

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW  
Washington, DC 20001-8002

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



**Issue Date: 13 July 2020**

**BALCA Case No.: 2020-TLC-00085**  
**ETA Case No.: H-300-20156-626175**

*In the Matter of:*

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

*Employer.*

Certifying Officer: Chicago National Processing Center

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

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

Before: **CARRIE BLAND**  
District Chief Administrative Law Judge

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

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.

On June 25, 2020, AG-Mart Produce, Inc. (“Employer”) filed a request for expedited administrative review of the Final Determination issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on July 6, 2020. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

## STATEMENT OF THE CASE

On June 4, 2020 the Department of Labor's ETA received an application for temporary labor certification from Employer. AF 106-112.<sup>1</sup> Employer requested certification for 15 Farmworkers and Laborers from August 17, 2020 until May 14, 2021 for a worksite in Immokalee, Florida. AF 106-107. Employer indicated that the nature of its need was seasonal, and explained the job duties as follows:

Cultivate and harvest tomatoes, cucumbers, squash and peppers – move around field to picking location and pluck vegetables from plants, walk to and empty buckets into bins. Field care tie plants, stake plants, prune plants, clean drip emitters and microjets, pull plastic, remove plastic drip lines, remove dead plants, and weed removal. Workers will walk along rows as specified by employer and remove weeds and grass from fields by hand or using a hoe. Prolonged standing, bending stooping, and reaching. Must be able to operate motorized farm equipment. Job is outdoors and continues in all types of weather.

AF 106.

Regarding the seasonal nature of the job, Employer noted the following:

[T]he crops being harvested mature at certain times of the year, and additional labor is needed in order to cultivate and harvest these crops when they are ready to be harvested. Additional labor is not necessary at times during the year which are not harvesting or cultivation periods. Generally, crops mature approximately the same time every year.

AF 142.

On June 11, 2020 the CO issued a Notice of Deficiency ("NOD"). AF 86-90.

The CO identified a failure to establish the job opportunity as seasonal in need and stated the following:

The Employer must explain how the employer's job opportunity represents a seasonal need. This explanation must explain how the need is tied to a certain time of year and demonstrate that the request represents a need for labor levels far above those required for ongoing operations.

AF 89.

To correct Employer's failure to establish the job opportunity as seasonal, the CO requested that Employer submit evidence and documentation to support the number of positions being requested, including, but not limited to:

---

<sup>1</sup> References to the appeal file will be abbreviated with an "AF" followed by the page number.

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 statement indicating the employer’s monthly staffing levels and identifying periods of normal operations and periods where its labor levels are far higher than normal;
3. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation outside the requested period of need;
4. An (sic) summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Farmworkers and Laborers. Crop*, the total number of workers or staff employed total hours worked, and total earnings received. Such documentation must be signed by employer attesting that the information being presented was compiled from employer’s actual accounting records or system. 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 specific information or 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.

AF 89-90. (emphasis in original).

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

<u>Case Number</u>	<u>Status</u>	<u>Beginning Date of Need</u>	<u>Ending Date of Need</u>	<u>Number of Workers</u>	<u>Admin File</u>
<b>H-300-19037-844388</b>	Certified-Full	04/16/2019	05/20/2020	50	744-877
<b>H-300-19157-394508</b>	Certified-Full	08/19/2019	05/15/2020	15	593-743
<b>H-300-19177-872907</b>	Certified-Full	09/09/2019	05/20/2020	40	450-592
<b>H-300-20035-295700</b>	Certified-Full	04/16/2020	05/15/2020	55	176-449
<b>H-300-20156-626175</b>	Received	08/17/2020	05/14/2021	15	1-175

The Employer responded on June 11, 2020, and included an April 2020 decision by Administrative Law Judge Theodore W. Annos in support of its response.<sup>2</sup> AF 38-85. The Employer also noted:

<sup>2</sup> In *Ag-Mart Produce Inc*, 2020-TLC-00050, 2020-TLC-00051 (Apr. 7, 2020), Judge Annos considered whether the CO had erred by finding that “(1) Employer failed to demonstrate a seasonal or temporary need, and (2) Employer’s locations in separate areas of intended employment do not create an independent basis to evaluate Employer’s need as separate and distinct.” Slip op. at 7. The decision noted that the CO “may review the situation as a whole . . . and

Proven by [Employer's] prior certifications, these activities are *recurrent on an annual basis*. However, all activities *cease* in May, and normally *no additional labor is needed* until August to fill the required positions. The *activities* are not year-round and *do not exceed one year in length*. The demand for labor is dictated by the activities performed; therefore, the need for additional labor coincides with the seasonal production and the activities being performed.

AF 38 (emphasis in original).

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer did not meet the regulatory requirements for certification, and issued a Final Determination denying Employer's application for temporary labor certification on June 25, 2020. AF 31-36. The CO noted that Employer failed to establish the job opportunity as seasonal in nature as required by the Department's H-2A regulations. AF 34.

The CO noted that Employer did not demonstrate the requested standard of seasonal need. AF 34-35. Specifically the CO concluded:

The Employer did not provide any of the information or documentation request[ed]. Rather, in the NOD response, the employer simply states "all activities cease in May, and normally no additional labor is needed until August." This statement demonstrates that the employer's ongoing operations run from August through May each year; there are no operations or labor levels, during the balance of the year. As a result, the employer has not demonstrated that this application presents the period during which it "requires labor levels far above those necessary for ongoing operations" or the number of additional workers needed to supplement the labor needed for ongoing operations during that period. Therefore, with no supporting documentation submitted, the Department cannot determine that the requested need represents a need of a seasonal nature as defined by Departmental regulation.

AF 36.

The CO further explained that while Employer cited a Board of Alien Labor Certification Appeals ("Board" or "BALCA") decision in its NOD response, "Employer appears to have misunderstood BALCA's decision as *carte blanche*, allowing it to file, and requiring the CO to certify, any future application requesting H-2A workers from August through May for its Southern Florida operations." AF 35-36. The CO explained that "the CO must review each application for compliance with regulatory requirements. . . . The employer's filing history in Southern Florida indicates the employer's operations require higher labor levels in other periods

---

need not confine the analysis to the existing application." *Id.* at 9. Judge Annos reversed the CO's denial, noting that the CO had incorrectly based his conclusion on prior applications from different geographic locations not within the same area of intended employment, as defined by 20 C.F.R. § 655.103(b), finding that the CO's basis for denying certification was "too far reaching, and therefore inaccurately reflect[ed] Employer's period of need." *Id.* at 12. In the present case, the CO only reviewed prior applications for the South Florida location.

of the year (e.g. April through May) than the period requested in the is application (August through May.)” *Id.*

On June 25, 2020, Employer requested expedited administrative review of CO’s denial. AF 1-30. Employer and the CO both filed timely briefs on July 10, 2020.

Counsel for the CO does not contest that Employer has a recurring annual need, but argues that Employer failed to prove a valid need “because its purported labor need is not far greater than the amount of labor needed for ongoing operations.” *Solicitor’s Brief* at 6. Counsel for the CO noted that Employer’s need was not temporary in nature, as Employer’s history shows that it needs H-2A workers on a recurring basis. *Id.* at 7.

Counsel for the CO further notes that “Employer’s ongoing operations run from August through May; operations cease from late-May until mid-August.” *Solicitor’s Brief* at 6. Counsel for the CO argues that “Employer’s statement that additional labor is not needed during the remainder of the year is misleading, because, during those times, Employer ceases operations and therefore needs no labor.” *Id.* Thus, Counsel for the CO concludes that “Employer seeks H-2A workers here for the entirety of its ongoing operations: August through May. Consequently, Employer cannot show that its need for labor from August through May is substantially higher than its need for labor during ongoing operations—which, in fact, run from August through May.” *Solicitor’s Brief* at 6.

Employer noted that its “need is well supported by Employer’s prior filings and ALJ Annos’ decision.” *Employer’s brief* at 4. Employer states that its need is “based on a particular event or period (i.e. the crops’ planting and growing cycle), which requires labor levels far above far above the periods during the year in which the Employer’s operations shutdown and no labor is needed.” *Id.*

### **APPLICABLE LAW**

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (“ALJ”) may only render a decision “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.”<sup>3</sup> A CO’s denial of certification must be upheld unless shown by the employer to be arbitrary or capricious, or otherwise not in compliance with law. *J and V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Brook Ledge, Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (“BALCA reviews decisions under an arbitrary and capricious standard.”). Accordingly, an Employer may not refer to any evidence that was not a part of the record as it appeared before the CO.

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof remains with the employer. *See, e.g., Garber Farms*, 2001-TLC-00006 (May 31, 2001) (citing 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures)).

---

<sup>3</sup> Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”

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

## **DISCUSSION**

In evaluating whether an employer has met its burden in establishing a need for agricultural labor on a seasonal basis, the Board has found that “the fact finder must look at the situation as a whole and not narrowly focus on the employer’s instant position.”<sup>4</sup> Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than other months of the year. However, where an employer has put forth evidence that it needs more workers in certain months than other months of the year, and the CO did not acknowledge the employer’s detailed explanation of its temporary need, the CO’s denial was arbitrary and capricious.<sup>5</sup>

### **Seasonal Need**

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). Importantly, an employer must also demonstrate that its need requires labor levels far above those necessary for ongoing operations.

However, where the “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.” *Farm-Op, Inc.*, 2017-TLC-00021, slip op. at 7 (July 7, 2017) (quoting *Larry Ulmer*, 2015-TLC-0003, slip op. at 4 (Nov. 4, 2014)). Further, a shifting need based on economics cannot properly be classified as “seasonal.” *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010).

---

<sup>4</sup> See *Rainbrook Farms*, 2017-TLC-00013 slip op. at 6 (Mar. 21, 2017) (citing *Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000)); *Bracey’s Nursery*, 2000-TLC-00011 (Apr. 14, 2000) (finding that it is proper to look at all H-2A applications to determine the true nature of employer’s “seasonal” business).

<sup>5</sup> See *Cowboy Chem., Inc.*, 2011-TLC-00211 (Feb. 10, 2011) (citing *Blondin Enters., Inc.*, 2009-TLC-00056, slip op. at 3-4 (July 31, 2009); *Bolton Springs Farm*, 2008-TLC-00028, slip op. at 6 (May 16, 2008)).

Here, Employer states that its need is seasonal because all activities cease in May, and normally no additional labor is needed until August to fill the required positions. *Employer's brief* at 4. Employer contends that its need for additional workers is temporary and supplements its workforce. *Id.* at 5. Employer further notes that its “need slowly increases during its pre-harvest period, it reaches its maximum level during the harvesting period, and begins to decrease during the post-harvest period.” *Id.* Employer states that it only started to supplement its workforce with H-2A workers after an audit was conducted on its operations. *Id.* However, Employer had the same job requirements in previous years, as demonstrated by nearly identical job descriptions in prior H-2A applications. AF 106, 194, 506, 648, 770.

In the present case, Employer failed to provide the required documentation to demonstrate that its need requires levels far above those necessary for ongoing operations. As the Board has consistently held, “[t]he burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers.” *DTM Trucking, Inc.*, 2018-TLN-00174, slip op. at 4 (Oct. 10, 2018). Applications for temporary labor certification are properly denied when the employer does not supply requested information. 20 C.F.R. § 655.32(a); *see also Saigon Rest.*, 2016-TLN-00053 (July 8, 2016); *Munoz Enters.*, 2017-TLN-00016 (Jan. 19, 2017); *Carolina Contracting and Mgmt., LLC*, 2017-TLN-00026 (Apr. 4, 2017).

Further, 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) (holding that an employer did not have a seasonal need for extra labor, but rather had a “seasonal need to lay off workers when operations slow”). In this case, Employer has failed to provide documentation that demonstrates its need for 15 additional farmworkers and laborers supplements its permanent workforce.

### Temporary Nature

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). In determining temporary need for purposes of the H-2A 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 also Sneed Farm*, 1999-TLC-00007, slip op at 4 (Sept. 27, 1999) (holding that it is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal).

Here, Employer argues that it has a temporary need, stating that its “period of need is ONLY nine (9) months which is far below the ten (10) month threshold in which to question the temporary nature of the job opportunity.” AF 38 (citing *Matter of Grandview Dairy*, 2009-TLC-000002 (2008)). Other cases have noted that while the 10 month period is a permissible threshold, it “is not an absolute requirement for further review by the CO, but has been an

accepted guideline for the CO to seek further information to ensure that the temporary employment opportunity is not, in fact, a permanent position with a short break between purported hiring periods.” *Matter of Tranel Ranch* 2019-TLC-00049, slip op at 3 (May 22, 2019); *see also Grassland Consultants LLC*, 2016-TLC-00012, slip op. at 5 (Jan. 27, 2016) (stating that the ten month rule serves only as a signal that an employer may need to substantiate that its labor need is truly temporary.)

I also find Employer’s reliance on *Ag-Mart Produce Inc*, 2020-TLC-00050 & 2020-TLC-00051 misguided. In that case, Judge Annos reversed the CO’s denial, finding that the CO’s decision to examine prior applications from different geographic locations resulted in a finding that was “too far reaching, and therefore inaccurately reflects Employer’s period of need.” Slip op. at 9. Even if I were to consider the other applications cited by Employer to be legally and factually similar, the fact that the CO approved similar applications in the past is not sufficient grounds for reversal of the denial. *See ATP Agri-Services Inc.*, 2019-TLC-00050 (May 17, 2019) (citing *Rollins Sprinkler & Landscape, LLC*, 2017-TLN-00020 (Feb. 23, 2017) (noting that perhaps both applications should have been denied, and “two wrongs would not make a right”).

Here, Employer has not provided any of the documentation demonstrating why it needs an additional 15 workers. Ultimately, Employer’s bare assertions that it needs 15 workers is insufficient to establish a seasonal need. *See, e.g., Lodoen Cattle Co.*, 2011-TLC-00109 (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)); *see also Estrada and Sons Inc.*, 2019-TLC-00084 slip op at 6-7 (Oct 23, 2019).

### **CONCLUSION**

Based on the foregoing, the CO did not err in denying certification in this matter.”<sup>6</sup>

### **ORDER**

In light of the foregoing, **IT IS HEREBY ORDERED** that the Certifying Officer’s Final Determination denying the Employer’s ETA Form 9142A, *H-2A Application for Temporary Employment Certification*, for 15 Farmworkers and Laborers is **AFFIRMED**.

For the Board:

**CARRIE BLAND**  
District Chief Administrative Law Judge

---

<sup>6</sup> Employer notes that it “also provided expert statements, a more detailed statement and four years of payroll history during settlement negotiations.” *Employer’s brief at 4*. While my scope of review is limited, it is unclear why Employer did not previously provide this information to the CO. Employer notes that “this information has been made available to Certifying Officers and Solicitors in each of the prior appeals and filings that the Employer has presented.” *Id.* However, no such information was part of the AF.

Washington, D.C.