



Issue Date: 02 September 2020

BALCA Case No.: 2020-TLC-00111
ETA Case No.: H-300-20199-721825

In the Matter of:

CERVINI FARMS NORTH CAROLINA INC.,
Employer.

DECISION AND ORDER AFFIRMING
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case arises from Cervini Farms North Carolina Inc.’s (“Employer”) request for review, under provisions of the Immigration and Nationality Act government temporary agricultural employment of non-immigrant works (H-2A workers), of the Certifying Officer’s (“CO”) denial of its application for an H-2A temporary labor certification for the Employment and Training Administration (“ETA”). *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, & 1188; 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO’s denial of temporary labor certification in this matter is affirmed.

BACKGROUND

On July 29, 2020, Employer filed an application for H-2A labor certification with the ETA. AF 33-51.¹ Employer requested certification of 22 Nurse Workers, for an alleged period of seasonal need from September 30, 2020 to May 31, 2021. AF 42. On August 4, 2020, the CO issued a Notice of Deficiency (NOD) explaining that Employer’s application had not demonstrated seasonal need. AF 23-27. The CO asked employer to either withdraw the application or provide a detailed explanation of why its job opportunity is seasonal rather than permanent. According to the CO, Employer’s application showed that its “need for workers to perform the same job duties, regardless of the crop, is not tied to a certain time of year but rather runs ‘throughout the entire year.’” AF 27.

In the NOD, the CO also pointed out that Employer had recently been certified for workers from July 2020 to May 2021. AF 26. The CO added that Employer’s current application contained the same job duties of Greenhouse Workers at the same worksite and its current application coupled with its previously certified application indicates that Employer has a permanent not seasonal need. *Id.* Per the CO, Employer was requesting dates outside its

¹ References to the Appeal File will be abbreviated with an “AF” followed by the page number.

formerly stated period of need, which exceeded the 10-month threshold.² *Id.* The CO included this table in its NOD:

Case Number	Employer Name	Status	Beginning Date of Need	Ending Date of Need
H-300-20121-532078 ³	Cervini Farms North Carolina Inc.	Certified	07/06/2020	05/05/2021
H-300-20199-721825	Cervini Farms North Carolina Inc.	Received	09/30/2020	05/31/2021

On August 10, 2020, Employer responded to the NOD. AF 20-23. Employer explained that the job opportunity was seasonal because:

It is tied to the crop plan/ and seasonal cycle in the greenhouse. As an example, if the company decided to pull the crop earlier for a reason such as plant disease or market demand, or due to weather condition, then no labor will be needed in the greenhouse as there will be no work available and we can let the workers go earlier or if we require to keep longer or plant a different crop due to market demand then we might need them few weeks more.

Also, our labor need is built and based on number of workers needed per acre per crop in order to complete the crop cycle. Example: We need almost 5 workers per acre for mini cucumber for 16-18 weeks and then we will keep planting them in cycles. That still makes the mini-cucumber crop seasonal as we will pull all the crop before our annual crop clean out.

As informed in previous deficiency report, the life cycle of tomatoes convention crop for example is 38-45 weeks in which we require farm workers to complete the different tasks associated with the crop maintenance.

The second application meant to fulfill the need of harvesters and packers of the same crop. The labor need will end with the end of the crop and then we need to clean the farm annually to get rid of any possible diseases.

AF 20. Employer also explained why it requested 22 additional workers. It said:

² The CO points to *In the Matter of Grandview Dairy*, 2009-TLC-00002 (2008) for the proposition that “10 months is a permissible threshold at which to question the temporary nature of a stated period of need.” AF 26.

³ On June 8, 2020, Employer was certified for 26 Farmworkers and Laborers, Crop, Nursery, And Greenhouse to work from July 6, 2020 to May 5, 2020. AF 54-55.

Original request date of July 6th, 2020 was not completed because of delay in the processing of H2A workers visa due to global pandemic reasons, in which 17 workers arrived on site on *July 27th, 2020 and still waiting for the rest of 9 workers*. Due to that, the actual planting date moved to August 6th, 2020.

We are still running very short handed with less workers than we requested due to delays in their visa processing due to COVID-19 and request you to grant us extension calculating 10 months from their arrival date due to COVID-19.

After the crop end, we require some workers to help us cleaning the greenhouse and prepare it for next cycle.

Id. at 20-21. Employer explained that its intent is to “request staggering labor based on the crop, harvesting, and packing plan and above all due to severe delay in visa processing due to Global Pandemic. *Id.* at 21.

On August 18, 2020, the CO issued its Final Determination informing Employer that its application was denied because Employer did not establish seasonal need as defined by 20 CFR § 655.103(d). AF 6-12. The CO mentioned that Employer’s decision to pull crops and its proposed cycles are not tied to any recurring seasonal pattern. Rather, employer’s decision is determined by its own choosing. Thus the operations of Employer’s greenhouse are controlled by Employer who determines the crops grown within the greenhouse. AF 11. The CO explained that while Employer is able to alternate the crops he grows and while the life cycles of those crop differ, Employer’s decision to alternate crops is a business one and does not establish season or temporary event. The CO also mentioned that Employer’s explanation for why it needed extra labor was lacking as Employer did not explain why the same labor force could not perform the work conducted throughout the year.

The CO maintained that while Employer is entitled to plant variety of crops (with each having their own specific growing period), “the underlying need for the associated labor is what determines whether a given employer’s need is appropriately viewed as seasonal.” AF 11. Here, Employer’s need was year round and not seasonal. *Id.* The CO added that the labor Employer’s request “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.’” AF 12. Also, Employer 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,” rather than seeking laborers “for a short growing cycle or smaller part of a longer cycle.” *Id.*

The CO explained that while it was sympathetic to the fact that the COVID pandemic affected Employer’s business given that 9 previously requested workers had not arrived and that it needed to expand its job opportunities, the fact that Employer could change its period of need demonstrated that Employer’s need was not seasonal.

On August 28, 2020, the undersigned issued a Notice of Assignment and Expedited Briefing Schedule wherein the undersigned informed the parties that they could submit written

submissions (without new evidence). The Tribunal did not receive written submissions from either party.

LEGAL STANDARD

The scope of review in H-2A cases is limited. The undersigned may consider the written record and any written submissions from the parties, which may not include new evidence. *See* 20 C.F.R. § 655.171(a). The standard of review is de novo. That is, the undersigned may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.⁴

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).

Under the regulations, Employment is of a seasonal nature where it is tied to a certain time of the 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). "It 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); *see also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009). 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.

⁴ The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO's decision. *See* 20 C.F.R. § 655.171(a). The undersigned finds persuasive the rationale articulated in *Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R.

§ 655.171(a). *See also E&A Farming*, 2019-TLC-00053, slip op. at 5 (May 29, 2019) (applying de novo standard).

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).

DISCUSSION

The question to decide here is whether Employer's request for 22 additional workers from September 30 to May 31, 2021 is seasonal in nature. Here, Employer was previously certified for 26 workers (Case No. H-300-20121-532078) "to start the new crop planting date of July 15, 2020." AF 26. In its current application it requests another 22 workers 9 weeks later to complete harvesting and packing of crop. *Id.*

In its response to the NOD, Employer laid out several reasons for why its current request was seasonal. Employer states that the job opportunity is seasonal as it is tied to the crop plan/ and seasonal cycle in the greenhouse. It is also seasonal because the "labor need is built and based on number of workers needed per acre per crop in order to complete the crop cycle." Employer explained that the application at issue was filed to "fulfill the need of harvesters and packers of the same crop." Employer added that this "labor need will end with the end of the crop and then we need to clean the farm annually to get rid of any possible diseases." Employer explained that its initial request date was not fulfilled due to delays in visa processing. Consequently 17 workers arrived on site in July and Employer was still waiting for 9 workers. As a result of the delay the planting date was moved to August 6, 2020. Employer stated that it was still understaffed due to the delays and asked the CO to give them an extension, that is calculate the 10 months from the date of the workers arrival.

The undersigned agrees with the CO's denial.⁵ As noted, a seasonal need is one that is tied to a certain time of the 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. Thus while it is conceivable that Employer could have a "*seasonal need*" that is tied to the planting and harvesting of crops, Employer has failed to demonstrate a seasonal need in the case at hand.⁶ Employer is a new business and will grow a variety of tomatoes and

⁵ The CO stated in its final determination that "the job opportunity, described on ETA Form 790A, Section A.4 and A.4, coupled with the employer's recent certified application H-300-20121-532078, indicates the employer's dates of need are from February 15, 2020, through May 31, 2021." AF 9. The CO adds: "the employer is now requesting dates outside of its formerly stated period of need, extending its total period of need beyond the allowable 10-month threshold." AF 10. The Tribunal believes that February 15, 2020 is a typographical error. Employer's application does not request workers for February 15, 2020. Thus Employer's current application seeks workers that falls within the timeframe Employer was certified for in its previous application for 26 workers.

⁶ That is, Employer could have a need that is tied to the specific growth cycle of its crops (tomato season, cucumber seasons, etc.), however that does not mean that it is sufficient to establish a seasonal need under the regulations. As the CO notes, it is also the underlying need for labor that defines whether that need is seasonal. "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

cucumbers in its greenhouse. However, Employer has not offered adequate reason as to why or how the growing seasons of these crops are related to any particular weather pattern or annual cycle. Rather, Employer's rationale is that the crops are grown based on the sales demands of customers and weather conditions. These reasons however do not adequately explain how Employer's need is seasonal as defined by the regulations.

Further, Employer stated that it shifted its planting date to August 6, 2020. As noted, a need is not seasonal where an employer is able to manipulate the season.⁷ Employer has thus 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). Additionally, as the CO notes, Employer has not adequately explained why the 26 workers that it has initially been certified for are not able to complete the tasks of the 22 laborers that it seeks current certification for.

CONCLUSION AND ORDER

It is Employer's burden to establish eligibility for the H-2A program, and here, the Employer has not established how its need for workers is seasonal, i.e., tied to a certain time of year by an event or pattern. As Employer has failed to establish that the nursery worker positions are on a seasonal or other temporary basis in accordance with 20 C.F.R. § 655.103(d), it is hereby ORDERED that the Certifying Officer's decision denying Employer's H-2A Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

more workers in certain months than other months of the year, an employer's certification must be denied." *See Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA00304 (Mar. 3, 1999)(en banc))

⁷ While Employer did not manipulate its planting season to accommodate the H-2a program, Employer was able to alter its start date indicating that its need is not tied to a certain time of year by a specific pattern or event.