



Issue Date: 13 August 2020

OALJ Case No.: 2020-TLC-00097
ETA Case No.: H-300-20196-713959

In the Matter of

**AG-MART PRODUCE, INC.
d/b/a SANTA SWEETS, INC.,**

Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Stephanie M. Rosin, *Esq.*
Signature Staffing, Inc./Impact Staffing Leasing LLC
Avon Park, Florida
For the Employer

Edward Waldman, *Esq.*
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.¹ A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies

¹ 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.²

STATEMENT OF THE CASE

On July 15, 2020, AG-Mart Produce, Inc. d/b/a Santa Sweets (“Employer”) filed an Application for Temporary Employment Certification (ETA Form 9142A), ETA Form 9142A Appendix A, ETA Form 790, 790A and Addendums, Statement of Temporary Need, Workers Compensation Insurance Documentation, Housing Documentation, FLC Documentation, Worksite Maps and Directions, and Agent Agreement and G-28. (AF 37-135).³ The Employer requested certification for 55 farmworkers and laborers⁴ for its Immokalee, Florida farm to “cultivate and harvest tomatoes, cucumbers, squash, and peppers” and to perform other duties such as “[f]ield care tie plants, stake plants, prune plants, clean drip emitters and microjets, pull plastic, remove plastic drip lines, remove dead plants, and weed removal.” (AF 45). The Employer requested workers from September 13, 2020 to May 14, 2021, based on an alleged other temporary need. (AF 37, 45).

Regarding its temporary need, the Employer wrote:

Ag-Mart Produce needs additional labor to plant and harvest its crops from September 2020 through May 2021. The work to be performed will include planting and harvesting Ag-Mart Produce's crops in its South Florida farming location, and all work will be complete on May 14, 2021. This job is only intended to occur during the period stated, and will only be performed on the crops planted and harvested during this 8-month period. All crops planted by Ag-Mart Produce in its South Florida location are only able to grow and be harvested during this general period.

(AF 83).

On July 17, 2020, the CO issued a Notice of Deficiency stating that the Employer had not demonstrated how the job opportunity was seasonal or temporary in nature.⁵ (AF 24-29). The CO stated that based on the Employer’s application history, it was not clear that the current application reflected a need for labor levels far above those for the employer’s normal operations. The CO stated:

[T]he employer explains that it needs additional labor to plant and harvest its crops from mid-September through May and it closes its operations in June and July. The employer is requesting workers from mid-September through mid-May; therefore, it appears the employer’s normal operations occurs during its entire requested period and the employer’s request does not represent a period that is *far above those necessary for ongoing operations*.

² 20 C.F.R. § 655.171.

³ In this Decision and Order, “AF” refers to the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop” and occupation code 45-2092.02. (AF 38).

⁵ The CO identified one other area of deficiency, which is not at issue on appeal as the denial was only based on the Employer’s failure to establish a temporary need for workers. (AF 9-14).

(AF 28, emphasis in original).

To correct the Employer’s failure to establish the job opportunity as seasonal, the CO requested that the Employer submit evidence and documentation to support the number of positions being requested. (AF 28-29).

The CO also reviewed the Employer’s previous applications to the Immokalee, Florida location, which have been summarized below and were included as part of the administrative file.

Case Number	Status	Beginning Date of Need	Ending Date of Need	Number of Workers
H-300-19037-844388	Certified-Full	04/16/2019	05/20/2019	50
H-300-19157-394508	Certified-Full	08/19/2019	05/15/2020	15
H-300-19177-872907	Certified-Full	09/09/2019	05/20/2020	40
H-300-20035-295700	Certified-Full	04/16/2020	05/15/2020	55
H-300-20156-626175	Appeal – Denial Decision Affirmed	08/17/2020	05/14/2021	15
H-300-20196-713959	Received	9/13/2020	05/14/2021	55

(AF 27).

The Employer responded to the Notice of Deficiency July 22, 2020, stating that the CO failed to address the temporary nature of the Employer’s need for workers, noting that it was requesting temporary workers for a period of less than one year. (AF 15-23). To support its argument, the Employer also submitted additional temporary and full-time employee payroll records. (AF 20-23).

On July 31, 2020, the CO issued a Notice of Denial (“Denial”), finding that the Employer’s past applications demonstrated a recurrent annual need for laborers over the same eight month period and so had failed to establish that its need was “temporary” in nature. (AF 9-14).

That same day, the Employer appealed the CO’s decision to deny its application. (AF 1-8). On August 3, 2020, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer’s request for expedited administrative review and permitting the parties to file briefs within three business days after receipt of the Administrative File. The Administrative File was received on August 6, 2020. The Employer filed a brief on August 10, 2020, arguing that it had established a seasonal or other temporary need for the workers requested in the application. The Solicitor, on behalf of the CO, filed a brief on August 11, 2020, stating that the Employer’s need was not temporary as it was reoccurring in nature.

DISCUSSION AND APPLICABLE LAW

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge (“ALJ”) under §655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.* The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011). The 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).

To qualify for the H-2A program, an employer must establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. §655.161(a). The Department’s H-2A regulations define these terms as follows:

Definition of a temporary or seasonal nature. For 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.

8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d).

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). 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*, slip op. at 3 (citing *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)).

For temporary work “[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.” *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 specific job at issue. *Haag Farms, Inc.*, 2000-TLC-00015 (Oct. 12, 2000); *Bracy’s Nursery*, 2000-TLC-00011 (Apr. 14, 2000). An Employer’s needs cannot be temporary if they continually reoccur. See *Little Wicomico Oyster*, 2018-TLC-00029, slip op. at 7 (Nov. 1, 2018); *William Staley*, 2009-TLC-00060, slip op. at 5 (“[A]n employer’s need to have job duties performed is ‘temporary’ [when it is] of a set duration and not anticipated to be recurring in nature . . .”).

Here, the Employer has not established that its employment need is temporary. As noted by the CO, the Employer’s past applications, current request, and descriptions of the planting and

harvest patterns in Immokalee, Florida (*see* AF 84) indicate a recurrent need for workers annually from mid-September to mid-May. The CO may properly consider the Employer's previously certified dates of need when determining whether a need is temporary. *Farm-Op, Inc.*, 2017-TLC-00021 slip op. at 10 (July 7, 2017). The Employer's previous applications (ETA Nos. H-300-19157-394508 and H-300-19177-872907) show that the Employer requested farmworkers and laborers to perform planting, cultivating, and harvesting crops from August 2019 to May of 2020. (*see* AF 740-890; AF 597-739). The Employer has also previously filed an application based on a seasonal need for workers to "cultivate and harvest tomatoes, cucumbers, squash and peppers" from August 2020 to May 2021. (ETA No. H-300-20156-626175, AF 136-322). The Employer's current application requests workers to cultivate and harvest crops from September 2020 to May 2021. Overall, I find that the record demonstrates that the Employer has a recurrent annual need for workers whose job duties do not change as they are repeatedly needed to plant and harvest tomatoes, cucumbers, squash, and peppers. Thus, I find that the Employer has not demonstrated a temporary need for workers.

Although not requested in their current application, I also find that the Employer's requested need is not seasonal because it does not occur within "a short annual growing cycle or a specific aspect of a longer cycle [that] requires labor levels far above those necessary for ongoing operations." *See* 20 C.F.R. § 655.103(d). In a very general sense, it could be argued that the Employer has described a pattern of activity that is "tied to a certain time of year" and requires more workers at that time than at other times (*i.e.*, September through May). However, the Employer's requested need is a pattern that, rather than being tied to a certain time of the year, comprises almost all of the entire year. The Employer has not requested workers for a short growing cycle or smaller part of a longer cycle, but instead has requested workers for the entire annual cycle of the company's ongoing business operations to perform nearly all the work that the company does with respect to the produce involved. A need is not seasonal when it spans almost the entire year and requires workers to accomplish the duties for the entire annual cycle of the company's ongoing business operations. *Frost Wines, LLC*, 2019-TLC-00042, slip op. at 5-6 (Apr. 18, 2019) (holding that the employer did not have a seasonal need when it requested workers for ten months out of the year to tend to all the duties of an annual growth cycle).

Further, there is no evidence in the record that the Employer has permanent farm workers or laborers that it needs to supplement during the requested period. On the contrary, the record indicates the Employer has 5 to 6 permanent employees that are described as supervisors, managers, a compliance officer, and a secretary. (*See* AF 85, AF 23). Thus, I find that the Employer has not described a temporary need for substantially more workers than needed for normal, ongoing operations, but rather has requested the number of workers that are needed throughout almost all of the year to perform all the normal, ongoing operations of the business. As counsel for the CO recognized, the purpose of the H-2A program is to supplement a permanent workforce and not to replace it. *Mapleview Dairy, LLC*, 2020-TLC-00013, slip op. at 5 (Dec. 4, 2019); *In re Mammoser Farms, Inc.*, 2017-TLC-00001, slip op at 8 n.3 (Nov. 22, 2016); *Frost Wines, LLC*, 2019-TLC-00042, slip op. at 5-6 (Apr. 18, 2019). Thus, I find that the Employer has not provided evidence of a need that lasts for a short growing cycle or for a single aspect of a longer cycle and had not provided evidence that it requires labor levels far above those necessary for ongoing operations. Therefore, I find that the Employer has not demonstrated a seasonal need for the 55 workers requested.

The recurrent nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrates that the Employer's need for workers is not temporary. Further, the number of farmworkers requested compared to the slight number of permanent workers indicates the Employer's need is not seasonal but rather that it is seeking to replace its workforce with temporary laborers. Accordingly, I find that the CO's denial of certification based on the Employer's failure to show that the employment need is seasonal or temporary was reasonable and not arbitrary, capacious or not in accordance with the law.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the CO's decision denying the Employer's Application is **AFFIRMED**.

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE