U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 September 2020

OALJ Case No.: 2020-TLC-00110
ETA Case No: H-300-20184-693083

In the Matter of:

MAROA FARMS, INC.,
Employer.

Appearance: Thomas P. Bortnyk, of Mas Labor, non-attorney agent for Employer and
Maria Fracassa Dwyer, Esq. and Thomas K. Ragland, Esq.
Clark Hill, PLC
For the Employer

Rebecca Nielsen, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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 temporary alien agricultural labor certification ("H-2A") program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On August 20, 2020, the Office of Administrative Law Judges received a letter from Thomas P. Bortnyk of Mas Labor, on behalf of Maroa Farms, Inc. ("Employer") requesting administrative review of the Certifying Officer's August 14, 2020 denial of Employer's H-2A temporary labor certification application. I received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on August 28, 2020. By Order dated August 28, 2020, the parties were granted leave to file briefs on or before September 2, 2020.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the Administrative File.

BACKGROUND

On July 9, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A ("Application"). AF 346-378. The Employer's Application which indicated that Employer was applying as an "Individual Employer" requested certification for 140 greenhouse workers under the SOC occupation title of Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period beginning August 31, 2020, and ending June 26, 2021, on the basis of a seasonal need. *Id*. In the attached statement of temporary need Employer stated:

> Maroa Farms Inc. ("Maroa" or Maroa Farms"), is an agricultural employer that produces hydroponically grown greenhouse tomatoes for wholesale distribution. Our greenhouse location is in Coldwater, Michigan and we operate under an advanced "state of the art" growing infrastructure. It is just under 60 acres of actual growing space with a complex irrigation system with recycled water usage, zoned heating, engineered venting capacity, artificial light, vertical and horizontal fans as well as roof and sidewall energy curtains (just to name a few of its key infrastructure points). Maroa also has a very sophisticated environmental control software program customized for its unique combination of controls to a complex zoned infrastructure.
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> The DOL has repeatedly certified Maroa as a seasonal employer and understands that, despite Maroa's sophisticated system which has allowed it to adjust its season over time for various reasons, the labor need is "tied to a certain time of year by an event or pattern that requires labor levels far above those necessary for ongoing operations." 20 CFR 655.103(b); See also, Altendorf Transport, Inc., 2011-TLC-00158, holding, seasonality is established where, "the need for labor services during the periods requested differs from other times of the year."
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> By way of background, in 2014, Maroa expanded its operation and added 27 acres of greenhouse growing space. Due to the operational expansions at that time, Maroa moved its planting cycle from a mono crop to four interplantings per season, requiring nearly double the amount of work because of the interplant. This shifted the season to late August through late June. In 2016, Maroa again utilized its innovative technology to align its season with Pepperco-USA, Inc.'s ("Pepperco") and shifted its season to late February through late December.
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> In 2019, Maroa Farms relied on its innovative technology to further improve its planting strategies for better plant health, quality and yield. First, Maroa Farms shifted back to a mono crop, rather than the four interplantings which had been done since 2014. This was done because the economics of continuous

> production versus the rising cost of labor no longer support the interplanting model. Secondly, Maroa Farms has implemented new sanitation techniques for its 2020/2021 planting season. This is necessary because of increased protocols from the Department of Agriculture, largely the result of the Tomato Brown Rugose Fruit Virus which struck the United States and numerous farms in 2019. The Tomato Brown Rugose Fruit Virus is a highly contagious tomato virus that can be easily spread mechanically through the use of contaminated tools, hands, and plant-to-plant contact.
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> As described in detail below, during weeks 26-27, production is reduced to approximately 5% and the prior season's crops are pulled out of the greenhouse to prepare for a complete greenhouse sanitation performed by a sanitation company. During these weeks, Maroa Farms' farm labor needs are minimal and Maroa Farms will utilize its permanent labor force to perform any residual greenhouse tasks. Maroa Farms' farm labor needs are seasonal. (See, In the Matter of: Artee Corp, 18 I&N Dec. 366 (B.I.A. 1982, holding when determining whether an employer qualifies as seasonal, it is appropriate "to determine if the employer's needs
> are seasonal, not whether the duties are seasonal.").
>
> A full tear-out and complete sanitation of the entire greenhouse growing space by an experienced outsourced sanitation company will occur in July 2020. At the completion of the sanitation process, the new plants will arrive at Maroa Farms for the 2020-2021 season and preparation for planting will begin. As more fully described below, planting and new crop preparation occurs in Weeks 30-34. Production then commences in late August (approximately Week 35).
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> We must have consistent and quality coverage from late August through late June. The work must be done on time and in the correct manner and has the direct result on plant health and habit to ensure the crop grows properly. The plants which are planted in late August will stay for up to 10 months and must produce at a high level the entire time which is a direct result of quality and consistent labor.

AF 369-370.

Employer also included a detailed breakdown of which duties occur in each period with Weeks 35-52, beginning the 2020-2021 contract period on August 31, 2020.

By letter dated July 16, 2020, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") finding Employer had failed to demonstrate its temporary or seasonal need. AF 331-338.

Specifically the CO stated that the Employer had not sufficiently demonstrated its standard of need as temporary or seasonal as required by 20 C.F.R. § 655.161(a). The CO cited 20 C.F.R. § 655.103(d) which defines temporary or seasonal need as follows:

> 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 one year.

AF-325.

The CO also cited the case, *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." *Id.*

The CO determined based on the Employer's filing history and "its relationship with Pepperco and farm labor contractors," that it was unclear if the employer had a true seasonal or temporary need. The CO noted the following:

> In 2015, BALCA found that Pepperco-USA, Inc. ("Pepperco") and Maroa were the same entity for purposes of determining seasonal need. *Pepperco-USA, Inc.*, 2015-TLC-00015 (Feb. 23, 2015) ("It has been clearly established . . . that Pepperco's need cannot be considered separately from that of Maroa Farms. The two facilities are not truly separate entities for purposes of the H-2A program.") Maroa's facility is located at 270 N. Fillmore Road, Coldwater, Michigan 49036. Pepperco's facility is nearby at 220 N. Fillmore Road, Coldwater, Michigan 49036. From 2015 until 2019, the companies have routinely filed for an approximately 10 month seasonal need. In 2019, Garza & Sons Labor Contractors, LLC ("Garza"), a farm labor contractor, filed for workers during Pepperco/Maroa's off-season (December 2018 to February 2019) but claimed that it had a seasonal or temporary need at the farm site location operated by Pepperco/Maroa at 220 N. Fillmore Road, Coldwater, Michigan 49036. The CO issued a Notice of Deficiency to Garza and questioned how it could have a seasonal or temporary need at a farm site location for which the farm itself stated there was no seasonal or temporary need for labor. Garza did not respond to the Notice of Deficiency and its application was ultimately denied.

Id.

The CO further explained that the relationship between Pepperco/Maroa and Garza suggests that Pepperco/Maroa has a year round need for additional labor because it contracted with a farm labor contractor ('Garza") during its stated offseason for such labor. The CO further noted that in 2019, both Pepperco and Maroa filed, and were each certified for H-2A workers, for the months of March 2019 to December 2019. Subsequently Maroa shifted its period of need and was certified for February 29, 2020, to June 26, 2020. *Id.*

The CO noted that the periods of need for Maroa's current application coupled with the filing history for Pepperco and Maroa, and Garza, (the labor contractor filing to work at Perpperco and Maroa's farm) show that the periods of need cover each month of the calendar year. The CO summarized the filed applications for Maroa, Pepperco and Garza in the chart below:

Case Number	Employer Name	Status	Number of Workers Requested	Beginning Date Of Need	Ending Date Of Need
H-300-18023-280054	MAROA FARMS INC.	Certified - Full	160	03/09/2018	12/28/2018
H-300-18296-175060	GARZA & SONS LABOR CONTRACTORS, LLC	Denied	100	12/20/2018	02/28/2019
H-300-19022-941974	MAROA FARMS INC.	Certified - Full[1]	199	03/09/2019	12/28/2019
H-300-19016-456029	PEPPERCO-USA INC.	Denied	105	03/10/2019	12/28/2019
H-300-19365-222588	MAROA FARMS INC.	Certified - Full	162	02/29/2020	06/26/2020
H-300-20184-693083	MAROA FARMS INC.	Received	140	08/31/2020	06/26/2021

AF 326.

The CO determined that Employer's demonstrated capability to both shift its period of need, as well as its need for work in every month of the year, caused the CO to question whether the Employer's need is truly seasonal, or whether it is, in fact, permanent and year-round. *Id.*

Based on the noted deficiency, the CO directed the Employer to provide a detailed explanation, with supporting documentation, showing how its job opportunity is seasonal of temporary in nature, as opposed to permanent or year round. The CO instructed the Employer to provide all contracts it has with farm labor contractors, as well as the contracts that Pepperco has with farm labor contractors for the years 2020 and 2021. The CO also requested the names of any other farm labor contractors that have been hired to work the land located at either 220 or 270 N. Fillmore Road, Coldwater, Michigan 49036, as well as copies of those contracts. *Id.*

[1] The CO noted that this application was not assessed in conjunction with the Garza filing, and as such, it was certified in error. However, the CO stated that this error should not be dispositive of future applications, citing *Wickstrum Harvesting, Inc*., 2018-TLC-00018, at 8 (May 3, 2018)(finding that the certification of prior applications "is irrelevant to the present proceeding").

The CO also directed the Employer to include in its response the following:

> 1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
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> 2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation outside the requested period of need;
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> 3. Summarized monthly payroll reports for the calendar years 2018, 2019, and 2020 calendar years that identify, for each month and separately for full-time permanent and temporary employment for all job titles in use, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system, and,
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> 4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 327.

The CO also directed the Employer to provide the above documentation for Pepperco. *Id.* The CO noted that Employer may choose to, but is not required to, explain its relationship with Garza in 2019 and "why it contracted for 100 additional workers during a time when it asserted to the CO that it did not have a need for additional labor." *Id.*

The CO also noted a second deficiency related to the Employer's failure to establish its seasonal or temporary need. AF 327-328. In this regard the CO noted Employer's statement of temporary need in which it explained that its season throughout the years has changed due to its utilization of innovative technology. Specifically, the CO cited Employer's statement that it had shifted back to a mono crop in 2019, "because the economics of continuous production versus the rising cost of labor no longer support the interplanting model." AF 328. The CO concluded that Maroa's decision to cease "continuous production" demonstrates its ability and choice to limit its season during the specified timeframe. However, the CO notes the current application (August 2020 to June 2021) requests labor for a period of need that is significantly longer than the most recent prior application (February 2020 to June 2020). Again the CO concluded that Maroa and Pepperco have demonstrated through their filing history that it is possible for them to have a "temporary need" for every month of the year. The CO asserts, [i]f Employer can shift seasons, or choose to operate at certain times of the year versus others, it is unclear how this job opportunity is tied to a certain time of year by an event or pattern, and therefore seasonal in nature." *Id.*

To cure this deficiency the CO directed the Employer to provide a detailed explanation and appropriate evidence and documentation as to why its job opportunity is seasonal in nature and tied to a certain time of year by an event or pattern. Accordingly, the CO requested the

documentation noted above, for both Maroa and Pepperco to address the second deficiency, as well as the submission of the documentation to address the first deficiency noted. AF 328-329.

The Employer responded to the NOD on July 28, 2020, providing multiple documents. AF 210-329. Documentation included photographs of its greenhouses, copies of a settlement agreement, as well as other court filings pertaining to a previous application for certification involving Maroa and Pepperco-USA, a copy of a sworn declaration from the chief growing officer of Mastronardi Produce Ltd., the parent company of Maroa Farms and Pepperco-USA, information from the Federal government pertaining to the tomato brown rugose fruit virus, and a copy of the sanitation service agreement between Caravan Facilities Management LLC and Maroa Farms.

In its July 28, 2020 response letter, Employer explained its position asserting that it has proven its temporary seasonal need in its current application. It restated its business history and current schedule of operations as previously submitted with its application. It noted that prior to 2014 Maroa utilized a mono crop planting cycle. In 2014 Maroa expanded its operations, adding 27 acres of greenhouse growing space and moved from a mono crop to four (4) interplantings per year. Other changes in 2016 expanded the Employer's labor need during a ten month period, between February and late-December. Employer claimed that due to its use of innovative technologies its ten month season has been modified at various times since it started business in 2012. Employer also maintained that its operations are separate and distinct from that of Pepperco-USA, its sister company, also a subsidiary of Mastronardi Produce, Ltd.

Employer stated that it "rejected" the CO's position that it does not have a seasonal need because of its "ability to rely on its innovative technology to shift its season." Employer claimed that dating back to 2012 the Department of Labor (DOL) has accepted Maroa's ten month stated need as seasonal and recognized its ability "to rely on its innovative technology to adjust its season following its increase in acreage." Employer cites the settlement agreement reached with the DOL in 2016, a copy of which it includes with its response in support of its position. Employer also cited the BALCA decision in *Pepperco-USA, Inc., 2015-TLC-00015* as supporting its position that it is a distinctly separate entity from Pepperco. Employer represents that in that case, "Pepperco presented a series of facts establishing that it and Maroa Farms are separate and distinct subsidiary corporations of Mastronardi Produce with distinct seasonal and temporary needs." Although expressing its disagreement with BALCA's holding, Employer admits the following in regard to BALCA's determination in that case:

> The issue turned on whether or not the <u>combined</u> needs of both Maroa Farms and Pepperco were in actuality a single need of Mastronardi Produce, the parent company. Judge Johnson concluded that they were and upheld the CO's denial on that basis.

Employer states that its current labor needs have shifted again to a mono crop period of need. Employer points out that this is different from the periods of need determined in the cited settlement agreement which were applicable to 2016 and 2017 only.

In regard to the CO's instruction that Employer submit payroll records for the years 2018, 2019, and 2020, for both Maroa Farms and Pepperco-USA, the Employer states that voluminous payroll records for 2018, 2019, and 2020 are not probative to the August 2020-June 2021 seasonal need, and therefore stated:

> Maroa Farms declines to provide the payroll reports as requested. Further, in light of the separate seasonal needs and separate corporate structure of Maroa Farms and Pepperco, Maroa Farms also objects to the production of voluminous payroll records for Pepperco for 2018, 2019 and 2020, a separate entity who has not filed for a 2020 season.

AF 220.

Employer further stated that the requested payroll records were not, in its opinion "relevant" and therefore declined to produce the requested records.

Employer also claimed that the H-2A application of Garza filed in 2019 was not authorized or sanctioned by Maroa Farms or Pepperco, and therefore, representations made by Garza should not be imputed to the Employer.

Employer additionally argued generally that it has met its burden of proving its "new" period of need despite the fact that it had requested varying periods of need in previous applications, asserting that it did not in fact manipulate its requested dates of need.

On August 14, 2020, the CO issued a Denial in this case. AF 35-59. The CO cited the prior BALCA decision in *Pepperco-USA, Inc.*, 2015-TLC-00015 (Feb. 23, 2015) and quoted the decision for the position that "[i]t has been clearly established . . . that Pepperco's need cannot be considered separately from that of Maroa Farms." The CO further stated:

> To date, neither company has submitted evidence to support their contention that they have, since that ruling, become distinct enough companies as to warrant analyzing their need separately. Therefore, for purposes of the H-2A program, the Chicago National Processing Center ("NPC") will continue to assess the needs of the companies as if they were one employer.

AF 38.

The CO also noted that it had, in the current case, requested payroll data for Maroa Farms and Pepperco-USA for calendar years 2018, 2019, and 2020, identifying the total number of workers, names of the workers, total hours worked, and total earnings received, separately for permanent and temporary employment. The CO stated that the purpose of obtaining this information was twofold:

> (1) To assess Maroa Farms Inc. claimed seasonal need for workers; and
>
> (2) To assess whether the current job opportunity, described in ETA Form 790A, coupled with the filing history for Maroa, Pepperco and Garza & Sons Labor

> Contractors, LLC ("Garza"), a farm labor contractor (filling to work at Pepperco and Maroa's farms located at 220 N. Fillmore Road and 270 N. Fillmore Road in Coldwater, Michigan) reflect a permanent or year round need. To the extent that the work performed at Maroa's farm site and Pepperco's nearby farm site constitute a single continuous production, the Chicago NPC will aggregate the dates of need of those entities to determine whether Maroa's stated need is temporary within the meaning of the H-2A regulations.

AF 38.

The CO noted the Employer's response to the NOD including Employer's reference to prior settlements, which the CO also noted do not control the current application. The CO further noted Employer's position that its payroll documentation is not relevant to this certification, asserting to the contrary, that Payroll documentation is relevant to determining the nature of Employer's labor needs especially in light of the Department's view that Pepperco and Maroa are one entity for purposes of the H-2A program. In regard to the request for payroll records the CO also stated:

> By definition, a seasonal need requires a need for labor far above an employer's labor need for ongoing operations. In the absence of a complete picture and coupled with the Employer's demonstrated capability and desire to utilize, either on its own or through proxies, temporary farm labor on a year round basis, the Employer's prior use of labor as conveyed by payroll is both germane and essential to assessing the existence of its claimed seasonal need.

AF 41.

In regard to the "Garza filing," the CO noted this information is pertinent to representations by Maroa and Pepperco regarding their labor needs, and whether representations of those labor needs is accurate. *Id.* Finally, the CO also determined that Employer's explanations regarding its business model did not explain how the change in their requested period of need is "tied to a certain time of the year by an event or pattern." AF 42.

For the foregoing reasons, the CO determined that Employer had failed to meet its burden of establishing its seasonal need, and therefore, its application for 140 greenhouse workers was denied. *Id.*

On August 20, 2020, Employer filed a timely request for administrative review of the CO's denial of its H-2A application.

By Order dated August 28, 2020, the parties were granted leave to file briefs by September 2, 2020. Employer filed a timely brief that was received by the undersigned on September 2, 2020. The U.S. Department of Labor, Associate Solicitor for Employment and Training Legal Services ("Solicitor") filed a timely brief in this matter, on behalf of the Certifying Officer, which was also received by the undersigned on September 2, 2020.

ISSUE

Whether the Certifying Officer properly determined that Employer had failed to meet its burden of establishing that its need for agricultural services or labor is "temporary or seasonal" as defined by the applicable regulation at 20 C.F.R. § 655.103(d)?

SCOPE OF REVIEW

BALCA has a limited scope of review in H-2B cases. Specifically, BALCA may only consider the appeal file prepared by the CO, the legal briefs submitted by the parties, and the Employer's request for review, which may contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued. 20 C.F.R. § 655.61(a). After considering this evidence, BALCA must take one of the following actions in deciding the case:

(1) Affirm the CO's determination; or
(2) Reverse or modify the CO's determination; or
(3) Remand to the CO for further action.

20 C.F.R. § 655.61(e).

Neither the Immigration and Nationality Act, nor the regulations applicable to temporary labor certifications, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO. BALCA has fairly consistently applied an arbitrary and capricious standard to its review of the CO's determination in temporary labor certification cases. *See Brook Ledge Inc.*, 2016 TLN 00033 at 5 (May 10, 2016); *see also J and V Farms, LLC*, 2016 TLC 00022, slip op. at 3, fn. 1 (Mar 4, 2016).

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, an employer must demonstrate that it has a "temporary" or "seasonal" need for agricultural services. 20 C.F.R. § 655.161. 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). 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).

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).

It is also 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). 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).

In order to utilize the H-2A program it is the employer's burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). In regard to a seasonal need, 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).

In the instant case, based on the current application, the Employer's filing history, as well as Employer's own representations, Employer's requested dates of need have shifted on multiple occasions over approximately the last eight years. Further complicating this situation is the relationship between Employer Maroa Farms ("Maroa"), its "sister" subsidiary Pepperco-USA ("Pepperco"), its parent company, Mastronardi Produce Ltd, and Garza & Sons Labor Contractors, LLC ("Garza"), a farm labor contractor that had previously filed an H-2A application to work at Pepperco and Maroa's farms/greenhouses.

The CO summarized recent filings by the Employer and the related entities in the chart below.

Case Number	Employer Name	Status	Number of Workers Requested	Beginning Date Of Need	Ending Date Of Need

H-300-18023-280054	MAROA FARMS INC.	Certified - Full	160	03/09/2018	12/28/2018
H-300-18296-175060	GARZA & SONS LABOR CONTRACTORS, LLC	Denied	100	12/20/2018	02/28/2019
H-300-19022-941974	MAROA FARMS INC.	Certified - Full[2]	199	03/09/2019	12/28/2019
H-300-19016-456029	PEPPERCO-USA INC.	Denied	105	03/10/2019	12/28/2019
H-300-19365-222588	MAROA FARMS INC.	Certified - Full	162	02/29/2020	06/26/2020
H-300-20184-693083	MAROA FARMS INC.	Received	140	08/31/2020	06/26/2021

AF 326.

BALCA has 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).

Further, other BALCA cases support the CO's position that when the dates of need listed on an application vary from the dates listed on previous applications, the employer is required to justify the reasons for the change. *Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011)(employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor).

Both the CO and Employer cite a BALCA decision issued in 2015, which addressed the relationship of Maroa Farms, Pepperco-USA, and the parent company of both Maroa and Pepperco, Mastronardi Produce Ltd. *See Pepperco-USA, Inc*. 2015-TLC-00115 (Feb, 23, 2015). Based on the record presented in that case, BALCA determined that "the combined needs of Pepperco and Maroa farms are in actuality a single need of Mastronardi." *Id*. at 31. The decision further states, "It has been clearly established by the testimony and exhibits that Pepperco's need cannot be considered separately from that of Maroa Farms. The two facilities are not truly separate entities for purposes of the H-2A program. They are interlocked in terms of ownership, management, and control, and their needs combine to establish a need for farmworkers of more than a year."

[2] The CO noted that this application was not assessed in conjunction with the Garza filing, and as such, it was certified in error. However, the CO stated that this error should not be dispositive of future applications, citing *Wickstrum Harvesting, Inc*., 2018-TLC-00018, at 8 (May 3, 2018)(finding that the certification of prior applications "is irrelevant to the present proceeding").

Other BALCA decisions also support that an employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application. *Katie Hieger*, 2014-TLC-00001 (Nov. 12, 2013). *See also Altendorf Transporation*, 2013-TLC-00032(March 28, 2013) and *Sugar Loaf Cattle Co., LLC*, 2016-TLC-00033 (April 6, 2016) (using principles developed under the NLRA to determine if two companies were so intertwined so as to constitute a single employer.

Although the above noted *Pepperco* case was decided based on the record presented to the tribunal in that matter, and is not controlling of the outcome of the current case, which will be determined on the basis of the written record developed in this matter, (*See* 20 C.F.R. § 655.171), the *Pepperco* case cited above has a bearing on whether the CO acted properly in the current case; specifically, in questioning the relationship of Maroa Farms and the related entities for purposes of the H-2A program. Clearly, based on the filing history and prior determinations, including those made by the Department of Labor, in regard to the parties, the CO did not abuse his discretion or act arbitrarily and capriciously in requesting further documentation supporting the Employer's changing seasonal need, nor in requesting further documentation addressing the employment needs of Employer Maroa Farms, and Maroa's related entity, its "sister" subsidiary, Pepperco.

Employer also provided to the CO documents related to a settlement agreement entered into between Maroa Farms and Pepperco-USA, and the U.S. Department of Labor, in regard to Maroa Farms and Pepperco's H-2A certification for the years 2016 and 2017, in which the two entities agreed to "align" their separate H-2A applications to indicate dates of need of February 28 – December 28, 2017. *See* AF 269-272. As this settlement agreement, as specifically stated in the agreement at Paragraph 2.9 (AF 271), only applies to the certification of these entities in the years 2016 and 2017, and specifically states that future applications would be decided based upon a *de novo* review of the applications and justifications for changes in the dates of need for each entity, this settlement agreement need not be addressed at any length herein, other than to note that it also supports the complex relationship of the entities, Maroa Farms and Pepperco-USA.

Among the documentation requested by the CO were the payroll records for both Maroa Farms, and the related entity, Pepperco, for the years 2018, 2019, and 2020. The CO's request for payroll records is not unreasonable and BALCA has consistently upheld the CO's request for such information to establish and document an Employer's seasonal or temporary need, as well as a bona fide need for the number of workers requested. *See e.g. Roadrunner Drywall Corp*. 2017-TLN-00035-38, slip op. at 9, fn. 40 (May 4, 2017) (CO's denial affirmed where Employer failed to provide specific payroll information for [past utilization of requested workers] which interferes with meaningful analysis of whether Employer's need is bona fide and the numbers requested are justified). *See also Imagine Thoroughbreds* 2019-TLC00059, slip op. at 4 (July 9, 2019)(Denial of certification affirmed where payroll records did not establish that the requested time period required labor levels above those necessary for ongoing operations).

Regarding the importance of payroll records to the analysis of seasonal need in this case, the CO asserts in his brief:

> Payroll reports are valuable evidence because they document how many workers are being paid at any given point—the number of workers or hours worked, etc. during certain months would either show that the Employer truly has a need for labor which is [consistent with the applicable regulation] "far above those necessary for ongoing operations," or if the need is stagnant, or if the need is non-existent during certain months. 20 CFR § 655.103(d). In the absence of the requested records, it is impossible for the CO to determine that Maroa's application is a reflection of the "need for additional labor" even if analyzed together with Pepperco, because the Employer *did not submit documentation* to establish what the baseline need for labor is for both Maroa and Pepperco.

CO's brief at 6.

In its response to the Notice of Deficiency Employer stated its position that it "declined" to provide the payroll records requested by the CO, because it had determined that these records were not relevant to its changing period of need, nor were they relevant to whether it had established its seasonal need for the 140 workers requested. In refusing to provide the requested payroll records, Employer cites to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, and specifically to 29 C.F.R. §§ 18.401 and 18.402, and states:

> Per the DOL's own rules of practice and procedure set forth in 29 C.F.R. § 18.401, evidence is only relevant if it has a tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that is not relevant is not admissible in an administrative adjudication. See 29 C.F.R. § 18.402.

AF 220.

The fatal error in the Employer's analysis is that there is nothing in the applicable rules of practice and procedure, and specifically Rules 18.401 and 18.402, which provides that the Employer may unilaterally make the determination of what evidence is relevant. In the current appeal before this Office, such a determination, as well as the probative value of such records would be made by the undersigned after consideration of the information contained in the records submitted. Employer may argue its position on the issue of relevance, but its argument does not control the tribunal's determination. Nor has the Employer adequately explained why a request for such records by the Certifying Officer is inappropriate, or unjustified, when payroll records are a logical and established form of documentation of labor needs in the H-2 labor certification process, as noted above, and especially in light of the changing dates of need, complex filing history, and complicated nature of the relationship between Maroa and Pepperco leading up to the current application.

In its response to the CO, Employer cites the cases of *Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013) and *Jose Uribe Concrete Construction* 2018-TLN-00044 (Feb. 2, 2018) as examples of cases where BALCA has determined that an Employer has met its burden of proof by providing alternate documentation, other than payroll records, and where the

CO was determined to have acted arbitrarily and capriciously in denying certification. In those cases it was determined that the Employer had made good faith effort to provide alternative information to the requested payroll information to establish its temporary need for workers. However, in the current case the undersigned finds that the Employer made no such effort, and gave no legitimate explanation for its failure to provide the requested payroll records other than its statement that it "declined" to do so because it did not believe they were relevant. Further, the cases cited by the Employer did not involve a shifting of the dates of need, an inconsistent filing history, and the complicated relationship between the Employer and its sister subsidiary, Pepperco, as demonstrated in prior determinations.

Employer has provided some support for its changing dates of need, as argued in Employer's brief and in its response to the CO. These include its alleged use of innovative technologies and its practice of sanitation of its greenhouses in response to a problem with the "tomato brown rugose fruit virus." Employer has also provided a specific schedule of work which would be performed by the temporary workers during its requested dates of need. However, Employer has not adequately explained its refusal to supply the requested payroll records which address other issues, as explained by the CO, including its need for labor throughout the year, and how these labor needs change in regard to its alleged seasonal or temporary need as required by the H-2A program.

After reviewing the totality of the evidence in the record, I do not find that the CO acted arbitrarily or capriciously, nor did he abuse his discretion in requiring the Employer to provide additional documentation, including payroll records, to support the Employer's seasonal need under the circumstances of this case. Likewise, I do not find the Employer's refusal to provide the requested records to be justified. The Employer's shifting dates of temporary need, coupled with the Employer's refusal to provide the requested payroll records and the complex nature of the relationship between the Employer, Maroa Farms, and it sister subsidiary, Pepperco, support the CO's actions in questioning the seasonal need of the Employer, and requiring Employer to provide additional documentation in support of its application for 140 temporary greenhouse workers.

Although Employer asserts that it is shifting its previously demonstrated period of need (approximately late-February/early-March to December) to the period of need listed in the current application (August 31, 2020, to June 26, 2021) on the basis of its use of "innovative technologies," Employer failed to provide the additional and reasonable documentation requested by the CO in support of its seasonal need. It is proper for the CO to question an Employer's seasonal need based on these shifting dates. *See Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011)(employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor). Furthermore, an employer must justify a need for changed dates through evidence and argument, mere assertions are not sufficient. *See Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016).

CONCLUSION

For the foregoing reasons, the undersigned concludes that the CO did not act arbitrarily or capriciously, nor did he abuse his discretion, or act contrary to law, in denying the Employer's application for certification for 140 greenhouse workers for the period of need of August 31, 2020 – June 26, 2021, on the basis that Employer failed to prove its seasonal or temporary need, based on the information in the record.

ORDER

Accordingly, it is hereby ORDERED that the CO's denial of Employer's application for temporary labor certification, is AFFIRMED.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge