



Issue Date: 08 January 2020

In the Matter of:

MEJIA PRODUCE LLC,
Employer

BALCA Case No. 2020-TLC-00030
ETA Case No. H-300-19317-142957

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act¹ and its implementing regulations.² On December 17, 2019, Mejia Produce LLC (“Employer”) filed a request for an expedited administrative review of the final determination (“Request”) issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application. On December 30, 2019, the Board of Alien Labor Certification Appeals (“BALCA”) received the Request and the Administrative File (“AF”) from the CO. On January 6, 2020, I was assigned to this matter for purposes of issuing a Decision and Order.³

STATEMENT OF THE CASE

On November 21, 2019, Employer filed an H-2A Application for Temporary Employment Certification (“Application”).⁴ The Application states that Employer is acting as an H-2A Labor Contractor⁵ (“H-2ALC”) for International Forest Genetics & Seed LLC (“IFGS”) and Mobley Greenhouse Investments LLC (“MGI”), and seeks

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

² 20 C.F.R. Part 655, Subpart B.

³ The delay between the Request and the subsequent docketing and assignment of this case is presumably due to the Request only being filed with the CO and not BALCA. See 20 CFR §§ 655.164(b), 655.171.

⁴ AF 63-86.

⁵ See 20 CFR § 655.103(b).

certification for 48 seasonal “Nursery Workers” (SOC Occupational Code 45-2092.01) for the period January 25, 2020 to July 30, 2020.⁶ The work is to be performed at IFGS and MGI agricultural sites in Pavo, Georgia; Dawon, Georgia; and Moultrie, Georgia.⁷ Employer described the duties and requirements as follows:

Workers will [be] planting, stringing, staking, [and] harvesting tomatoes. Workers will also plant and harvest squash, cucumbers, and cabbage. Workers will prune and harvest pollen catkins[,] place pollination bags on trees using zip ties for breeding purposes, mark the bags with permanent markers, place the bags onto the trees, and remove and collect all bags at the end of the season. Workers will also be performing general farm labor duties such as cleaning, weeding, fertilizing, pruning[,] organizing supplies, [] tagging orchard trees[], and removing stakes and plastic from harvested fields.⁸

The task the workers will be performing is seasonal in nature due to the fact that these practices are performed to promote growth and control pollination on plants and trees. Season typically begins from the end of January through middle of summer.

Plants and trees will be nursed and prepared for the growing season by pruning, cleaning of debris, maintenance to irrigation, and making sure all areas are clean of any debris. This will also be the time to spray all insecticides, tag all trees/plants and prepare for the spring and growing season. Once plants begin to pollinate[,] pollination bags will placed on the plants for breeding purposes. Workers will then tag and mark all trees and will have made sure all tools, materials, and equipment is accounted for and placed for storage. The whole process continues [] up to the end of July.⁹

⁶ AF 63-64, 71.

⁷ AF 28.

⁸ AF 71.

⁹ AF 79.

The Application also contains statements from both IFGS and MGI specifying the workers' duties at the various agricultural sites.¹⁰ IFGS states in pertinent part:

Job activities

- Placing pollination bags on tree[] branches using zip ties for spring breeding purposes
- Workers will use a pollination application device to pollinate each individual bag (this procedure will happen 2-3 times)
- Workers will use a permanent markers or spray paint to mark bags that have been pollinated (a different color will be used for each pollination application)
- Workers will cut zip ties with clippers to remove the bags placed on to the trees
- Workers will count and fold and store the white cloth pollination bags at the end of the season
- Use of pruning shears/clippers to harvest pollen catkins
- All of the above activities will require the use of a man lift and will be done outdoors in the cold and wet environment

-Miscellaneous work will be done during days of slow activity or from weather related issues, and will include:

- o Minor/heavy lifting
- o Minor pruning to orchard trees and debris pick up
- o Trash will be picked up within the job site
- o One or more workers will be used for processing pollen in the pollen building
- o One or more workers will be used for cleaning/organizing all breeding supplies and or workrooms
- o Cutting away brush from the base of the trees within the job site
- o Workers will use a grubbing hoe to weed around seedlings planted within the job site
- o Hand fertilizing seedlings with IFG&S staff
- o Hand weeding
- o Touch-up painting on orchard trees within job site
- o Tagging and flagging orchard trees within job site¹¹

¹⁰ AF 80-83.

¹¹ AF 81-82.

MGI states that the workers will “harvest tomatoes along with other tasks which go along with tomato production. Those tasks include: picking tomatoes, stringing tomatoes, stake tomatoes, pull weeds, cut string, pull stakes, pull plastic, picking cucumbers, picking squash, and cutting cabbage[.]”¹²

On November 26, 2019, the CO issued a Notice of Deficiency (“NOD”) because Employer had not demonstrated how the job opportunity is temporary in nature.¹³ Specifically, the CO stated that, “[b]ased on employer’s current requested dates of need and its previously established dates of need [in prior applications], it is unclear how this job opportunity is seasonal in nature; tied to a certain time of year by an event or pattern.”¹⁴ The CO required Employer to “provide a detailed ... explanation as to why this job opportunity is seasonal rather than permanent in nature[.]” and submit supporting documentation, including monthly payroll reports for a minimum of three previous calendar years.¹⁵

On November 27, 2019, Employer filed its response to the NOD. In addressing the temporary need issue, Employer stated:

Mejia Produce LLC has its own fields that it harvests throughout the year and is also a **Farm Labor Contractor that is hired by different farms and Nurseries**. *It is not tied to only one crop, task, or plant throughout the whole year but rather to the need of workers that farms and nurseries have.* This is the reason why the dates of need for the laborers requested is not consistent with the dates of need from previous years. This will be the first year that Mejia Produce LLC will be furnishing its services to IFG&S LLC and MGI Farms and therefore the dates of need are not consistent with previous applications. Typically, the dates of need from previous years reflects the dates that it brings for the harvesting of the crops in its farm.

The task the workers will be performing for the IFG&S LLC and MGI Farms will be to plant, promote growth, and control pollination on plants

¹² AF 83.

¹³ AF 43-51. The CO also cited four other areas of deficiencies, which are not at issue on appeal as the denial was based only on Employer’s failure to establish a temporary need. AF 4-8, 43-51.

¹⁴ AF 45.

¹⁵ AF 46.

and trees. These tasks include preparing growing areas, planting, fertilizing, placing pollination bags to help promote growth. Other task will be to prune, tag plants and trees, spray insecticides, collect materials, and clean growing areas. Season typically begins from the end of January through middle of summer which are within the dates listed in this application (January 25, 2020 through July 30, 2020). I have included documents to support this as well as to help understand.

Some of the plants that will be planted and nursed are vegetable plants which includes tomatoes, cucumbers, squash, and other plants. Once the plants are at the ideal stage the plants will be sold, transported, and transplanted in other farms. **This is a seasonal natural recurring event that takes places every year around the same time of year in the area.** As listed on the documents that I have included for support, this is not year-round but rather consistent with the dates of need listed.¹⁶

Although Employer's statement references supporting documentation, the response to the NOD does not appear to contain any such documents, including the payroll reports that the CO requested.¹⁷

On December 16, 2019, the CO denied the Application,¹⁸ stating in pertinent part:

The job opportunity ... shows the H-2AL[C] has requested workers every month of the year. The history reflects a single 30-day break in need from November 9, 2019 to December 9, 2019. Therefore, based on the H-2ALC's requested dates of need and its previously requested dates of need, it has not established how this job opportunity is seasonal, rather than permanent in nature.

¹⁶ AF 21 (emphasis in original).

¹⁷ AF 21-30.

¹⁸ AF 4-8.

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date of Need</u>	<u>Ending Date of Need</u>
H-300-18193-665550 ¹⁹	Mejia Produce LLC	Certified - Full	09/14/2018	04/14/2019
H-300-19200-690504 ²⁰	Mejia Produce LLC	Certified - Full	09/19/2019	11/09/2019
H-300-19283-081039	Mejia Produce LLC	Withdrawn	12/09/2019	06/01/2020
H-300-19317-142957	Mejia Produce LLC	Received	01/25/2020	07/30/2020

The H2ALC's applications listed above shows the employer has requested workers every month of the year. The applications share worksites in the same area of intended employment, Grady County, Georgia, and have similar job duties. Although the crops vary, the crops and corresponding job duties are all consistent with established job duties for Farmworkers and Laborers (SOC Code 45-2092).

... [T]he combination of its applications represents the employer seeking temporary workers in Georgia each month of the year. The work cannot therefore be considered tied to a certain time of the year as is required for a showing of seasonal need.

¹⁹ AF 246-405. In H-300-18193-665550 ("Application 550"), Employer, acting as an H-2ALC for Ricky Powe Farms ("RPF"), sought 120 seasonal "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" (SOC Occupational Code 45-2092) for RPF's agricultural site in Cairo, Georgia. The duties were described as harvesting, planting, sorting, grading and packing squash, peppers, eggplant, tomatoes, corn, cucumbers and beans. The CO approved Application 550 and granted certification for the requested 120 workers for the period September 14, 2018 to April 14, 2019. AF 292, 350, 383.

²⁰ AF 123-245. In H-300-19200-690504 ("Application 504"), Employer, acting as an H-2ALC for MGI, sought 90 seasonal "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" (SOC Occupational Code 45-2092) for MGI's agricultural sites in Pavo, Georgia and Moultrie, Georgia. The duties were described as harvesting tomatoes, squash, cucumbers, cabbage, and performing general farm labor duties. MGI also submitted a statement stating that the workers would "harvest tomatoes along with other tasks which go along with tomato production. Those tasks include: picking tomatoes, stringing tomatoes, stake tomatoes, pull weeds, cut string, pull stakes, pull plastic, picking cucumbers, picking squash, and cutting cabbage[.]" The CO approved Application 504 and granted certification for the requested 90 workers for the period September 19, 2019 to November 9, 2019. AF 127, 200, 234, 236.

Further, the NOD instructed the employer to provide summarized monthly payroll reports for a minimum of three previous calendar years[.] ... However, the employer failed to submit the payroll records, nor did the employer provide an explanation for the omission of the requested documents. Therefore, a review of the employer's use of the requested occupation for the past three years could not be assessed.

The H-2ALC failed to demonstrate a seasonal or temporary need for H-2A workers, as its history shows the request for farmworkers in every month of the year and the H-2ALC failed to provide documentation to support its stated seasonal period, as directed in its NOD. Therefore, this application for 48 Nursery Worker job opportunities is denied.²¹

On December 17, 2019, Employer filed its Request.²² Employer argues that "the jobs that workers are performing is seasonal in nature and is performed every year during the same time frame."²³

DISCUSSION

The scope of review in H-2A cases is limited. I may only consider the written record and any written submissions from the parties, which may not include new evidence.²⁴ The standard of review is de novo. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.²⁵

²¹ AF 6-8. BALCA has consistently permitted the CO to 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 (Apr. 14, 2000); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (Mar. 21, 2017).

²² AF 1-2.

²³ AF 2. Employer also cites to Case Number H-300-19337-176411 as support. However, that application is not in the record and therefore I cannot consider it in my review. See 20 C.F.R. § 655.171(a).

²⁴ 20 C.F.R. § 655.171(a).

²⁵ The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO's decision. See 20 C.F.R. § 655.171(a). I find persuasive the rationale articulated in *Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a).

To qualify for the H-2A program, an employer has the burden to establish that it has a need for agricultural services or labor on a temporary or seasonal basis.²⁶ According to the regulations:

[E]mployment 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 1 year.²⁷

In determining whether an employer's need 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."²⁸ The inquiry is whether the employer's needs are seasonal, not whether the particular job at issue is seasonal.²⁹ "Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year."³⁰ Similarly, "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position."³¹ If "[t]he consecutive nature of...current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer's need does not differ from its need for such labor during other times of the year; the need is year round."³²

An employer is required to justify a change in its dates of need in order to ensure it is not manipulating its "season" when it really has a year-round need for labor.³³ An

²⁶ 20 C.F.R. § 655.161(a); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015).

²⁷ 20 C.F.R. § 655.103(d).

²⁸ *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport*, 2011TLC-00158, slip op. at 11 (Feb. 15, 2011)).

²⁹ *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015).

³⁰ *Farm-Op Inc.*, 2017-TLC-00021, slip op. at 7 (July 7, 2017) (citing *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011)).

³¹ *Id.*

³² *Lodoen Cattle Co.*, slip op. at 4.

³³ *Pleasantville Farms, LLC*, slip op. at 3.

employer may also not continually shift its periods of need in order to utilize the H-2A program.³⁴ In *Farm-Op Inc.*, the ALJ noted that:

Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected. See, e.g., *Salt Wells Cattle Co., LLC*, 2010-TLC00134 (Sept. 29, 2010). In other words: “An employer’s ability to manipulate its ‘season’ in order to fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).” *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011).³⁵

Here, Employer has not established that its employment need is seasonal or temporary. Although Employer is acting as an H-2ALC for various entities with multiple agricultural sites, the similarities in job titles, job duties, and geographic locations stated in this Application and Applications 504 and 550, are at odds with the differing periods of need in those same applications. That is, to be seasonal, the periods of need in this Application and Applications 504 and 550 should be substantially similar given the similarities in job duties and geographic locations in those applications. Employer’s filing history, however, does not correspond with that necessary showing. For instance, in this Application, Employer’s period of need for workers at MGI is from January 25, 2020 to July 30, 2020,³⁶ and according to MGI the workers would “harvest tomatoes along with other tasks which go along with tomato production. Those tasks include: picking tomatoes, stringing tomatoes, stake tomatoes, pull weeds, cut string, pull stakes, pull plastic, picking cucumbers, picking squash, and cutting cabbage[.]”³⁷ However, those duties are verbatim the duties MGI specified in Application 504,³⁸ where the stated period of need is vastly different (September 19, 2019 to November 19, 2019).³⁹ Therefore, this Application and Applications 504 and 550 make clear that Employer’s needs are not tied to a specific season. Instead, Employer’s filing history evidences a year-round need for similar workers in the same geographic location

³⁴ *Farm-Op Inc.*, slip op. at 10.

³⁵ *Farm-Op Inc.*, slip op. at 7-8 (citations and quotations in original).

³⁶ AF 71.

³⁷ AF 83.

³⁸ AF 236.

³⁹ AF 200.

performing the same duties. Accordingly, the basis stated by the CO for the denial is legally and factually sufficient.

ORDER

For the reasons stated above, the denial of Employer's H-2A Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC