

**U.S. Department of Labor**

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**Issue Date: 31 October 2019**

**OALJ Case No.: 2019-TLC-00092**  
**ETA Case No.: H-300-19241-987551**

*In the Matter of:*

**CLARENCE ARCHIBALD,**  
*Employer.*

Appearance: Wendel V. Hall, Esquire  
Hall Law Office, PLLC  
Washington, D.C.  
*For the Employer*

Nicholas C. Hall, Esquire and Anthony Tran, 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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On September 25, 2019, Clarence Archibald (Employer) filed a request for a *de novo* hearing pursuant to 20 C.F.R. § 655.171(b) to review the Certifying Officer's (CO) September 20, 2019 denial in regard to Employer's temporary alien agricultural labor certification (H-2A) application. I received the Administrative File (AF) on October 11, 2019. A hearing in this matter was scheduled for October 21, 2019.

On October 21, 2019, I conducted a telephonic hearing where all parties were represented by counsel and afforded the opportunity to present witnesses, introduce exhibits, and cross-examine. This decision and order is based on the record consisting of the AF forwarded by ETA

and the testimony offered at the hearing.<sup>1</sup> No additional documentary evidence was offered at the hearing. This Decision and Order is issued within ten (10) calendar days of the hearing as required by the regulation at 20 C.F.R. §655.171(b)(1)(iii).

### **BACKGROUND**

On August 29, 2019, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A. AF 34-44. The Employer's application requested certification for four "farm ranch animal workers" for the period beginning October 25, 2019 and ending June 1, 2020. (AF 34). The nature of temporary need was listed as seasonal. Employer noted on its application form, in response to "statement of temporary need," that the change in its start date (from its previous application) was due to its emergency filing last year when Employer was new to the program, and also because it was unable to complete its paperwork in the current year to reflect its actual period of need, which it asserted would be October 14th through June 1st moving forward. *Id.* Job duties were listed as the following:

Performs any of the following tasks to attend to livestock: Maintain heated watering system. Operate snow removal equipment in order to operate feed wagons. Mix feed and additives, fill feed troughs with feed and water for livestock. Remove ice formed in water. Examine animals to detect diseases and injuries. Vaccinate animals by placing vaccine in drinking water or feed using syringes and hypodermic needles. Apply medications to cuts and bruises. Spray livestock with insecticide. Confine livestock in stalls. Wash and clip cows to prepare them for calving. Assist veterinarian in delivery of offspring. Bind or clamp testes or surgically remove testes to castrate livestock. Clip identifying notches or symbols on animal, or brand animal, using branding iron, to indicate ownership. Clean livestock stalls and sheds, using disinfectant solutions, brushes and shovels. Maintain buildings and equipment used for livestock. Maintain breeding, feeding and costs records. Drive to town to pick up feed sometimes.

(AF 36, 40).

On September 5, 2019 the Certifying Officer (CO) issued a Notice of Deficiency (NOD) identifying two deficiencies in the Employer's application. (AF 23-28). The first deficiency was the Employer's failure to establish its job opportunity as "temporary or seasonal in nature." The second deficiency pertained to an inconsistency in the Employer's application regarding whether the payroll period was bi-weekly or twice monthly. As the second deficiency was remedied, it will not be addressed further in this decision.

In regard to the first deficiency the CO determined that the Employer did not sufficiently demonstrate that the job opportunity was temporary or seasonal in nature citing 20 C.F.R. § 655.103(d) which defines temporary or seasonal need. In pertinent part, 20 C.F.R. § 655.103(d) provides:

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<sup>1</sup> References to the Administrative File are designated as AF-n and references to the transcript are identified as TR-n. There were no additional exhibits offered by any of the parties.

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 noted the Employer's filing history in the following chart:

<u>Case Number</u>	<u>Employer Name</u>	<u>Stat us</u>	<u>Beginning Date Of Need</u>	<u>Ending Date Of Need</u>
<b>H-300-18324- 426159</b>	Clarence Archibald	Certified	1/4/2019	6/1/2019
<b>H-300-19241- 987551</b>	Clarence Archibald	Received	10/25/2019	6/1/2020

The CO noted that the Employer explained the change in its start date as follows:

[t]he change in start date is due to the Emergency filing last year we were new to the program and this winter we were unable to complete our paperwork to get our needed dates. Moving forward our actual dates of need 10/14-6/1...we were unable to complete our paperwork to get our needed dates. Moving forward our actual dates of need 10/14-6/1. (AF 25).

The CO observed that the Employer submitted the same explanation of its temporary need with its previous application although the period of need stated was early January through June 1. The CO also found inconsistencies in the Employer's following statement which explains and supports its need for temporary workers in the current application.

I would like to provide you with an explanation for my need of foreign labor during the **winter months**. I operate a livestock business but the need for foreign labor is only for the winter and spring months, as explained below...

...During the **winter and spring months**, we are required to feed the cattle with hay and supplements since they are not grazing in the pasture. This process alone requires 6 or more hours per day. The holding pens require daily cleaning to prevent illness or disease, as well as the water tanks to provide fresh water that it isn't frozen. While the cattle are confined in this area, they also require close inspection for disease and/or injuries. Many days we are required to plow snow before we can begin to feed and take care of the livestock.

During early spring calving season begins and the livestock are under constant supervision if trouble should arise during the birthing process. After the cows calve, we separate them from the herd so that the calves are not lost or injured by the remaining herd. We also vaccinate the calves and keep them under watch for any sign of disease.

This is a highly labor-intensive period in our livestock operation and we work in extreme weather conditions. At the end of May, we take the livestock to grazing/feeding areas.

The duties that need to be performed include the following:

- ▶ Maintain heated watering system.
- ▶ Operate snow removal equipment in order to operate feed wagons.
- ▶ Mix feed and additives, fill feed troughs with feed and water for livestock.
- ▶ Remove ice formed in water.
- ▶ Examine animals to detect diseases and injuries.
- ▶ Vaccinate animals by placing vaccine in drinking water or feed using syringes and hypodermic needles.
- ▶ Apply medications to cuts and bruises.
- ▶ Spray livestock with insecticide.
- ▶ Confine livestock in stalls.
- ▶ Wash and clip cows to prepare them for calving.
- ▶ Assist veterinarian in delivery of offspring.
- ▶ Bind or clamp testes or surgically remove testes to castrate livestock.
- ▶ Clip identifying notches or symbols on animal, or brand animal, using branding iron, to indicate ownership.
- ▶ Clean livestock stalls and sheds, using disinfectant solutions, brushes and shovels.
- ▶ Maintain buildings and equipment used for livestock.
- ▶ Maintain breeding, feeding and costs records.
- ▶ Drive to town to pick up feed sometimes. (AF 8-9).

The CO points out that Employer states in one place that it has a temporary need during the **winter months** and then goes on to state that it has a temporary need during the **winter and spring months**. Further the CO also noted that Employer lists its actual period of need as October 14<sup>th</sup> through June 1<sup>st</sup> which typically is considered **fall through spring** in South Dakota. (AF 8).

The CO directed the Employer to submit a written explanation clarifying its period of temporary need for H-2A workers, as well as supporting evidence in the form of summarized payroll reports for a minimum of one previous calendar year (2018) for the position of “farm ranch animal worker.” The CO also directed that the information be summarized monthly and listed separately for permanent and temporary employment in the designated occupation.

The Employer responded to the Notice of Deficiency on September 11, 2019 providing its monthly payroll records for 2018 and January through May of 2019. In the accompanying statement, filed on behalf of the Employer, the Employer reiterated that its actual dates of temporary need are 10/14 through 6/1. The Employer explained that its current application was filed 11 days late (and therefore the start date was delayed by eleven (11) days) due to a combination of heavy workload and due to the fact that the office employee who handles the paperwork “has been dealing with cancer.” The statement also noted that “[d]uring the months of June –mid-October, the cattle are grazing in the pastures and one of the [Archibald] brothers

checks on them at this time.” Additionally, the Employer noted that “(I)n mid-October, he brings the cattle into feedlots ...he has to hand feed and care for the livestock during the sub-freezing temperatures in SD. He also calves during the months of requested need, so he needs extra workers to deal with the extra workload.” (AF 20).

On September 20, 2019 the CO issued a Denial of Employer’s H-2A application. (AF 12-18). The CO determined that the Employer’s assertion of temporary need was not supported by the documentation provided, specifically the Employer’s payroll records. The CO noted that the months of January, February, March and May of 2018, which are during the Employer’s stated peak period, show less hours worked than in September 2018, which is a non-peak month. Further November and December 2018 showed less hours worked than certain non-peak months. Accordingly the CO determined that there was not a significant fluctuation during peak vs. non peak season. Therefore the CO concluded that Employer had failed to establish its temporary need for the period of need requested (AF 12-18).

On September 25, 2019, Employer requested a *de novo* hearing on the CO’s Denial of its H-2A application.

### **EVIDENCE AND ARGUMENT**

The Administrative File was admitted without objection. (TR 7). No additional documentary evidence was offered into the record at the hearing. The Employer called the following witnesses to testify: the Certifying Officer, John T. Rotterman; Mr. Thomas D. Williams, CPA; and Mr. Brad L. Archibald. The Solicitor also called the Certifying Officer, John T. Rotterman to testify on behalf of the Certifying Officer.

#### *A. Summary of Testimony*

##### John T. Rotterman

Certifying Officer, John T. Rotterman (CO) was called as a witness by the Employer. Mr. Rotterman discussed his evaluation of the application and stressed the importance of considering the initial application, subsequent filings, and filings from prior years. (TR 16-17). When asked if there were reasons for the denial that were not listed on AF 16-18, Mr. Rotterman stressed the importance of examining the application’s entire filing history.<sup>2</sup>

Mr. Rotterman stated the ultimate reason for denial was that the information Employer provided did not support the period of need. He stated there was a significant change in the period of need from the prior year, inconsistencies regarding the terms of the seasons, and that the payroll records also did not support Employer’s purported seasonal need. Specifically, he

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<sup>2</sup> When asked repeatedly if there were any reasons for the denial other than the reasons listed on AF 16-18, Mr. Rotterman was evasive. Specifically, he replied, “the filing history is important” and “I don’t understand why you would take apart the document. It stands on its own as a complete document.” When asked to provide a yes or no answer, he replied, “inasmuch as that removes the filing history from it, I would say no.” (TR 17). Later, he continued to be evasive when repeatedly asked if the Regulations require the CO to specify all of the reasons for the denial before stating that yes, it’s required. (TR 95-99).

stated the month of October is a fall month, not a winter month. He further stated that the payroll records show a uniform need year-round. (TR 18-21).

Mr. Rotterman acknowledged the exact dates of a season might not be germane but there must still be a “seasonality” aspect to it. He took issue with Employer’s position that its need begins and ends with the winter and spring. He said Employer’s need may not have a direct analog in the summer and fall, but that a seasonal change to the same underlying job does not make a job itself seasonal. For instance, he said one of the winter job duties is to maintain heated water systems. However, he stated cattle also need a water system in the summer, it’s just not heated. He found a seasonal change with the job duties, but determined it’s the same underlying job year-round and that the payroll records do not support Employer’s purported need. (TR 23-26, 30-33).

Mr. Rotterman was also called as a witness by the Solicitor. He discussed the application process and stated that he reviews job duties to ensure they’re consistent with the job title and evaluates the duties to the extent they’re seasonal or temporary. He said he sought more information in the form of payroll records here when he noticed inconsistencies in the requested period of need. He explained that he expects an Employer’s payroll to reflect that if the number of workers increased due to a seasonal need, the number of hours would also increase significantly. He further stated he expects to see this pattern reflected from year to year, and that any changes would be related to the labor market rather than a change in Employer’s operation. Although Employer explained that doubled their number of cattle, he said this does not constitute a seasonal need. He acknowledged that, although livestock operations continue year-round, there can be a seasonal need on top of that, but it requires support. He concluded that the payroll records did not support such a need here. (TR 88-94, 100-102).

#### Thomas D. Williams, CPA

Thomas D. Williams, CPA was called as a witness by the Employer. Mr. Williams testified that he has worked for Employer for ten and a half years and does accounting work, income tax work, and issues feedlot billings. (TR 35). He discussed the ranch’s operation and explained that in the fall of 2018, they increased their heads of cattle from 800 to 1,200, which increased the workload. He stated that Employer began to utilize the H-2A program in the fall of 2018 due to their need to hire more workers and the shortage of workers in their area. However, he stated that, due to the timing of their application, they were unable to employ workers until January 2019, rather than in October as they requested this year. (TR 36-38).

Regarding the inconsistency on the application of their purported seasonal need starting in winter, he clarified that the term “winter” was used to refer to winter weather as opposed to the winter calendar season. He stated that winter weather, including freezing temperatures, snowfall, et cetera, can begin in early October and last until mid-to-late May, and noted the ranch had a six-inch snowfall approximately ten days prior to the hearing. (TR 38-39).

Mr. Williams discussed the payroll data and explained that he committed an error when he submitted the data. He explained that the data was downloaded from the payroll program Employer uses, and that it was missing vital information about employees that are salaried versus

employees that are hourly wage earners. He explained the hours were missing for Brad Archibald and Carter Archibald as they had an arrangement with their father, Clarence Archibald, to work without receiving paychecks. Mr. Williams also explained that there was also another employee who was salaried, did not turn in time cards, and who quit mid-November 2018. He estimated those three employees worked approximately 200 hours per month. (TR 39-42, 50-52). He further estimated if the 2018 hours were adjusted to account for the missing hours, they would be as follows:

<b>Month</b>	<b>Hours</b>
January	1,179.00
February	1,137.41
March	1,193.75
April	1,660.61
May	1,196.65
June	1,163.75
July	1,153.99
August	1,110.45
September	1,351.45
October	1,899.68
November	1,083.85
December	1,030.83

(TR 44-45, 54-56). He also estimated the adjusted hours for January 2019 were 1,259.06. (TR 56-58).

Regardless of these adjustments, he contended that payroll data may not demonstrate their need accurately. He stated the data does not account for the outside contract labor they hire to fill in the gap or workers who have other employment arrangements. (TR at 42-43). Additionally, he explained there's no way to distinguish hours based on the tasks performed. (TR 59-60). Thus, the mere fact that there are similar hours worked in those months outside the period of requested need is not necessarily indicative of the work performed with respect to the Employer's livestock operations.<sup>3</sup>

Mr. Williams further testified that, during the warmer months, there's not as much work as in the colder months because there aren't as many cattle being handled in the feedlot then because they're out in the pasture. He said that the cattle go out to the pasture in April and are brought in beginning in October. (TR 45-48).

Mr. Williams also clarified that paychecks are issued biweekly. (TR 49).

Brad L. Archibald

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<sup>3</sup> The Employer is also engaged in corn crop farming. (TR 37). The corn crop is planted in May and harvested in October (TR 38). While not clear, the Employer may have an H2A application seeking additional employees to assist with the farming operations during the months of summer and fall. (TR 37-38). This application, if any, is not involved herein.

Brad L. Archibald, son of Clarence and Susan Archibald, co-owners of Archibald Ranch, was called as a witness by Employer. Mr. Archibald testified that he's a general manager of the feedlot for the cattle, works with the custom cattle side, and procures commodities for the operation. (TR 61-63). He explained that their operation expanded to 1,200 heads of cattle in 2018 and that they've purchased an additional 400 head of cattle, for a total of 1,600 cattle. Mr. Archibald noted that the additional head of cattle will also increase the calving that will occur in 2020. (TR 63). As they have increased the herd from 2017, he stated this is another reason that they need additional laborers. (TR 64). He testified that since 2017, the amount of work to be performed in cold weather months and the calving season in the spring, as a consequence of the increased number of cattle, has doubled. (TR 65).

Mr. Archibald stated that their seasonal need begins in October when the cattle come in to the holding pens and fall completely under their care. He clarified that when the application stated their need began in winter, it meant winter weather, which he explained begins in October in South Dakota. He stated that the temperature can fall to 50-55 degrees below zero Fahrenheit during the colder months, and that in 2018, a town eight miles away was recorded as having the coldest temperature in the world. He explained that when a freeze sets in, the grass is no longer sustainable for the cattle to feed on and they have to be kept in holding pens. While the cattle are in holding pens, he said they're fed twice a day with a total mixed ration that includes corn, earlage, hay, silage, and supplements. He further said that the water supply needs to be checked twice a day. He explained that there are heating elements to keep the water from freezing, but that it sometimes gets so cold water has to be thawed by hand. Additionally, he said that twice a month, the holding pens need to be cleaned to prevent the cattle from getting sick. He stated that other winter job duties include snow-removal and mixing feed and additives. (TR 65-66, 73, 75-79, 81-83).

From mid-March to April, Mr. Archibald said the calving process occurs. He stated that the artificially inseminated cows start calving in mid-March, and then the majority of cows start calving in April. (TR 66-68).

From June through September, Mr. Archibald testified that the cattle graze in the pasture. (TR 63). He stated the only work they do during these months are artificially inseminate and naturally inseminate the cows before putting them out to the pasture, rotate them every two weeks to manage grass cycles, and check the fences and water source. Other than that, he said the cattle are self-sufficient until October. When rotating them, he explained that the gate to the next pasture is opened at night and they encourage a few cattle into the next pasture until the rest notice and follow. After this, they do a cleanup and secure the gates. (TR 68-73). While the cattle are grazing, he stated the ranch does haying work from the end of June through October. (TR 74).

#### *B. Argument of the Parties*

At the close of the telephonic hearing the parties presented closing arguments and were also granted leave to file written closing briefs on or before October 29, 2019. Both parties filed timely post hearing briefs.

## 1. *The Employer*

Employer argues that Employer has established its seasonal need for labor as the duties relating to cattle are materially different in kind, intensity, and comprehensiveness during the colder months, when the cattle need “round-the-clock care,” than the warmer months, when they go into a period of “benign neglect” and require only bi-monthly rotation. Employer stated that when the cattle are brought into the holding pens and livestock stalls from mid-October until May, they require special feed, medical care, water, and additional handling to prevent pandemic diseases that could wipe out the entire herd. Employer contends it does not need anyone to perform this employment during the months of June through September because the farming operation shifts to raising silage, hay, and corn for cattle consumption while the cattle graze in the pasture.

Further, in response to the Certifying Officer’s statement that Employer chooses when the cattle will become inseminated, Employer clarified that the timing is necessary because they need to be weaned by the time the snow comes in.

Employer also explained that the summer payroll hours reflect different work than the winter payroll hours and that it’s inappropriate to conflate the different activities. Employer stated that when the hours for the distinct job duties are assessed, it would amount to zero hours in June, July, and August.

Employer concluded that it has demonstrated a need for seasonal labor due to the distinct job duties in caring for the cattle in winter months as opposed to summer months.

## 2. *The Certifying Officer*

The Solicitor submitted a closing brief on behalf of the CO urging that I affirm the CO’s determination. The CO acknowledged that Employer may have a need for additional labor services due to its expansion; however, the CO alleges Employer has not demonstrated a *seasonal* need from October 2019 through June 1, 2010. The CO stated that, at most, Employer demonstrated a temporary or seasonal need for October 2019, March 2020, and April 2020.

The CO contends that Employer’s payroll data does not substantiate their alleged need, regardless of whether the job duties are considered seasonal or temporary. Rather, the CO states that the payroll records demonstrate a “nearly uniform need across peak versus non-peak periods.” The CO requests that limited weight be given to Mr. Archibald’s testimony regarding his calculation of the hours. Even if credit was given to them, the CO purports that the number of hours would not meet the necessary level as required by the regulation. The CO further purports that the increased hours in 2019 were likely due to increased livestock inventory as opposed to a seasonal need, and thus does not warrant H-2A labor certification.

The CO further contends that Employer’s prior certification is irrelevant to his current application because an employer must prove its need in each application.

The CO concluded that Employer has not provided sufficient evidence of a seasonal need from October 2019 until June 2020.

### **ISSUE**

Whether the Employer has 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**

The current case arises from the Employer’s request for a de novo hearing in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program. The regulation pertaining to appeals of the CO’s determinations in H-2A labor certification matters states, in cases where a de novo hearing has been requested, that the procedures in 29 C.F.R. Part 18 apply and that the ALJ will schedule a hearing within five business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. §655.171(b)(ii).

In pertinent part, the regulations further provide that after a de novo hearing “the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken...The Decision of the ALJ is the final decision of the Secretary.” 20 C.F.R. §655.171(b)(2).

Since neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge’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 Administrative Law Judge 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).

It is also well established that the H-2A program is designed to fill only temporary or seasonal labor needs and therefore 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).

In order to utilize the H-2A program 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).

In the instant case, the Employer’s application requests temporary labor certification for four “farm ranch animal workers” for the period beginning October 25, 2019 and ending June 1, 2020. (AF 34). The CO noted that the requested dates of need differ from the previously certified application, which was certified for the period between January 4, 2019 through June 1, 2019. The CO also observed that the dates of need requested in the current application are inconsistent with the Employer’s statements that its actual period of need is October 15, 2019 through June 1, 2020.

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).

Further, legal precedent supports the CO's position that 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 changes. *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).

In this case Employer has consistently offered the same explanation for why the dates of need in its previous and current applications are different and why both of its applications vary at least some degree from what it claims are its actual dates of need, October 14, 2019 through June 1, 2020.

Employer noted on its application form, in response to "statement of temporary need," that the change in its start date (from its previous application) was due to its emergency filing last year when Employer was new to the program, and also because it was unable to complete its paperwork in the current year to reflect its actual period of need, which it asserted would be October 14, 2019 through June 1, 2020 moving forward. (AF 34).

In its response to the Notice of Deficiency Employer reiterated that its actual dates of temporary need are October 14, 2019 through June 1, 2020. Employer explained that its current application was filed eleven (11) days late (and therefore the start date was delayed by eleven (11) days) due to a combination of heavy workload and due to the fact that the office employee who handles the paperwork "has been dealing with cancer." The statement also noted that "[d]uring the months of June – mid-October, the cattle are grazing in the pastures and one of the [Archibald] brothers checks on them at this time." The statement further states that "In mid-October, he brings the cattle into feedlots...he has to hand feed and care for the livestock during the sub-freezing temperatures in SD. He also calves during the months of requested need, so he needs extra workers to deal with the extra workload." (AF 20).

Testimony at the hearing also confirms the Employer's explanation for the discrepancy in its previous application and the current application as well as the dates of need that it states are its actual dates of need, October 14, 2019 through June 1, 2020. Mr. Williams explained that they were unable to hire workers under the H-2A program until January of 2019 because of the late timing of their application in 2018. He stated that, had they made their decision earlier, "we would have wanted to start employing them in October of 2018." (TR 37).

The variation in the Employer's stated dates of need only involves the beginning date of need. The ending date of need has been consistently June 1, 2020. Employer reasonably explained that its previous application with dates of need of January 4, 2019 through June 1, 2019 was filed late when it first became aware of the H-2A program. Its current application clearly states that its actual dates of need going forward are October 14, 2019 – June 1, 2020, although Employer used a start date of October 25, 2019 because its filing was eleven (11) days late, it made it clear on its application that October 14, 2019 is the actual date of need.

Although one may question the competence of the Employer's office staff and/or their knowledge of the H-2A application filing deadlines, the undersigned finds the discrepancy in the

stated dates of need in Employer’s previous and current applications does not reflect Employer’s attempt to manipulate its stated dates in order to conceal a year-round need for the requested labor. As will be discussed further below, Employer’s explanation of its temporary need correlates with the stated actual dates of need, October 14, 2019 and June 1, 2020. Any difference between the beginning date of October 25, 2019 in the current application and the stated “actual beginning date of need going forward” is somewhat moot at this point in light of the fact that both dates have passed, due to delay in processing the current application.

In order to prove its seasonal need an Employer must show how its period of need is “tied to a certain time of year by an event or pattern.” 20 C.F.R. 655.103(d). *See Fegley Grain Cleaning*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011) (“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.”).

The CO argues that the Employer’s payroll records for the previous year 2018 do not support its period of temporary need. Employer provided the following payroll records, covering 2018 and January through May in 2019, in response to the Notice of Deficiency:

Month	Year	Permanent U.S. Workers			Temporary U.S. Workers			H-2A Workers		
		Workers	Total Hours	Total Pay	Workers	Total Hours	Total Pay	Workers	Total Hours	Total Pay
JAN	2018	5	779.73	24977.78						
FEB	2018	5	737.41	25391.65						
MAR	2018	5	793.75	24237.3						
APR	2018	5	126.06	41741.26						
MAY	2018	5	796.65	26372.68						
JUN	2018	3	466.2	12039.42						
JUL	2018	3	450.68	11789.05						
AUG	2018	5	548.03	16838.26						
SEP	2018	5	951.45	26956.6						
OCT	2018	5	1174.08	36307.4						
NOV	2018	3	431.25	9624.03						
DEC	2018	4	830.83	28025.53						

Month	Year	Permanent U.S. Workers			Temporary U.S. Workers			H-2A Workers		
		Workers	Total Hours	Total Pay	Workers	Total Hours	Total Pay	Workers	Total Hours	Total Pay
JAN	2019	4	904.03	19686.25				2	200.62	\$ 2,884.87
FEB	2019	4	1025.08	17029.78				2	420.6	\$ 6,048.23
MAR	2019	4	1145.12	18940.08				3	654.5	\$ 9,411.70
APR	2019	4	1921.6	31319.78				2	734.82	\$ 10,566.67
MAY	2019	3	931.88	15110.6				2	590.4	\$ 8,489.95
JUN	2019									
JUL	2019									
AUG	2019									
SEP	2019									
OCT	2019									
NOV	2019									
DEC	2019									

The CO stated in the Final Denial that the payroll records do not establish a temporary need. Specifically, the CO noted that the months of January, February, March and May of 2018, which are during the Employer’s stated peak period, show less hours worked than in September 2018, which is a non-peak month. Further, the CO noted that the months of November and December 2018 also showed less hours worked than certain non-peak months. (AF 12-18). The

CO re-iterated his opinion that the payroll records do not support the purported temporary need in his testimony. (TR 30-33, 88-94). The CO concluded that the payroll records demonstrate a “nearly uniform need across peak versus non-peak periods” and that an increase in hours in 2019 is likely due to Employer’s increased livestock inventory as opposed to a seasonal need. *Certifying Officer’s Brief*.<sup>4</sup>

However, in *Sur-loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013), the CO was reversed and BALCA found that the Employer had established its need for the requested workers where the employer made a good faith effort to provide alternative information to the requested payroll information. Here, the Employer demonstrated that the payroll records do not provide a complete picture of its need. Specifically, the Employer explained that the summer payroll hours reflect different work duties than the winter payroll hours, and if the hours were calculated based on the job duties, it’d amount to zero hours in June, July, and August. *Employer’s Brief*. This is supported by the testimony of Mr. Williams and Mr. Archibald. Mr. Williams testified that there is no way to distinguish between the tasks performed when he computed the total number of hours worked each month. (TR 59-60). Further, as Mr. Williams and Mr. Archibald both testified, the job duties performed in the winter are markedly different than the duties in the summer, and thus create a different need in the colder months for additional labor. (TR 45-48, 71-83).

In addition, the payroll records do not account for other forms of employment arrangements that Employer utilized. Mr. Williams testified that the payroll records did not factor in the outside contract labor they hired to fill in the gaps as needed. (TR 42-43). Mr. Archibald also testified that they’ve hired day laborers to fill employment gaps and have also used neighbors as a part of a training program. However, Mr. Archibald testified that they need additional workers as there’s not enough of a labor force to meet their need. (TR 83-84).

Further, the payroll records also do not include the hours of salaried employees. Mr. Williams testified that the hourly accounting did not include the hours for Brad Archibald and Carter Archibald because they had an arrangement with their father, Clarence Archibald, to work without receiving paychecks. The records also do not include the hours of a third salaried employee, who did not submit time cards and terminated her employment in mid-November 2018. Mr. Williams estimated that each employee worked an additional two hundred (200) hours per month. TR 39-42, 50-52. However, these calculations are mere estimates and may not be accurate determinations. As such, I find that they are not particularly probative.

The CO also questioned inconsistencies in the statement of temporary need contained in the application involving Employer’s use of the terms winter and spring as well as its statement which the CO also found to be inconsistent with a start date beginning in mid-October, a month falling within the calendar season of fall. Employer presented hearing testimony which explained its use of the term winter and spring and how its seasonal need for labor is determined.

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<sup>4</sup> The CO contends that Employer’s expansion of 800 cattle to 1,200 cattle in 2018, and to 1,600 cattle in 2019 represents Employer’s own decision rather than a seasonal need. Although Employer decided to expand its operation on its own accord, such a decision should not be penalized. Here, as discussed *supra*, the cattle go into a period of “benign neglect” from June to mid-October when they’re grazing in the pasture and require little work, regardless of whether there are 800 cattle or 1,600 cattle. As such, I find that the number of cattle neither establishes nor refutes the existence of a seasonal need.

The testimony of Mr. Williams and Mr. Archibald support that the Employer's use of the term winter in its application reflects the winter weather season in northern South Dakota as opposed to the calendar seasons. Both Mr. Williams and Mr. Archibald testified that subfreezing temperatures in the area of South Dakota, where the livestock business is located, generally begin in mid-October and often last until the end of May. (TR 38-39, 71, 73). Further, Mr. Williams noted that just recently, earlier this month (October), the area received six inches of snow, which is not uncommon at this time of the year in South Dakota. (TR 39). Mr. Archibald also pointed out that the need for the temporary "farm ranch animal workers" begins during mid-October because the livestock can no longer graze in the field and must be moved to holding pens, where they need to be fed twice a day. (TR 73-74). The temporary ranch workers need to perform other tasks which are related to the winter weather including maintaining the heated watering system, operating snow removal equipment in order to operate feed wagons, mixing feed and additives and filling feed troughs with feed and water for the livestock. (TR 75-79, 81-83). Multiple veterinary procedures are also performed which the livestock are confined in the stalls as well as procedures necessary for the "calving" or breeding of the livestock which Employer asserts occurs primarily in the months of March and April. Employer's statement of temporary need states, "At the end of May, we take the livestock to grazing/feeding areas." (AF 9).

Employer has also addressed how its need for labor differs between its dates of need and the offseason months of June through mid-October. Employer's response to the Notice of Deficiency states "[d]uring the months of June–mid-October, the cattle are grazing in the pastures and one of the [Archibald] brothers checks on them at this time." (AF 20). Testimony of Mr. Williams and Mr. Archibald supports that the livestock require little care at this point and generally just need to be moved from pasture to pasture during the grazing season, which is determined by the weather. (TR 45-48, 63, 69-70). The higher temperatures in June through mid-October provide the proper climate for the grass to grow and the cattle are able to feed on the grass in the pastures. Mr. Archibald testified that generally the only necessary labor at this point is raising the gates between the pastures so that the cattle can move from one site to the other. (TR 69-73).

This case involves the care of livestock during the Employer's stated period of need of mid-October through June 1, 2020. Other similar cases have determined that duties are relevant inasmuch as the duties involve the care and feeding of livestock, which are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis. *See Cowboy Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011); *Gisi Pheasant Farm*, 2011-TLC-00139 (Jan. 25, 2011).

As discussed above, both the Administrative File and the hearing testimony support that Employer has established its seasonal need for temporary "farm ranch animal workers" between mid-October and June 1, 2020 and has overcome the presumption that its need for "farm ranch animal workers is year round.

### **CONCLUSION**

For the reasons stated above, I find that that Employer has met its burden of proving its temporary need for four "farm ranch animal workers" for the period beginning October 25, 2019

and ending June 1, 2020, on the basis of a seasonal need, as noted in its H-2A temporary labor certification application. I have based my decision on my review of the administrative file, as well as the evidence, testimony, and argument presented at the October 21, 2019 hearing, and closing briefs. Therefore the CO's denial of the Employer's application for temporary labor certification for four "farm ranch animal workers" for the period beginning October 25, 2019 and ending June 1, 2020 is reversed

**ORDER**

Accordingly, for the foregoing reasons, the CO's denial of this H-2A application, is **REVERSED**, and this matter is **REMANDED** to the CO for additional processing including regulatory recruitment.

**PATRICIA J. DAUM**  
Administrative Law Judge