in determining whether the instant request qualifies as temporary or seasonal.

Temporary Need

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."²⁵ The only issue before me is whether Employer has established a temporary or seasonal need for the positions requested in its application. The Department's H-2A regulations provide:

Definition of a temporary or seasonal nature. For purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.²⁶

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.²⁷ To that end, I must consider whether Employer's need for labor or services during April, May, and June (the

²⁴ AF 5-6

²⁵ 20 C.F.R. § 655.161(a).

²⁶ 20 C.F.R. § 655.103(d).

timeframe in the current issue) differs from its need for such labor or services during other times of the year.

Employer had 99 temporary workers approved and continuously employed at least 71, from March 2015 thru December 2016²⁸. During eight of those 21 months, through overlapping approved certifications, Employer had an additional 99 temporary workers approved, and employed up to a total of 196 of the approved 198.²⁹ Employer's farm is located in South Florida and is demonstrably a year-round operation.³⁰ The CO's skepticism about the nature of Employer's "temporary" need is not irrational and was shared by the previous ALJ. That being said, Rainbrook's last two applications were denied and no temporary workers have been on site since 31 Dec 16.

Employer's current application discusses its seasonal need, noting that "[t]he crops being harvested mature at certain times of the year, and additional labor is needed in order to harvest those crops when they are ready to be harvested.³¹ Additional labor is not necessary at times during the year which are not harvesting periods.³² Generally, the crops mature at approximately the same time every year.³³ The requested workers would begin on 1 Apr 17 for the pickling cucumber harvest in early spring, and sometime late spring they will be needed for peppers, then they would work the summer doing field maintenance in preparation for the fall harvest and would also help with peppers when needed.³⁴

²⁷ *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011).

²⁸ These continuous workers will be referred to as the "baseline" workers. If it is determined that this "baseline" was an improper use of the H-2A system, there are methods in place to bar this Employer from the H-2A program. This employer has not, as of yet, been barred.

²⁹ In the past, the additional 99 workers that were approved 8 out of 21 months likely should have been addressed on a "peakload" need theory, and denied because Employer would not be able to satisfy the permanent worker requirement. Because the previous ALJ denied the prior request, however, this case is correctly addressed using the seasonal approach.

³⁰ Employer's year-round operation may very well require up to 99 workers January through March and July through September, and up to 198 workers April through June and October through December. If that is the case, however, the H-2A program is not the correct program through which to fill the continuous "baseline" 99 workers. Should Employer find permanent workers to fill the continuous need, and assuming all other requirements are met, the H-2A program may be able to provide the additional 99 workers needed during Employer's "peakload need". Although the H-2A regulations are silent as to whether an employer can establish a temporary need under a theory of "peakload need," the regulatory history indicates that the meaning of "temporary" was intended to be the same under the H-2A and H-2B program. *Altendorf Transport*, 2011-TLC-158, slip op. at 13-14, n.4 (Feb. 15, 2011). Therefore, the H-2B definition of "peakload need," is properly applied to the H-2A program. *Altendorf*, at 14.

³¹ AF 488

³² *Id.*

³³ *Id.*

³⁴ AF 1

Upon review of the record, I find that Employer established a seasonal need for agricultural services or labor during the months of April, May, and June. While the “baseline” 99 laborers should only have been approved on a distinct and definite temporary basis, if at all, the 99 truly seasonal laborers from 1 April 17 through 1 July 17 should be approved.

Employer’s Future Requests

Employer has requested these workers for its seasonal harvest, and has represented that “[a]dditional labor is not necessary at times during the year [that] are not harvesting periods”.³⁵ In the future, should Employer continue to attempt to use the H-2A program to fill its labor needs, it should bear in mind that an employer cannot continually shift its period of need in order to utilize the H-2A program to fill a permanent need.³⁶ A seasonal need is tied to the weather or a certain event, and a change in the dates for a seasonal need must be justified in order to ensure that the employer is not manipulating its “season” when it really has a year-round need for labor.³⁷ Employer should expect any further H-2A requests will be thoroughly scrutinized for compliance with the regulations.

Rainbrook requested workers that are temporary and seasonal. I find that the requested workers are seasonal.

³⁵ AF 488

³⁶ *Salt Wells Cattle Co.*, 2010-TLC-134 (Sept. 29, 2010). 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 Company, LLC*, 2011-TLC-185 (Feb. 8, 2011).

³⁷ *Southside Nursery*, 2010-TLC-157, slip op. at 4 (Oct. 15, 2010); *Thorn Custom Harvesting*, 2011-TLC-196, slip op. at 3 (Feb. 8, 2011)

ORDER

In light of the foregoing, I find that Employer's request is for seasonal workers, and the Certifying Officer's decision is **REVERSED**.

ORDERED this 21st day of March, 2017, at Covington, Louisiana.

For the Board:

PATRICK M. ROSENOW
Administrative Law Judge