

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 20 March 2019

BALCA Case No.: 2019-TLC-00039

ETA Case No.: H-300-19021-438978

In the Matter of:

WILLIAM PAUL HABETZ,

Employer.

Certifying Officer: Lynette Wills
Chicago National Processing Center

Appearances: Rachel Ann Zaunbrecher, Agent
Crowley, Louisiana
For the Employer

Micole Allekotte, Esq.
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S
DENIAL OF TEMPORARY LABOR CERTIFICATION**

This matter is before me on a request for expedited administrative review. It arises under the temporary agricultural 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. It is before the undersigned on William Paul Habetz's ("Employer") request for an expedited administrative review pursuant to 20 C.F.R. § 655.171. For reasons stated below, the undersigned **AFFIRMS** the determination of the Certifying Officer ("CO") to deny the application for temporary labor certification.

STATEMENT OF THE CASE

On January 21, 2019, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with ETA’s Chicago National Processing Center (“CNPC”) for one “Farmworker Aquacultural” laborer. The period of intended employment was to begin March 13, 2019, and continue through January 13, 2020.¹ (AF 60-71).

The CO issued a Notice of Deficiency (“NOD”) on January 28, 2019, which informed Employer that, in accordance with Departmental regulations at 20 C.F.R. § 655.103(d), the job opportunity was not on a seasonal or other temporary basis. (AF 52-55). Seasonal or temporary is defined as:

Employment [that] 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. § 656.103(d) (emphasis added). (AF 54).

On this basis, the CO noted the job opportunity described on Employer’s ETA Form 9142, Section B, Items 5 and 6, and ETA Form 790, Item 9, indicates Employer’s dates of need are from March 13, 2019 through January 13, 2020. However, the CO also noted Employer’s previous certification was from February 22, 2016 through September 15, 2016. The CO provided the history of Employer’s previous certifications and dates of need as follows:

Case Number	Employer’s Name	Status	Beginning Date of Need	Ending Date of Need
H-300-13294-166290	William Paul Habetz	Certified-Full	11/17/2013	09/15/2014
H-300-14261-627706	William Paul Habetz	Certified-Full	11/15/2014	09/15/2015
H-300-16007-491684	William Paul Habetz	Certified-Full	02/22/2016	09/15/2016
H-300-19021-438978	William Paul Habetz	Received	03/13/2019	1/13/2020

(AF 54).

Given the foregoing, the CO stated that based upon Employer’s current requested dates and the previously certified dates of need, it is unclear how the current job opportunity (H-300-19021-438978) is temporary or seasonal in nature. Consequently, the CO requested that Employer explain why the job opportunity is temporary or seasonal in nature. In addition, the

¹ In this decision, citations to the Appeal File will appear as follows: Appeal File: (AF ___).

CO requested that Employer also “provide in detail as to why its dates of need have significantly changed from the established season of November through September of the following year to its current request of March through January of the following year.”² (AF 54).

On January 29, 2019, Employer responded to the Notice of Deficiency. Employer explained that he has six children, some of whom were able to assist in harvesting 575 acres of crops in the past years, during which temporary labor was not needed. However, Employer’s children are grown, and although they have provided assistance when their schedules permit, Employer’s children are unable to do so at this time. Thus, Employer avers the request for one “Farmworker Aquacultural” laborer is based upon a temporary need for the rice and crawfish harvesting seasons. Employer stated that his requested dates of need were determined by the time each crop is harvested and/or prepared for harvesting, and based upon the timing in which his family will be able to assist in harvesting. For example, Employer avers one family member, who was laid-off from work in pipeline construction, was able to assist with harvesting in “December and January,” but is no longer available to do so. Employer averred the last time it received certification for workers was from November 15, 2014 through September 15, 2015 (H-300-14264-627706).³ (AF 44-51).

On February 15, 2019, the CO denied Employer’s Application for Temporary Alien Labor Certification in a Notice of Denial. In the denial, the CO again concluded the Employer failed to establish a temporary need as set forth by 20 C.F.R. § 655.103(d). The CO reiterated much of the same reasons for denial as was stated in the January 28, 2019 Notice of Deficiency. In doing so, the CO stated that based upon Employer’s previous certification from February 22, 2016 through September 15, 2016, and Employer’s current dates of need from March 13, 2019 through January 13, 2020, it is unclear how the job opportunity for one “Farmworker Aquacultural” laborer is temporary or seasonal in nature. The CO stated the Notice of Deficiency required Employer to explain how its job opportunity is seasonal or temporary in nature, and therefore, Employer needed to provide **a detailed explanation as to why the dates of need have significantly changed from its previously established season of November through September**, to its current request of March through January. (AF 24-27).

The CO found Employer’s response to the Notice of Deficiency, in effect, was a concession that Employer’s need for the type of labor sought is year round. The CO stated that in the past, Employer was able to create the appearance of a temporary or seasonal need as family members “subbed in for enough of the year to make the request for H-2A workers appear to be, on its face, compliant with program requirements.” The CO concluded that, in reality, if the Employer’s application had represented the entirety of his need (i.e., inclusive of the portion of the need met by family members), his year round need would have been apparent at the time of the Employer’s first filing. Thus, the CO determined the Employer failed to establish a temporary or seasonal need pursuant to 20 C.F.R. § 655.103(d). (AF 24-27).

² The CO directed Employer to explain why the dates of need significantly changed from the season of “November through September” of the year following its current request. However, prior to the current request of March 13, 2019 through January 13, 2020, Employer’s requested dates of need were **February 22, 2016 through September 15, 2016** (H-300-16007-491684). (AF 54).

³ The record demonstrates that Employer last requested four “Farmworkers” for seasonal work needed due to rice and crawfish season, from **February 22, 2016 through September 15, 2016** (H-300-16007-491684). (AF 121).

On February 21, 2019, Employer requested an administrative review of the February 15, 2019 Notice of Denial. (AF 1-23). Specifically, Employer argued the CO improperly denied the pending certification application for temporary labor based upon the erroneous conclusion that the application was not shown to be for a temporary or seasonal job opportunity, in part, due to the CO's reliance upon Employer's prior filing history and its certified temporary labor application in Case Number H-300-16007-491684, which ended on September 15, 2016. (AF 1-2).

Employer explained that he is a crawfish, rice and soybean farmer, but that his request for a worker concerning the present certification request pertains only to crawfish and rice seasons. Further, Employer stated that while he harvests other crops, temporary workers are not needed because Employer's children assist in harvesting these crops. Employer explained that "seasons" for all of the crops are based on timing in which crops are available for preparation and harvesting, but due to inclement weather and other circumstances beyond Employer's control, some or all of the crop harvest times may be delayed or vary from year to year. On this basis, Employer averred that presently he was unable to harvest the second crop of rice until December 2018, thus delaying preparation for and harvesting of crawfish. (AF 2).

Employer further avers that the present dates of need were determined based upon the need for one worker for the upcoming crawfish and rice harvesting season. Employer explained that in the past, when his children were younger, he requested four workers for different dates of need. However, the past couple of years his children were able to assist in the preparation and harvesting of all the crops which eliminated any need for temporary labor. Nevertheless, Employer's children are grown and unable to assist in preparation and harvesting of crawfish and rice. Employer avers he based the need for one worker on the work to be done in harvesting crawfish and rice, as well as the total acres to be harvested. As such, Employer argued the aforementioned facts demonstrate the need for one worker is not a year-round need, but rather the dates of need are temporary and comport with the time period in which Employer must harvest crawfish and rice crops. Employer asserts he intends to keep the dates of need in accordance with 20 C.F.R. § 655.103(d). (AF 2-3).

On February 28, 2019, this case was received by the Office of Administrative Law Judges ("OALJ") in Covington, Louisiana, and assigned to the undersigned, and a Notice Assignment and Expedited Briefing Schedule was issued. Nevertheless, not until March 18, 2019, did the undersigned receive the administrative file. Both parties were afforded an opportunity to file briefs, however, only the Employer submitted a brief on the brief due date of March 6, 2019. Employer's Brief set forth the same arguments and facts summarized above.

ISSUE

Federal regulations state that an employer seeking temporary labor certification under the H-2A program must establish that it has a "temporary" or "seasonal" need for the agricultural services or labor to be performed. 20 C.F.R. § 655.161. In this case, the issue remains whether Employer has demonstrated that he has a temporary or seasonal need for agricultural services or labor?

DISCUSSION

In an expedited administrative review, as is the case here, the undersigned has jurisdiction pursuant to 20 C.F.R. §§ 655.141(c), 655.171(b)(2). Moreover, the Decision and Order that follows must be based solely on the written record, and may not be based on new evidence. 20 C.F.R. § 655.171(a). When an employer requests an administrative review, the administrative law judge's decision may affirm, reverse, or modify the CO's determination, or remand to the CO for further action. 20 C.F.R. § 655.171(b)(2). The administrative law judge's decision is the final decision of the Secretary. *Id.* In light of the foregoing standards, the undersigned will discuss the merits of this case below.

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b); Salt Wells Cattle Co., LLC, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). 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). Consequently, 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).

Temporary or Seasonal Need

Employer also bears the burden of demonstrating that it has a "temporary or seasonal" need for agricultural services. 20 C.F.R. § 655.161; Fegley Grain Cleaning, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015) (citing 20 C.F.R. § 655.161(a)).

A "seasonal need" occurs if employment is tied to a certain time of year by an event or pattern, and it is of a recurring nature 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). An employer must therefore justify any change in the dates for a seasonal need, in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. See, e.g., Southside Nursery, 2010-TLC-157, slip op. at 4 (ALJ, Oct. 15, 2010); Thorn Custom Harvesting, 2011-TLC-196, slip op. at 3 (ALJ, Feb. 8, 2011). Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected. See, e.g., Salt Wells Cattle Co., 2010-TLC-134 (Sept. 29, 2010). In other words:

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, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).

Salt Wells Cattle Co., LLC, 2011-TLC-00185 (Feb. 8, 2011).

The fact-finder must determine if the **employer's needs are seasonal**, not whether the particular job at issue is seasonal. Pleasantville Farms LLC, 2015-TLC-00053, slip op. at 3 (June 8, 2015) (quoting Sneed Farm, 1999-TLC-00007, slip op. at 4 (Sept. 27, 1999)). Therefore, “[i]n determining whether 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.**” Fegley Grain Cleaning, 2015-TLC-00067, slip op. at 3 (citing Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). **Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year.** Lodoen Cattle Co., 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011) (citing Carlos Uy III, 1997-INA-00304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof)).

Similarly, 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). It is well-established that “[i]t is not the nature or 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) (emphasis added); see William Staley, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009). Accordingly, to determine an employer’s need for labor, the fact-finder must look at the whole situation and not narrowly focus on the instant position. See Haag Farms, Inc., 2000-TLC-00015 (Oct. 12, 2000); Bracy’s Nursery, 2000-TLC-00011 (Apr. 14, 2000). However, the employer’s application for temporary labor certification is properly denied when the “**consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer’s need does not differ from its need for such labor during other times of the year; the need is year round.**” Larry Ulmer, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014) (emphasis added) (finding that an “overlapping need for the same H-2A labor year round . . . exceed[ed] the ‘seasonal and temporary’ period for H-2A certification.”).

In the instant case, Employer has filed *Applications for Temporary Employment Certification* on three previous occasions, all of which requested four “Farm Workers” for “seasonal workers needed for rice season and crawfish season.” (AF 121, 182, 266). Employer’s first two applications for certification (H-300-13294-166290 and H-300-14261-627706) concerned dates of need beginning in **November** and ending in **September** of the following year. (AF 182, 266). In contrast, Employer’s third application for certification (H-300-16007-491684) began in February due to a delay in filing, but ended again in September of the same year, just as with the previous applications. (AF 121). Therefore, based upon Employer’s prior dates of need, Employer’s seasonal need for rice and crawfish seasons end in **September**. With respect to the present application for certification, Employer’s dates of need begin on **March 13, 2019**, but ends on **January 13, 2020**. Employer explained he was delayed in preparing and harvesting crawfish due to not being able to harvest his second crop of rice until December 2018, which delayed his applying for temporary labor certification. However, as noted by the CO, Employer fails to explain why his need for one worker for the rice season and crawfish season extends into January, going beyond what has historically been the ending date of need in September of each year.

Employer bears the burden of establishing when his **season occurs and how the need for labor or services during this time of the year differs from other times of the year.**” Fegley Grain Cleaning, *supra*, slip op. at 3; Rodriguez Produce, 2016-TLC-00013, slip op. at 4-5 (Feb. 4, 2016) (Employer’s three previous applications all ended in November of each year, but its current application set forth a date of need ending in December, rather than November. The ALJ found that Employer failed to establish a temporary need because it did not provide evidence establishing when the Employer’s temporary need actually begins and ends, and Employer did not justify extending its temporary need to what were “off-season” months in previous applications). Accordingly, I find denial of Employer’s certification application is appropriate because Employer has failed to establish when his season for crawfish and rice actually occurs. Employer presented no evidence demonstrating when the season for crawfish and rice harvesting begins and ends and why the current dates of need (i.e., March through January) for the crawfish and rice seasons extended beyond the previously established dates of need (i.e., November through September). *See Rodriguez Produce*, *supra*; *see also Lodoen Cattle Co.*, *supra*, slip op. at 5. Furthermore, Employer did not provide sufficient explanation as to how the need for labor or services during this time of year differs from other times of year, except to state that his children are grown and unable to assist in harvesting crops.⁴ Fegley Grain Cleaning, *supra*.

Likewise, I find denial of Employer’s application for certification is appropriate because the nature of Employer’s need for the duties to be performed do not appear to be temporary. *See Matter of Artee Corp.*, *supra* at 367. Employer concedes that he has six children who assisted him in harvesting crops, but when his children were younger Employer requested **four** “Farmworkers” (in all three previous applications for temporary labor certification). Nevertheless, Employer also concedes that when his six children became older they were able to assist in harvesting crops in the past years, and as a result, temporary labor certification was not sought. Presently, Employer avers that his children are grown and only one child is continuing to assist in harvesting, and that another family member who assisted in harvesting in “December through January” is no longer able to do so. Thus, Employer seeks one “Farmworker Aquacultural” laborer from March 13, 2019 through January 13, 2020. Looking at the whole situation, I find the CO was correct in concluding Employer’s need is year round, rather than temporary in nature, due to the fact that Employer utilized his children’s labor as a substitute during previous years to, in effect, make the request for H-2A workers appear to be compliant with applicable regulations. Indeed, Employer concedes that he is seeking one worker for an extended period of time (i.e., December and January) because a family member is no longer able to assist with harvesting during these months. Thus, if Employer’s previous applications had represented the entirety of Employer’s need (inclusive of the portion of the need fulfilled by his children), the nature of Employer’s year-round need would have been apparent. *See Larry Ulmer*, *supra*, slip op. at 4. Consequently, I find the CO properly denied Employer’s application for temporary labor certification because Employer also failed to demonstrate the need for one “Farmworker Aquacultural” laborer is temporary in nature.

⁴ With respect to his current application for temporary labor certification, other than his children, Employer did not provide any information about the number of workers, if any, he customarily employs year-round or full-time to assist in the preparation and harvesting of 575 acres of crops to demonstrate how his need for labor during this time of year differs from other times of year. (AF 1-23). Such information was also not provided when Employer previously applied for H-2A workers. (AF 121, 182, 266).

Accordingly, I find and conclude Employer has not demonstrated that it has a seasonal or temporary need for H-2A workers pursuant to 20 C.F.R. § 655.103(d), and thus the CO properly denied certification. Therefore, I find and conclude the CO's denial should be **AFFIRMED**.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

ORDERED this 20th day of March, 2019, in Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge