



**Issue Date: 20 May 2020**

OALJ Case No.: 2020-TLC-00067  
ETA Case No.: H-300-20081-426089

***In the Matter of:***

**WILLIAMS FARMS, LLC**  
*Employer.*

Appearance: Steven McKay, Lay Representative  
H2 Express, Inc.  
*For the Employer*

Nicole I. Schroeder, Esquire and Rebecca Nielsen, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Patricia J. Daum  
Administrative Law Judge

**DECISION AND ORDER REVERSING THE 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 H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On May 4, 2020, Williams Farms, LLC ("Employer"), filed a request for a *de novo* administrative hearing pursuant to 20 C.F.R. § 655.171(b) to review the Certifying Officer's (CO) April 28, 2020 Denial determination in regard to Employer's temporary alien agricultural labor certification (H-2A) application. The undersigned received the Administrative File (AF) on May 5, 2020. A telephone conference call with Counsel/representatives for the parties was conducted on May 7, 2020, in which the parties agreed to a telephone hearing on this matter which was set for May 12, 2020.

On May 12, 2020, the undersigned conducted a telephonic hearing where all parties were represented and afforded the opportunity to present witnesses, introduce exhibits, and cross-examine. This decision and order is based on the record consisting of the Revised Administrative File forwarded by the U.S. Department of Labor, Employment and Training Administration (“ETA”), the parties’ exhibits, and the testimony offered at the hearing.<sup>1</sup> Furthermore, this Decision and Order is issued within ten calendar days of the hearing as required by the regulation at 20 C.F.R. §655.171(b)(1)(iii).

## **BACKGROUND**

On March 27, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* including ETA Forms 9142A, 790, 790A and Addendums. AF 47-65. The Employer’s application requested certification for four H-2A workers under the occupational title “Farmworkers and Laborers, Crop” for the period beginning June 1, 2020 and ending March 31, 2021. AF 55. The nature of temporary need was listed as seasonal. No statement of temporary need was included with the application. Stated job duties were noted as “Help lead and participate in harvest of apples and pruning and planting of apple trees, weed orchard, assist in pack/sort operations of potatoes and onions and maintaining warehouse and farm in general. *Id.* In regard to work experience, three months was noted, and job requirements included a lifting requirement of 75 pounds. AF 56.

On April 3, 2020, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) identifying two deficiencies in the Employer’s application. AF 33-37. The first deficiency noted is the Employer’s failure to establish its job opportunity as “temporary or seasonal in nature.” The second deficiency pertains to the required amount to be provided for “transportation and subsistence.” As the second deficiency has apparently been remedied, it will not be addressed further in this decision.

In regard to the first deficiency the CO determined that the Employer did not sufficiently demonstrate that the job opportunity is temporary or seasonal in nature citing 20 C.F.R. § 655.103(d) which defines temporary or seasonal need. In pertinent part, 20 C.F.R. § 655.103(d) provides:

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.

The CO 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.” AF 35.

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<sup>1</sup> References to the Administrative File are designated as “AF,” Employer’s Exhibits as “EX,” Certifying Officer’s Exhibits as “CX” and references to the transcript are designated as TR.

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>
<b>H-300-17206-83660</b>	Williams Farms LLC	Certified -Full	09/11/2017	11/15/2017
<b>H-300-18197-99097</b>	Williams Farms LLC	Certified -Full	9/04/2018	11/26/2018
<b>H-300-19190-62360</b>	Williams Farms LLC	Certified -Full	09/10/2019	11/15/2019
<b>H-300-19190-883434</b>	Williams Farms LLC	Certified -Full	09/04/2019	06/20/2020
<b>H-300-20081-42608</b>	Williams Farms LLC	Received	06/01/2020	3/31/2021

The CO determined that the Employer's job opportunity, coupled with the Employer's recent filing history, indicates that the Employer's dates of need are from September 4, 2019 through March 31, 2021 which is a period of 1 year, 6 months and 28 days. AF 35-36. The CO also noted that the prior application with period of need of 9/4/19 - 6/20/19 and the current application with period of need of 6/1/20 - 3/31/21 are requesting workers with the same SOC code of 45-2092. Accordingly, the CO noted that Employer is requesting workers to perform the same job duties, at the same single worksite location, on a year-round basis, and therefore it is unclear how the job opportunity is temporary or seasonal in nature. The CO therefore directed the Employer to explain why its job opportunity is seasonal or temporary and also explain in detail why its dates of need have significantly changed from its established season of early September through mid-November, to a new and different season from early September through mid-June, to its current request of early June through the end of March. AF 36-37.

Employer responded to the Notice of Deficiency on April 4, 2020. AF 31-32. The Employer explained its seasonal need for the current application, as well as its varying dates of need as follows:

Last year William's farm submitted two applications at approximately the same time. One was for harvesting, and consistent with past applications that were made for September to mid-November. The dates for these harvesting contracts varied a bit based on the projections for the year (as weather conditions vary a bit from year to year). Another contract was made that included more responsibilities besides harvesting. The farm had needed these workers earlier, but were late in making their application since they had not realized they could have two different contracts for different activities that take place at different times of the year. They have refined their schedule for 2020, and they plan to maintain this schedule for four workers consistently from year to year. The farm was lucky to have the workers in April and May this year because they will be able to help with some

tree planting that is normally not needed. The schedule has been adjusted to one that will work more ideally for the company.

AF 31.

Employer provided the following schedule for its 10 month seasonal need:

June:	thinning, suckering, weeding, farm maintenance
July:	thinning, suckering, summer pruning, weeding, pack and sort potatoes, onions, apples, farm and warehouse maintenance
August:	summer pruning, harvest, pack and sort potatoes, onions, apples, farm and warehouse maintenance
September:	weeding, harvest, pack and sort apples, farm and warehouse maintenance
October:	harvest, pack and sort apples, farm and warehouse maintenance
November:	pack and sort apples, farm and warehouse maintenance
December:	pack and sort apples, pruning, farm and warehouse maintenance
January:	pack and sort apples, pruning, farm and warehouse maintenance
February:	pruning, farm maintenance
March:	pruning, farm maintenance

April and May: no activity

Employer further stated that “This contract is seasonal because the activity for these four workers ceases in April and May and they are laid off then.” *Id.*

Employer also explained that the previous applications for workers during the harvest season, September through November, had not changed, and would still be filed as in previous years. Employer asserted that the two contracts/applications were different and unique and had their own job descriptions. The job description for the September through November harvest workers is as follows: “Weed fields; harvest, sort, stack, potatoes and onions; harvest apples; pack apples, potatoes, and onions, move stock and clean warehouse.” The job description for the current application between June and March, is, “Help lead and participate in harvest of apples and pruning and planting of apple trees; weed orchard, assist in pack/sort operations of potatoes and onions and maintaining warehouse and farm in general.” AF 31-32.

On April 9, 2020 the CO issued a Notice of Required Modification (“NRM”). AF 25-30. The CO noted the above response filed by the Employer. The CO stated: While the employer has pointed to seasonal differences in the job duties within the period of need it has not demonstrated that the applications represent distinct occupations. Furthermore, when combined, the dates of need for the applications referenced above total 1 year, 6 month, 28 days which is beyond 10 months. Therefore, it is unclear how this job opportunity is temporary or seasonal in nature.” The CO again requested clarification of the seasonal need and directed the Employer to submit supporting evidence in the form of summarized payroll reports for two years (2018 and 2019) which identify the total number of workers, total hours worked and total earnings shown separately for permanent and temporary employment in the designated occupation. AF 30.

On April 13, 2020, the Employer responded to the NRM, primarily providing explanation as to how the two positions differ and providing a listing of the job duties for the longer term position and the harvest season petition. Employer also provided payroll information for 2018 and 2019 for the position of “Farm workers: pruning, harvest and maintenance.” AF 21-24.

The CO issued a Final Determination denying the application on April 28, 2020. AF 11-17. In regard to the payroll information submitted the CO stated:

The payroll that was submitted in response to the NRM showed that the employer employed four (4) to nine (9) temporary workers under the Designated Occupation: Farm Workers, Pruning, Harvest, Maintenance between January through March and June through December of 2018 and 2019. However, the employer is now asking for dates of need of June 1, 2020 through March 31, 2021.

AF 15.

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.

The CO also noted that the current certification period included workers for April and May of 2020 which is inconsistent with Employer’s representation that April and May represent downtime when workers are not needed. The CO again noted the Employer’s filing history and concluded “based on the employer’s requested dates of need, and the previously established dates of need, the employer has failed to prove that it has a temporary or seasonal need.” AF 17.

On May 4, 2020, Employer timely requested a de novo hearing in regard to the CO’s Denial of its H-2A application. AF 1-10.

### **EVIDENCE AND ARGUMENT**

A de novo hearing in this matter was held on May 12, 2020. The Administrative File (CX 1) was admitted without objection. TR 7-8. Employer offered, as Employer Exhibits, the May 4, 2020 statement of Mark Wiltberger of the Cornell Cooperative Extension, Lake Ontario Fruit Program, (AF 5), as well as Employer’s letter requesting de novo hearing in this matter (AF 1-4). TR 8. Both documents were admitted without objection. TR 9.

The Employer called John Williams, a partner in Williams Farms, LLC, to testify on behalf of the Employer. The Solicitor called Certifying Officer Alejandra Dominguez to testify on behalf of the Certifying Officer.

#### *A. Summary of Testimony*

## John Williams

John Williams, a partner in Williams Farms, LLC (See AF 47) was called as a witness by the Employer. He testified generally to the differences in the two jobs for which applications had been filed and his need for these temporary workers. He testified that his need for extra apple pickers is generally, depending on the weather, approximately September 10th until mid to late November. The apple pickers do their job solely while the apples are being harvested and therefore are only needed until mid to late November. TR 17. He stated that the other workers, which are needed for a more extended period perform additional jobs such as running equipment, moving pallet boxes around, loading trucks, as well as mowing, spraying, fertilizing, and also pruning and training the trees. These extended workers are requested from June until March. TR 17-19.

In regard to payroll, he confirmed that there were extra people, totaling about six or seven employees, on the payroll during harvest season. Mr. Williams testified that once the apple pickers are gone the other workers will begin clean up and then start pruning trees, January through the end of March. TR 19. He noted that additional skills were required for pruning, where the trees have to be trained properly to maximize production, as opposed to the more basic labor involved with picking apples and placing them in a box. *Id.* In regard to the pruners, he noted, “And those guys, we like to work with for a few months and get them trained to do the job like we like it done, to grow the best tree possible.” *Id.* He noted this dormant pruning occurs January through March. In regard to summer pruning he stated, “With fresh fruit we like to go through and what happens is when you dormant prune, you make cuts on the tree, and in the summertime, those cuts will sometimes regrow a new shoot. So we like to pull off those shoots, keep the trees opened up with as much light as possible to try to get the best finish, the best color possible on the apples.” TR 19-20.

Williams also elaborated on summertime job tasks that the workers perform. He stated:

Also, summertime is a time for keeping the weeds down under the trees, and we will hand-thin. There’s no mechanical way to really thin the apples. There’s chemical thinning which knocks off a fair amount, but to get it more precise, you have to hand-thin the fresh fruit to make it the right size—the right number of apples hanging on that tree to get the right size for the best market for the highest dollar return back to us. And that takes a fair amount of guys to do that. It’s a very tedious job.

TR 20.

In addition to the duties previously noted, Williams testified that the four workers requested for the period June 1, 2020 through March 31, 2020 would perform additional duties during the harvest season. He stated the following regarding the harvest duties for the four extended workers:

[These workers would be] running the equipment ...pulling the pallet boxes out of the orchards, bringing them to the storages, keeping their eye on the [apple pickers] to make sure that everything is going the way it is supposed to be going. Keeping track of what the guys pick per day, and making sure that they take their breaks, that their restrooms are there; you know, we need help with all that stuff, keeping things straight. So it's quite a job really, but it works.

TR 20-21.

Williams testified that work is limited in April and May when the orchard only has a couple of individuals spraying as necessary. *Id.*

During cross examination Mr. Williams confirmed that prior to 2019 he had not hired H-2A workers from December to March to do pruning and packing. He stated that he had previously hired local workers who are no longer available. He noted the possibility that the documentation of the local workers may not have been proper and that they may have been removed by border patrol. He testified that he no longer has workers applying for the position in question. TR 23. He referred to his payroll summary, found at AF 24, and noted that in 2018 and 2019 he had four workers in December. The payroll summary notes the job description for these workers as "farm workers-pruning, harvest, maintenance." He testified that in December they would have been helping finish up the packing and then depending on the weather they would have started to prune trees. TR 23. He also testified that in regard to the job in question he did not hire any permanent workers to perform this job, noting that he does not hire a permanent tree trimmer for twelve months out of the year nor a permanent apple picker for twelve months out of the year. He confirmed that he hires permanent people but not for these positions. The permanent workers work primarily in the packing house. They use H-2A people when it is harvest time and time to prune and take care of the orchard. TR 28. He also clarified that in 2018 the temporary workers who performed pruning and orchard maintenance were not from the H-2A program. But in 2019 they did use the H-2A program for the winter jobs. TR 29. He also clarified that previous H-2A workers who performed apple picking between September and November, did not perform pruning as that task is not performed between September and November. TR 30.

Employer also testified that in the future he anticipated that he would need the temporary H-2A workers from June until March, with a bump up of workers in the fall. He noted that April and May are the slowest time of the year for fruit production. TR 31.

### Alejandra Dominguez

Certifying Officer, Alejandra Dominguez (CO) was called as a witness by the Solicitor. Ms. Dominguez testified that she began working as a certifying officer at the Chicago National Processing Center in May of 2015. TR 33. Ms. Dominguez testified that the current application came to her attention because of the Employer's filing history and the changing dates of need. TR 33. She stated that the Employer had an established filing history dating back to 2016 with dates of need of September through November for the job with a SOC Code 45-2092. Applications with dates of need of September through November were filed in 2016, 2017 and

2018. *Id.* In 2019 a new application was filed with dates of need from September 4, 2019 to June 20, 2020. She stated that after a notice of deficiency was issued Employer responded that the application was for a new small crew that was to help with pruning in addition to the harvesting and picking. TR 33-34. She noted that certification was granted for the application with the September 4, 2019 to June 20, 2020 dates of need. However, when the new application, covering June 1, 2020 to March 31, 2020, was filed, her office realized that the job duties in the current application were the same as the prior application and in fact, all of the application since 2016 had similar job duties. She testified that this triggered the initial notice of deficiency with the current application. TR 34.

Ms. Dominguez discussed the H-2A application process in general noting pursuant to the regulation at 20 C.F.R. § 655.161 that the Employer must establish it has a need for agricultural services to be performed on a temporary or seasonal basis and that there are insufficient U.S workers to fill the Employer's job opportunity. She further noted that the purpose of the H-2A program is to fill a temporary need but not to address an Employer's year-round employment needs. TR 34-35.

The Certifying Officer went through the administrative file noting the details of the application as well as the notice of deficiency. Specifically, she noted that the current application requests four H-2A workers for the period June 1, 2020 through March 31, 2020, with an experience requirement of three months and a lifting requirement of 75 pounds. TR 36-37. She noted the job duties listed were, "Help, lead, and participate in harvest of apples, and pruning and planting of apple trees. Weed orchard, assist and pack/sort operations of potatoes and onions, and maintaining warehouse and farm in general." Ms. Dominguez noted these were similar job duties as noted in the filings with dates of need from September to November, as well as the prior application with dates of need of September 4, 2019 to June 20, 2020. TR 37-39. She noted that the SOC code for all of the applications was also the same. TR 40. She admitted however, that the SOC codes are fairly broad and meant to encompass a wide variety of job duties. TR 41-42.

Ms. Dominguez noted that Employer did not adequately explain the differences in the job duties in the current and prior applications and therefore the current application was denied. TR 45. She noted, based on the information in the files, it appeared that the Employer has a year round need and was attempting to carve out two separate job opportunities where there are not two and therefore the application was denied. TR 45.

Upon questioning Ms. Dominguez admitted that if an Employer can show a temporary need it is not a problem that the need may increase for a certain period, so long as two applications are filed. TR 46-47. She also clarified that even when an historical pattern is established, it is possible for that pattern to change. She also confirmed that she has no evidence to the contrary which would contradict the Employer's representation that going forward its future applications would show similar periods of need as indicated in the current application. TR 47.

*B. Argument of the Parties*

At the close of the telephonic hearing the parties presented brief closing statements and were also granted leave to file written closing briefs on or before May 19, 2020. Both parties filed timely post hearing briefs.

### *1. The Employer*

In its closing statement Employer primarily reiterates the positions taken in its submissions to the CO which are contained in the administrative file, as well as those articulated at the hearing. Specifically, Employer states that its short term need for helpers during harvest has remained consistent through its filing history, but the farm is adjusting to its need for workers who help lead in the harvest, do pruning, and do other maintenance activities to help run the farm.

The Employer again explains its position that the prior application which was filed for dates of November 2019 through June 20, 2020 would “ideally” have reflected a start date of June but had been filed late. Further, the temporary period of temporary employment need in the previous application would normally have ended by the end of March, but as the farm “had a one- time planting planned for April 2020,” it was decided that the workers would be requested through June 20, 2020. Employer restates its previously expressed intention that it would revert to a schedule of requesting workers from June through March, as April and May are down times in the orchard when labor is not needed.

Employer asserts that this orchard schedule (including down time in April and May) is consistent with “the standard/semi-dwarf apple planting system used in [New York State],” as confirmed by the May 4, 2020 statement of Mark Wiltberger of the Cornell Cooperative Extension, Lake Ontario Fruit Program, which is found at AF 5, and which was admitted as an Employer exhibit at the hearing.

Employer also reiterates the differences in the two H-2A positions as stated at the hearing. These positions consist of the short term harvest position with dates of need between September and November each year, and the extended position which involves orchard maintenance, pruning weeding, and planting, as well as leading and participating in the harvesting of the apples.

### *2. The Certifying Officer*

The Solicitor submitted a closing brief on behalf of the CO urging that the undersigned affirm the CO’s determination. In its brief the CO restates the facts regarding the dates of need and the job descriptions in the Employer’s current and previous applications. The CO stresses that these applications reflect an established filing history whereby for years 2016, 2017 and 2018 Employer only requested farm laborers under the SOC Code 45-2092 in the months of September through November. However, Employer’s previous application, which was certified, requested an extended period from November to June 20, 2020 and the current application

requests H-2A workers for the period of June 1, 2020 through March 31, 2020. The CO asserts that all of these applications request workers with essentially the same job description with only minor variations and all fall under the same SOC Code 45-2092 with the job title of “farm worker.”

The CO points out that when the previous application, covering period of need from September 2019 to June 20, 2020, and the current application, requesting a period of need of June 1, 2020 through March 31, 2021, are viewed in conjunction, the periods of requested need extend from September 2019 to March 2021, which is a period of one year, six months and 28 days. Thus, the CO asserts that the Employer’s need is not a seasonal need but in fact, reflects a year-round need. The CO also asserts that the job duties requested in all of the Employer’s applications are essentially the same and do not represent distinct job opportunities.

The CO cites case law for the general principles that it is Employer’s burden to prove its temporary or seasonal need, that it is necessary for the Employer to establish when the Employer’s season occurs, and how the need for labor or services during this time of the year differ from other times of the year, and also that it is appropriate for the CO to question a seasonal or temporary need that lasts for more than ten months.

The CO asserts that since the Employer’s applications show a year round need for labor, the Employer has failed to meet its burden under the H-2A regulations of proving it has a temporary or seasonal need for agricultural labor or services. Accordingly, the Solicitor urges the undersigned to affirm the CO’s denial of Employer’s current H-2A application.

## **ISSUE**

Whether the Employer has met its burden of establishing that its need for agricultural labor or services as stated in its current H-2A application is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. §655.103(d)?

## **SCOPE OF REVIEW**

The current case arises from the Employer’s request for a de novo hearing in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program. The regulation pertaining to appeals of the CO’s determinations in H-2A labor certification matters states, in cases where a de novo hearing has been requested, that the procedures in 29 C.F.R. Part 18 apply and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. §655.171(b)(ii).

In pertinent part, the regulations further provide that after a de novo hearing “the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken...The Decision of the ALJ is the final decision of the Secretary.” 20 C.F.R. §655.171(b)(2).

Since neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO, I will review the evidence presented in this case de novo, but will also review the CO's decision for abuse of discretion. *T. Bell Detasselling, LLC*, 2014 TLC 00087, slip op. at 3, fn. 7 (May 29, 2014), citing *RP Consultant's, Inc.*, 2009-JSW-00001, slip op. at 8 (June 30, 2010), and *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug 17, 2001). See also *David Stock*, 2016-TLC-0040 (May 6, 2016) (where "Employer requested de novo review, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification").

## **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 labor or 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, the Employer's application requests temporary labor certification for four farm workers for the period beginning June 1, 2020 and ending March 31, 2020. AF 55. The CO noted that the requested dates of need differ from the previously certified application, which was certified for the period between September 4, 2019 and June 20, 2020. The CO also noted that the job duties listed for the current and previous applications are essentially the same. When these two applications are viewed in conjunction, they cover a period of approximately one year and six months, September 2019 through March 2021.

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, legal precedent supports the CO's position that when the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the changes. *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).

Therefore, based on the filing history in this case the CO acted appropriately in questioning whether the Employer had demonstrated a recurring seasonal need of less than one year in its current application.

However, in this case the record shows that Employer has consistently offered the same explanation for why the dates of need in its previous and current applications are different and why the current application reflects its true seasonal need between June 1<sup>st</sup> and March 31<sup>st</sup>, a period of ten months, which Employer asserts it expects to be its recurring seasonal need going forward.

In response to the initial Notice of Deficiency the Employer stated:

Last year William's farm submitted two applications at approximately the same time. One was for harvesting, and consistent with past applications that were made for September to mid-November. The dates for these harvesting contracts varied a bit based on the projections for the year (as weather conditions vary a bit from year to year). Another contract was made that included more responsibilities

besides harvesting. The farm had needed these workers earlier, but were late in making their application since they had not realized they could have two different contracts for different activities that take place at different times of the year. They have refined their schedule for 2020, and they plan to maintain this schedule for four workers consistently from year to year. The farm was lucky to have the workers in April and May this year because they will be able to help with some tree planting that is normally not needed. The schedule has been adjusted to one that will work more ideally for the company.

AF 31.

Employer provided the following schedule for its 10 month seasonal need:

June:	thinning, suckering, weeding, farm maintenance
July:	thinning, suckering, summer pruning, weeding, pack and sort potatoes, onions, apples, farm and warehouse maintenance
August:	summer pruning, harvest, pack and sort potatoes, onions, apples, farm and warehouse maintenance
September:	weeding, harvest, pack and sort apples, farm and warehouse maintenance
October:	harvest, pack and sort apples, farm and warehouse maintenance
November:	pack and sort apples, farm and warehouse maintenance
December:	pack and sort apples, pruning, farm and warehouse maintenance
January:	pack and sort apples, pruning, farm and warehouse maintenance
February:	pruning, farm maintenance
March:	pruning, farm maintenance

April and May: no activity

Employer further stated that “This contract is seasonal because the activity for these four workers ceases in April and May and they are laid off then.” *Id.* Employer also explained that the previous applications for workers during the harvest season, September through November, had not changed, and would still be filed as in previous years. Employer asserted that the two contracts/applications were different and unique and had their own job descriptions.

The Employer has maintained this explanation consistently throughout the application process. It is also supported by the testimony offered by the Employer at the hearing. John Williams, a partner in Williams Farms, LLC, testified in regard to the farm’s need for temporary workers. Generally, his testimony supports that the shorter term applications between September and November have requested workers primarily for picking apples during the harvest season, while the longer term applications involve more extensive duties related to maintenance of the orchards pruning and additional harvest duties.

He testified that his need for extra apple pickers is generally, depending on the weather, approximately September 10th until mid to late November. TR 17. The apple pickers do their job solely while the apples are being harvested and therefore are only needed until mid to late

November. He stated that the other workers, which are needed for a more extended period perform additional jobs such as running equipment, moving pallet boxes around, loading trucks, as well as mowing, spraying, fertilizing, and also pruning and training the trees. These extended workers are requested from June until March. TR 17-18.

During his testimony Williams detailed the job duties the workers would perform between June and March. He testified that once the apple pickers are gone the other workers will begin clean up and then start pruning trees January through the end of March. TR 19. He noted that additional skills were required for pruning, where the trees have to be trained properly to maximize production, as opposed to the more basic labor involved with picking apples and placing them in a box. *Id.* In regard to the pruners, he noted, “And those guys, we like to work with for a few months and get them trained to do the job like we like it done, to grow the best tree possible.” *Id.* He noted this dormant pruning occurs January through March. In regard to summer pruning he stated, “With fresh fruit we like to go through and what happens is when you dormant prune, you make cuts on the tree, and in the summertime, those cuts will sometimes regrow a new shoot. So we like to pull off those shoots, keep the trees opened up with as much light as possible to try to get the best finish, the best color possible on the apples.” TR 19-20.

Williams also elaborated on summertime job tasks that the workers perform. He stated:

Also, summertime is a time for keeping the weeds down under the trees, and we will hand-thin. There’s no mechanical way to really thin the apples. There’s chemical thinning which knocks off a fair amount, but to get it more precise, you have to hand-thin the fresh fruit to make it the right size—the right number of apples hanging on that tree to get the right size for the best market for the highest dollar return back to us. And that takes a fair amount of guys to do that. It’s a very tedious job.

TR 20.

In addition to the duties previously noted, Williams testified that the four workers requested for the period June 1, 2020 through March 31, 2020 would perform additional duties during the harvest season. He stated the following regarding the harvest duties for the four extended workers:

[These workers would be] running the equipment ...pulling the pallet boxes out of the orchards, bringing them to the storages, keeping their eye on the [apple pickers] to make sure that everything is going the way it is supposed to be going. Keeping track of what the guys pick per day, and making sure that they take their breaks, that their restrooms are there; you know, we need help with all that stuff, keeping things straight. So it’s quite a job really, but it works.

TR 20-21.

Williams testified that work is limited in April and May when the orchard only has a couple of individuals spraying as necessary. *Id.* He also clarified that June until March was the

time he would need to use the H-2A program to supplement his workforce, noting that “[t]he April and May time period is the slowest time of the year for fruit production.” TR 31.

This testimony is consistent with and supports Employer’s schedule of work as noted below and found in the Administrative File at AF 31. This monthly schedule of job duties is consistent with Employer’s request for temporary labor in its current application and is limited to a ten month period.

June:	thinning, suckering, weeding, farm maintenance
July:	thinning, suckering, summer pruning, weeding, pack and sort potatoes, onions, apples, farm and warehouse maintenance
August:	summer pruning, harvest, pack and sort potatoes, onions, apples, farm and warehouse maintenance
September:	weeding, harvest, pack and sort apples, farm and warehouse maintenance
October:	harvest, pack and sort apples, farm and warehouse maintenance
November:	pack and sort apples, farm and warehouse maintenance
December:	pack and sort apples, pruning, farm and warehouse maintenance
January:	pack and sort apples, pruning, farm and warehouse maintenance
February:	pruning, farm maintenance
March:	pruning, farm maintenance

April and May: no activity

As previously noted, in order to prove its seasonal need, an Employer must 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.”).

I find the Employer’s statements in the record regarding its seasonal need, as well as the testimony of John Williams at the hearing, to be consistent and credible. Accordingly, I find that Employer has met its burden of establishing, for its current application, when its ten month season occurs and how the seasonal duties in the months of June through March are different from the months of April and May when workers are not needed.

It would appear that the Employer’s previous application requesting a period of need between September and June did not accurately reflect Employer’s seasonal need as detailed in the outline above.

Employer attempts to explain this discrepancy by alleging that the previous application would have ideally started in June but was delayed as Employer did not file its 2019 application until September. In this regard Employer states in its closing statement, consistent with other statements in the record addressing this issue as follows:

In fall of 2019, the farm was suffering the loss of domestic workers that had been helping to run the farm. John Williams, one of the partners in the farm decided to make two different H2A contracts then, the consistent harvest contract, and another to cover the jobs that the lost workers had been doing. The start date for that contract would have ideally been June, but he figured better to get the workers later than not at all. Normally he would have expected these workers to finish by the end of March, but he had a one-time planting planned for April 2020, and decided to keep the workers into June. The intention would then be to revert to a schedule having workers from June through March, since April and May are down time in his apple orchard where the labor is not needed.

This explanation has been consistently given by the Employer to explain the dates of need used in the previous application which are inconsistent with the current application. As the issue of whether the previous application was properly certified as a seasonal need, or arguably a one-time occurrence, is not before this tribunal, it will not be addressed by the undersigned, nor is any determination made in this regard. Further, although the discrepancy in the dates between the two applications may have justified the CO's decision to question the current application, the discrepancy would not necessarily determine the outcome of the current application, as each application must stand on its own merits. Accordingly, for the reasons stated above, the undersigned finds Employer has met its burden of showing its temporary need covering ten months between June 1, 2020 and March 31, 2020, in the current application, despite the apparent defects in the previous application.

Also, although the Employer's application for extra harvest workers between September and November is also not at issue at this time, it would appear that Employer's statements in the record and testimony have established a clear distinction between the job duties in the current application which include pruning, weeding, orchard maintenance, as well as leading in the harvest duties, as opposed to the job duties of the temporary workers it hires between September and November which involve primarily apple picking. Although all of these workers may fall under the general job title of "Farmworkers and Laborers, Crop" and a SOC Code 45-2092, Employer has established through the record in this case, and hearing testimony, that the requested workers in the extended position and the harvest position will be performing distinctly different duties.

### **CONCLUSION**

For the reasons stated above, I find that that Employer has met its burden of proving its temporary need for four workers under the job title "Farmworkers and Laborers, Crop" for the period beginning June 1, 2020 and ending March 31, 2021, on the basis of a seasonal need, as noted in its H-2A temporary labor certification application. I have based my decision on my review of the administrative file, as well as the evidence, testimony, and argument presented at the May 12, 2020 hearing, and closing briefs. Therefore, the CO's denial of the Employer's application for temporary labor certification for four farm workers for the period beginning June 1, 2020 and ending March 31, 2021 is reversed.

**ORDER**

Accordingly, for the foregoing reasons, the CO's denial of this H-2A application, is **REVERSED**, and this matter is **REMANDED** to the CO for additional processing including regulatory recruitment.

PATRICIA J. DAUM  
Administrative Law Judge