



**Issue Date: 31 August 2020**

OALJ Case No.: **2020-TLC-00107**  
**2020-TLC-00108**

ETA Case No.: H-300-20194-709188  
H-300-20194-709192

In the Matter of:

**AG LABOR LLC,**  
Employer.

Certifying Officer: Chicago National Processing Center

Appearances:

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*For the Certifying Officer*

Before: JOSEPH E. KANE  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING THE 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 presented 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. The Employer timely filed a request for expedited administrative review of the Certifying Officer's denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Appeal File ("AF") forwarded by the Employment and Training Administration ("ETA"), and the written submissions of the parties.

### STATEMENT OF THE CASE

The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On, July 14, 2020, the DOL's Employment and Training Administration ("ETA") received two *Applications for Temporary Employment Certification* from Ag Labor, LLC ("Employer"). (AF1 657-744; AF2 558-642).<sup>1</sup> In these applications, the Employer requested temporary labor certification for 460 harvesters and 7 drivers/supervisors from September 11, 2020 through May 5, 2021, citing a temporary seasonal need. (AF1 665-666; AF2 566-7). The Employer is a farm laborer contractor who supplies workers for farms in Florida. *Id.*

On July 20, 2020, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") in both cases finding that the Employer failed to establish that its job opportunity is seasonal or temporary pursuant to 20 C.F.R. §655.103(d). (AF1 641-645; AF2 535-557). Specifically, the CO noted that the Employer's dates of need have changed since the Employer's previous application. *Id.* The CO determined that based on the filing history, the Employer has requested a need during every month except July. *Id.* The CO stated that the Employer failed to provide an adequate explanation for the date change. *Id.* Accordingly, the CO asked the Employer to explain why its job opportunity is seasonal or temporary, to provide a detailed explanation as to why its dates of need have significantly changed from its established season and to submit among other things payroll records "separately for full-time permanent and temporary employment in the requested occupation." (AF1 645; AF2 539).

The Employer responded to the NODs on July 27, 2020. (AF1 412-640; AF2 306-534). While the Employer submitted its payroll records, it did not summarize them as requested. (AF1 412-640; AF2 306-534). The records contain almost 400 pages of payroll records. The Employer noted that its primary business has been "providing temporary farm labor to growers in the Florida strawberry and blueberry industry," but "since some strawberry growers have begun to diversify, [the Employer's] services as such have also diversified occasionally into providing the same labor pool for the secondary crops such as vegetables." (AF1 640; AF2 534). Employer further explained:

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<sup>1</sup> Citations to the Administrative File will be abbreviated "AF1" and "AF2" followed by the page number. AF1 represents the Administrative File in 2020TLC00107 and AF2 represents the file in 2020TLC00108.

Cases H-300-20064-373765 and H-300-20065-379569 [for workers from May 6, 2020 to June 30, 2020] were for vegetable harvesting, a crop activity which we have not previously been engaged in in the area of intended employment but one fixed-site strawberry grower client of ours began diversifying into vegetables the past year and requested assistance with the harvesting. However, this job and this fixed-site grower are still seasonal in nature and do not offer employment year-round. **While we do understand that this is not sufficient justification**, if this will interfere with the temporary nature of the berry season, we will in the future refrain from harvesting these crops past our 10-month threshold or refrain completely from harvesting them.

(*Id.* Emphasis added). The Employer asserted that despite these two requests, its usual off-season is May through early August. *Id.* Employer provided a table with a schedule of operations indicating that it does not currently have contracts covering the months of June and July. (AF1 639; AF2 533).

The CO issued a Final Determination denying the Employer’s two requests for certification on August 7, 2020 and August 10, 2020. (AF1 402-407; AF2 296-301). The CO determined that the Employer failed to show a seasonal or temporary need. *Id.* The CO reasoned that based on the Employer’s prior applications, July appears to be the only month where the Employer has not requested workers. *Id.* The CO found that while the Employer may diversify crops throughout the year, “the employer has demonstrated a near year need for the same type of agricultural labor” and its need is “limited only by its contracts with fixed site growers.” *Id.* The CO included the following table of Employer’s previous and pending H-2A applications for harvesters and drivers/ supervisors<sup>2</sup>:

| Case Number         | Status    | Job Title           | Beginning Date of Need | Ending Date of Need |
|---------------------|-----------|---------------------|------------------------|---------------------|
| H-300-19302-114022  | Certified | Harvesters          | 01/06/2020             | 04/06/2020          |
| H-300-19302-115595  | Certified | Harvesters          | 01/06/2020             | 05/05/2020          |
| H-300-20064-3737651 | Certified | Harvesters          | 05/06/2020             | 06/30/2020          |
| H-300-20065-3795692 | Certified | Drivers/Supervisors | 05/06/2020             | 06/30/2020          |
| H-300-20148-602660  | Certified | Harvesters          | 08/07/2020             | 05/05/2021          |
| H-300-20148-602536  | Certified | Drivers/Supervisors | 08/07/2020             | 05/05/2021          |
| H-300-20194-709188  | Current   | Harvesters          | 09/11/2020             | 05/05/2021          |
| H-300-20194-709192  | Current   | Drivers/Supervisors | 09/11/2020             | 05/05/2021          |

<sup>2</sup> The CO included in the appeal file the files for the Employer’s other applications. (See AF1 745- 2245; AF2 643-2148).

The CO also found that the Employer failed to summarize the submitted payroll documents and to clearly identify the temporary and permanent workers and the hours worked by each category of workers. Therefore, the CO denied certification.

By letters dated August 14, 2020, the Employer appealed the CO's determinations. (AF1 1-401; AF2 1-295). On August 17, 2020, this case was assigned to me. In an Order dated August 19, 2020, I provided the CO two business days after the filing of the Appeal Files to file a brief. I received the Appeal File on August 24, 2020. The CO filed a brief on August 26, 2020. The record is closed and the case is ready for decision.

The only issue before me is whether the Employer established a temporary or seasonal need for the positions listed in its applications, as defined by 20 C.F.R. § 655.103(d). This decision is based on the administrative file, the arguments of the parties, and the applicable laws and regulations. This decision is issued within five business calendar days after receiving the Appeal File, as required by 20 C.F.R. § 655.171(b)(1)(iii).

### **Scope of Review**

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 Employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Any additional evidence filed with the Notice of Appeal that was not previously filed with the CO cannot be considered. BALCA may affirm, reverse, modify, or remand the CO's decision based only on the administrative file and "after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae." 20 C.F.R. 655.171. BALCA must uphold the CO's decision unless the Employer proves that the decision was arbitrary, capricious, or not otherwise in accordance with the law. *Mapleview Dairy, LLC*, 2020-TLC-00013, slip op. at 4 (Dec. 4, 2019). It is also settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms*, 2001TLC-00006 (ALJ May 31, 2001) *citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures).

### **Temporary Need**

The issue before me is whether the Employer's need is temporary and seasonal in nature. To succeed on an H-2A application, the Employer must establish "the need for the agricultural services or labor to be performed on a temporary or seasonal basis." § 655.161(a). "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." § 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, “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)). 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). As a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. 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).

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.” *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-TLC00011 (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.” *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014)(finding that an “overlapping need for the same H-2A labor year round. . . exceed[ed] the “seasonal and temporary” period for H-2A certification.”)

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.*, 2010TLC-134 (ALJ, Sept. 29, 2010). In *Salt Wells Cattle Co., LLC*, the ALJ explained:

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).

2011-TLC-185 (ALJ, Feb. 8, 2011). 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-158, 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).

Here, the Employer has not established that its employment need is purely seasonal. As noted by the CO, the Employer's past certified applications, combined with its current requests, indicate a need for workers from August 7<sup>th</sup> to June 30<sup>th</sup>. This leaves just one month where workers aren't needed. The Employer relies on the premise that the work that is to be completed at various worksites on different crops determines the temporary or seasonal nature of employment. The Employer asserts in its request for appeal,

The employer recognized in the NOD response that it exceeded its normal berry season during the *previous seasonal cycle* because of the fact that it assisted one of its fixed-site strawberry grower clients with a summer vegetable crop. However, as the employer also stated, it will not be doing this type of work in the future. It was a one-time contract that it took on in order to help one of several farm clients who previously relied on local labor for their vegetable crop but could not find sufficient local labor at the time due to a shortage. It is unclear whether this labor shortage was due to the newly discovered COVID-19 pandemic at the time.

It is well established that the CO may properly consider the Employer's previously certified dates of need when determining whether a need is temporary. *Farm-Op, Inc.*, slip op. at 10. To allow otherwise would provide employers with an opportunity and ability to continually shift their purported periods of need in order to utilize the H-2A program. The Employer's previous applications show that the Employer needed temporary harvesters and drivers/supervisors. The Employer's current application includes the same job title and SOC code, includes a similar work description. The Employer attempts to distinguish its need for workers in this current application by asserting that the workers worked on different crops and at just one location. Again, this distinction between crops does not make the Employer's need seasonal. Rather, the record demonstrates that the Employer has a consistent need for year-round workers whose job duties do not change.

There are a number of issues with the Employer's argument. First, it is an Employer's **need**, and not an individual task or worksite, which dictates whether a need for workers is seasonal or temporary. *Pleasantville Farms LLC*, slip op. at 3. Looking at the whole situation, it is clear that the Employer's need, irrespective of crop or worksite, is neither seasonal or temporary in nature. Second, when examining the Employer's request for workers between May 5<sup>th</sup> and June 30<sup>th</sup>, the Employer listed "seasonal" and not "temporary" as the grounds for the requested workers. (AF2 1700-1879). The Employer never identified this additional need as temporary. The Employer identified during the time of the prior application or during this application in response to the CO's concerns that the prior need was due to extraordinary circumstances, Covid-19 (as referenced in the request for appeal), circumstances beyond the Employer's control, or referenced simply a temporary one-time need. Besides the Employer's conclusory arguments on appeal, there is nothing to support any of those potential arguments in the record.

The Employer's statements that it won't harvest vegetables if it cannot harvest strawberries, clearly shows that the Employer is trying to pick and choose its time of need to stay within the 10 month period, further hindering the Employer's argument. The Employer even

acknowledges in its response to the Notion of Determination that “this is not sufficient justification.” (AF1 640; AF2 534).

Even if I accepted the Employer’s argument that the duties are different between the two locations as they are at a separate site and different crops, the very applications show otherwise. Both sets of applications request harvesters and drivers/supervisors. (AF1 665-55; AF2 558-642, 1700-1978). The job duties for the drivers/supervisors are almost identical. (AF2 558-642, 1700-1978). The harvesters have some duties that are different, while others are interchangeable. (AF1 657-744, AF2 1700-1978). However, the past precedent is clear. BALCA has consistently held that the seasonal variations of a farm laborer position are not determinative of the Employer’s seasonal need but rather it is the need for the labor itself that must be considered in determining whether the Employer has proven a seasonal need. *See Nature Fresh Farms USA, Inc.*, 2020-TLC-79 (June 19, 2020); *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *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); *LVJ Pimentel Resources, LLC*, 2020-TLC-104 (August 25, 2020).

Thus, the Employer has not tied 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 has continuously entered into contracts with agricultural producers in order to create continuous work and an unceasing need for workers. There is also no evidence in the record to show that the Employer requires labor levels far above those necessary for ongoing operations from October to July. Therefore, the Employer has not met its burden to show that it needs more workers in certain months than in other months of the year. *Farm-Op, Inc.*, slip op. at 7; *Lodoen Cattle Co.*, slip op. at 5.

The overlapping 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 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 farm workers and laborers is permanent and year-round, not seasonal or temporary. Accordingly, I find that the CO’s denial of certification based on the Employer’s failure to show that the employment need was seasonal or temporary was reasonable and not arbitrary, capacious, or not in accordance with the law. Accordingly, the Employer has not established a seasonal need for labor, as defined in § 655.103(d).

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decisions are **AFFIRMED**.

JOSEPH E. KANE  
Administrative Law Judge