



Issue Date: 19 June 2020

OALJ Case No.: 2020-TLC-00079
ETA Case No: H-300-20127-546179

In the Matter of:

NATURE FRESH FARMS USA, INC.,
Employer.

Appearances: Robert Birach, Esquire
For the Employer

Edward Waldman, Esquire
Office of the Solicitor
U.S. Department of Labor
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S DENIAL

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 June 5, 2020, the Office of Administrative Law Judges received a letter from Nature Fresh Farms USA, Inc., ("Employer") requesting administrative review of the Certifying Officer's denial of Employer's H-2A temporary labor certification application. I received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on June 12, 2020. On June 15, 2020, I conducted a conference call with the parties to confirm the Employer's request for an administrative review, identify the issue to be resolved, and establish a timeline for this case. By Order dated June 15, 2020, the parties were granted leave to file briefs on or before June 16, 2020, consistent with the teleconference discussion.

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 May 7, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A. (AF 70-92). The Employer's Application requested certification for seventy (70) farmworkers under the SOC occupation title of Farmworkers and Laborers, Crop for the period beginning July 15, 2020, and ending May 15, 2021. (AF 78). The Employer did not attach a statement of temporary need to this application. (AF 70). However, the Employer identified the farmworkers' job duties as follows:

Plant, string tie, prune, de-leaf, twist, clip, pick, sort, and pack tomatoes. Apply biologicals Operate farm machinery, i.e. forklift and cart to move boxes of produce. Crop clean out and greenhouse preparation for new plants. Work in warm climate, fast-paced environment. Must be willing to work unpredictable hours. Crops: tomatoes.

(AF 78).

By letter dated May 12, 2020, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") finding Employer's application deficient for its failure to establish its job opportunity as "temporary or seasonal in nature." (AF 60-64).

The CO stated that Employer had not sufficiently demonstrated its standard of need as temporary, citing 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 1 year.

20 C.F.R. § 655.103(d).

The CO noted that the Employer's business appears to be year round because the Employer requested Farmworkers and Laborers Crop, containing the same job duties at the same work location, on three separate occasion for the combined dates of need from July 15, 2019, through August 1, 2020. (AF 63). The CO noted the Employer's filing history in the following chart:

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date Of Need</u>	<u>Ending Date Of Need</u>
H-300-19123-139651	Nature Fresh Farms USA, Inc.	Certified	07/15/2019	05/15/2020
H-300-19200-977227	Nature Fresh Farms USA, Inc.	Certified	10/01/2019	08/01/2020

H-300-20031-289656	Nature Fresh Farms USA, Inc.	Certified	04/15/2020	08/01/2020
H-300-20127-546179	Nature Fresh Farms USA, Inc.	Received	07/15/2020	05/15/2021

The first application mirrors the application submitted in this case, which contains packing and sorting duties as well as other greenhouse work. (AF 245-394). While the second and third applications describe a packing position:

Assist with a wide variety of tasks in the warehouse: Clean containers, materials, supplies, work areas, produce. Examine produce and plan on proper line. Pack, grade, clip, stack boxes, weigh/count product, place labels. Ensures the final product quality and sanitation of the packing lines. Must ensure safety procedures are followed at all times. Other general labor warehouse duties as assigned. Walking, sitting, standing, bending, twisting, crouching, and kneeling throughout the day. Crops: tomatoes.

(AF 158, 179).

The CO further stated that, because Employer requested Farmworkers and Laborers Crop for each month of the year, “the employer’s job opportunity does not appear to be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle.” Additionally, CO stated Employer’s website suggests Employer operates a year-round greenhouse operation as further proof that the job is not temporary. Thus, the CO concluded, based on Employer’s requested dates of need, it had not established how the job opportunity is temporary, rather than permanent and full-time, in nature. (AF 63).

The CO requested a detailed explanation and supporting documentation addressing why the job opportunity should be considered seasonal or temporary rather than permanent in nature. The CO stated the explanation must include the following:

1. A detailed explanation as to why the employer’s 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;
2. 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;
3. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation outside the requested period of need;
4. Summarized monthly production numbers for the calendar years 2018 and 2019 that clearly show the number of tomatoes, and other fruits or vegetables, produced and packed each month at the employer’s worksite; and

5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 64).

On May 21, 2020, Employer responded to the NOD. (AF 52-57). In support of its temporary need, Employer submitted a statement addressing its need for two different jobs with different job duties, a monthly payroll report and monthly production numbers.

In its statement, the Employer explained that it has a seasonal need for Greenhouse workers from July 15 through May 15, and Packers from October 1 through August 1; both jobs require a different seasonal need. The Employer argued that the NPC has historically acknowledged both seasonal needs since the NPC understood that the jobs were different, and "it is unclear why the RFE claims that the job descriptions are the same as that clearly is not accurate and indicates they were not reviewed closely." (AF 53). The Employer asserted that Greenhouse workers are needed from July 15 to May 15 because, beginning in mid-July, a labor increase is necessary to commence the planting process to "plant, string tie, prune, de-leaf, twist, clip, etc." The Employer submitted its production numbers to corroborate that greenhouses are not a year-round since its production capacity is reduced in the hotter months due to the greenhouse's design features that keep it warm and insulated in the winter season. Additionally, the Employer's labor needs decrease by 70% from mid-May to mid-July from plants being "topped" in May stopping production, summer heat, and the elimination of biological application in the greenhouse. *Id.*

Similarly, the Employer explained that it has a seasonal need for Packers beginning in October, a month after the start of tomato production, through August. The Employer stated that Packers' job duties include "cleaning containers, materials, supplies, work areas, and produce and packing grading, boxing, and labeling the produce" in the warehouse. *Id.* The Employer noted Packers are not involved in the greenhouse production of produce. Employer further explained Packers are necessary through July to complete the packing of tomatoes that were produced throughout the production season. *Id.*

The Employer additionally argued that, without seasonal Greenhouse workers from mid-July through mid-May, it may be unable to locate enough local laborers to meet its labor demand, causing a negative impact on the company, potentially resulting in a shutdown of its plant. The Employer also stated that permanent and seasonal greenhouse workers perform the same job, but due to the limited production in the summer, permanent workers can complete the work without the help of supplemental labor.

In its response, the Employer submitted a statement addressing its “business, history, activities, and schedule of operations,” and an explanation of its origin, goals, and gross sales. The Employer explained that it originated in Canada in 2000, before expanding its operations into in the United States in February 2015. Its stated goal is to become the largest, highest quality, local producer of premium vegetables; and its year-to-date gross sales are greater than \$25 million. (AF 54).

Employer attached records of the monthly tomatoes production for the 2019 Calendar Year and the 2018 – 2019 Fiscal Year, 2019 Greenhouse payroll, and 2019 – 2020 Packhouse payroll. (AF 55-57).

Calendar Year Kg's (2019)			
Date	TOV Tomatoes	Beef tomatoes	Specialty. Tom.
Jan-19	736,968	312,659	237,176
Feb-19	574,143	292,159	195,326
Mar-19	796,599	322,239	230,251
Apr-19	691,511	282,911	234,468
May-19	806,499	337,985	256,601
Jun-19	570,946	236,913	233,114
Jul-19	282,615	151,218	39,438
Aug-19			
Sep-19	255,464	133,741	186,549
Oct-19	457,781	440,148	204,082
Nov-19	483,152	422,981	168,431
Dec-19	509,754	444,620	199,113
Total	6,165,432	3,377,574	2,184,549

Fiscal Year Kg's (2018 to 2019)			
Date	TOV Tomatoes	Beef tomatoes	Specialty. Tom.
Sep-18	177,985	83,836	196,094
Oct-18	403,495	153,279	158,032
Nov-18	649,352	324,801	272,574
Dec-18	630,022	277,877	235,155
Jan-19	736,968	312,659	237,176
Feb-19	574,143	292,159	195,326
Mar-19	796,599	322,239	230,251
Apr-19	691,511	282,911	234,468
May-19	806,499	337,985	256,601
Jun-19	570,946	236,913	233,114
Jul-19	282,615	151,218	39,438
Aug-19	-	-	-
	6,320,135	2,775,877	2,288,229

**Nature Fresh Farms
Greenhouse payroll 2019**

Month	Monthly Payroll	Total hours worked	# of Greenhouse Emp	
			Permanent	Temporary
January	\$201,928.99	14,843.29	15	53
February	\$175,384.86	13,156.38	18	53
March	\$183,646.06	14,316.57	17	53
April	\$188,881.10	14,220.97	16	52
May	\$123,430.04	8,390.00	24	52
June	\$42,851.17	3,163.58	23	0
July	\$75,271.00	5,650.17	16	40
August	\$156,424.35	11,480.73	7	65
September	\$187,093.53	13,209.40	5	66
October	\$231,428.46	15,888.64	5	67
November	\$226,101.40	15,285.49	7	68
December	\$237,176.99	16,006.76	9	67
TOTALS	\$1,468,658.04	145,611.98		

**Nature Fresh Farms
Packinghouse Payroll 2019/2020**

Month	Monthly Payroll	Total hours worked	# of Packinghouse Emp	
			Permanent	Temporary
January, 2019	\$13,716.07	841.60	5	0
February, 2019	\$8,214.93	543.80	4	0
March, 2019	\$10,074.85	611.87	3	0
April, 2019	\$6,775.49	465.54	4	0
May, 2019	\$9,973.63	643.98	5	0
June, 2019	\$10,735.50	669.21	6	0
July, 2019	\$12,534.22	847.03	7	0
August, 2019	\$15,446.98	1,089.50	11	0
September, 2019	\$13,234.77	938.51	9	0
October, 2019	\$8,402.04	586.57	6	0
November, 2019	\$23,909.31	1,716.44	4	35
December, 2019	\$105,439.79	7,899.29	2	35
January, 2020	\$126,478.39	8,704.87	2	34
February, 2020	\$94,191.93	6,487.05	1	32
March, 2020	\$100,978.34	6,954.43	4	32
April, 2020	\$112,183.86	7,726.16	7	32
TOTALS	\$640,284.25	46,725.85		

The Employer averred that its payroll was a clear indication of its seasonal need for both Greenhouse workers and warehouse Packers.

On June 1, 2020, the CO issued a Notice of Deficiency. (AF 33-39). The CO noted parts of Employer's response to the previous Notice of Deficiency, stating that Employer's data does not establish a need for seasonal greenhouse work. Specifically, the CO stated tomatoes were produced every month from September 2018, to December 2019, except for August 2019, and production of all types of tomatoes during the period of October to August, when seasonal greenhouse workers are purportedly not needed, occasionally exceeded the July through May period's production. Furthermore, the Employer's greenhouse payroll reports indicated the hiring of temporary workers every month except June 2019. Similarly, the Employer's payroll showed that Packinghouse employees are not needed because Employer only utilized temporary workings from November to December.

The CO quoted the Employer’s website: “We are a family owned & operated greenhouse operation with facilities in Leamington, Ontario and Delta, Ohio that enables us to grow year-round,”¹ as proof of a year-round growing operation. (AF 36). The CO also noted Employer’s explanation regarding seasonal job duties for the two positions, but determined that Employer had not demonstrated that the applications represent distinct occupations. Thus, the CO determined “employer’s explanation failed to demonstrate either a seasonal or a temporary need for H-2A workers. Therefore, this application for 70 Farmworkers and Laborers, Crop, Nursery, and Greenhouse job opportunity is denied.”

On June 5, 2020, the Employer filed a brief requesting an appeal before the Board of Alien Labor Certification Appeals and a reversal of the CO’s denial of its H-2A application. In its request for review, Employer expressed its disagreement with the denial and asserted that the CO erroneously compared two different job descriptions for Greenhouse Workers and Packers, the jobs are not for the same job location, the jobs were erroneously assigned the same SOC codes by Ohio State Workforce Agency, and its need is seasonal and backed by data.²

On June 15, 2020, the undersigned held a teleconference with the parties to clarify whether Employer sought a de novo hearing under 20 C.F.R. § 655.171(b) or an administrative review under 20 C.F.R. § 655.171(a). Employer requested an administrative review.

Pursuant to the schedule discussed during the teleconference, and by Order dated June 15, 2020, the undersigned permitted the parties to submit briefs by June 16, 2020. The Solicitor, on behalf of the CO, submitted a brief supporting CO’s denial of Employer’s H-2A application on June 16, 2020. The Employer submitted its brief in support of its appeal on June 16, 2020, reiterating its position that greenhouse workers and packers are separate positions.³

ISSUE

Whether Employer has met 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

This case arises from the Employer’s request for administrative review regarding the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program.

Pursuant to 20 C.F.R. § 655.171(a), upon a request for an administrative review, “the ALJ will, on the basis of the written record and after due consideration of any written

¹ <https://www.naturefresh.ca/greenhouse-education-center/>

² The Employer’s request for review presented certain factual information that was not before the CO when the CO’s determination was made; thus, in accordance with 20 C.F.R. § 655.171(a), this information will not be considered.

³ The Employer’s brief also contained additional documents that will not be considered since the documents were not present before the CO, in accordance with 20 C.F.R. § 655.171(a).

submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse or modify the CO's decision, or remand to the CO for further action." The administrative law judge presiding over the case "must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law." *See also J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) ("BALCA reviews decisions under an arbitrary and capricious standard."). Thus, the Employer may not refer to evidence not part of the record before the CO when the CO's determination, even if such evidence is in the appeal file, request for review, or legal briefs. *See Goldenview Dairy, Inc.*, 2020-TLC-00049 (April 7, 2020).

APPLICABLE LAW

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). 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, it is not an arbitrary rule).

DISCUSSION

For purposes of the H-2A temporary alien labor certification program, when determining a temporary need, 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).

To utilize the H-2A program, it is Employer's burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal in nature. 20 C.F.R. § 655.161(a). It is well established that the H-2A program exists to fill only temporary or seasonal labor needs; therefore, the need for a particular position cannot be a year-round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). Concerning 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). Also, 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). Generally, a seasonal need has been interpreted to be 10 months or fewer. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008).

In administering the H-2A program, the Board of Alien Labor Certification Appeals ("BALCA") has resisted efforts to use temporary labor certification to fill particular positions of permanent or year-round employment need. BALCA has also "consistently found that the CO can review the situation as a whole . . . and need not confine the analysis to the existing application." *See Larry Ulmer*, 2015-TLC00003, slip op. at 4 (Nov. 4, 2014)(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.").

In several cases, employers have gone to great lengths in their attempts to characterize what is a year-round need for a particular position as a seasonal need. However, a need is not seasonal if the employer can manipulate the season to fit the criteria of the temporary labor certification program. *See Salt Wells Cattle Company, LLC*, 2011-TLC-00185 (Feb. 8, 2011)(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 is not seasonal according to the definition established at 20 C.F.R. § 655.103(d)). Further, an employer is required to justify a change in its dates of need to ensure it is not manipulating its "season" when it really has a year-round need. *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015). *See Katie Heger*, 2014 TLC-00001 (November 12, 2013)(Denying certification where two applications covering entire year reflected "same job title, job duties, job requirements and were filed by different but related parties for the same worksite"). *See also Sugar Loaf Cattle Co., LLC*, 2016-TLC-00033 (April 6, 2016).

In the instant case, the Employer's application requested H-2A temporary labor certification for 70 farmworkers under the SOC occupation title of Farmworkers and Laborers, Crop, (SOC Code 45-2092.02) for the period beginning July 15, 2020, and ending May 15, 2021. The CO determined that Employer had not established that its employment need for the farm worker position in the current application is separate and distinct from its requests for farmworkers in its prior applications, and that its requests for farmworkers covered more than a year. The CO noted that the three previous applications for farmworkers covered the period July 15, 2019 through August 1, 2020. When the current requested period of need is also considered

the dates of need for the farmworker position would cover the period of July 15, 2019 through May 15, 2021.

Employer argues in its response to the CO, and in its brief, that the two positions are distinct with the current application covering the greenhouse position and the two previous applications covering the packing house position. It is significant to note, however, that all of the requested temporary workers fall under the same SOC occupation title of Farmworkers and Laborers, with the same SOC Code of 45-2092.02.

BALCA has consistently held that the seasonal variations of a farm laborer position are not determinative of the Employer's seasonal need but rather it is the need for the labor itself that must be considered in determining whether the Employer has proven a seasonal need. *See 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 would appear from the record that although the farmworker's duties may vary by the season the Employer's need for these farmworkers is year round. The CO correctly points out that the dates of need in Employer's various applications appear to shift continuously and do not reflect an established season. 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). Without a justification as to the sudden shift in its application dates, Employer has failed to show how its period of need is "tied to a certain time of year by an event or pattern." 20 C.F.R. § 655.103(d); *see Fegley Grain Cleaning*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)("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.").

Employer argues that Greenhouse workers and Packers are separate jobs with different seasonal needs. However, the CO noted similarities among the two positions, specifically the cleaning of produce and work area and the clipping, packing, and sorting of produce. Though the job duties seem different at first glance, the similarities remain enough to consider them the same position with variances throughout the year. All jobs fall under the same SOC occupation title of Farmworkers and Laborers, Crop with the same SOC Code of 45-2092.02.

Moreover, the Employer's argument that Greenhouse workers and Packers are separate jobs with different seasonal needs is inconsistent with its previous H-2A applications. The Employer argued that its seasonal need for Greenhouse workers begins in mid-July, while its seasonal need for Packers commences in October, a month after the start of tomato production. Meanwhile, the Employer's prior application (H-300-20031-289656) is for "farmworkers" from April 15, 2020, through August 1, 2020; yet it listed the same job duties as Employer's application (H-300-19200-977227) for "farmworkers" from October 1, 2019, through August 1, 2020. The CO did not abuse his discretion in questioning these overlapping and shifting periods.

An employer must also demonstrate that its need requires labor levels far above those necessary for ongoing operations. However, where an employer fails to provide evidence that it needs more workers in certain months than other months of the year, an employer's certification must be denied. *Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999)(*en banc*)(a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)).

Moreover, the purpose of the H-2A program is to supplement an employer's permanent workforce. See *Salt Wells Cattle Co.*, 2010-TLC-00134 (Sept. 29, 2010)(an employer cannot continually shift its period of need in order to utilize the H-2A program to fill a permanent need); *Mapleview Dairy, LLC*, 2020-TLC-00013, slip op. at 5 (Dec. 4, 2019); and *Frost Wines, LLC*, 2019-TLC-00042, at 5-6 (Apr. 18, 2019)(where an ALJ found that employer did not have a seasonal need for extra labor, but rather had a "seasonal need to lay off workers when operations slow").

Here, it appears from the record that Employer is utilizing the H-2A program to provide for the vast majority of its workforce throughout the year. According to Employer's payroll, Employer's temporary workforce from the H-2A program remained constant while its permanent employees fluctuated throughout the year.⁴ Additionally, Employer's workforce is composed of significantly less permanent employees than of temporary employees from the H-2A program, and the permanent workforce tends to decrease in correlation with an increase in the H-2A program. Therefore, the Employer's reliance on the H-2A program may be misplaced because the Employer's requested need for labor in its current application appears to be a permanent need rather than a seasonal need.

Based upon the record, the Employer has failed to meet its burden of proving its seasonal need for seventy (70) farmworkers under the SOC occupation title of Farmworkers and Laborers, Crop for the period beginning July 15, 2020, and ending May 15, 2021. Accordingly, the CO did not act arbitrarily or capriciously in denying this application for temporary labor certification.

CONCLUSION

Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). Therefore, the basis for the CO's issuance of the June 2, 2020 Denial is affirmed.

⁴ Temporary employees from the H-2A program remained relatively constant for Greenhouse workers every month except June 2019, and for Packers from November 2019, to the present.

ORDER

Employer has failed to establish that its application for temporary labor certification should be accepted for processing, as Employer has failed to establish its need for labor as requested in its application is temporary or seasonal pursuant to 20 C.F.R. § 655.103(d). Accordingly, it is hereby **ORDERED** that the Certifying Officer's Denial is **AFFIRMED**.

SEAN M. RAMALEY
Administrative Law Judge