



**Issue Date: 18 August 2020**

**BALCA Case No.: 2020-TLC-00098**  
ETA Case No.: H-300-20162-643361

*In the Matter of:*

**Moonshadows, LLC**  
**doing business as Two Dot Ranch**  
*Employer*

Before: **Judge Francine L. Applewhite**

### **DECISION AND ORDER AFFIRMING FINAL DETERMINATION**

The above-captioned case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act (“INA”), 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 program (“H-2A”) permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the request for administrative review of the Certifying Officer’s (“CO”) Final Determination denying the temporary labor certification application under the H-2A filed by Moonshadows, LLC doing business as Two Dot Ranch (“Employer”).

#### **Procedural History**

On July 10, 2020, the Employment Training and Administration, Office of Foreign Labor Certification (“OFLC”) received the Employer’s Application for Temporary Employment Certification (“Application”). AF<sup>1</sup> 44-68. The application requested approval for two workers under the H-2A labor certification program.

After reviewing the Employer’s application, on June 17, 2020, the assigned CO issued a Notice of Deficiency to the Employer. *Id.* at 32-38. On June 23, 2020, the Employer filed a response, which included a short letter and Employer payroll records. *Id.* at 18-31. Additionally, on July 6, 2020, the Employer filed a second response, comprised of a letter and a copy of the Employer’s emergency filing waiver request. *Id.* at 13-17. On July 28, 2020 the CO issued a final determination, denying the Employer’s application. *Id.* at 4-11.

---

<sup>1</sup> As used herein, “AF” refers to the OFLC’s Administrative File in the above-captioned matter.

## H-2A Application

In its June 10, 2020 application, the Employer designated July 25, 2020 to March 31, 2021 as the period of intended employment. AF 44-68. Regarding the job's duties, the Employer described the job as:

Move African wildlife and livestock from seasonal breeding/reproduction facilities out to range once their offspring are matured. Check up on and work with African wildlife and livestock while they are seasonally out to pasture. General farm duties such as habitat maintenance, servicing equipment, fencing, facility upkeep and shop work.

*Id.*

In addition, the Employer included a statement of temporary need as part of its application. As part of its statement, the Employer characterized itself as a "commercial cattle and African wildlife farming/ranching operation," which has a need for additional farmworkers between early July and late March of each and every calendar year. *Id.*

## Notice of Deficiency (NOD)

On June 17, 2020, the CO issued a NOD. *Id.* at 32-38. The CO listed two grounds of deficiency: 1) failure to establish a temporary need (20 C.F.R. § 655.103(d); and 2) failure to establish the job opportunity as agricultural labor or services (20 C.F.R. § 655.103(c)).

As to the first deficiency ground, the CO explained that, pursuant to 20 C.F.R. § 655.103(d), the job opportunity must be on a seasonal or temporary basis. Specifically, 20 C.F.R. § 103(d) defines "seasonal" as "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." *Id.* The general farm duties contained in the Employer's job description are presumed to occur "on a year round basis." *Id.* The Employer did not submit additional documentation or evidence to support its temporary need for workers. Accordingly, the CO requested that the Employer submit:

1. A written explanation documenting the temporary need for H-2A workers.
2. Summarized payroll reports, at a minimum of one previous calendar year. The reports must be a summary of the Employer's payroll reports by month, and at a minimum, must contain the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation. The Employer must also sign the reports with the statement "I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by Moonshadows, LLC (Two Dot Ranch) for Calendar Year 2019."

*Id.*

As to the second deficiency, the CO wrote that 20 C.F.R. § 655.103(c) requires that the job opportunity consist of agricultural labor and services. *Id.* at 36. The CO elaborated that “agricultural labor and services” is defined and applied by 26 U.S.C. 3121(g) of the Internal Revenue Code of 1986 (IRC); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. *Id.* The CO noted that the Employer’s job description, with habitat maintenance, facility upkeep and shop work, does not appear to fit within the FLSA. Similarly, the CO explained that the Employer did not establish that its application was H-2A program eligible under the IRC definition of “agricultural.” *Id.* at 38. The NOD then requested the Employer to provide:

A written explanation of how the Employer’s application should be properly considered agricultural labor and services as those terms are defined for the H-2A program.

#### Employer’s Response to NOD

As to the first deficiency regarding temporary need, the Employer’s June 23, 2020 contained a short statement describing the timeline of the job’s duties. *Id.* at 18-31. The statement identified the period of need as from January to July. The first response also included the Employer’s payroll records for 2019. While the payroll records contained the names of 4 workers, the records did not include total number of workers, total number of hours worked, or whether the positions are permanent or temporary. The Employer did not sign the records with the required statement.

The Employer’s filed another response, on July 6, 2020, which also addressed the first deficiency. *Id.* at 13-17. Specifically, the Employer asserted that while the Employer raises cattle year round, there are “numerous facets” of the Employer’s livestock operation that are seasonal in nature. *Id.* The Employer also stated that the payroll is “entirely useless” in evidencing a seasonal need. *Id.* According to the Employer, payroll data is often “irrelevant” in determining such a need for a small farm “as payroll data will often not show many or any temporary seasonal workers in recent past years, due to a small farming operations inability to find them. *Id.*

As to the second deficiency, in its July 6, 2020 response, the Employer stated that it is a legitimate ranching and farming operation that raises cattle and African wildlife on its own land. The Employer asserted that all duties associated with this need would be performed on a farm in connection “with the management of livestock in the form of beef cattle and African wildlife.” *Id.* Thus, the Employer surmised, its need falls under 20 C.F.R. § 655.103(c)(1)(i)(A).

#### CO’s Final Determination

On July 28, 2020, the CO issued a final determination denying the temporary labor certification. AF 4-11. The CO found the response to the NOD unacceptable. Regarding temporary need, the CO noted that the Employer provided different dates in its response to the NOD and that the payroll demonstrates additional workers employed outside of the period of need. In addition, the CO explained the Employer did not provide any alternative evidence to

“support finding a labor demand increase at a particular time of the year, or by a reoccurring event or pattern.” *Id.* at 4-11.

Concerning agricultural labor or services, the CO explained that it is unclear whether the land will be used as an operating farm that “produces a commodity.” *Id.* at 4-11. In addition, the CO found that the Employer’s response did not show how the Employer’s application would qualify for eligibility under the FLSA definition of agriculture or IRC definition of agricultural. Therefore, the CO issued a denial of the application because the Employer did not provide sufficient documentation to overcome the deficiency.

### Standard of Review

The scope of an administrative review in H 2-A cases is limited to consideration of the written record and any written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). The decision on administrative review must specify the reasons for the actions taken and must affirm, reverse, or modify the decision of the CO, or remand to the CO for further action. *Id.* The governing regulation mandates that the presiding administrative law judge “must uphold the CO’s decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” *Id.* See also *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) (“BALCA reviews decisions under an arbitrary and capricious standard.”) (H-2B). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Moreover, the Administrative Law Judge may not consider evidence not before the CO at the time of the CO’s determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

### Discussion

An employer’s failure to comply with a NOD, including a failure to provide all required documentation, will result in a denial of the Application for Temporary Employment Certification. 20 C.F.R. § 655.32(a). An employer seeking to hire employees under the H-2A program bears the burden of proving that it is entitled to a temporary labor certification. 8 U.S.C. §1361.

In the NOD, the CO clearly described the requirements to demonstrate temporary need under 20 C.F.R. § 655.103(d). AF 32-38. Specifically, the CO requested summarized payroll reports that substantiated a need for temporary workers. The CO then explained, in detail, what the payroll must include as a submission. While the Employer included the payroll for the last calendar year, it did not include the total hours worked, the total number of workers,<sup>2</sup> or the breakdown between permanent and temporary workers. In addition, the Employer did not comply with the signature requirement attesting to the accuracy of the payroll.

The Employer did not submit any payroll information, or alternative evidence, that would support its assertion of temporary need. Ultimately, as noted by the CO, the Employer failed to

---

<sup>2</sup> The payroll included the names of four different workers, but did not explain whether these four workers comprised the entirety of the workforce on the farm.

provide any documentation “labor demand increase at a particular time of year or consistent with a reoccurring event or pattern.” *Id.* Without such documentation, the Employer cannot rely solely on its assertion to show a temporary need.

Accordingly, the Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested laborers. The Employer was provided with a NOD and in response, the Employer submitted additional evidence. However, the CO determined that the responsive evidence did not cure the deficiencies. After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer did not provide sufficient information and documentation to overcome its deficiencies. As the Employer did not overcome the deficiency as to temporary need, I do not need to address the second deficiency of agricultural labor or services under 20 C.F.R. § 655.103(c).

Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the denial is **AFFIRMED**.

**ORDER**

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED**.

**SO ORDERED.**

**FRANCINE L. APPLEWHITE**  
Administrative Law Judge