

**U.S. Department of Labor**

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**Issue Date: 29 March 2019**

OALJ Case No.: 2019-TLC-00041  
ETA Case No.: H-300-18339-805007

*In the Matter of:*

**ANDREW DAHL FARMS,**  
*Employer.*

Appearance: John C. Bedell  
H Visa Solutions  
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Sioux Falls, South Dakota  
*For the Employer*

Sarah Tunney, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Patricia J. Daum  
Administrative Law Judge

**DECISION AND ORDER**

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), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (H-2A) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On March 1, 2019, Andrew Dahl Farms (Employer) filed a request for expedited administrative review, pursuant to 20 C.F.R. § 655.171(a), of the February 25, 2019 Denial Letter issued by the Certifying Officer (CO) in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File (AF) from the Employment and Training Administration (ETA) on March 25, 2019. Although provided the opportunity to do so, neither the Employer nor the CO submitted briefs. Pursuant to 20 C.F.R. § 655.171(a), this

decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

## **BACKGROUND**

The Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (Form 9142) on December 5, 2018 (AF 139).<sup>1</sup> On its application, the Employer requested certification for 17 Agricultural Equipment Operators for the period beginning January 19, 2019 and ending November 15, 2019 (AF 139). The nature of the temporary need was listed as seasonal (AF 139). In Section B Item 9, the Employer stated that “workers are needed on a temporary basis to haul the soy bean, corn and swine livestock” (AF 139). The Employer described its activities from January through November, including raising and monitoring pigs, and planting, maintaining, and harvesting its crops, and stated that “from mid-November to mid-January workers are not need[ed] until the swine start giving birth to piglets” (AF 139, 145).

In an additional Statement of Temporary Seasonal Need submitted with the Employer’s application, the Employer stated that its temporary seasonal need is “tied to the colder weather months of the year” and that it performs work from October to June each year (AF 159). The Employer explained that it needs temporary workers to haul the soy bean, corn, and to take care of the hog livestock, but that because it finishes planting in June and the piglets are born by June, it does not need workers again until October to harvest the soy bean and corn and monitor the hogs (AF 159).

The CO issued a Notice of Deficiency (NOD) on December 12, 2018, listing nine deficiencies with the Employer’s application (AF 126-133). Of those nine deficiencies, six were primarily clerical, not substantive, and thus will not be addressed in this decision. As to the three remaining deficiencies, they are more substantive in nature and will be addressed herein.

The first deficiency was the Employer’s failure to establish its job opportunity as “temporary or seasonal in nature” (AF 128). The second deficiency was the Employer’s failure to provide valid evidence of workers’ compensation insurance (AF 129). The CO noted that the workers’ compensation certificate that had been provided expired on December 1, 2018, and observed that in a case where a certificate expires before the requested end date of need, an employer must provide a signed written assurance that the workers’ compensation insurance will be renewed. The third deficiency was that the Employer only provided page one of the ETA Form 790, instead of the full document, and did not provide written assurances as required by the H-2A regulations (AF 130). The CO noted this deficiency could be cured by providing the complete ETA Form 790 and the written assurances. As noted above, the remaining deficiencies were mainly clerical in nature (AF 131-133).

In regard to the first deficiency, the CO determined that the Employer did not sufficiently explain why the job opportunity is seasonal or temporary in nature in accordance with 20 C.F.R. § 655.103(d). 20 C.F.R. § 655.103(d) provides, in pertinent part:

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<sup>1</sup> References to the Administrative File and specific page number are annotated as “AF n”.

For the 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.

The CO observed that the Employer's current requested dates of need, from January 19, 2019 until November 15, 2019, were different from those requested in its previous certifications (AF 128). Specifically, the Employer's previous certifications were issued with dates of need from November 24, 2015 through April 1, 2016; September 5, 2016 through May 31, 2017; and October 13, 2017 through June 30, 2018 (AF 128). Additionally, the CO found that the Employer provided conflicting statements describing its temporary need. The Employer contended in Section B Item 9 of the ETA Form 9142 that workers are not needed "from mid-November to mid-January until the swine start giving birth to piglets," but then stated in its additional Statement of Temporary Seasonal Need that its "temporary need is tied to the colder weather months of the year" and that it performs work from October through June each year (AF 128, 139). Based thereon, the CO found the Employer's true dates of need were unclear and concluded that the Employer's requested period of need in conjunction with its filing history indicated that the Employer has a year-round need for workers. The CO directed the Employer to submit a variety of information and documents describing its business activities and seasonal needs, including summarized payroll reports for 2017 and 2018 identifying "separately for full-time permanent and temporary employment for all job titles in use, the total number of workers or staff employed, total hours worked, and total earnings received" (AF 129).

The Employer submitted a response to the CO's NOD on December 21, 2018 (AF 71-125). The Employer provided a statement clarifying its temporary need, provided other additional information requested by the CO in the NOD, and attached supporting documents. In the explanation of its temporary need, the Employer stated that it was re-establishing its dates of need to better fit the seasonality of the farm because the Employer decided to expand its hog operation instead of focusing on growing crops. The Employer described its hog operation from January through October, noting that in October the swine birthing process would be complete and that the temporary "workers will then assist farming operations by ensuring all vehicles are ready for harvest and start the harvesting process" (AF 71-72). The Employer submitted that once the piglets are sold around November, foreign workers would no longer be needed because the remaining pigs maintain themselves during the winter months. The Employer asserted that its U.S. workers could maintain the farm until the pig operation resumed. However, the Employer again stated that "the seasonal need is tied to the winter months of the year" (AF 72). Additionally, the Employer explained that because of its expanded pig operation, "[w]e are using the Visa workers primarily to complete pig operations and when the piglets are sold to market in November and December time frame the additional labor is no longer needed and US workers are used to complete harvesting operations because, they will no longer be maintain[ing] the equipment needed by the Visa workers" (AF 72). The Employer further clarified that it has changed its business model due to growth in the pig industry and, as a result, its seasonal need has changed and it now needs foreign workers to handle its hog operation.

The Employer also submitted payroll records for 2017 and 2018 with its response to the CO's NOD attached as Exhibit C (AF 99-119). The payroll records list employee names, hours worked per week, and wage information (AF 99-111, 113-119). In the middle of the payroll records is a chart titled "Hours Worked" with a graph appearing to show the hours worked on a monthly basis for the years 2017 and 2018 (AF 112). The chart indicates that a majority of the hours worked fell between March and July, and it seems to show no hours worked during August through December for either 2017 or 2018.

The Employer stated that it was also providing its workers' compensation policy, however the document was not attached and is nowhere in the record (AF 72). The Employer submitted written assurances as Exhibit D, as the CO requested (AF 120-125).

The CO issued a Denial Letter on February 25, 2019 finding that the Employer failed to sufficiently address all of the deficiencies, including most importantly temporary need (AF 59-64). The CO determined that the Employer failed to cure the first deficiency because the CO found that while the Employer's application described the bulk of the duties for the position to include heavy equipment operation and harvesting duties with incidental livestock duties, the Employer's NOD response heavily referenced livestock duties. Furthermore, the CO observed that the Employer failed to provide summarized payroll records as requested because the data between 2017 and 2018 was indistinguishable and the records did not differentiate hours worked for temporary vs. permanent workers. Thus, the CO concluded that the Employer failed to establish that its need is temporary or seasonal.

Additionally, the CO concluded that the Employer did not sufficiently cure its second deficiency because although it referenced providing a new workers' compensation policy, the document was not attached to the NOD response (AF 64). Furthermore, the CO concluded that the Employer did not sufficiently cure the third deficiency because it still did not provide the full ETA Form 790 (AF 65).

The Employer requested expedited administrative review of the CO's denial of certification on February 27, 2019 (AF 2).

### **ISSUE**

Whether the Employer met its burden of establishing that its need for agricultural services or labor as stated in its current H-2A application is "temporary or seasonal" as defined by the applicable regulation at 20 C.F.R. § 655.103(d)?

### **SCOPE OF REVIEW**

This matter arises from the Employer's request for expedited administrative review of the CO's letter denying certification for 17 Agricultural Equipment Operators. When an employer requests an expedited administrative review in a Temporary Labor Certification (TLC) case, the regulations provide that the administrative law judge's (ALJ) ruling must be based on the written record and any legal briefs from the parties involved or amici curiae. 20 C.F.R. § 655.171(a).

The parties' written submissions may not include new evidence. *Id.* The ALJ's written decision must be issued within five business days after the ALJ received the AF.

The regulation states the ALJ must "either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken . . . The ALJ's decision is the final decision of the Secretary." 20 C.F.R. § 655.171(a).

Because neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an ALJ's review of determinations by the CO, I will review the evidence presented in this case de novo, but will also review the CO's decision for abuse of discretion. *T. Bell Detasselling, LLC*, 2014 TLC 00087, slip op. at 3, fn. 7 (May 29, 2014), citing *RP Consultant's, Inc.*, 2009-JSW-00001, slip op. at 8 (June 30, 2010), and *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug 17, 2001). See also *David Stock*, 2016-TLC-0040 (May 6, 2016) (where "Employer requested de novo review, the ALJ must independently determine if the employer has established eligibility for temporary labor certification").

### **DISCUSSION**

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); see also 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a "temporary" or "seasonal" need for agricultural services. 20 C.F.R. § 655.161. 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). 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).

In determining temporary need for purposes of the H-2 temporary alien labor certification program it is well settled that it is "not the nature of 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 *Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999) (It is appropriate to determine if the employer's needs are

seasonal, not whether the duties are seasonal). *See also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).

Because the H-2A program is designed to fill only temporary or seasonal labor needs, the need for the particular position cannot be a year round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). Ten months has been viewed as an acceptable threshold to question whether an employer's need is temporary. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008) (finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, is not an arbitrary rule).

It is the employer's burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). In regard to a seasonal need, an employer must demonstrate when the employer's season occurs and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op at 11 (Feb. 15, 2011).

When the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the change. *Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) (employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor).

BALCA has consistently found that the CO can review the situation as a whole when determining temporary need and need not confine the analysis to the existing application. *See Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011 (April 14, 2000); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017).

In this case, the Employer's application requested temporary labor certification for 17 Agricultural Equipment Operators with a start date of January 19, 2019 and an end date of November 15, 2019. As the requested dates of need differed from the three previously certified applications (November 24, 2015-April 1, 2016; September 5, 2016-May 31, 2017; and October 13, 2017-June 30, 2018), I find that the CO reasonably questioned whether the Employer established a seasonal need in light of the three prior filings, as noted in the NOD (AF 128).

Upon review of the record, I find that the Employer failed to establish a seasonal need for agricultural services or labor. In the NOD, the CO concluded that based upon the historical applications as well as conflicting information in the current application, the Employer's dates of need were unclear and further that the Employer's requested period of need, in conjunction with its filing history, indicated that the Employer has a year-round need for workers. In the Denial Letter, the CO noted the inconsistencies in the Employer's description of the job duties, including whether the Employer's need relates mostly to harvesting duties or to livestock duties. I find that the record supports the CO's denial of certification. The Employer is inconsistent in its description of its need for seasonal labor throughout its ETA Form 9142, additional Statement of Temporary Seasonal Need, and NOD response.

The Employer was internally inconsistent at multiple points in the record with respect to its actual dates of need. In Section B Item 9 of the ETA Form 9142 the Employer stated that workers are not needed from mid-November through mid-January until the swine start giving birth to piglets (AF 139, 145). However, in the additional Statement of Temporary Seasonal Need, the Employer stated that its “temporary seasonal need is tied to the colder weather months of the year” and that the Employer performs work from October until June of each year (AF 159). The Employer attempted to clarify this inconsistency in its NOD response by noting that Employer is “re-establishing [its] dates of needs and requesting dates that will better fit the seasonality of the farm,” insinuating that it needs foreign workers from January through November to assist with its hog operation. Nonetheless, the Employer again stated that its “seasonal need is tied to the winter months of the year” (AF 71). Taken as a whole, these various statements and explanations show shifting dates of need. Thus, the record supports the CO’s finding that the Employer’s requested dates of need are unclear.

Furthermore, there is no other evidence in the record apart from the Employer’s varying statements to support the Employer’s requested dates of need. Although the Employer provided payroll records for 2017 and 2018, the records were not summarized as the CO requested. The records do not list the job titles for the employees, the duties being performed, or differentiate between full-time permanent and temporary staff. The chart titled “Hours Worked” shows a majority of hours worked between March and August in 2017 and 2018. There were no hours worked between September and February. Thus, this data does not support the Employer’s requested dates of need for January through November. *See Carol Rhodes*, 2013-TLC-41 (July 5, 2013) (where the ALJ affirmed the denial of certification finding the record inadequate to corroborate the employer’s temporary need because although the CO had requested detailed payroll records, the employer only provided generalized records that did not indicate workers’ duties, wages, or previous need); *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016) (finding that the employer failed to establish a temporary or seasonal need because the employer failed to include any documentary evidence supporting that its dates of need had changed from prior applications even though the employer provided a reasonable explanation for the change).

Moreover, the CO reasonably found that the dates referenced in the Employer’s application, Statement of Temporary Seasonal Need, and the Employer’s NOD response indicate that, as a whole, the Employer has a year-round need for workers (AF 62). In this respect, the Employer requested workers for January through November. However, in conjunction with its statements that the Employer also performs work from October through June and that the Employer’s seasonal need is tied to colder weather months, the record evidence indicates that the Employer’s need exceeds ten months. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008) (holding that ten months is an acceptable threshold to question whether an employer’s need is temporary). This is particularly so in light of the fact that the Employer’s three previously certified applications were for time periods spanning from November 24, 2015 through April 1, 2016, September 5, 2016 through May 31, 2017 and October 13, 2017 through June 30, 2018 (AF 128). While it is true that an employer may alter its seasonal needs where there are circumstances supporting a change, an employer must establish the changed circumstances. As noted above, the attempt by the Employer herein to do just that fell short and actually contributed to the confusion concerning the true dates of need.

Additionally, the Employer is inconsistent in explaining the seasonal job duties of the requested temporary workers and why the Employer's current need for seasonal workers is distinguishable from its previous applications. In the ETA Form 9142, the Employer states that "[w]orkers are needed on a temporary basis to haul the soy bean, corn and swine livestock" (AF 139). The Employer described in detail that the workers' activities would be related to maintaining both crops and swine (AF 139). The Employer reiterated in its additional Statement of Temporary Seasonal Need that the type of activities the temporary workers will engage in includes assisting with the harvesting of corn and soy bean, maintaining the hogs and swine operation, and assisting in the maintenance of the farming equipment (AF 159-160). Yet, in the NOD response, the Employer attempted to clarify that because of its expanded pig operation, "[w]e are using the Visa workers *primarily* to complete pig operations and when the piglets are sold to market in November and December time frame the additional labor is no longer needed and US workers are used to complete harvesting operations because, they will no longer be maintain[ing] the equipment needed by the visa workers" (AF 72) (emphasis added). Although the Employer attempted to distinguish between the need for foreign labor to manage its pig operations versus conducting the harvesting duties for which the Employer was previously certified, the inconsistencies in the Employer's explanation of the job duties are glaring and weigh heavily against the Employer. See *Rainbrook Farms, LLC*, 2016-TLC-00076 (Sept. 23, 2016) (rejecting employer's argument that its current need was distinguishable from its previous applications because its current application was related to the cultivation and planting season and its previous applications related to the harvesting season).

Accordingly, I find that the Employer failed to establish a need for temporary or seasonal workers for the positions of Agricultural Equipment Operator for the period of January 19, 2019 until November 15, 2019.

The CO also denied certification because the Employer failed to provide a new workers' compensation policy (AF 64). The workers' compensation certificate that the Employer had provided with the ETA Form 9142 expired on December 1, 2018 and the CO appropriately requested a signed written assurance that the workers' compensation would be renewed. Although the Employer indicated it would be submitting such evidence, it did not do so. Where the workers' compensation insurance ends during the period of need and the CO requests the employer to sign a written assurance that it will renew its policy and the employer fails to provide such an assurance that the policy will be renewed, the CO properly denied the application. *Lyons*, 2010-TLC-00056 (July 19, 2010) (finding that the employer's signed assurance at the end of ETA Form 9142 could not substitute for the additional assurance).

Furthermore, the Employer also failed to cure the third deficiency by submitting the full ETA Form 790. Although this failure might be considered inconsequential by itself, in conjunction with the Employer's failure to cure two more important deficiencies, the CO's denial of certification was proper.

In *Anna Rosa Perez-Quintino*, 2014-TLC-00027 (March 5, 2014), the ALJ concluded that while not all the deficiencies had been corrected, delays in the appeal process and the fact that

some of the deficiencies were minor warranted a remand.<sup>2</sup> Here, although the Employer's failure to submit the full ETA Form 790 is minor, as discussed, the Employer's other two deficiencies are not. Thus, I am not inclined to remand this case based upon the inordinate delay by the CO in making the administrative file available.

Accordingly, because the Employer's application is still incomplete, otherwise deficient, and fails to establish a temporary or seasonal need for workers, I find that the CO properly denied certification.

### **CONCLUSION**

The Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). The Employer failed to cure other deficiencies by not providing a new workers' compensation policy or the full ETA Form 790. Therefore, the basis for the CO's February 25, 2019 Notice of Denial letter is affirmed.

### **ORDER**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's Notice of Denial is **AFFIRMED**.

**PATRICIA J. DAUM**  
Administrative Law Judge

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<sup>2</sup> With respect to delays in the appeal process, it is undeniable that an inordinate delay in the administrative review occurred in this case. The Employer filed its request for expedited administrative review on March 1, 2019 and it took almost one month for the CO to make the file available to OALJ for decision. Such a delay is unreasonable and contrary to the purpose of the Act. The appeal process is intended to move swiftly, as clearly laid out in the regulations. 20 C.F.R. § 655.171(a). Moreover, the administrative review of the file reveals that there were also delays in the processing of the application that prompted the Employer to make several requests for updates on the status of its application. While in a very real sense the Employer has been denied the expedited processing of its application and review of the CO's denial as contemplated by the regulations, I do not find that this delay, in light of the substantive problems with the Employer's application, warrant a remand.