



Issue Date: 07 July 2017

BALCA Case No.: 2017-TLC-00021

ETA Case No.: H-300-17130-148334

In the Matter of:

FARM-OP, INC.,
Employer.

Certifying Officer: Ishel Quintana
Chicago National Processing Center

Appearances: David J. Stephany, Esq.
Tampa, Florida
For the Employer

Micole Allekotte, Esq.
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

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

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

This matter arises under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (collectively, H-2A program). It is before the undersigned on Farm-Op, Incorporated's ("Employer") request for an expedited administrative review pursuant to 20 C.F.R. § 655.171. For reasons stated below, the undersigned **AFFIRMS** the determination of the Certifying Officer ("CO") to deny the application for temporary labor certification.

STATEMENT OF THE CASE

On May 10, 2017, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with ETA's Chicago National Processing Center ("CNPC") for "30 Farmworkers and

Laborers, Crop, Nursery, and Greenhouse job opportunities.” The period of intended employment was to begin July 1, 2017 and continue through March 15, 2018.¹ (AF 285-300, 359-361)

The CO issued a Notice of Deficiency on May 17, 2017, which informed Employer that, in accordance with Departmental regulations at 20 C.F.R. § 655.103(d), the job opportunity was not on a seasonal or other temporary basis. (AF 269-272). Seasonal or temporary is defined as:

Employment [that] is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, **last no longer than 1 year**.

20 C.F.R. § 656.103(d) (emphasis added).

On this basis, the CO noted that a 10 month period has been determined to be a permissible threshold at which to question the temporary nature of a stated period of need. See In the Matter of Grandview Dairy, 2009-TLC-00002 (Nov. 3, 2008). The CO concluded that the job opportunity described on Employer’s ETA Form 9142, Section B Items 5 and 6 and ETA Form 790 Item 6, coupled with Employer’s recent filing history, indicates the Employer’s dates of need are from March 3, 2017 through March 15, 2018, a one year and 13 day period of need, including the end date. The CO noted Employer’s previous certified application for temporary labor (H-300-17011-208551) with the dates of need listed as March 3, 2017 through July 6, 2017, while the pending application (H-300-17130-148334) lists the dates of need as July 1, 2017 through March 15, 2018. Furthermore, both aforementioned applications included similar work sites designated as 1068 Nine Mile Road, LaBelle, Florida 33935 in Glades County (herein Farm #1); 15000 CR 858E, Immokalee, Florida 34142 in Collier County (herein Farm #8); and 18229 70th Road North, Loxahatchee, Florida 33470 in Palm Beach County (herein Farm #9). In addition, the previously certified application and the pending application contain the same job duties which include “employee badge, staking, pruning, tying, pick up plastic, stake puller, harvest dumper, pull plastic, [and] harvesting tomatoes (Round, Roma, Cherry & Grape). Finally, the CO noted the aforementioned applications identify the same crop, that being, tomatoes. (AF 269-272).

On May 22, 2017, Employer responded to the Notice of Deficiency. (AF 259). The Employer confirmed that on its prior certified application (H-300-17011-208551) (“Initial Certification”) the designated period of need was March 3, 2017 through July 6, 2017, and the pending certification application (H-300-17130-148334) (“Second Certification”) lists the period of need as being from July 1, 2017 through March 15, 2018. The Employer averred that the need to employ new H-2A workers for the Second Certification application is indeed a temporary or seasonal employment need, per 20 C.F.R. Section 655.103(d), as the work outlined is to be performed on Farm-Op Farms #1, 8 and 9 and involve cultural activities for new tomato crops that have yet to be planted on those farm properties. The Employer explained that the ninety (90) H-2A workers employed by Farm-Op for its Initial Certification have completed all described work activities on Farms #1, 8 and 9 as of May 17, 2017, as final activities on these properties have been the clean-up of the crops which were planted and cultivated last year, and harvested earlier this year. Consequently, since May 17, 2017, the H-2A workers employed under

¹ In this decision, citations to the Appeal File will appear as follows: Appeal File: (AF ____).

Farm-Op's Initial Certification have been exclusively working on clean-up activities at 21000 Six L's Farm Road, Estero, Florida 33928 in Lee County (herein Farm #2); 11900 Six L's Farm Road, Naples, Florida 34114 in Collier County (herein Farm #7); and 12955 County Road 39, Duette Florida 33834 in Manatee County (herein Farm #15). However, Employer explained that due to crop and weather conditions, such activities on Farms #2, 7, and 15 are now projected to be completed by June 24, 2017, rather than July 6, 2017, as originally estimated when the certification application was submitted back in January. (AF 258-59).

Thus, Employer asserted there will be no work activities conducted by H-2A workers employed under its Initial Certification for Farms #1, 8 and 9, from the period of **May 17, 2017** through the projected ending date of July 6, 2017, or a period of eight (8) weeks. Moreover, there will not be any work performed by H-2A workers employed under the Initial Certification at Employer's Farms #2, 7 and 15, **after June 24, 2017**, or a period of twelve (12) days. Employer also averred that none of the H-2A workers employed under the Initial Certification will be employed by Employer under the Second Certification, should it be approved. (AF 259).

Given the foregoing, Employer asserted the Initial and Second Certification applications involve separate and distinct seasonal opportunities for employment, rather than a continual need for fulltime, permanent employment. Pursuant to 20 C.F.R. Section 655.143(a), Employer also requested its Second (pending) Certification be amended to show a starting date of July 14, 2017, rather than July 1, 2017. (AF 260).

On June 16, 2017, the CO denied Employer's Application For Temporary Alien Labor Certification in a Notice of Denial. In the denial, the CO reiterated much of the same reasons for denial as was stated in the May 17, 2017 Notice of Deficiency. The CO did note, however, that in Employer's response to the Notice of Deficiency letter, it explained that the workers for the Initial Certification (H-300-17011-208551) were expected to complete their job duties early on May 17, 2017, as opposed to July 6, 2017, due to crop and weather conditions. Nevertheless, the CO stated the expected end date of the Initial Certification application has no effect on the start date of the pending Second Certification application (H-300-17130-148334) because the Employer requested, and was certified, for the previously-established dates of need, that being, March 3, 2017 through July 6, 2017. Additionally, the CO noted that the Chicago NPC did not receive "a request to grant contract impossibility due to adverse weather" for the Initial Certification, nor did the Chicago NPC receive worker "abandonment/termination notifications" that reflect no work was being performed as of May 17, 2017, on Farms #1, 8, and 9, as indicated by the Employer's statements in response to the Notice of Deficiency. (AF 246-47).

Furthermore, the CO disagreed with Employer that the Initial Certification application and Second Certification application involve **separate and distinct seasonal job opportunities**, noting that Section F(a) Item 5 of ETA Form 9142 of the Initial Certification application (H-300-17011-208551), as well as the Second Certification (H-300-17130-148334) provides the following identical job duties:

Using both hands gathering bundles of stakes from bed of field truck and carrying to place a tomato stake between each tomato plant. Each stake must remain upright. Repeat process through entire rows and field. Once first procedure is performed by an air hammer system being pulled by a tractor the worker places an air hammer over the stake

to drive in the stake 12" to 14" into ground. If using manual hammers must place opening over stake and pound stake into the ground also 12" to 14".

(AF 247, 291, 439, 443).

Consequently, the CO determined the Initial Certification and the Second Certification applications contain identical job duties and are performed at the same worksites (i.e. Farms #1, 8, and 9), along with "offering piece rates for the same crop activities." (AF 247).

Lastly, the CO determined the Employer had not differentiated the "seasonal" position in terms of its Standard Occupational Classification (herein SOC), which is identical in both the Initial and Second Certification applications (SOC code 45-2092, "Farmworkers and Laborers, Crop, Nursery, and Greenhouse"). (AF 285, 437). The CO stated that for purposes of the H-2A program, jobs falling within the same SOC code represent the same job opportunity. Moreover, the CO noted the production of crops, from beginning to end, is encompassed within SOC code 45-2092, which the Employer included in the Initial and Second Certification applications. Taking into account the certified and requested dates of need for both applications, Section F(a) Item 5 of ETA Form 9142 listing the same job duties on both applications, along with the same SOC code being utilized on the Initial and Second Certification applications, the CO concluded the "**Employer has workers performing the same job duties year-round.**" (AF 247-48).

On June 23, 2017, Employer requested an administrative review of the Notice of Denial dated June 16, 2017. Specifically, Employer argued the CO improperly denied the pending Second Certification application for temporary labor (H-300-17130-148334) based upon the erroneous conclusion that the application was not shown to be for a temporary or seasonal job opportunity, in part, due to the CO's reliance upon Employer's prior recent filing history and its certified temporary labor application in Case Number H-300-17011-208551. (AF 1-6).

Employer explained that as part of its tomato and vegetable growing business, it cultivates crops on six separate agricultural properties in central and south Florida, that being, Farms #1, 2, 7, 8, 9, and 15, as identified above. Further, in order to operate a continuous supply of marketable produce during the Florida tomato season (from October through June of the following year), Employer's farm properties are cultivated in sequence, rather than simultaneously. Consequently, Employer's labor certification applications describe "the temporary job opportunity being offered as involving work on multiple separate farm properties involving specific job tasks which are needed throughout the temporal periods associated with cultivating its tomato crops." Therefore, Employer averred its annual tomato growing season generally lasts from early July to early May, or mid-August through mid-June, for a seasonal period of **ten months** with a two-month gap in time during which there are no job opportunities on Employer's farm properties. Thus, Employer asserted it is offering "seasonal" job opportunities as defined in 20 C.F.R. § 656.103(d). (AF 1-6).

Prior to the current application for temporary labor, Employer sought and obtained certification for the 2016-2017 Florida tomato season for 90 agricultural workers to perform various cultural activities on the six aforementioned farm properties for the period of need that began on March 3, 2017 and ended July 6, 2017. However, Employer confirmed the agricultural activities ended early on June 24, 2017, rather than July 6, 2017. More specifically, the clean-up activities for Farms #1, 8, and 9 were

completed by May 17, 2017, and work for Farms #2, 7, and 15 was conducted from May 17, 2017 through June 24, 2017. (AF 1-6).

To commence its 2017-2018 Florida tomato season, Employer submitted the labor certification application, which is at issue in the instant case, for its **Farms #1, 8, and 9**, with the period of need beginning on **July 1, 2017** and ending on **March 15, 2018**. (AF 1-6).

Employer argues that the CO's erroneous conclusion that the job opportunity in the present certification application for the 2017-2018 tomato season appears to be "permanent" in nature results in the CO's misunderstanding of the sequencing of the agricultural activities performed on Employer's various farm properties, and the CO's failure to consider that fixed-site employers need not attach estimated work itineraries to their certification application. On this basis, Employer notes that its agricultural activities ended for Farms #1, 8, and 9 on **May 17, 2017**, which is thirteen days later than the estimated date of **May 4, 2017**, provided on one of Employer's previous labor certification in regard to only Farms #1, 8, and 9 for the 2016-2017 Florida tomato season.² (AF 1-6, 7).

Employer further argues the CO's contention that "the expected end date of the currently certified application has no effect on the start date of the pending application," is not true when, as is the case here, the worksites differ between the 2017 certification for temporary labor and the pending application, and the job opportunities are performed sequentially on the farm properties. Indeed, Employer points out that unlike the 2017 certification for temporary labor, the at-issue pending certification seeks to offer temporary and seasonal employment on only three of the six farms listed as worksites on Employer's 2017 certification, that being farms #1, 8, and 9. Thus, Employer asserts the difference in worksites explains why it did not submit a request to the CO to seek a determination of contract impossibility for the 2017 certification, as the CO's denial of the current application for temporary labor suggests Employer should have done. In regard to the 2017 certification, Employer avers it always expected the workers on Farms #1, 8, and 9 were going to cease agricultural operations earlier than the corresponding dates workers completed such work at Farms #2, 7, and 15. Therefore, Employer contends "it is simply not true" that the agricultural activities for Employer's Farms #1, 8, and 9 are being conducted from March 3, 2017 through March 5, 2018. (AF 1-6).

Conversely, Employer asserts the pending application for temporary labor is best viewed in comparison to one of its prior labor certifications (H-300-16139-047104) obtained by Employer for the 2016-2017 Florida tomato season, which sought 32 H-2A workers for the period of need beginning on July 10, 2016 through May 4, 2017, at Employer's Farms #1, 8, and 9. Whereas, presently Employer's temporary labor application seeks 30 H-2A workers for the employment period of July 1, 2017 through March 15, 2018, at its Farms #1, 8, and 9. (AF 1-7).

On June 26, 2017, this case was received by the Office of Administrative Law Judges ("OALJ") in Covington, Louisiana, and assigned to the undersigned. Nevertheless, not until June 30, 2017, did the undersigned receive the administrative file and issue a Notice of Docketing and Order Setting Briefing

² In case number H-300-16139-047104, Employer obtained certification for temporary labor pertaining only to Farms #1, 8, and 9 which sought 32 H-2A workers for the period of need beginning on **July 10, 2016** through **May 4, 2017**. (AF 1320-1449).

Schedule. The Employer and the Office of the Solicitor submitted briefs on the brief due date of July 5, 2017.

DISCUSSION

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

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

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

8 U.S.C. § 1188(a).³

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

In an expedited administrative review, as is the case here, the undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171(b)(2). Moreover, the Decision and Order that follows must be based solely on the written record, and may not be based on new evidence. 20 C.F.R. § 655.171(a). When an employer requests an administrative review, the administrative law judge’s decision may affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. 20 C.F.R. § 655.171(b)(2). The administrative law judge’s decision is the final decision of the Secretary. Id. In light of the foregoing standards, the undersigned will discuss the merits of this case below.

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b); Salt Wells Cattle Co., LLC, 2011-TLC-00185, slip op. at 4 (Feb.

³ The Secretary of Labor delegated the authority to make this determination to the Assistant Secretary for the Employment and Training Administration, who in turn delegated it to the Office of Foreign Labor Certification. 20 C.F.R. § 655.101.

8, 2011). The employer, therefore, must demonstrate that the CO's determination was based on facts that are **materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.** See Catnip Ridge Manure Application, Inc., 2014-TLC-00078 (May 28, 2014). Consequently, a 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).

Employer also bears the burden of demonstrating that it has a "temporary or seasonal" need for agricultural services. 20 C.F.R. § 655.161; Fegley Grain Cleaning, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015) (citing 20 C.F.R. § 655.161(a)). A "seasonal need" occurs if employment 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. 20 C.F.R. § 655.103(d). The fact-finder 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) (quoting Sneed Farm, 1999-TLC-00007, slip op. at 4 (Sept. 27, 1999)). Therefore, "[i]n determining whether the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year differs from other times of the year." Fegley Grain Cleaning, 2015-TLC-00067, slip op. at 3 (citing Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). 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. Lodoen Cattle Co., 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011) (citing Carlos UyIII, 1997-INA-00304 (Mar. 3, 1999) (en banc)).

Similarly, employment is "temporary" where the **employer's need** to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). It is well-established that "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. **It is the nature of the need for the duties to be performed which determines the temporariness of the position.**" Matter of Artee Corp., 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982) (emphasis added); see William Staley, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009). Accordingly, to determine an employer's need for labor, the fact-finder must look at the whole situation and not narrowly focus on the specific job at issue. See Haag Farms, Inc., 2000-TLC-00015 (Oct. 12, 2000); Bracy's Nursery, 2000-TLC-00011 (Apr. 14, 2000). However, the employer's application for temporary labor certification is properly denied when 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."** Larry Ulmer, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014) (emphasis added) (finding that an "overlapping need for the same H-2A labor year round . . . exceed[ed] the 'seasonal and temporary' period for H-2A certification.").

Finally, 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 (ALJ 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).

In the instant case, the Employer's history of applications for temporary employment certification is as follows:

Case Number	Employer's Worksites	# of Worker's/ SOC Code	Status	Beginning Date of Need	Ending Date of Need	Admin. File Pages
H-300-16139-047104	Farms # 1,8,9	32 Workers/ 45-2092	Certified	7/10/2016	5/04/2017	1320-1449
H-300-16165-495373	Farms # 1,2,7,8,9,15	100 Workers/ 45-2092	Certified	8/05/2016	5/04/2017	1161-1319
H-300-16231-958503	Farms # 2,7,8,9,15	30 Workers/ 45-2092	Certified	10/15/2016	6/01/2017	1014-1160
H-300-16245-535710	Farms # 2,7,8,9,15	125 Workers/ 45-2092	Certified	11/04/2016	6/01/2017	863-1013
H-300-16274-468711	Farms # 2,7,8,9,15	100 Workers/ 45-2092	Certified	11/26/2016	6/01/2017	710-862
H-300-16285-930785	Farms # 2,7,8,9,15	30 Workers/ 45-2092	Certified	12/9/2016	3/16/2017	552-709
H-300-17011-208551	Farms # 1,2,7,8,9,15	90 Workers/ 45-2092	Certified	3/03/2017	7/06/2017	368-551
H-300-17130-148334	Farms # 1,8,9	30 Workers/ 45-2092	Pending	7/01/2017	3/15/2018	285-300

In brief, Employer explains that it sequentially conducts cultural activities on six separate farm properties (i.e., Farms #1, 2, 7, 8, 9, and 15) in Florida, in order to provide a continuous supply of marketable produce. Furthermore, Employer states that on a previous certified application, Case File H-300-16139-047104, it demonstrates that for the **2016-2017 Florida tomato season** Employer sought 32 H-2A workers **only for Farms #1, 8, and 9** for the period of need beginning on **July 10, 2016** through **May 4, 2017**. In addition, Employer avers that although its previous certified application (H-300-17011-208551) listed the dates of need as March 3, 2017 through July 6, 2017, for Farms #1, 2, 7, 8, 9, and 15, it actually completed all work on Farms #1, 8, and 9 on **May 17, 2017**, and thereafter, on **June 24, 2017**, for Farms #2, 7, and 15. Thus, Employer asserts that its pending temporary labor certification application (H-300-17130-148334) for the **2017-2018 Florida tomato season** for 30 H-2A workers **only for Farms #1, 8, and 9** for the period of need beginning on **July 1, 2017** through **March 15, 2018**, demonstrates that its need is indeed temporary because there is approximately a two-month gap in which there is no job opportunity on Farms #1, 8, and 9. Moreover, Employer notes that it amended its date of

need for the pending temporary labor certification application to begin on **July 14, 2017**, instead of July 1, 2017.

Employer also contends that the instructions for completing certification applications for the Agricultural and Food Processing Clearance Order ETA-Form 790, OMB Control No. 1205-0134 only require that Employer “[e]nter the **anticipated period of employment** or the date when work is expected to be completed.” On this basis, Employer avers nothing in the INA or H-2A regulations require that its estimated dates of need be “precise,” but only require Employer to provide its “best estimate of the start and stop times for the job opportunity.” Thus, Employer asserts the CO erroneously concluded that Employer’s requested dates of need in the pending certification application and its previously established dates of need demonstrate Employer’s job opportunity is permanent in nature.

Given the foregoing, I find Employer’s arguments unpersuasive. As demonstrated in the chart above, Employer obtained prior certifications for temporary labor consistently from July 10, 2016 through July 6, 2017. Employer mistakenly relies upon the premise that the cultural work to be completed at its specific worksites determines the temporary nature of employment. In brief, the CO contends it is **Employer’s need** (not an individual task or worksite) that dictates whether a need for workers is either seasonal or temporary. I agree.⁴ See 20 C.F.R. § 655.103(d); Pleasantville Farms LLC, 2015-TLC-00053, slip op. at 3; Fegley Grain Cleaning, 2015-TLC-00067, slip op. at 3. Indeed, upon looking at the whole situation it is clear that Employer’s need, irrespective of any worksite, is neither seasonal nor temporary in nature. See Haag Farms, Inc., 2000-TLC-00015 (Oct. 12, 2000). In regard to a seasonal need, I find the record evidence suggests that Employer’s need is not tied to any particular time of the year by an event or pattern, but instead Employer states it **sequentially** conducts various cultural activities in order to provide a **continuous** supply of produce. 20 C.F.R. § 655.103(d). Accordingly, I find denial of Employer’s certification application is appropriate because Employer has failed to demonstrate its need is seasonal, that is, there is no evidence Employer needs more workers in certain months than other months of the year. See Lodoen Cattle Co., 2011-TLC-00109, slip op. at 5 (citing Carlos UyIII, 1997-INA-00304 (Mar. 3, 1999) (en banc)).

Furthermore, I am not convinced that Employer’s need is of a temporary nature. Employer’s prior certified applications demonstrate that Employer’s need is year round due to the “**consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties.**” See Larry Ulmer, 2015-TLC-00003, slip op. at 4. As demonstrated above, Employer’s prior certifications reflect it employed workers consecutively from July 10, 2016 through July 6, 2017, all of which involved similar job requirements as evidenced by SOC code 45-2092. Employer argues that its need is not permanent in nature because it completed work for Farms #1, 8, and 9 on May 17, 2017, and on June 24, 2017, for Farms #2, 7, and 15, prior to the July 6, 2017 certified end date of need. Likewise, Employer contends the applicable regulations only require an “estimation” as to the periods of time Employer needs temporary labor. On this basis, Employer appears to suggest that its certified dates of need listed on prior applications do not determine whether its subsequent needs are seasonal or temporary. However, as noted by the CO in brief, in order for Employer to receive certification for H-2A workers the Employer avers that the seasonal need is for the **entirety of the dates**

⁴ Furthermore, assuming **arguendo** the individual worksites determined whether Employer’s need was seasonal or temporary, Employer would still be unable to demonstrate its need is seasonal or temporary because Employer received certification for temporary labor pertaining to Farms #1, 8, and 9 from July 10, 2016 through July 6, 2017.

of certification, and not the actual end date of work. Accordingly, Employer's previously certified dates of need are properly considered by the CO when determining whether a need is temporary. To allow otherwise, would provide employer's with the ability to continually shift their purported periods of need in order to utilize the H-2A program. See Salt Wells Cattle Co., LLC, 2010-TLC-00134 (Sept. 29, 2010). Thus, Employer's previous certified dates of need run consecutively from July 10, 2016 through July 6, 2017. As a result, whether Employer's pending certification application lists the date of need beginning on July 1, 2017 or on July 14, 2017 (i.e., its amended beginning date of need), Employer's need for H-2A workers is not temporary because the dates of need would either overlap or be separated by only eight days. Considering the entirety of the evidence, Employer's consecutive nature of the current and prior application periods in conjunction with the similarity of job requirements demonstrates that Employer's need is permanent.

Accordingly, I find and conclude Employer has not demonstrated that it has a seasonal or temporary need for H-2A workers pursuant to 20 C.F.R. § 655.103(d), and thus the CO properly denied certification. Therefore, I find and conclude the CO's denial should be **AFFIRMED**.

ORDER

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

ORDERED this 7th day of July, 2017, in Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

