



**Issue Date: 03 July 2019**

BALCA Case No.: 2019-TLC-00060

ETA Case No.: H-300-19105-333488

*In the Matter of:*

ORCHARD PARKS, LLC,  
*Employer.*

### **DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This case arises from a request for review by Orchard Parks, LLC (“Employer”) of the decision of the Certifying Officer (“CO”) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a temporary or seasonal basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 8 C.F.R. § 214.(h)(5). Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142A, *H-2A Application for Temporary Employment Certification* (“Form 9142”). A CO in the office of Foreign Labor Certification (“OFLC”) of the Employment and Training Administration reviews applications for temporary labor certification. If the employer receives an unfavorable determination, the employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.171.

For the reasons set forth below, the CO’s denial of temporary certification is affirmed.

#### **Statement of the Case**

On April 15, 2019, Employer submitted a Form 9142 requesting certification for one “Groom, Farmworker” from June 17, 2019 through April 14, 2020. (AF 128). The CO issued a Notice of Deficiency on April 22, 2019, identifying nine deficiencies with the original application. (AF 115-122). On April 26, 2019, Employer submitted its response to the Notice of Deficiency with modifications to the application and payroll documents. (AF 14-114).

On June 10, 2019, the CO issued a Denial Letter. (AF 9-13). The CO concluded that Employer had failed to prove that it has temporary or seasonal need, as required by the regulations. (AF 13). The CO wrote:

In its NOD response, the employer provided its payroll report, with no further explanation.

The employer's payroll summaries submitted for 2017 and 2018 showed that both permanent and temporary workers were employed. However, the summaries also showed that no workers were employed during the months of January through March for either 2017 or 2018. Furthermore, the employer's payroll records appeared incomplete.

Month	Number of Workers		2017	Number of Workers		2018
	Permanent Employees	Temporary Employees	Total Hours Worked	Permanent Employees	Temporary Employees	Total Hours Worked
January	1	0	-	2	0	-
February	2	0	-	2	0	-
March	2	0	-	2	0	-
April	2	1	24	1	4	186
May	2	3	226	1	6	530.5
June	2	3	252	2	5	750.5
July	1	4	328	1	6	776
August	1	4	310	1	6	743
September	1	4	398	1	5	421
October	1	3	235	1	4	281
November	1	3	201	1	4	37.5
December	1	2	2	1	4	30

After reviewing the employer's payroll records, the Chicago NPC emailed the employer on May 5, 2019, to confirm whether the documentation provided was its complete payroll and afforded an opportunity to submit additional documentation to support its requested dates of need. The employer provided a response on May 21, 2019, as indicated below[:]

All the workers in my payroll are Farmhands, except Allison Gulley who is my Farm Manager. 2017 and 2018 complete payroll documentation was turned in. The months that have workers working hourly are the months where we used temporary seasonal extra help, and the months where my statements show no hours for certain workers is because they are on salary.

The total number of workers and total earnings for every employee Orchard Park had, was listed on those earning reports. Orchard Park does not have any H-2A workers at this time, so the farm was not required to have any other records at those times than what we have.

These are Orchard Park's complete payroll records.

The above payroll establishes the employer's dates of need for temporary workers in the months of May through November, rather than June through April, as the employer is requesting. March through November had a higher number of workers employed as well as the total hours worked. Likewise, the months of December through March had the lower number of workers employed as well as the hours worked. For example, for the month of December, which is included in the employer's requested dates of need, the total hours worked were 2 in 2017 and 30 in 2018; however, the months of January through March employed no temporary workers but is included in the requested dates of need. There is no evidence that the employer has a need for extra labor from December

through March. Beyond its payroll, the employer did not provide any additional documentation to illustrate why its need should be considered temporary or seasonal.

To the extent that the employer's payroll supports a seasonal need, it does not do so for the period of need identified in this application.

(AF 11-13).

On June 12, 2019, Employer requested administrative review of the denial of its application. (AF 2-3). Employer wrote:

To the contrary of the reason for the denial letter. The summarized 2018 payroll reports show that the months of January, February, and March that no temporary payroll was paid out. The reason for this is because; the employer could not find any willing, or able workers to do the job required. During the summer months the employer hired college students, because that is the only extra help that applied for the jobs. The college students went back to school in the fall months. As the payroll statement shows, our permanent help during these months is low also, because of the winter weather, it is very hard to find help that wants to work outside in freezing cold temperatures. As the employer stated before, Orchard Park LLC has more horses during the summer, fall and winter times of the year, which requires them to hire extra temporary help at those times. For the last 3 years we have had to turn away clients with foaling mares because we didn't have enough help to take care of the number of horses we usually have Finding permanent or temporary help in the agriculture racehorse business is very difficult, the help in the racehorse business is very volatile.

For these reasons is my request to hire a worker who is going to be here for 10 months working on a regular daily basis.

I will be forced out of the horse business because of the help situation in this industry, as it is affecting all aspects of the business.

(AF 3).

### **Legal Analysis**

In cases where administrative review has been requested, "the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action." 20 C.F.R. § 6551.71(a).

Throughout the labor certification process, the employer has the burden of proving entitlement to temporary alien labor certification. *DeSoto Fruit and Harvesting, Inc.*, 2019-TLC-00032, slip op. at 6 (March 1, 2019). The employer 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. *Catnip Ridge Manure Application Inc.*, 2014-TLC-00078, slip op. at 3 (May 28, 2014).

To receive temporary labor certification under the H-2A program, the employer “must establish that the employment proposed in the certification is of a temporary or seasonal nature.” 8 C.F.R. § 214.2(h)(5)(iv); *see also* 20 C.F.R. § 655.161(a). Under the regulations, “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.” 20 C.F.R. § 655.103(d).

Employer requested certification for one “Groom, Farmworker” from June 17, 2019 through April 14, 2020. (AF 128). In its Statement of Temporary Need, Employer wrote:

I Ryan Mahan, Orchard Park LLC., cannot find local, legal, and documented, workers who want to apply for farm jobs, there are not enough able, willing, or qualified workers in the agriculture industry to hire in the U.S. My farm is a Thoroughbred farm that consists of weanlings, yearlings, racetrack layups and broodmares. During the summer and fall months, the farm has a large number of sale prep horses. At the end of December, broodmares start arriving in anticipation of foaling. January through March the mares are foaling. We need extra temporary help during these peak times for Orchard Park LLC. I have been running local job advertisements at the colleges, and in local newspapers to no avail. This is why the farm is in need of an H-2A worker.

(AF 128, 155). In the Notice of Deficiency, the CO found that Employer’s application failed to establish a temporary need as required by the regulations and requested supporting evidence showing that temporary need exists. (AF 117). The CO wrote:

The employer is required to submit summarized payroll reports for a minimum of two previous calendar years 2017 and 2018 for ‘Groom, Farmworker’. These payroll reports must be a summary of the employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation.

*Id.* (emphasis in the original). In its response to the Notice of Deficiency, Employer attached its payroll documentation. (AF 47-114). I have summarized Employer’s 2017 and 2018 payroll documents below.

**2017 Monthly Payroll Summary**

Month	Employee	Number of Hours Worked	Total Number of Hours Worked
January	Jose Varela	Not indicated	N/A
February	Jose Varela	Not indicated	N/A
	Olivia Camp	Not indicated	
March	Jose Varela	Not indicated	N/A
	Olivia Camp	Not indicated	
April	Jose Varela	Not indicated	24 hours
	Olivia Camp	Not indicated	
	Sergio Aguilar	24 hours	
May	Jose Varela	Not indicated	226 hours

	Olivia Camp	Not indicated	
	Sergio Aguilar	94 hours	
	Juan Aguilar	96 hours	
	Abel Zamora	36 hours	
June	Jose Varela	Not indicated	252 hours
	Allison Gulley	Not indicated	
	Sergio Aguilar	106 hours	
	Juan Aguilar	134 hours	
	Abel Zamora	12 hours	
July	Jose Varela	5 hours	328 hours
	Allison Gulley	8 hours	
	Sergio Aguilar	155 hours	
	Juan Aguilar	153 hours	
	Abel Zamora	7 hours	
August	Jose Varela	13 hours	310 hours
	Allison Gulley	9 hours	
	Sergio Aguilar	152 hours	
	Juan Aguilar	129 hours	
	Abel Zamora	7 hours	
September	Jose Varela	5 hours	398 hours
	Allison Gulley	Not indicated	
	Sergio Aguilar	199 hours	
	Juan Aguilar	186 hours	
	Abel Zamora	8 hours	
October	Jose Varela	Not indicated	235 hours
	Allison Gulley	Not indicated	
	Sergio Aguilar	121 hours	
	Juan Aguilar	114 hours	
November	Jose Varela	Not indicated	100.5 hours
	Allison Gulley	Not indicated	
	Juan Aguilar	71 hours	
	Abel Zamora	29.5 hours	
December	Jose Varela	Not indicated	1 hour
	Ryan Mahan	1 hour	

### 2018 Monthly Payroll Summary

Month	Employee	Number of Hours Worked	Total Number of Hours Worked
January	Jose Varela	Not indicated	N/A
	Allison Gulley	Not indicated	
February	Jose Varela	Not indicated	N/A
	Allison Gulley	Not indicated	
March	Jose Varela	Not indicated	N/A
	Allison Gulley	Not indicated	
April	Jose Varela	Not indicated	186 hours
	Allison Gulley	Not indicated	
	Hannah Koehler	75 hours	
	Sergio Aguilar	29 hours	
May	Juan Aguilar	82 hours	530.5 hours
	Charlotte Talbott	81.5 hours	
	Hannah Koehler	5 hours	
	Hope Hager	109 hours	
	Jose Varela	Not indicated	
	Juan Aguilar	143 hours	
Sergio Aguilar	153 hours		

	Kerri Montgomery	15 hours	
	Abel Zamora	24 hours	
	Allison Gulley	Not indicated	
June	Charlotte Talbott	198.5 hours	750.5 hours
	Hope Hager	195 hours	
	Jose Varela	Not indicated	
	Juan Aguilar	143 hours	
	Sergio Aguilar	176 hours	
	Abel Zamora	38 hours	
	Allison Gulley	Not indicated	
July	Charlotte Talbott	174.5 hours	776 hours
	Hope Hager	119.5 hours	
	Jose Varela	8 hours	
	Juan Aguilar	163 hours	
	Sergio Aguilar	195 hours	
	Allison Gulley	51 hours	
	Kerri Montgomery	65 hours	
August	Charlotte Talbott	91 hours	743 hours
	Hope Hager	111 hours	
	Jose Varela	8 hours	
	Juan Aguilar	181 hours	
	Sergio Aguilar	201 hours	
	Allison Gulley	12 hours	
	Kerri Montgomery	139 hours	
September	Hope Hager	33 hours	421 hours
	Jose Varela	3 hours	
	Juan Aguilar	131 hours	
	Sergio Aguilar	124 hours	
	Allison Gulley	8 hours	
	Kerri Montgomery	122 hours	
October	Jose Varela	Not indicated	281 hours
	Juan Aguilar	126 hours	
	Sergio Aguilar	123 hours	
	Allison Gulley	8 hours	
	Kerri Montgomery	24 hours	
November	Jose Varela	Not indicated	37.5 hours
	Juan Aguilar	20 hours	
	Allison Gulley	1 hour	
	Kerri Montgomery	16.5 hours	
December	Jose Varela	Not indicated	30 hours
	Allison Gulley	Not indicated	
	Kerri Montgomery	5 hours	
	Charlotte Talbott	24 hours	
	Ryan Mahan	1 hour	

In the Denial Letter, the CO wrote:

The above payroll establishes the employer's dates of need for temporary workers in the months of May through November, rather than June through April, as the employer is requesting. March through November had a higher number of workers employed as well as the total hours worked. Likewise, the months of December through March had the lower number of workers employed as well as the hours worked. For example, for the month of December, which is included in the employer's requested dates of need, the

total hours worked were 2 in 2017<sup>1</sup> and 30 in 2018; however, the months of January through March employed no temporary workers but is included in the requested dates of need. There is no evidence that the employer has a need for extra labor from December through March. Beyond its payroll, the employer did not provide any additional documentation to illustrate why its need should be considered temporary or seasonal.

(AF 12-13). Based on my review of the payroll documents, it is not readily apparent whether the listed employees were permanent or temporary employees. Employer attached a statement to its response to the Notice of Deficiency, which read in pertinent part: “The months that have workers working hourly are the months where we used temporary seasonal extra help, and the months where my statements show no hours for certain workers is because they are on salary.” (AF 15).

Employer filed a legal brief on July 2, 2019. Employer argues “[i]t is our position that this decision was arbitrary and capricious because of the illogical nature of the denial.” Employer argues the decision “completely ignores the sworn affidavit of the petitioner which explains the seasonal nature of the equine industry,” and “places great emphasis on the payroll records not supporting the seasonal nature of the business because there is no evidence of payroll increase for seasonal workers at the time requested by the petitioner.”

The sworn affidavit, attached to Employer’s legal brief as Exhibit B, does not appear in the Administrative File. It cannot be said that the CO “ignored” evidence not submitted to her. Moreover, the regulations prohibit me from considering new evidence on review of the CO’s decision, *see* 20 C.F.R. § 655.71(a), therefore Exhibit B will not be considered.

Employer has the burden of establishing entitlement to labor certification from June 17, 2019 through April 14, 2020. As the CO pointed out, the evidence establishes that Employer requires additional help from May through November, not June through April. The payroll documents suggest that Employer has a decrease in demand for workers during winter months. This may be because Employer did not record the number of hours its salaried employees worked at those times. In its Statement of Temporary Need, Employer stated: “At the end of December, broodmares start arriving in anticipation of foaling. January through March the mares are foaling. We need extra temporary help during these peak times for Orchard Park LLC.” (AF 128, 155). While it is possible that its salaried employees work significantly longer hours during winter months to deal with the arriving broodmares, the Administrative File contains no objective evidence that Employer “requires labor levels far above those necessary for ongoing operations” from December through April. 20 C.F.R. § 655.103(d). Accordingly, the CO’s denial of certification is affirmed.

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<sup>1</sup> I note the CO was incorrect here, however this error is harmless and does not undermine the CO’s legal conclusion. The payroll records reflect that only 1 hour of work was performed in December 2017.

**ORDER**

In light of the foregoing, IT IS ORDERED that the denial of labor certification in this matter is AFFIRMED.

**SO ORDERED.**

PAUL C. JOHNSON, JR.  
District Chief Administrative Law Judge

PCJ, Jr./PML/ksw  
Newport News, Virginia