



**Issue Date: 07 April 2020**

BALCA CASE NO.: 2020-TLC-00057

ETA CASE NO.: H-300-20043-31779

*In the Matter of:*

BEAR MOUNTAIN ORCHARDS, INC.,  
*Employer.*

**DECISION AND ORDER REVERSING AND REMANDING  
THE DECISION OF THE CERTIFYING OFFICER**

This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

Bear Mountain Orchards, Inc. (“Bear Mountain” or Employer) applied for authorization to hire twenty-two temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification denied the application. Accordingly, Bear Mountain appealed the decision and requested review by an administrative law judge (“ALJ”). The matter is now properly before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to Section 655.171 for review of the Certifying Officer’s denial.<sup>1</sup> Upon a review of the record and the relevant legal authority, the undersigned **REVERSES** the determination of the Certifying Officer and **REMANDS** this matter to the Office of Foreign Labor Certification for the issuance of the certification for H-2A workers.

**I. Procedural and Factual Background**

Bear Mountain is a Pennsylvania company that operates an 1100 acre fruit tree orchard in Pennsylvania. (AF, at 31, 43, 60, 62.) The company also operates a packing house. (AF, at 31.) On February 20, 2020, Bear Mountain submitted an H-2A Application for Temporary

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<sup>1</sup> The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.171. Here, the Chief ALJ designated a single member of the Board to hear this appeal.

Employment Certification with the United States Department of Labor seeking certification for twenty-two thinners/harvesters to thin fruit trees and harvest fruit. (AF, at 43, 48, 51, 59-60.) This is not the first H-2A application submitted by Bear Mountain. (See AF, at 42.) Carol Salazar, the Human Resources Generalist, filed the application for Employer. (AF, at 48.)

The H-2A application was based on a stated seasonal need during the growing season from April 27, 2020, through November 27, 2020. (AF, at 51, 62.) The SOC Occupational Code listed on the application was 45-2092.02. (AF, at 44.) The corresponding SOC Occupational Title listed was Farmworkers and Laborers, Crops. (Id.) The application described the need for a total of thirty-five laborers with twenty-two H-2A workers. (AF, at 51.) Individuals must have three months of experience thinning and hand harvesting fruit trees, and Bear Mountain will not provide any on-site training. (AF, at 52.) These positions do not have an education requirement, but the position does require the ability to lift fifty pounds and maneuver ladders. (AF, at 52.) The wage offered for the position is \$13.34 an hour plus \$0.77 per bushel of fruit the individual picks. (AF, at 59.)

For the first few months the laborers will thin fruit trees. (AF, at 60.) Then, once harvesting begins, the individuals will shift to picking the fruit from the trees for market. (Id.) The listed job description includes a number of additional duties that the job may include. (Id.) However, all of these job duties involve work in the orchard rather than the packing house. (See id.)

The application described Bear Mountain's seasonal need for laborers in the orchard. (AF, at 62.) The application provided as follows:

Agricultural employer seeks approval to hire foreign non-immigrant workers to perform seasonal agricultural work which is dependent on weather and growing seasons. Employer anticipates an insufficiency of qualified U.S. workers to meet these seasonal labor needs. Many of the various jobs required to run a fruit tree farm that is harvested for fresh fruit consumption is extremely time sensitive.

(AF, at 62.)

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency. (AF, 33-4.) The Notice of Deficiency cited two separate deficiencies with the application. (AF, at 35-6.) First, the Notice of Deficiency cited to an insufficiency with the stated temporary need in the application. (AF, at 35.) The Certifying Officer noted that Bear Mountain previously submitted five applications for the same classification of workers, SOC Code 45-2092 (Farmworkers and Laborers Crop), at the same location. (Id.) All of these previous applications were approved. These applications covered periods from: (1) August 15, 2018, to April 15, 2019; (2) May 1, 2019, to November 30, 2019; (3) August 1, 2019, to November 30, 2019; and (4) August 1, 2019, to April 15, 2020.<sup>2</sup> (Id.) Based on the prior applications, the Certifying Officer found that Bear Mountain was requesting the same

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<sup>2</sup> The Notice of Deficiency referenced two different applications with the May 1, 2019, to November 30, 2019, time period. (AF, at 35.)

classification of workers for year round employment. (AF, at 35.) The Notice of Deficiency further stated that:

The employer must provide a detailed explanation as to why its need for Farmworkers and Laborers Crop is seasonal rather than permanent in nature when the employer's need for the workers is in every month of the year. The employer's explanation must describe how its job opportunity is tied to certain time of the year by event or pattern.

(AF, at 36.)

Second, the Notice of Deficiency listed a deficiency with the application's designation related to meals. (AF, at 36.) The application was not clear as to whether Bear Mountain intended to charge the laborers for the provision of meals or whether Bear Mountain was furnishing free cooking and kitchen facilities. (Id.) The Certifying Officer set forth the steps needed to modify the application to correct this deficiency. (AF, at 36-7.)

Bear Mountain responded to the Notice of Deficiency. (AF, at 31.) As to the deficiency related to meals, Bear Mountain indicated that the company would provide free cooking and kitchen facilities to the laborers and authorized the removal of the per day charge for meals listed on the application. (Id.)

As to the deficiency related to temporary need, Bear Mountain described how the company operates a packing house and manages over a thousand acres of fruit trees. (AF, at 31.) Because the company has a variety of types of fruit trees on the property, each variety of fruit has a different thinning, harvesting, and pruning season. (Id.) The packing house operates approximately eight months a year and employs graders and sorters. (Id.) The two positions involve different skill sets: individuals working in the packing house never work in the orchards, and the individuals working in the orchards never work in the packing house. (Id.) Bear Mountain indicates that it requested separate SOC codes to distinguish the two types of laborers in its prior applications, but the Office of Foreign Labor Certification did not provide separate codes and listed both categories of workers under SOC Code 45-2092. (Id.)

Bear Mountain responded to the Notice of Deficiency by explaining that two of the case numbers listed in the Notice of Deficiency were for workers for the packing house. (Id.) The dates of need for these workers were August 1, 2019, to April 15, 2020, and August 15, 2018, to April 15, 2019. (AF, at 31, 35.) Two of the cases were for thinners/harvesters like the current application. (AF, at 31.) These dates covered May 1, 2019, to November 30, 2019, and August 1, 2019, to November 30, 2019. (AF, at 31, 35.) The final case was for equipment operators over a period from May 1, 2019, to November 20, 2019. (AF, at 31, 35.)

The Office of Foreign Labor Certification denied Bear Mountain's application on March 18, 2020. (AF, at 20.) The Certifying Officer found that Bear Mountain failed to sufficiently address the Notice of Deficiency as to temporary need. (AF, at 22-23.) The Certifying Officer found that Bear Mountain failed to establish that the need was seasonal rather than permanent in nature. (AF, at 23.)

The Certifying Officer also addressed the issue related to the SOC codes raised by Bear Mountain in response to the Notice of Deficiency. (AF, at 24-25.) The Certifying Officer found that the activities listed on the current application and the prior applications all fall within the duties described under SOC Code 45-2092. (AF, at 24.) “As such, the employer did not demonstrate that this application represents a seasonal need, as the same job opportunity requested is year round rather than tied to a certain time of year.” (AF, at 25.)

Bear Mountain immediately appealed the decision to the Chief Administrative Law Judge. (AF, 3.) Because it was unclear from the request for review whether Employer sought a *de novo* hearing under 20 C.F.R. § 655.171(b) or administrative review under 20 C.F.R. § 655.171(a), the undersigned entered an Order stating that it would construe the request as one for a *de novo* hearing. The undersigned instructed Employer to notice the Office of Administrative Law Judges if Employer did not intend to request a *de novo* hearing. Bear Mountain subsequently notified the undersigned that it did not want a hearing and sought only a request for administrative review.

The undersigned received the administrative file in this matter on March 31, 2020. Pursuant to 20 C.F.R. § 655.171(a), the undersigned has reviewed the entirety of the administrative file and issued this decision within five business days of receipt of the administrative file.

## **II. Legal Standard**

Where an employer requests administrative review of the certifying officer’s decision, the administrative law judge shall make his or her decision based on the written record, including any new submissions by the parties. 20 C.F.R. § 655.171(a). After review, the ALJ may either affirm, reverse, or modify the decision of the certifying officer, or remand the matter to the certifying officer for further action. Id. The ALJ must specify the reasons for his or her determination in a written decision, which must be issued within five business days of receipt of the ALJ’s receipt of the administrative file. Id.

## **III. Analysis**

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform “agricultural labor or services, as defined by the Secretary of Labor . . . .” 8 U.S.C. § 1101(a)(15)(H). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work needed. 20 C.F.R. § 655.103(a). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a).

An employer seeking certification for workers under the H-2A program must establish that the need for agricultural labor or services is of a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The regulations define both temporary and seasonal. 20 C.F.R. § 655.103(d). Section 655.103(d) provides:

Employment is of a seasonal nature where it is tied to a certain time of year by and 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.

Id.

Bear Mountain seeks certification for twenty-two laborers to work in its orchard, primarily thinning fruit trees and picking fruit. The Certifying Officer does not dispute that the workers sought by Bear Mountain are performing agricultural labor. Rather, the Certifying Officer found that the employment was not temporary or seasonal because Bear Mountain's recent history of H-2A applications demonstrates a continuous need for laborers spanning over a year.

Bear Mountain takes issue with the Certifying Officer's decision. It contends that the work at issue in the current application - thinning trees and harvesting fruit - is seasonal, and the prior H-2A applications relied on by the Certifying Officer to deny this application cover different categories of laborers performing diverse task on the farm during distinct seasonal time periods. In short, Bear Mountain contends that the work listed on the application is seasonal, and the company does not retain thinners/harvesters for a consecutive one year period.

Much of the dispute between the parties involves the application of the SOC codes. The application listed SOC Code 45-2092.02. The summary description for this SOC code provides:

Manually plant, cultivate, and harvest vegetables, fruits, nuts and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; cleaning, packing, and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities.

Farmworkers and Laborers, Crop - 45-2092.02. This is different than the description quoted by the Certifying Officer in the Denial Letter. (AF, at 10.) Aside from the fact that the quoted definition used by the Certifying Officer appears to be incorrect, it included language related to the cleaning, grading, and sorting of harvested products that does not appear in the actual summary definition of SOC Code 45-2092.02. However, some of these tasks are listed under the tasks portion of this SOC code. See Farmworkers and Laborers, Crop - 45-2092.02.

As Employer correctly points out, there is also a code for graders and sorters - Graders and Sorters, Agricultural Products - 45-2041.00. The summary of job duties for this position includes: “[g]rade, sort, or classify unprocessed food and other agricultural products by size, weight, color, or condition.” Graders and Sorters, Agricultural Products - 45-2041.00. According to Bear Mountain, two of the prior applications, including the application with an end date of April 15, 2020, involve laborers that should have been classified under SOC Code 45-2041.00 rather than 45-2092.02. On June 1, 2018, Bear Mountain requested via email that the Office of Foreign Labor Certification classify the laborers in its prior application for Case Number H-300-18166-126066 under SOC Code 45-2041.00 since the workers in the packing house are distinct from the workers in the orchard. (AF, at 15.)

Upon a review of the hundreds of pages of prior applications in the record, it is clear that Bear Mountain is applying for and has previously obtained certification for laborers for different aspects of its business. For example, Case Number H-300-18166-126066, involved an application for ten seasonal laborers in the packing house. (AF, at 603.) The listed job title was grader and sorter of agricultural products. (AF, at 603.) The individuals were to perform grading, sorting, and packing of the fruit from fruit trees. (AF, at 603, 605.) The description of work involves a very different set of job responsibilities than the current application for laborers to thin fruit trees and pick fruit by hand. The pay is also different, as the individuals in the current application are receiving an hourly rate plus a rate per bushel of fruit picked. (AF, at 59, 607.) The laborers in the packing house did not receive additional pay based on the amount of fruit picked. (AF, at 607.)

Like Case Number H-300-18166-126066, Case Number H-300-19154-363111 involved a certification for ten seasonal laborers. (AF, at 74.) The listed job title was grader and sorter of agricultural products, and the job description was very different from the job description in current application. (AF, at 60, 74.) Case Number H-300-18166-126066 and Case Number H-300-19154-363111 both involved work in the packing house, not in the orchard. (AF, at 74, 603.) The pay was also different. (AF, at 59, 78.) The seasonal period of work for the individuals in the packing house was August 1, 2019, to April 15, 2020. (AF, at 74.)

The current application involves a request for twenty-two laborers for seasonal work as thinners/harvesters. (AF, at 51.) The date range for the seasonal work is April 27, 2020, to November 27, 2020. (AF, at 51.) The job description listed in the application does not overlap with the application for workers in the packing house that expires on April 15, 2020. (AF, at 74, 51.) It is clear from the two applications that the applications involve different categories of workers on the farm; the workers are performing distinct jobs. The workers appear to be performing the work of two separate SOC Codes – 45-2041.00 and 45-2092.02.

Upon a review of the entire record, including the past applications, the undersigned is unpersuaded by the rationale of the Certifying Officer that the applications demonstrate a continued period of need of over 1 year for the same type of laborers. Regardless of the SOC code listed on the applications, Bear Mountain is regularly seeking workers for two distinct types of seasonal workers – graders and sorters to work in the packing house sorting and packing the

fruit after the fruit is harvested and agriculture laborers in the orchards thinning fruit trees and picking fruit by hand. The Certifying Officer erred in finding that the record demonstrated a continuous period of over a year for the same type of workers.

Moreover, the Office of Foreign Labor Certification previously approved Bear Mountain for seasonal workers in both the packing house and the orchard with overlapping time periods. The Certifying Officer has not explained what is fundamentally different about the application covering the 2020 season for seasonal orchard workers from the prior seasons to warrant granting the applications in years past but denying the application this year.

However, it appears from the record that Bear Mountain is also utilizing the H2-A program to provide the bulk of its workforce throughout the year. It is unclear to the undersigned why Bear Mountain could not increase its permanent workforce of U.S. workers and shift those workers from the packing house to the orchard as the seasonal needs of its overall workforce shifts. Neither of the classified categories of workers requires specialized skills or training that would preclude the individual from shifting from orchard work to packing house work depending on the particular need of the company. Presumably, this would reduce, although not eliminate, the overall need for reliance on the H-2A program for agricultural labor.

Regardless, the undersigned finds that Bear Mountain has demonstrated a seasonal need for orchard workers as set forth in its application, and the record does not, as the Certifying Officer found, demonstrate that the specific type of workers sought – thinners/harvesters – are needed for a continuous period of over a year. The record reflects that the work of thinning and harvesting fruit trees is seasonal, lasting several months each year and that the twenty-two workers are only performing this seasonal work. The work description for the twenty-two workers Bear Mountain seeks is of a seasonal nature. The fact that Bear Mountain also uses seasonal workers for its packing house is not a sufficient reason on the record before the undersigned to warrant denying the application for individuals to work in the orchard. That is not to say that such a record could not be developed in the future for a company, like Bear Mountain, that is using the H2-A program to fill different needs on a farm, and those applications collectively cover a period of approximately a year. However, the record before the undersigned does not support the decision of the Certifying Officer, especially in light of the prior grants for similar H-2A applications by Bear Mountain.

The undersigned **REVERSES** the decision of the Certifying Officer denying the application for H-2A agricultural laborers and **REMANDS** this matter for the issuance of a certification for the twenty-two laborers sought by Bear Mountain.

**IV. Conclusion**

The undersigned **REVERSES** the decision of the Certifying Officer's denying the application for H-2A workers filed by Bear Mountain. The undersigned **REMANDS** this matter for the issuance of a certification for the twenty-two laborers in application H-300-20043-31779.

**SO ORDERED.**

STEWART F. ALFORD  
Administrative Law Judge