

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 January 2020

OALJ Case No.: 2020-TLC-00018
ETA Case No.: H-300-19312-136199

In the Matter of:

AG-MART PRODUCE, INC.,
Employer.

Appearance: Stephanie M. Rosin, Esq.
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For the Employer

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U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER

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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On November 21, 2019, Ag-Mart Produce, Inc. (Employer) filed a request for a *de novo* hearing pursuant to 20 C.F.R. § 655.171(b) to review the Certifying Officer's (CO) November 19, 2019 Denial in regard to Employer's temporary alien agricultural labor certification (H-2A) application. I received the Administrative File (AF) on December 10, 2019.

In a telephone conference conducted on December 5, 2019, Employer's Counsel waived the right to a hearing within five business days of the Judge's receipt of the administrative file. A hearing in this matter was scheduled for January 3, 2020. On December 31, 2019, I granted the parties' joint request to cancel the hearing and issue a decision on the record and admitted

Employer's Exhibits A-E and the Certifying Officer's Administrative File (AF 1-959) without objection.¹ This Decision and Order is issued within ten calendar days of the scheduled hearing, as required by the regulation at 20 C.F.R. § 655.171(b)(1)(iii).

BACKGROUND

On November 14, 2019, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A. (AF 22-66). The Employer's application requested certification for 50 "Farmworkers and Laborers, Crop" for the period beginning January 20, 2020, and ending April 12, 2020. The nature of temporary need was listed as seasonal. Job duties were listed as the following:

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. Workers may be requested to submit to random drug or alcohol tests at no cost to the worker. Failure to comply with the request or testing positive may result in immediate termination. Drug testing and background check may occur during the interview process, and will be conducted at the sole cost and discretion of the employer. Must be able to lift 50lbs to shoulder height repetitively throughout the workday and able to lift and carry 50lbs in field.

(AF 30).

On November 19, 2019 the Certifying Officer (CO) issued a Notice of Deficiency (NOD). (AF 11-15). The CO determined that the Employer did not sufficiently demonstrate that the job opportunity was temporary or seasonal in nature, citing 20 C.F.R. § 655.103(d), which defines temporary or seasonal need. In pertinent part, 20 C.F.R. § 655.103(d) provides:

For the 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.

¹ References to the Administrative File are designated as AF-n and references to the transcript are identified as TR-n. The Employer's exhibits are identified as EX-n. The Certifying Officer submitted additional exhibits in this matter and thus, references to those exhibits are identified as CX-n.

The CO noted that prior “applications have a combined certified period of employment of January 1, 2019 through December 16, 2019. When combined with the current application, the total period of need is January 1, 2019 through April 12, 2020, a period of 15 months and 12 days.” (AF 13). The CO noted the Employer’s filing history in the following chart:

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date Of Need</u>	<u>Ending Date Of Need</u>
H-300-18304-283117	Ag-Mart Produce, Inc.	Determination Issued - Certification	1/1/2019	6/10/2019
H-300-18311-337358	Ag-Mart Produce, Inc.	Determination Issued - Certification	1/7/2019	6/17/2019
H-300-19043-730662	Ag-Mart Produce, Inc.	Determination Issued - Certification	4/16/2019	5/20/2019
H-300-19130-833692	Ag-Mart Produce, Inc.	Determination Issued - Certification	7/15/2019	12/16/2019
H-300-19144-568266	Ag-Mart Produce, Inc.	Determination Issued - Certification	8/5/2019	12/16/2019
H-300-19214-668990	Ag-Mart Produce, Inc.	Determination Issued - Certification	10/14/2019	12/16/2019
H-300-19312-136199	Ag-Mart Produce, Inc.	Received	01/20/2020	04/12/2020

(AF 13-14). The CO stated that, based on Employer’s current requested dates of need and its previous dates of need, it is unclear how this job opportunity is seasonal in nature, as being tied to a certain time of year by an event or pattern. The CO directed the Employer to provide a detailed explanation as to why this job opportunity is seasonal rather than permanent in nature and to submit documentation to support its seasonal need, including summarized monthly payroll reports for a minimum of the three previous calendar years (2016, 2017, and 2018). The CO also directed that the information be summarized monthly and listed separately for permanent and temporary employment in the designated occupation. (AF 14-15).

Employer responded to the Notice of Deficiency on November 20, 2019, and requested a *de novo* hearing. Employer also provided its payroll records from January 5, 2019, through August 17, 2019. In the accompanying statement, Employer explained that its:

seasonal activities are *recurrent on an annual* basis. However, these activities will *cease* twice a year in mid-June and mid-December, and normally *no labor is needed* for these activities until January and mid-July, respectively. 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 of crops and agricultural activities being performed. The employer's period of need in its application is starkly different from the two periods in which all activities cease and the facilities shutdown. The employer's total period of need is in fact less than 10 months which is contrary to a finding that the need is year-round, and below the threshold in which to question the seasonality of the job opportunity.

(AF 1)(*emphasis* in original). Employer stated that its payroll records show there was a break in need from June 17, 2019, to July 15, 2019, and another break from December 16, 2019, through January 20, 2020.

EVIDENCE AND ARGUMENT

The parties have supplemented the Administrative File with the following evidence, which has been received and is admitted without objection:

Employer's Exhibit A: Ag-Mart Produce Labor Levels from January to April.

Employer's Exhibit B: Federal Register Volume 84, Number 144, dated Friday, July 26, 2019 Proposed Rules.

Employer's Exhibit C: Employer's counsel's email exchange with the Solicitor.

Employer's Exhibit D: a letter from Lee Timmerman, VP of Farming Operations explaining the seasonality of Ag-Mart Produce's Central Florida farm location; Ag-Mart Produce Seasonal Cycle chart; and payroll records for temporary employees, dated January 2, 2016, to December 7, 2019.

Employer's Exhibit E: Department of Labor, Bureau of Labor Statistic's Work Experience of the Population – 2018.

The parties also submitted a joint statement of the following facts:

- (1) The payroll records submitted by Employer ("Employer's Exhibit [EX] D") is a fair and accurate representation of all of the employees Ag-Mart Produce, Inc. employs at the locations at issue in the Employer's H-2A Application for Temporary Employment Certification, Case Number H-300-19312-136199.

(2) Ag-Mart Produce, Inc. does not employ any permanent workers in the locations at issue in the aforementioned H-2A Application.

The parties were granted leave to file written closing briefs on or before January 6, 2020. Both parties filed timely post hearing briefs.

Employer contends that the CO incorrectly determined that it failed to demonstrate a seasonal need or other temporary need. Employer states that its need is based on a particular event or period, which requires labor above the minimum needed for its operations and “far above the periods during the year in which the Employer’s operations shutdown and no labor is needed.” Employer explained that its growing seasons are cyclical in nature of planting, growing, and harvesting, and associated tasks are performed at specific times during the year. Employer also contends that its current application is for the pre-harvest period and does not extend beyond those seasonal activities.

Employer further argues that its need is not year-round. Employer cites to the Department of Labor’s Bureau of Labor Statistic’s definition of year-round employment, which classifies workers under “year-round employment” when they worked for 50-52 weeks out of the year. Here Employer states that its total period of need does not exceed 45 weeks per year. Employer also argues that its need is seasonal because the Department of Labor states in the Notice of Proposed Rule Making that “agricultural production is highly seasonal.”

Alternatively, Employer argues its need is temporary because their period of need is limited to a distinct period of time during its spring pre-harvest period. Employer further asserts that it neither intends to keep, nor needs workers for an indefinite period of time as its need ends when the crops are harvested. Employer further argues that its position is supported by its prior applications that were granted certification.

The Solicitor argues in support of the CO’s determination that Employer did not prove either element of a seasonal need. First, the Solicitor contends that Employer’s need is not tied to a certain time of the year by an annual event or pattern because Employer grows the same crops twice a year, with the exception of approximately two weeks in the winter and four weeks in the summer. However, the Solicitor states that Employer has not explained why it shuts down twice per year, and purports that Employer’s cycle is one of its own economic creation.

The Solicitor next argues that Employer does not have a need for labor “far above those necessary for ongoing operations” during its purported period of need because Employer does not have a permanent workforce. The Solicitor argues that the purpose of the H-2A program is to supplement an Employer’s permanent workforce, not replace it. The Solicitor referenced Employer’s payroll records and states that Employer’s number of employees remains stable from January to early-to-mid April, and then spikes from 100 workers to between 300 and 500 workers after that, an increase that the Solicitor states also happens later in the year in October. As such, the Solicitor contends that Employer has not established a seasonal need for labor above what is needed for ongoing operations for the stated period of need.

The Solicitor further argues that Employer’s need is not temporary either as it has the same recurring need throughout each month and in subsequent years as evidenced by the

identical job duties listed on all of its H-2A applications. Rather, the Solicitor contends that Employer has a continuing need for labor required to complete all the tasks necessary for its ongoing operations at its three Central Florida farm locations.

ISSUE

Whether the Employer has met its burden of establishing that its need for agricultural services or labor as stated in its current H-2A application is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. § 655.103(d)?

SCOPE OF REVIEW

The current case arises from the Employer’s request for a *de novo* hearing in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program. The regulation pertaining to appeals of the CO’s determinations in H-2A labor certification matters states, in cases where a *de novo* hearing has been requested, that the procedures in 29 C.F.R. Part 18 apply and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. §655.171(b)(ii).

In pertinent part, 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).

Since neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge’s review of determinations by the CO, I will review the evidence presented in this case *de novo*, but will also review the CO’s decision for abuse of discretion. *T. Bell Detasselling, LLC*, 2014 TLC 00087, slip op. at 3, fn. 7 (May 29, 2014), citing *RP Consultant’s, Inc.*, 2009-JSW-00001, slip op. at 8 (June 30, 2010), and *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug 17, 2001). See also *David Stock*, 2016-TLC-0040 (May 6, 2016) (where “Employer requested *de novo* review, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification”).

DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and

(2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, it is an employer's burden to demonstrate that it has a "temporary" or "seasonal" need for agricultural services. 20 C.F.R. § 655.161.

It is well established that the H-2A program is designed to fill only temporary or seasonal labor needs, and therefore, the need for the particular position cannot be a year-round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d).

BALCA has also consistently found that the CO can 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(April 14, 2000); *Stan Sweeney*, 2013-TLC-00039(June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017).

In the instant case, the Employer's application requests temporary labor certification for 50 "Farmworkers and Laborers, Crop" for the period beginning January 20, 2020, and ending April 12, 2020. AF 30. The CO issued a Notice of Deficiency finding that Employer failed to establish its job opportunity as "temporary or seasonal in nature." AF 11-15. Employer contends that it has a seasonal need for additional labor. Alternatively, Employer also argues that its need is temporary.

A. *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). An employer must demonstrate when the employer's season occurs and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011).

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)). In addition, a need is not seasonal if the employer is able to manipulate the season to fit the criteria of the temporary labor certification program. *See Salt Wells Cattle Company, LLC*, 2011-TLC-00185 (Feb. 8, 2011)(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 is not seasonal according to the definition established at 20 C.F.R. § 655.103(d)). Further, a shifting need based on economics cannot properly be classified as "seasonal." *Southside Nursery*, 2010-TLC-00157 (Oct. 15, 2010).

Here, Employer argues that its need is seasonal because the current application is for its pre-harvest period for the spring season and does not extend beyond those activities. Employer stated it grows the same crops, including tomatoes, cucumbers, peppers, and squash, in two seasons per year in plant, grow, and harvest cycles. (EX D). These cycles span the entire year with the exception of approximately four weeks in the summer, from mid-to-late June through mid-to-late July, and two weeks in the winter, from late December through mid-January. (EX D). However, as the Solicitor states, Employer has not offered a reason as to why it shuts down during these periods or how these growing seasons are related to any particular weather pattern or annual cycle given that they grow the same crops throughout the year. As a need is not seasonal where an employer is able to manipulate the season to fit the criteria, and Employer has not demonstrated how its need is tied to a certain time of year by an event or pattern. *See Scott Farms*, 2011-TLC-00388 (Apr. 14, 2011)(An employer's need for labor was not tied to the weather or any particular annual pattern where greenhouse crops were capable of being grown year-round).

An employer must also demonstrate that its need requires labor levels far above those necessary for ongoing operations. However, where an employer fails to provide evidence that it needs more workers in certain months than other months of the year, an employer's certification must be denied. *Lodoen Cattle Company*, 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)).

Moreover, the purpose of the H-2A program is to supplement an employer's permanent workforce. *See Salt Wells Cattle Co.*, 2010-TLC-00134 (Sept. 29, 2010)(an employer cannot continually shift its period of need in order to utilize the H-2A program to fill a permanent need); *Mapleview Dairy, LLC*, 2020-TLC-00013, slip op. at 5 (Dec. 4, 2019); and *Frost Wines, LLC*, 2019-TLC-00042, at 5-6 (Apr. 18, 2019)(where an ALJ found that employer did not have a seasonal need for extra labor, but rather had a "seasonal need to lay off workers when operations slow").

Here, Employer does not have any permanent workers. (CO and Employer's Joint Statement of Stipulated Facts). Further, Employer's payroll records demonstrates that its number of employees remains relatively consistent between the dates of purported need. Rather, it's not until mid-to-late April, after its purported period of need ends, that Employer's number of workers increases from approximately 100 workers to approximately 300-550 workers. (EX D). As Employer's increased need for workers does not begin until after its purported dates of need, Employer has failed to demonstrate that its need for labor goes above what's necessary for its ongoing operations for the period of January 20, 2020, to April 12, 2020.

B. Temporary Need

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-2 temporary alien labor certification 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 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). Ten months has been viewed as an acceptable threshold to question whether an employer's need is temporary. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008)(finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, is not an arbitrary rule).

Employer contends that its need for additional workers is a temporary need because it "seeks to employ workers that will perform specific agricultural production tasks for a distinct period of time during its spring pre-harvest period" and does not have a need for workers for an indefinite period. However, here Employer has the same job requirements both throughout the year and in previous years, as demonstrated by having the same job requirement descriptions listed in its prior H-2A applications. (AF 30, 137, 254, 359, 490, 685, 863). Further, as the chart above demonstrates, in 2019, Employer was certified for temporary workers throughout the entire year except from June 17, 2019, to July 15, 2019, and December 16, 2019 through the end of the calendar year, or for a total shutdown period of approximately six weeks. (AF 13-14). As this period of need is greater than ten months, and Employer has not demonstrated extraordinary circumstances to support its need, Employer's need is not temporary.

CONCLUSION

Employer has not established that its need for labor for the requested dates in the current application, from January 20, 2020, to April 12, 2020, is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). Therefore, the basis for the CO's issuance of the November 19, 2019 Notice of Deficiency is affirmed.

ORDER

Accordingly, for the foregoing reasons, it is hereby **ORDERED** that the Certifying Officer's Notice of Deficiency is **AFFIRMED**.

SEAN M. RAMALEY
Administrative Law Judge