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Issue Date: 01 March 2019

Case No.: 2019-TLC-00032

ETA Case No. H-300-18352-410594

In the Matter of:

DESOTO FRUIT AND HARVESTING, INC.,
Employer.

Certifying Officer: Lynette Wills
Chicago National Processing Center

Appearances: Justin Sorrells
President, DeSoto Fruit and Harvesting, Inc.
Arcadia, Florida
Pro Se for the Employer

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For the Certifying Officer

Before: **Hon. Tracy A. Daly**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer (CO) in this matter denied Employer’s Employment and Training Administration (ETA) Forms 9142A and 790 application for temporary labor certification for 60 agricultural workers. Pursuant to 20 C.F.R. § 655.141(b)(4), Employer appealed the denial and requested a de novo hearing and review before an Administrative Law Judge (ALJ). In appeals where a de novo hearing has been

requested, the presiding ALJ must issue a decision within 10 calendar days after the hearing. 20 C.F.R. § 655.171(b)(1)(iii) The undersigned's decision in this matter must be issued by March 2, 2019.

2. Procedural History and Findings of Fact.

a. On December 18, 2018, the Chicago National Processing Center (CNPC) received for filing an ETA Form 9142A application from DeSoto Fruit and Harvesting, Inc. (Employer). Employer requested authorization based on a claimed seasonal need for 60 Farmworkers and Laborers, Crop, Nursery, and Greenhouse job opportunities, Standard Occupational Classification (SOC) Code 45-2092.02, to perform work from February 15, 2019 to October 31, 2019.

Employer described the job opportunity as performing “tasks pertaining to the production and growing of citrus trees during the growing season,” which included mowing grass between plated rows of citrus trees, distributing fertilizer to trees, spraying nutrients on foliage of trees, spraying nutrients on the ground beneath trees, repairing irrigation systems, planting new citrus trees, removing old or dead trees, pruning trees, repairing farm buildings, removing weeds and vines, repairing equipment, and preparing land for new citrus trees. (AF 30-32)¹

b. On December 21, 2018, the CO issued a Notice of Deficiency (NOD) in part because Employer failed to demonstrate a temporary or seasonal need as required by 20 C.F.R. § 655.103(d). (AF 15-22)

c. The CO timely received Employer's reply to the NOD on December 26, 2018. Employer referenced a prior H-2A application in which the CO granted certification from September 1, 2018 to June 1, 2019. Employer explained the prior application obtained certification for workers to harvest citrus from September to June for Sorrells Citrus, Inc. Employer further explained the SOC Code identified in the prior application, SOC Code 45-2092 is a “general classification for all laborers.” In contrast, Employer attested the instant labor certification application, with SOC Code 45-2092.02, seeks authorization to secure workers for Sorrells Grove Care, Inc. for production and growing work from February through October. Employer stated SOC Code 45-2092.02 is “more specially” used for production workers, rather than harvest workers.

According to Employer, Sorrells Citrus, Inc. and Sorrells Grove Care, Inc. are “two totally separate corporations that carry on two totally separate types of business.” Sorrells Citrus harvests fruit; in contrast, Sorrells Grove Care produces citrus. Employer argues these two entities should be considered separately because “the job titles and duties are completely separate.” After conducting additional research, Employer requested to amend the SOC Code on the instant application to 45-2092.01 reflecting “Nursery Workers.” (AF 12-14)

d. On January 9, 2019, the CO issued a non-acceptance letter and denied certification. The CO explained the requested dates of temporary need for Employer's instant application (H-300-18352-410594) ranged from February 15, 2019 through October 31, 2019. Employer's

¹ References to the Appeal File are by the abbreviation AF and page numbers.

previously certified application (H-300-18208-310653) established dates of temporary need from September 1, 2018 through June 1, 2019. The CO stated the dates on Employer's instant application and previously certified application combined to establish a temporary need period of 13 months.

Moreover, the CO cited two additional applications previously filed by Employer. The CO certified Employer's application (H-300-17215-698683) for temporary labor certification with requested dates of need from September 17, 2017 through July 15, 2018. The CO denied Employer's application (H-300-17306-533547) with requested dates of need from December 15, 2017 through October 15, 2018. The CO further noted that all of Employer's past applications contained the same SOC Code, job title and duties, worksite itinerary, and fixed site grower Sorrells Citrus, Inc.

The CO addressed Employer's contention that the needs of its applications were distinct based on the SOC Codes. The CO noted Employer's instant application and its most recently certified application contained the same SOC Code listed in ETA 9142 (45-2092) and SOC Code listed in ETA 790 (45-2092.02), as certified by the Florida State Workforce Agency (SWA). The CO pointed out that both applications included similar job duties such as "planting new citrus trees, removal of dead or old citrus trees, pruning all citrus trees, handwork associated with the production of citrus, repairing farm buildings, repairing broken equipment, removal of weeds and vines from citrus trees, and land preparation for new citrus trees." The CO stated the production of crops, beginning to end, is encompassed in SOC Code 45-2092.02. Further, the CO noted that Employer's request to amend the SOC Code was "misplaced" given the fact such a classification is not made by an employer. The CO explained Employer could have "taken issue" with the assigned SOC Code at the time of the filing of the application and no evidence suggested the SOC Code was incorrect when Employer filed its application.

The CO concluded Employer failed to establish a temporary need as required by 20 C.F.R. § 655.103(d) and denied certification. (AF 3-7)

e. On January 15, 2019, Employer requested administrative review of the CO's denial of certification pursuant to 20 C.F.R. § 655.164(b). Employer asserted its current application and its most recent prior application represented two separate needs for two distinct contracts. Employer argued that, despite identical SOC Codes, the applications represented requests for workers with "two very different jobs with different requirements, duties, and responsibilities." Employer further noted that "it has become increasingly difficult to locate and hire qualified workers for the purposes of growing and producing our crops." (AF 1-2)

f. On January 15, 2019, the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. The CO transmitted the Appeal File to BALCA on January 31, 2019.

g. On February 1, 2019, Employer clarified its request and filed a letter requesting a de novo hearing based on the denial of its application. Employer did not specifically request that the administrative de novo hearing occur within five days of receipt of the Appeal File.

h. On February 4, 2019, the undersigned issued a Notice of Case Assignment. On

February 12, 2019, the undersigned issued a Notice of Hearing and scheduled this matter for hearing on February 20, 2019.

i. The undersigned conducted a telephonic hearing on February 20, 2019 from Covington, Louisiana. Employer's president, Mr. Justin Sorrells, represented Employer in a pro se capacity and participated in the hearing telephonically. Counsel for the Solicitor, U.S. Department of Labor, Mr. Philip Vieira, represented the Certifying Officer and participated in the hearing telephonically.

j. Employer filed a post-hearing brief on February 25, 2019. The Certifying Officer filed a post-hearing brief on February 26, 2019.²

3. Proffered Relevant Evidence.

a. *Exhibits Admitted Into Evidence.* In a de novo hearing, employers are permitted to submit evidence even if that evidence could have been submitted to the CO in response to a NOD. *Westward Orchards*, 2011-TLC-00411 (July 8, 2011). Other than the documentary evidence contained in the Administrative File, Employer did not offer any additional exhibits into evidence. The CO offered two exhibits into evidence, but did not reference or cite them in the post-hearing brief.³

b. *Testimonial Evidence.* The undersigned fully considered the entire testimony of each witness who appeared at the hearing. These witnesses provided, in pertinent part, the following relevant testimony:

1)

Mr. Steve Sorrells.

Mr. Steve Sorrells is the father of Mr. Justin Sorrells. Mr. Steve Sorrells testified he has been involved in the citrus business for 47 years. He explained Sorrells Grove Care is an entity that grows citrus. The employees mow grass, distribute fertilizer, spray nutrients and fertilizer, plant trees, remove dead trees, perform handwork associated with the production of citrus trees, and repair irrigation systems.

Mr. Steve Sorrells stated there is no relationship between Sorrells Grove Care and Employer. Employer is solely owned by Mr. Justin Sorrells and Sorrells Grove Care is owned by various members of the Sorrells family. Employer and Sorrells Grove Care are separate business entities.

Sorrells Grove Care's growing season is in the spring, summer, and fall, during the months of February through October. Workers are not needed from October through February because the orange trees are dormant during these months. Sorrells Grove Care manages approximately 6,000 acres.

Mr. Steve Sorrells testified Sorrells Citrus is an entity that harvests fruits and berries. Its

² Employer's post-hearing brief is marked EB-1. The Certifying Officer's post-hearing brief is marked COB-1.

³ The CO's exhibits are marked as C.O. EX-A and C.O. EX-B.

harvest season is generally from September through May or June. From May or June until September, there is nothing to harvest. Employees of Sorrells Citrus use sacks to place fruit into bins, snap fruit off tree stems, and transport bins. Sorrells Citrus harvests approximately 10,000 acres. Depending on the crop size, approximately 350 to 450 temporary workers are needed during the harvest season.

Mr. Steve Sorrells explained that Sorrells Citrus employees do not want to perform production work; they only want to perform harvesting work. Mr. Steve Sorrells makes hiring decisions for both Sorrells Citrus and Sorrells Grove Care. Mr. Steve Sorrells is the general manager of both Sorrells Citrus and Sorrells Grove Care.

Employer supplies harvesting labor for Sorrells Citrus; it currently does not supply labor for Sorrells Grove Care. Employer contracts with Sorrells Citrus to supply laborers. Both Sorrells Grove Care and Sorrells Citrus have never applied for temporary labor certification for H-2A workers. Both Sorrells Grove Care and Sorrells Citrus are located at the same work site.

2) Mr. Justin Sorrells.

Mr. Justin Sorrells testified Employer was established for the sole purpose of being an H-2A employer. Mr. Justin Sorrells is Employer's only full-time employee; he is the general manager, owner, president, and secretary. At present, Employer has 400 temporary guest workers. Employer has been in business for the past 10 or 12 years.

Mr. Justin Sorrells believed the Department of Labor assigns the SOC Code when it receives an application for temporary labor certification based on the job description and number of workers requested. Mr. Justin Sorrells has never requested or suggested a specific SOC Code.

Mr. Justin Sorrells testified Employer should be permitted to contract with two separate companies for two separate jobs with two different seasonal periods. He has no control over the SOC Codes assigned to the job opportunities. If Employer's application is ultimately denied, then Employer will be unable to operate for two or three months out of the year.

Currently, Employer does not have multiple contracts that taken together would span the entire year. However, Mr. Justin Sorrells explained that if multiple contracts spanned an entire year, the workers with differing job descriptions would not span an entire year. A harvester would not work for an entire year. A production worker would not work for an entire year. However, if Employer had multiple contracts, then it would have a need for temporary workers for an entire calendar year.

Mr. Justin Sorrells stated that some of the work sites in the current application may have included some of the same work sites from the prior application.

In its current application, Employer is requesting 60 workers to perform work for Sorrells Grove Care. Employer has a contract with Sorrells Grove Care to provide temporary workers to perform all tasks relating to the production and growing of citrus during the growing season from February 15, 2019 to October 31, 2019.

3)

Mr. John Rodderman.

Mr. Rodderman has worked as an H-2A Certifying Officer since December 2009. He testified Employer's application for certification was denied in this matter because it failed to establish a temporary or seasonal need.

Mr. Rodderman recalled that Employer's current application contained the SOC Code 45-2092.02. SOC Codes determine what duties a job opportunity will encompass. A state workforce team issues the SOC Codes. Mr. Rodderman explained Employer's current application and most recently certified application contained the same SOC Codes, and the job opportunities described in both applications were consistent with the assigned SOC Code. In reviewing both applications, Mr. Rodderman identified an overlapping need. This was problematic because it demonstrated Employer had an ongoing need for an occupation that spanned an entire year. There was no "off-season."

Mr. Rodderman testified an employer could demonstrate a seasonal need if it requests workers for more than one year by establishing distinct needs within the one year period with different SOC Codes. In this matter, Mr. Rodderman explained Employer did not establish a seasonal need because Employer requested workers for the same area of employment, the same SOC Code, the same experience requirements, and the same requirement of having no special skills. Thus, there was "no meaningful difference between the applications." He explained it is irrelevant if Employer will use the workers for separate contracts because the regulations require an employer to establish its need is temporary. In this instance, Employer's application demonstrated a year-round need for temporary labor.

4. Applicable Law and Analysis.

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the United States Department of Labor (DOL). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Burden of Proof and Standard of Review.* Throughout the labor certification process, the burden of proof in alien certification remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). The employer, therefore, must demonstrate that the CO's determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. *See Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).

In cases where an employer appeals a denial and requests an expedited administrative review by an ALJ, a CO's denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-

TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

However, when an employer appeals a denial and requests a de novo hearing before an ALJ, the parties are permitted to present additional evidence on the matter. Consequently, the presiding ALJ “must independently determine if the employer has established eligibility for temporary labor certification” *David Stock*, 2016-TLC-00040 (May 6, 2016).

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).

c. *H-2A Labor Contractors*. As reflected on ETA Form 9142A, Employer is designated as an H-2A Labor Contractor (H-2ALC). (AF 30) An H-2ALC is any individual or a legal entity who is not a fixed-site employer or employee or an agricultural association or employee, but who recruits, solicits, hires, employs, furnishes, houses, or transports H-2A workers. 20 C.F.R. § 655.103(b).

This definition “broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer. Employment and Training Administration, U.S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010). The regulation at 20 C.F.R. 655.132(a) provides that an H-2A labor contractor’s ETA 9142 applications are limited “to a single area of intended employment in which the fixed-site employer(s) to whom an H-2 ALC is furnishing employees will be utilizing the employees.”

d. *Temporary or Seasonal Need*. 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 one year. Pursuant to 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. 20 C.F.R. § 655.103(d). A seasonal need has generally been interpreted to be 10 months or less. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008).

When determining whether an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999). In order to determine if the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

In this matter, during the certification process, the CO compared Employer’s instant application to its prior applications for temporary labor certification. The CO previously certified

Employer's application for 338 Farmworkers with requested dates of need ranging from September 17, 2017 to July 15, 2018. (AF 1003) The CO previously denied certification for Employer's application for 55 Farmworkers with requested dates of need ranging from December 15, 2017 to October 15, 2018. (AF 579) Subsequently, the CO granted certification for Employer's application for 268 Farmworkers with requested dates of need ranging from September 1, 2018 to June 1, 2019. (AF 359)

After reviewing Employer's prior applications, the CO denied certification for Employer's instant application requesting 60 Farmworkers with claimed dates of need from February 15, 2019 to October 31, 2019. (AF 30) As the CO noted in the denial letter, when comparing Employer's instant application to its most recently certified application, the requested dates of need combined to form a period of 13 months. As the Certifying Officer points out, when reviewing Employer's instant application and its last three applications, Employer has asserted a temporary need in every month of the year from September 2017 through October 2019. (CBO-1, p. 7) Therefore, the CO reasonably concluded Employer failed to establish the job opportunity was seasonal in nature or tied to a certain time of the year by an event or pattern as required by 20 C.F.R. § 655.103(d). Rather, Employer's consecutive applications demonstrate a year-round need for agricultural workers. BALCA has consistently permitted the CO to 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 (Apr. 14, 2000); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (Mar. 21, 2017).

In its post-hearing brief, Employer asserts "the skills needed to harvest citrus are completely different than the skills needed to produce or grow citrus" and "the two jobs are not interchangeable and a harvesting worker would never perform jobs pertaining to growing or producing and vice versa." (EB-1, pp. 1-2) However, the CO acted reasonably in denying the instant application because it contains the same SOC Code and some of the same or similar job duties as Employer's most recently certified application. For example, both applications contain the same job duties of land preparation, removing weeds, planting trees, fertilizing trees, and repairing irrigation equipment and farm buildings. In addition, both applications required 36 hours of work per week and scheduled work times from 7:00 a.m. to 2:00 p.m. with work to be performed at the same address. (AF 33; AF 362)

The undersigned recognizes Employer's contention that the Florida SWA may have assigned its instant application with an inexact SOC Code, which perhaps in part led the CO to conclude the instant application did not reflect a distinct job opportunity. However, the Florida SWA assigned the SOC Code based on information provided by Employer, and there is no evidence to suggest Employer disputed the Florida SWA's SOC Code at the time of its assignment. Rather, Employer only complained about the assigned SOC Code after the CO issued a Notice of Deficiency. Because the Florida SWA assigned the SOC Code, an independent and separate entity from the Office of Foreign Labor Certification, the CO reasonably relied on the SOC Code in finding Employer's application did not represent distinct job opportunities from its previously certified application. Consequently, the CO reasonably concluded Employer failed to establish the job opportunity was temporary or seasonal in nature.

Additionally, at the hearing and in its post-hearing brief, Employer argues that it “has entered into contracts with two completely separate legal corporations to perform two completely separate jobs, with two different seasons, with two separate job duties.” (EB-1, p. 2) However, the appropriate inquiry is whether “the employer’s needs are seasonal, not whether the duties are seasonal.” *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015). BALCA panels have rejected similar arguments in other cases. *See Rosalba Gonzalez*, 2017-TLC-0028, slip op. at 5 (Oct. 11, 2017) (the employer did not tie its alleged employment need to a certain time of year by an event or pattern, as required by 20 C.F.R. § 655.103(d), but instead continuously entered into contracts with agricultural producers in order to create continuous work and an unceasing need for workers).

In this matter, the overlapping nature of Employer’s current and previous application periods in conjunction with the same SOC Codes and similarity in job requirements and duties demonstrates that Employer’s need for workers in its proposed season does not differ from its need for such labor during other times of the year; rather the record demonstrates that its need for farmworkers and laborers is permanent and year-round, not seasonal or temporary.

5. Ruling. Employer failed to carry its burden to establish its eligibility for H-2A labor certification. The CO’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge