

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 23 September 2020**

**BALCA Case No.: 2020-TLC-00118**  
ETA Case No.: H-300-20198-717939

*In the Matter of:*

**SOUTHERN FLAVOR FARMS, LP**  
*Employer*

Appearances:

James L. Hughes, Esquire  
Wimberly, Lawson, Steckel, Schneider, & Stine, PC.  
*For the Employer*

Stephan Babich, Esquire  
Nicole Schroeder, Esquire  
Office of the Solicitor  
Division of Employment and Training Legal Services  
United States Department of Labor  
*For the Certifying Officer*

**Before: Honorable Francine L. Applewhite**

**DECISION AND ORDER REVERSING AND REMANDING**  
**DENIAL OF LABOR CERTIFICATION**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act<sup>1</sup> and its implementing regulations.<sup>2</sup> The temporary alien agricultural labor certification (H-2A) program permits employees to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer (“CO”) in this matter denied Southern Flavor Farms, LP (“Employer”) application for temporary labor certification for 72 agricultural workers. Pursuant to 20 C.F.R. § 655.141(b)(4), the

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<sup>1</sup> 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188.

<sup>2</sup> 20 C.F.R. Part 655, Subpart B.

Employer appealed the denial and requested a *de novo* hearing before an Administrative Law Judge (“ALJ”).

Procedural History and Findings of Fact

On July 31, 2020, the Chicago National Processing Center (“CNPC”) received for filing an ETA Form 9142A application from the Employer requesting authorization to hire 72 workers to perform manual labor to work in a hydroponic greenhouse facility preparing new crops, and loading and unloading new plants. (AF 191).<sup>3</sup> The dates to perform this work would be from September 14, 2020 to July 14, 2021. *Id.* On August 4, 2020, the CO issued a Notice of Deficiency (“NOD”) claiming the Employer failed to demonstrate a temporary (seasonal) need as required by 20 C.F.R. § 655.103(d), and also failed to provide a detailed explanation as to why the need is seasonal rather than permanent in nature. (AF 175-76).

On August 4, 2020, the Employer filed a timely reply to the NOD. The Employer provided payroll documents which denoted H-2A employees being compensated from September 1, 2019 to July 1, 2020. (AF 26). The Employer also noted that they were going into their third year of harvesting, and after learning about the warmer climate in Georgia during the months of July and August, they hired an independent consultant to conduct a climate study in the area. (AF 161). This study determined that because of the weather conditions, it was more feasible to adjust future growing plans which led to the change in growing dates of the current request<sup>4</sup>. (AF 162).

On August 24, 2020, the CO issued a final determination denying the temporary labor certification. The CO noted that the Employer grows greenhouse hydroponic crop which “on its face” is not seasonal. (AF 7). The CO also noted the Employer’s filing season as reflected below.

<b>Case Number</b>	<b>Employer Name</b>	<b>Status</b>	<b>Start Date of Need</b>	<b>End Date of Need</b>
H-300-19184-556315	Southern Flavor Farms LP	Certified	9/1/2019	7/1/2020
H-300-20198-717939	Southern Flavor Farms LP	Received	9/14/2020	7/14/2021

The CO determined that the Employer did not provide any documentation with its application supporting the shift in their requested dates of need. (AF 8). The CO added that the Employer submitted an extension request in April 30, 2020 for application H-300-19184-556315, to extend the end date until August 22, 2020 due to losing the crop. However, the CO determined that the request was not for an extension, but reflected a new need with a new crop. *Id.* The CO concluded that based on the Employer’s history and the shift in requested dates of need, the Employer had not established a seasonal need as required by 20 C.F.R. § 655.103 (d) and denied the certification. *Id.*

<sup>3</sup> The following abbreviations are used in this Decision: “AF” refers to Appeals File, “Tr” refers to Transcript.

<sup>4</sup> The dates that were requested on the Employer’s first approved application was September 1, 2019 to July 1, 2020. This current issue is only the second request.

On August 25, 2020, the Employer requested an expedited *de novo* hearing of the CO's Denial of Certification. On September 3, 2020, I issued a Notice of Hearing and Scheduling Order, and on September 9, 2020 I conducted a telephonic hearing.

### Proffered Relevant Evidence

In *de novo* hearings, employers are permitted to submit evidence even if that evidence could have been submitted to the CO in response to a NOD. *In re Westward Orchards*, 2011-TLC-00411 (July 8, 2011). Other than the documentary evidence contained in the Administrative File, neither the Employer nor the Certifying Officer submitted any additional exhibits into evidence. I have fully considered the entire record, including testimony of the witness. The testimony, in pertinent part, was provided.

#### *John Secker*

Mr. Secker is the Vice President of Operations for the Employer and has been in the greenhouse industry since 1984. (Tr. pg. 9). Mr. Secker explained that the Employer began construction of the greenhouse in late 2017 and completed in November 2018. In September 2018, prior to completion of construction, the first crop was planted, which was tomato on the vine, English cucumbers, and mini cucumbers. *Id.* That harvest began to produce in December 2018, and continued to June 2019. He stated that because of the weather in Georgia, there is only an eight month harvest. (Tr. pg. 12). The first H-2A season was approved for September 1, 2019 to July 1, 2020. (Tr. pg.13). The request for the second season was to begin in the third week of September of “this year.”<sup>5</sup>

Mr. Secker also explained that a crop was planted early the previous year, and as a result an “abortion” on the fruit occurred which “costed [sic] us a couple of clusters.” (Tr. pg. 19). Based on the events that occurred with the crop, the Employer decided to have a climate review done. The consultant who provided the review concluded that the climate in Georgia is not suitable for growing year round crop, and the humidity condition allow for crop setting from week 38/39 to week 20/21. (AF 62). In addition, planting can be in week 37 till last harvest week 28. Anything before and after is too risky in regards to high temperature that will cause damage to the settings and juts. *Id.* The report also noted that from week 22 to 38, the temperature is out of range, and the climate is very humid causing problems for the plants as well as workers inside the greenhouse. *Id.*

Mr. Secker also testified that the greenhouse has climate control capabilities. The climate control can be used to adjust the temperature throughout the day in order to manipulate plant growth. However, there is a period in July and August in which temperature control cannot offset the high temperatures in the summer. (Tr. pg. 46). He also stated that the Employer looked into artificial cooling for the greenhouse, however “the economics are just not there.” *Id.* He also testified throughout the hearing that attempts are made regularly to find local employment, however as the season progresses, “there is a lot of turnover.” (Tr. pg. 27).

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<sup>5</sup> The second season request was for September 14, 2020 until July 14, 2021. *See* AF 191.

## Applicable Law and Analysis

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a labor certification that:

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and;
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. §1188(a)(1); *see also* 20 C.F.R. §655.100; *Form ETA-9142A, H-2A Application for Temporary Employment Certification*, U.S. DEPT. OF LABOR (“ETA Form 9142A”).

In order to receive labor certification under the H-2A program, the employer “must certify that the employment proposed in the certification is of a temporary or seasonal nature.”<sup>6</sup> C.F.R. §214.2(h)(5)(iv); *see also* 20 C.F.R. §655.161(a). Under the regulations, “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 one year.” *See* 20 C.F.R. §655.103(d). “The factfinder 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, “[i]n 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.” *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)).” *See Jonathan Vega*, 2020-TLC-00001, slip op. at 3 (Oct. 9, 2019). When examining an employer’s temporary need “[i]t 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. 4 (Aug. 28, 2009)<sup>7</sup>.” *Id.* Moreover, 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-00002(Nov. 3, 2008).

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<sup>6</sup> The court notes that the requirement that employment be proposed in the certification must be of a temporary or seasonal nature, is found in the cited regulations. It is also found in federal regulations that refer to the employment of H-2A visa workers. *See* 20 C.F.R § 655.100, which uses the phrase “temporary and seasonal” in the context of Department of Labor certifications. Recent Administrative Law Judge opinions affirm the prospective H-2A employment for which certification is requested may be temporary or seasonal, and need not be both. *See Jonathan Vega*, 2020-TLC-00001, slip op. at 3 (Oct. 9, 2019); *Tranel Ranch*, 2019-TLC-00049, slip o p. at 2-3 (May 22, 2019).

<sup>7</sup> Note: the quote cites case number 2009-TLC-00009 when citing to *William Staley* slip opinion. However the proper case number is 2009-TLC-00060.

In cases where an employer appeals a denial and requests an expedited administrative review by an ALJ, a CO's denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015). However, when an employer appeals a denial and requests a *de novo* hearing before an ALJ, the parties are permitted to present additional evidence on the matter. Consequently, the presiding ALJ "must independently determine if the employer has established eligibility for temporary labor certification." *David Stock*, 2016-TLC-00040 (May 6, 2016). The regulations further provide that after a *do 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. 20 C.F.R. § 655.171(b)(2).

As discussed previously, the Employer requested labor certification under the H-2A program for 72 greenhouse workers to perform manual labor in hydroponic greenhouse facility, which included preparing for new crop, and loading and unloading new plants. The dates for the need are September 14, 2020 to July 14, 2021. (AF 191). The CO issued a Notice of Deficiency noting that the Employer's ETA Form 790A included work with greenhouse crops, which on its face is not seasonal. (AF 175). The CO also noted that the Employer requested a shift in requested dates of need, but did not provide any documentation to justify the shift in dates.<sup>8</sup> *Id.* In response to the Notice of Deficiency, the Employer provided a climate report justifying the shift in requested dates of need, as well as other documentation justifying a seasonal need. (AF at 58-62, 159-170). The CO then issued a Notice of Denial noting that the Employer grows hydroponic crops...which is not on its face seasonal. (AF 7). The CO also noted that the Employer requested a shift in established dates due to weather conditions, however they did not provide any documentation with the application supporting the shift. (AF 7-8). The CO added that on April 30, 2020, the Employer submitted an extension request for its prior application<sup>9</sup> until August 22, 2020 "due to losing its crops, and the need to plant a new crop to offset the Employer's losses." (AF 8). The CO interpreted this request not as an extension of their current certification, but as a new need for a new crop. Had this request been in the initial application, it would have called into question the Employer's temporary need.<sup>10</sup> The CO concluded that based on the Employer's history and shift in requested dates of need, the Employer had not established a seasonal need. (AF 8).

To obtain certification, an employer must establish that the *employment* proposed in the certification is of a temporary or seasonal nature. *See* 20 C.F.R. §§ 655.103(d), 655.161(a) (emphasis added). The Court must also determine whether the Employer established the proposed employment as temporary or seasonal. The CO initially opined that greenhouse work on its face was not seasonal. Analysis of the seasonal need should focus on when the 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). In addition, it is

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<sup>8</sup> The previous seasons requested dates of need were September 1, 2019 to July 1, 2020. The new dates are September 14, 2020 to July 14, 2021.

<sup>9</sup> H-300-19184-556315 from September 1, 2019 to July 1, 2020

<sup>10</sup> The Employer filed for an extension on April 20, 2020 on certification H-300-19184-556315 noting that the planted crop was affected by a viral infection. The Employer intended to replant a rapid growing productive cucumber plant and requested an extension from July 1, 2020 to August 22, 2020. This extension was ultimately denied. It should be noted that the Employer's ETA Form 9142 included cucumbers.

appropriate to determine if the employer's needs are seasonal, not whether the duties are seasonal. *See also William Staley, 2009-TLC-00060 slip op. at 4 (Aug. 28, 2009).*

In this case, the Employer stated that the nature of the job opportunities and number of workers being requested reflect a seasonal need because the work is performed exclusively at certain seasons and performance of the work is of short duration and will not continue indefinitely. (AF 206). The Employer added that a recurring need for temporary workers is from September to mid-July. Although, the facility is operational year round, conditions from mid-July to September are too hot for local growing. *Id.* Moreover, the Employer stated that the shifting of the start date by two weeks is based on a climate study done, where experts determined that the best time to plant would be "around" week 37. *Id., see also (AF 61).* The nature, need and length is supported by the Employer's 2019-2020 payroll records which show the number of H-2A workers only being utilized through the growing season. (AF 25). The shift in the growing season is also supported by the Employer's expert report which notes the need to shift the season the start date of the planting season, which as explained shifts the end of the harvesting season. (AF 58). The requested H-2A period is September 14, 2020 to July 14, 2021.

Reviewing when the season occurs and how the need for labor or services during the season differs from other times of the year, I find that the Employer's payroll records, their explanation of their growing season, and their explanation of their need to shift the upcoming 2020 to 2021 growing season establish a seasonal need for H-2A laborers to fill these job duties in Employer's operations from September 14, 2020 to July 14, 2021.<sup>11</sup>

Based on the evidence in the record, the Employer has established the seasonal nature of the proposed H-2A employment. Accordingly, the decision of the Certifying Officer denying the Employer's Application for Temporary Labor Certification under the H-2A Agricultural Program is reversed for the reasons discussed above.

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<sup>11</sup> Inasmuch as the finding is that the Employer established a seasonal need for H-2A employment, the issue of whether the Employer established, in the alternative, a temporary need is not addressed. It is noted that the Employer's request is for a ten month period, which has been held to be the threshold for a temporary need.

**ORDER**

It is hereby **ORDERED** that:

1. The Certifying Officer's denial of Employer's application for temporary labor certification is **REVERSED**.
2. The matter is **REMANDED** to the Certifying Officer for further consideration in accordance with this decision.

**SO ORDERED.**

**FRANCINE L. APPLEWHITE**  
Administrative Law Judge  
Washington, D.C.