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Issue Date: 28 January 2019

OALJ Case No.: 2019-TLC-00011
ETA Case No.: H-300-18331-046502

In the Matter of:

J & J CORP DBA SOYKO INTERNATIONAL,
Employer.

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

Micole A. Allekotte, 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 December 12, 2018, J & J Corp. DBA Soyko International (Employer or Syoko) filed a request for a *de novo* administrative hearing pursuant to 20 C.F.R. § 655.171(b) to review the Certifying Officer's (CO) December 4, 2018 Notice of Deficiency in regard to Employer's temporary alien agricultural labor certification (H-2A) application. I received the Administrative File (AF) on January 7, 2018. Pursuant to the agreement of the parties in a telephone conference call on January 7, 2018, the hearing in this matter was scheduled for January 18, 2019 by telephone. On January 7, 2019 an order issued clarifying filing deadlines and formally scheduling the January 18, 2019 hearing.

On January 18, 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, the parties' exhibits, and the testimony offered at the hearing.¹ Furthermore, this Decision and Order is issued within ten calendar days of the hearing as required by the regulation at 20 C.F.R. §655.171(b)(1)(iii).

BACKGROUND

On November 27, 2018, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (Form 9142). (AF 23-32). The Employer's application requested certification for four agricultural equipment operators for the period beginning February 1, 2019 and ending November 20, 2019. (AF 23). The nature of temporary need was listed as seasonal. No statement of temporary need was included on the application.

On December 4, 2018 the Certifying Officer (CO) issued a Notice of Deficiency (NOD) listing two deficiencies in the Employer's application. (AF 13-16). The first deficiency was the Employer's failure to establish its job opportunity as "temporary or seasonal in nature." The second deficiency was the Employer's failure to provide evidence of worker's compensation insurance. The CO noted that the second deficiency could be cured with Employer's submission of updated proof of workers' compensation insurance, prior to the certification of the application, and Employer has expressed its willingness to do so. Accordingly, this deficiency will not be addressed further herein. (AF 15-16; TR 10).

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:

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:

¹ References to the Administrative File are designated as AF-n and references to the transcript are identified as TR-n. Only the Certifying Officer submitted additional exhibits in this matter and thus, references to those exhibits are identified as CX-n.

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date Of Need</u>	<u>Ending Date Of Need</u>
H-300-17353-033013	Soyko International, Inc.	Certified – Full	03/01/2018	12/31/2018
H-300-18304-518209	J & J Corp DBA Soyko International	Withdrawn	01/01/2019	10/30/2019
H-300-15050-701298	J & J Corp DBA Soyko International	Received	02/01/2019	11/30/2019

The CO found that the job opportunity described in Employer’s application, “coupled with the Employer’s recent filing history, indicates the employer’s dates of need are from March 1, 2018 through November 30, 2019” which the CO concluded represented a one year and nine month period of need. (AF 13). The CO observed that all three of the applications requested workers at the same work location with the same SOC code of 45-2091 Agricultural Equipment Operator, and all three had similar job duties and experience requirements. The CO therefore determined that under these circumstances, the employer’s need for the job opportunity was in excess of 10 months and further questioned the temporary or seasonal nature of the requested job opportunity. *Id.*

In the Notice of Deficiency, the CO requested a detailed explanation and supporting documentation addressing why the job opportunity should be considered seasonal or temporary rather than permanent in nature. The CO stated the explanation must include the following:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation outside the requested period of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Agricultural Equipment Operators* the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system;
4. Summarized monthly production numbers for two calendar years that clearly show the number of plants produced each month by workers in the requested occupation at the employer’s worksite location, or equivalent facility; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from

providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

Note: If the submitted document(s) and its relationship to the employer’s need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested dates of need.

(AF 14).

The CO noted that in response to a Notice of Deficiency issue for the previously certified application (for the period of March 1, 2018 to December 31, 2018), the Employer explained its requested dates of need as follows: “Are [sic] typical seasonal need is from late February to late December”. The CO observed that the application filed before the current application, which was ultimately withdrawn, and the current application, requested different periods of need that did not correspond to the Employer’s previous explanation.² The CO reiterated that the Employer’s response to the Notice of Deficiency must address “in detail as to why its dates of need have significantly changed from its established season of March through December to its current request of February through November.” (AF 15).

On December 11, 2018, the Employer requested a de novo hearing on the CO’s Notice of Deficiency. (AF 1-10).

EVIDENCE AND ARGUMENT

The Administrative File was admitted without objection. (TR 7-8). CO Exhibits (CX) A through G were admitted by stipulation of the parties. (TR 9). The Employer did not offer any additional exhibits. The Employer called to testify Certifying Officer, Ischel Quintana, and Soyko’s Office Manager, Melissa Koehn. The CO did not call any additional witnesses.

Exhibit	Description	Requested Period of Seasonal Need
A	ETA-9142A H-2A Application for Temporary Employment Certification H-300-13045-271602 Certified March 19, 2013	4/1/13 – 1/31/14
B	ETA-9142A H-2A Application for Temporary Employment Certification H-300-14034-560026 Certified February 19, 2014	4/1/14 – 1/31/15
C	ETA-9142A H-2A Application for Temporary Employment Certification H-300-15023-569176 Certified February 10, 2015	3/15/15 – 12/31/15

² The CO included the previously certified application for the period 3/1/18 to 12/31/18, as well as the withdrawn application for the period 1/1/19 to 10/30/19 in the Administrative file at AF 52-195.

D	ETA-9142A H-2A Application for Temporary Employment Certification H-300-15322-770274 Certified December 29, 2015	2/1/16 – 12/1/16
E	ETA-9142A H-2A Application for Temporary Employment Certification H-300-16293-251838 Denied	1/1/17 – 11/1/17
F	ETA-9142A H-2A Application for Temporary Employment Certification H-300-16340-326459 Denied	2/15/17 – 12/1/17
G	ETA-9142A H-2A Application for Temporary Employment Certification H-300-17052-600325 Certified March 23, 2017	4/20/17 – 12/1/17

A. Exhibits

The CO’s Exhibits A-G are summarized in the following chart:

B. Summary of Testimony

Ischel Quitana

Certifying Officer, Ischel Quitana (CO) was called as a witness by the Employer. Although CO Quitana acknowledged that she was not the CO who personally reviewed the Employer’s application or caused the Notice of Deficiency to issue (TR 19), she testified to her familiarity with the file in this case and the reasons for the issuance of the Notice of Deficiency.³ (TR14). She explained that there was an inconsistency in the filing history which led to the issuance of the notice of deficiency, and a question regarding whether there was a temporary vs permanent need for agricultural employees. (TR 15). She conceded that the analysts who review applications are trained in departmental regulations but do not have knowledge of agricultural farming practices. (TR 17). She confirmed that “under the policy and the law as the Department applies it,” a farm that has a year-round need for agricultural labor would not qualify for the H-2A program. (TR 22). She also confirmed that generally, a farm that has a recurring seasonal need for labor would qualify for the H-2A program. (TR 23). CO Quitana reviewed the CO’s Exhibits and admitted that certification was granted for the years as indicated in the Exhibits. She also testified that she had no reason to believe those certifications were issued negligently or inappropriately. (TR 25-28).

On cross examination by the Solicitor, CO Quitana was questioned about the documentation requested in the Notice of Deficiency, specifically the requirement to submit payroll records separately detailing full-time permanent and temporary employment on a monthly basis over the past 2 years, the number of employees employed, hours worked and earnings for each employee employed in the requested occupation (agricultural equipment operators) (TR 31-32). CO Quitana agreed that this was the information that the CO would rely on to assess whether the need for labor required labor levels far above those necessary for ongoing operations. *Id.* She also compared the previous certifications to the instant application, noting in particular the variation in the requested dates of need. (TR 32-35). CO Quitana

³ CO Quitana is one of three Certifying Officers directly employed by the Department of Labor who review applications under the H2A program. (TR 19). CO John Rotterman reviewed the instant application. (TR 19).

testified that even if a past certification was issued in error, that issuance would not entitle an employer to certification in subsequent years with similar applications. (TR 35-36).

On redirect examination CO Quitana admitted that not all applications include the requested payroll information, but all applications are required to demonstrate that there is a temporary or seasonal need. (TR 36-37). When asked whether dates of need can change she responded, "Needs typically do not change. And we do ask for explanations if they do." (TR 39). CO Quitana admitted that the certifying officers are not farmers and defer to the expertise of the farmer regarding certain farming practices. (TR 39-40).

Melissa Koehn

Melissa Koehn, the office manager for Soyko International testified on behalf of the Employer. (TR 41). In regard to her duties, she testified that she did the "accounts payable and receivable" and the payroll. She also tracks "all of the growers that bring loads in and their payments" and all of the "export shipments and all of the documents that go with that." As to her involvement in the Employer's H2A application process, she explained that it was her responsibility to compile all of the information for the H-2A application process. (TR 41-42). Koehn noted that Soyko International is located in northwestern Minnesota in a town called Gary with a population of about 200 people. Koehn explained that Soyko is engaged in the farming business and as such raises soybeans, wheat and barley, all of which are seasonal crops in that are not grown year round. (TR 42). She identified the soybean growing season as typically May through November, and the wheat and the barley season as typically April through possibly October. (TR 42-43).

As to the Employer's need for personnel before the earliest growing season beginning in April (wheat and barley), Koehn testified:

We need to go over all of our equipment that has been stored over the winter months, inspect it thoroughly, see what needs to be repaired, make those repairs, get it ready for operation so we can start getting into the ground as soon as the ground is warm enough. (TR 43).

She testified if they did not begin preparation work until May they probably would not get their crop in the ground until June, which is too late because of the weather and the fact that the soil is too warm at that point. *Id.* Accordingly, she contended that pre-planting preparation work is also tied in some way to the weather. (TR 44). Koehn further elaborated that the equipment preparation can't be done too early because when temperatures are too cold (as was the current temperature at negative 13), the liquids in the machinery are not liquid and therefore the Employer waits until it is warm enough to bring the equipment out. (TR 44).

When questioned why the current application requested a start date of February 1, 2019, in contrast to the withdrawn application listing a start date of January 1, 2019, Koehn explained this was because the Employer was in the process of leasing and purchasing additional acreage and that the earlier date "was reflective of preparing for the extra acreage." *Id.* She further explained that the previous application with a January 1, 2019 start date was withdrawn because

there were delays with the closing in the purchase agreement originally scheduled for January but now delayed until February 15, 2019. (TR 44-45). She testified that in the past year the Employer farmed 130 acres and in the upcoming season as a result of adding acreage from the lease/purchase, the acreage would increase to closer to 2800 acres. (TR 45).

In regards to why a January 1, 2019 start date was requested, she testified, “There’s other things we need to get ready. We need to do all of our different repairs. We need to know what needs to be repaired. We need to start planning out what we’re going to be planting, and getting the seed ready for that.” (TR 46). She further testified that the February 1, 2019 start date was tied to the planting schedules for the soybeans and the wheat and that the current application reflects the Employer’s best understanding of its need for that labor or services. In response to the question of whether it reflected the need for work above normal levels, Office Manager Koehn responded, “For this year, yes. Considering that we’re doing 2600 more acres than before. We also have plans in for leasing additional equipment, because the current equipment we have won’t suffice for all those acres.” (TR 46).

On cross examination, Koehn admitted that the reason for the change in start dates was “solely based on whether the land purchase was complete or not,” and that “nothing about the planting season or the growing season has changed, and nothing about the weather has changed.” (TR 48). She testified that in the past season there was one person performing equipment maintenance, and one full-time and two additional part-time agricultural equipment operators during the growing season of April to November.

Koehn elaborated that typically March/April is preparation; April/May is planting; May/September is monitoring, weeding, fertilizing, spraying; and September/October through mid-November is harvesting. According to Koehn, following harvesting, a couple of weeks to a month is required to prepare for prepare the equipment for storage. (TR 52).

In regard to the current application start date of February 1, 2019, Koehn testified that in February, the requested workers would “be assisting with obtaining the new equipment, and then checking all that over and getting ready for all the acres that we have to plant.” (TR 54). She later testified that the need for labor in February was due to the fact that “we’re adding on an additional 2700 acres.” (TR 58).

Koehn confirmed that applications were filed in prior years covering the period April 1, 2013 to January 31, 2014, April 1, 2014 to January 31, 2015, and January 1, 2017 to November 1, 2017 and that each of these applications included the month of January. However, she could not recall what the workers were required to do in the month of January in those years, or why workers were requested for January in those years, but not in the current application. (TR 59-60). She also confirmed that in some years the period of certification covered the month of December and in the current application December was not included. She explained that she thought the discrepancy was “because of this extra acreage agreement that is going to be finalized we wanted workers in the preparation months rather than in December.” (TR 61). When asked on cross examination, “So it’s not something different about the work. It (sic) that’s you’re making a calculation about when – you know you only get ten months, and doing a

calculation about which ten months you need the workers the most,” she responded “I believe so.” *Id.*

Koehn asserted that the need for labor or services can vary from season to season based on the farmer’s business judgement of what will be needed to run the farm in the upcoming season. (TR 62). She also reiterated that Soyko had a seasonal need for services between February 1, 2019 and November 30, 2019, consistent with its current H-2A application. (TR 63).

C. Argument of the Parties

1. The Employer

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 January 23, 2019. Both parties filed timely post hearing briefs.

In its brief the Employer argues that the Court should dismiss Employer’s appeal for lack of jurisdiction because the Certifying Officer never determined that the Employer’s application was incomplete, contained inaccuracies or did not comply with the requirements of 20 C.F.R. Part 655, subpart B. Accordingly the Employer asserts that the Court should remand this matter to the CO for further action.⁴

The Employer next argues that assuming the Court has jurisdiction, the Court should require the CO to accept Employer’s application. In this regard Employer argues that Employer has established its seasonal need for labor. Employer argues that Employer need only show 1) “when the employer’s season occurs” and 2) how the need for the performance of the services in question differs from other times of the year; *citing, Rolling Meadows Farm, LLC, 2012 TLC-00007, slip op. at 5 (December 6, 2011).*

With respect to the variations in the dates of need evidenced in its application history, the Employer maintains that although an employer’s filing history will be roughly the same each year, significant variations are not fatal to a finding of a temporary need unless they are not explained, *citing Southside Nursery, 2010-TLC-00157 (Oct. 15, 2010).* Moreover, the Employer contends that insignificant variations from season to season or shifts in dates because of outside factors do not call into question the existence of temporary or seasonal need. *Steven Cox 2011-TLC-00087 (Dec. 23, 2010).* In sum, the Employer asserts that it has satisfied the requirements set forth in the regulations and as further interpreted in the administrative decisions for the following reasons:

⁴ It is difficult to reconcile the Employer’s jurisdictional argument with the fact that this matter came before me because the Employer chose to request a de novo hearing before an administrative law judge, rather than comply with the request for additional information detailed in the Notice of Deficiency. Because the regulations clearly provide an employer the right to choose to seek review by an administrative law judge after issuance of a notice of deficiency and the instant Employer chose to do just that, I find the Employer’s lack of jurisdiction defense to be without merit. Moreover, regardless of the Employer’s claim that the CO did not make a final determination, it is clear from a plain reading of the Notice of Deficiency that the CO was unwilling to certify the current application based upon the then available information or the CO would have simply done so. Accordingly, the CO has in fact made a determination that the application could not be certified.

It (the Employer) has stated when its season occurs and what duties the season involves. It has explained why its start date of need changed this year. It has explained why preparation duties are tied to a particular time of the year and cannot be pushed off. That is all Soyko needs to show to demonstrate its temporary or seasonal need.

(Employer's brief at 5-6).

The Employer argues that the CO's reliance upon variations in prior applications to support an inquiry into the seasonal temporary employment needs of the Employer should be rejected because the CO certified previous applications despite the variations in the requested period of need. The Employer maintains that timing of the need for workers to perform preparatory work on its equipment is also tied to the crop's growing season and therefore should not be discounted the basis that this work occurs before the fields can be prepared for planting and after the crops have been harvested from those fields. The Employer also asserts that variations in the volume of need and the consequent need to push the start date earlier in the year does not prove that the need is not tied to a particular time of the year.

2. The Certifying Officer

As previously noted, the Solicitor submitted a closing brief on behalf of the CO urging that I affirm the CO's determination that Soyko's application failed to establish eligibility for temporary employment certification. The CO further asserts despite the explanations provided at the hearing, the Employer still has not resolved either the temporary need or the workers' compensation deficiencies noted in the NOD.⁵ Therefore the Employer has not met its burden of proving that it is entitled to acceptance of its application.

The CO maintains that Employer has not met its burden of establishing that its need for H-2A workers is temporary or seasonal. The CO asserts that Employer's previous applications establish that it has a year round need for workers and not a temporary need as allowed under the H2A program. To further support its position, the CO contends that the need is also not seasonal because the requested labor is not tied to a certain time of year as demonstrated by the varying dates of need in its previous applications. The CO additionally argues that the Employer's employment need is not seasonal because it has not been demonstrated that its needs "far exceed the labor levels necessary for ongoing operations."

The Solicitor argues that the CO was justified in questioning whether the employer's need is permanent in light of the previous certified application, the withdrawn application and the current application. When viewed in conjunction, this filing history shows a continuous need from March 1, 2018 through December 31, 2019 which is a period of one year and nine months. The CO relies on the case of *Grandview Dairy*, 2009-TLC-00002 (2008) for the proposition that 10 months is a permissible threshold to question the temporary nature of a stated period of need.

⁵ As noted previously herein, the workmen's compensation coverage deficiency, could be remedied as late as just prior decertification. Accordingly, I need not address this deficiency as a basis for denial of the requested certification.

Relying again on the Employer's previous filing history, the CO contends that these applications when considered in conjunction with each other demonstrate a year-round need, rather than seasonal need, for Agricultural Equipment Operator(s). The Solicitor cites multiple cases in support of its position that filing history may be considered in determining whether employer has a year round rather than a seasonal need. The CO argues that an employer must establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year, *citing Fegley Grain Cleaning*, slip op. at 3 and *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

The Solicitor notes that while the period of requested labor shifts, the Employer's previous applications demonstrate that the Employer has requested labor in all twelve months of the year. Based thereon, the Solicitor contends that this supports a finding that Employer's need is year-round. The Solicitor also contends that Koehn's testimony fails to establish that its dates of need are tied to a particular time of the year. In this respect, the Solicitor relies upon Office Manager Koehn's explanation that the change in the dates of need between that the withdrawn application (January 2019 start date) and the current application (February 2019 start date) was based on a business decision to purchase additional land, rather than a seasonal variation. The Solicitor also notes that the Employer failed to provide the payroll information requested by the CO which would allow the CO to determine whether the need for labor during the Employer's requested seasonal dates is actually "far above the labor levels necessary for ongoing operations" as required by 20 C.F.R. §655.103(d).

Accordingly, for the above noted reasons the Solicitor argues that Employer has not met its burden of proving it is entitled to acceptance of its application and therefore the CO's Notice of Deficiency should be affirmed.

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 decision to issue a Notice of Deficiency and inherent refusal to certify the Employer's application for temporary alien labor certification under the H-2A program based upon the application and information available to the CO at that time. 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 5 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, it 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 Agricultural Equipment Operators with a start date of 2/1/19 and an end date of 11/30/19 on the basis of a seasonal need. (AF 23). As the requested dates of need differ from both the previously certified application (3/1/18 – 12/31/18) and the withdrawn application (1/1/19 – 10/30/19), I find the CO reasonably questioned whether the Employer had established a seasonal need on the basis of the prior two filings as noted in the Notice of Deficiency. (AF 13-15).

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). It is undisputed that the dates of need listed on the current application vary from the dates indicated on previous applications. A review of the application reveals that the Employer did not sua sponte explain in the current application why there was such a variation.

Based thereon, I find that the CO permissibly and reasonably requested an explanation as to Employer's seasonal need, as well as supporting documentation as noted in the CO's December 4, 2018 Notice of Deficiency, in light of the variation in the dates of need as shown on the previously certified and withdrawn applications. Such information would have provided necessary information addressing whether Employer's need was in fact, seasonal, as well as whether the change in dates of need, from the previously certified application, was justified. Thus I further find that the CO did not abuse his discretion in issuing the December 4, 2018 Notice of Deficiency, in which the CO determined that Employer's application was deficient because the Employer failed to establish that Employer's requested need for temporary labor was seasonal, nor did the CO abuse his discretion in requesting a further explanation of seasonal need and other supporting documentation.

As noted herein, the Employer did not provide the requested explanation and supporting documentation requested by the CO in the notice of deficiency, but rather requested *de novo* hearing pursuant to 20 C.F.R. § 655.171. I now turn to whether the additional explanation and

information offered at the hearing held herein is sufficient to establish a temporary need for labor, on the basis of a seasonal need, as requested in its H-2A application.

For the reasons stated more fully below, I find that that Employer has failed to meet its burden of proving its temporary need for labor, 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 January 18, 2018 hearing, and closing briefs.

As the CO noted in the NOD, the previously certified application viewed in conjunction with the withdrawn application and the current application supports a finding that Employer has requested temporary labor certification for a continuous period of one year and nine months, March 1, 2018 – November 30, 2019. Additional evidence of the Employer’s historical H2A applications admitted at the hearing show a wide variation in the Employer’s requested period of need. When these applications are considered in their totality ranging from 2013 through the present, (CX A-G; AF 1-195), a period covering approximately five years, the Employer has requested temporary labor in various applications for all twelve months of the year.

The Employer has not established through evidence or testimony that it has a seasonal need rather than a year-long need. As the pattern of filing shows a continuous shifting of the period of need, the Employer has failed to show how its period of need is “tied to a certain time of year by and 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.”)

With the exception of the Employer’s first two applications, its requested period of need shifted in every subsequent application. This shifting of the Employer’s needs reflects that the need is not tied to a “certain time of year by an event or pattern,” such as a particular weather pattern or other seasonal pattern. *See Salt Wells Cattle Company, LLC*, 2011-TLC-00185 (Feb. 8, 2011) [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 is not seasonal according to the definition established at 20 C.F.R. § 655.103(d)].

Office Manager Koehn’s explanation also fails to support that the requested dates of need in the current application (February 1, 2019 – November 30, 2019) are attributable to a seasonal pattern based on the Employer’s practice of farming in northwestern Minnesota. Koehn reported that Employer raises soybeans, wheat and barley, all of which she stated were seasonal crops that were not grown all year round. Koehn testified that typically March/April is preparation; April/May is planting; May through September is monitoring, weeding fertilizing, spraying; September/October through mid-November is harvesting, and after harvesting a couple of weeks to a month for preparing and storing the equipment. (TR 52). Arguably her testimony may support a seasonal need as requested in Employer’s previously certified application with a requested need of March 1, 2018 – December 31, 2018. However, it does not support the current applications requested dates of need of February 1, 2019 – November 30, 2019 or the previously withdrawn application’s dates of need of January 1, 2019 – October 30, 2019.

When questioned as to why the current application had a start date of February 1, 2019, and the withdrawn application had a start date of January 1, 2019, Koehn explained this was because the company was currently in the process of leasing and purchasing additional acreage and that the earlier date “was reflective of preparing for the extra acreage.” (TR 44). She testified that the previous application with the January 1, 2019 start date was withdrawn because there were delays with the closing in the purchase agreement which was originally scheduled for January but was pushed back until February 15, 2019. (TR 44-45). She testified that in the past year Employer had 130 acres and in the upcoming season it would be closer to 2800 acres. (TR 45). However, she also testified that the preparation of the farming equipment before the planting is necessarily tied to the planting season since it would be imprudent to prepare the equipment to be operated only to have it sit for an extended period of time. She further indicated that given the harshness of Minnesota winters, it was a practical impossibility to work with the liquids used in the preparation of the equipment (oils presumably) when the temperatures are so low that these liquids are “not liquid”. No explanation was provided to distinguish why the preparation of additional equipment in January, instead of February, would not present the same problems claimed by the Employer when the Solicitor suggested that the equipment preparation could have been performed at times unrelated to the growing season. I find that these conflicting rationales for changing the period of need, particularly the time to begin equipment preparation for the field preparation and planting, reflect that the Employer is manipulating the requested needs of employment to avoid a red flag to certifying officers based upon the duration of the request (over 10 months) that the Employer’s need is year round, rather than temporary and seasonal in nature. Unfortunately, for the Employer, a review of the previous application history by this Certifying Officer raised a different red flag that resulted in the issuance of the Notice of Deficiency in the instant matter. As such, I find that the Employer’s explanation for the change in requested dates of need is insufficient to demonstrate that the Employer’s need is temporary based on a seasonal need.

Koehn’s testimony on cross-examination further supports the conclusion that the Employer is manipulating its requested dates of need to avoid a determination that its employment needs are year round and permanent rather than temporary and seasonal. Specifically, Koehn admitted that the reason for the change in start dates was “solely based on whether the land purchase was complete or not,” and that “nothing about the planting season or the growing season has changed, and nothing about the weather has changed.” (TR 48).

Accordingly, I find the Employer has failed to establish that the requested dates of need in its current application are based on a seasonal pattern. In this case, testimony supports that the change in the dates of need as shown in the Employer’s current and previous application is based on a business decision to acquire more land and not on its seasonal farming practices.

Further, Office Manager Koehn also failed to adequately explain the variation in the Employer’s previous applications which at times included the months of January (2014, 2015 and 2017). Koehn confirmed that applications were filed in prior years covering the period April 1, 2013 to January 31, 2014, April 1, 2014 to January 31, 2015, and January 1, 2017 to November 1, 2017 and that each of these applications included the month of January. However, she could not recall what the workers were required to do in the month of January in those years, or why workers were requested for January in those years, but not in the current application. (TR 59-60). Given Office Manager Koehn’s testimony that she was responsible for the

Employer's payroll records as well as compiling information for the H2A application, her inability to provide a reasonable explanation for the work performed in January by employees who were hired pursuant to prior H2A applications is particularly troublesome. Regardless, it is the Employer's burden to demonstrate that its need is temporary based upon a seasonal pattern. Thus, this inability to adequately distinguish the variations in the dates of need between prior applications seeking a January start and those requesting later start dates, including the current applications start date of February 1, while also relying upon claims that the work in January and February is tied to its clearly seasonal operations further undermines its ability to meet that burden.

Although, as argued by Employer, there may be some variations in a seasonal pattern from year to year, it is Employer's burden to justify the reason for the seasonal change, which in this case, Employer has failed to do.⁶ *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); *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010) (finding that a seasonal need is tied to the weather or a certain event, and a change in the dates from a previous application for a seasonal need must be justified).

CONCLUSION

Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). Therefore, the basis for the CO's issuance of the December 4, 2018 Notice of Deficiency is affirmed.

ORDER

After de novo hearing, Employer has failed to establish that its application for temporary labor certification should be accepted for processing, as Employer has failed to establish its need for labor as requested in its application is temporary or seasonal pursuant to 20 C.F.R. §655.103(d). Accordingly, it is hereby **ORDERED** that the Certifying Officer's Notice of Deficiency is **AFFIRMED**.

PATRICIA J. DAUM
Administrative Law Judge

⁶ Ms. Koehn responded, "I believe so," to the question, "So it's not something different about the work. It (sic) that's you're making a calculation about when – you know you only get ten months, and doing a calculation about which ten months you need the workers the most." (TR 61). This admission also supports that Employer's need for labor is year-round with the requested dates of need reflecting which 10 months Employer is most in need of labor, rather than a recurring seasonal need.