

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 November 2020

Case Nos.: 2021-TLC-00015; 2021-TLC-00020

ETA Case Nos.: H-300-20267-842718; H-300-20267-842347

In the Matters of:

AG LABOR, LLC,

Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Ann Margaret Pointer, Esq.
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For the Employer

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For the Certifying Officer

Before: Hon. Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

1. Jurisdiction and Nature of Appeal. 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. The Certifying Officer (CO) in this matter denied Employer’s Employment and Training Administration (ETA) Forms 9142A and 790 applications for two separate seasonal temporary labor certifications.

Pursuant to 20 C.F.R. § 655.141(b)(4), Employer appealed the denials and requested de novo hearings and review of both applications before an Administrative Law Judge (ALJ).¹

2. Procedural History.

a. On September 24, 2020, the Chicago National Processing Center received two H-2A applications from Employer. One application requested a temporary labor certification for nine (9) First-Line Supervisors of Agricultural Crop and Horticultural Workers job opportunities. (AF 2020-TLC-00015; ETA No.: H-300-20267-842718). The second requested a temporary labor certification for 579 Farmworkers and Laborers, Crop job opportunities. (AF 2020-TLC-00020; ETA No.: H-300-20267-842347).²

b. On September 29 and 30, 2020, the CO issued Notice of Deficiency (NOD) letters to Employer for both the Supervisors and Laborers applications respectively; in pertinent part, the NODs indicated that the applications created questions as to whether Employer's job opportunity represented a seasonal need.

c. On October 6, 2020, Employer responded to the NOD letters in both cases.

d. On October 19 and 29, 2020, after considering Employer's NOD responses, the CO concluded Employer failed to demonstrate that the job opportunities in both the Supervisors or Laborers applications represented a seasonal need as outlined at 20 CFR § 655.103(d), and he denied the applications.

e. After notice of Employer's appeal, the CO transmitted the Administrative Files for the Supervisors and Laborers applications to BALCA on October 29 and November 6, 2020, respectively.

f. On November 10, 2020, for the sake of judicial efficiency, the undersigned consolidated Employer's appeals of both applications into one hearing. The undersigned conducted the consolidated hearing by video on November 17, 2020.³

g. Counsel for Employer and the CO filed post-hearing briefs on November 24, 2020.⁴

3. Statement of the Case. The parties contest whether the Supervisors and Laborers applications sufficiently establish the seasonal need requirements of 20 C. F. R. §655.103(d) necessary for certification approval. Employer asserts the CO erred by concluding Employer's certification history demonstrates a need for year-round field crop laborers that effectively makes the applications non-seasonal.

¹ During a prehearing teleconference with the undersigned, Employer's attorney waived the requirement of 20 C.F.R. § 655.171(b)(ii) for the ALJ to conduct the hearing within 5 business days of receipt of the Administrative File, but she requested it be scheduled as soon as Employer could be ready to proceed.

² Case 2020-TLC-00015 is referred to as the "Supervisors" application and its Administrative File is cited as AF1. Case 2020-TLC-00020 is called the "Laborers" application and its Administrative File is cited as AF2.

³ In appeals where a de novo hearing is requested, the presiding ALJ must issue a decision within 10 calendar days after the hearing. 20 C.F.R. § 655.171(b)(1)(iii)

⁴ Employer's brief is marked as EB. The Certifying Officer's brief is marked as CB.

4. Material and Relevant Evidence Considered.

a. *Exhibits Admitted Into Evidence.* In a de novo hearing, employers are permitted to submit evidence even if it could have been submitted to the CO in response to a NOD. *Westward Orchards*, 2011-TLC-00411 (July 8, 2011). The undersigned admitted the documentary evidence contained in both Administrative Files in this matter. Additionally, Employer offered thirty-nine (39) additional exhibits. The undersigned sustained objections to Employer exhibits, 22, 23, 26, 27, and 28 through 39, and they were not admitted into evidence. Employer's exhibits 1 through 21, 24 and 25 were admitted into evidence. The CO offered one (1) exhibit that was admitted into evidence.⁵ The undersigned considered all exhibits admitted into evidence in this matter.

b. *Testimonial Evidence.* The undersigned fully considered the entire testimony of each witness who appeared at the hearing, resolved any issues of credibility and determined what weight should be given to each witness' testimony. These witnesses gave, in pertinent part, the following relevant sworn testimony:

1) Joel Connell.

Mr. Connell testified generally about his background and job duties as general manager for Circle G Strawberry Farm and Ranch, which is a 750-acre ranch and farm in Hillsborough and Polk counties in west-central Florida. The farm grows fruit and vegetable crops and raises cattle. The farm employs 75 permanent workers – none of whom perform field labor. He's been employed with Circle G Strawberry Farm and Ranch since 2002, and he described his education, farming experience and professional farming affiliations, which includes serving on the Florida Strawberry Farm Growers Association as a board member and past president.

Mr. Connell testified about the general fruit and vegetable growing season for Circle G Strawberry Farm and Ranch and other farms in the same region. He identified squash, peppers, beets, peas and beans as other field crops grown by farmers in the region. He also testified that Circle G Strawberry Farm and Ranch cannot hire the necessary labor force needed to grow and harvest strawberries without using contracts with Employer.

Mr. Connell's testimony was highly credible and uncontradicted by other testimonial or documentary evidence. His significant experience and qualifications are sufficient to provide a foundation for his opinions related to the west-central Florida annual strawberry season, its specific phases and the manner in which farmers perform the numerous tasks and jobs related to producing strawberry crops. He was also highly qualified to express an opinion about how farmers utilize temporary field laborers during strawberry season. The undersigned accorded Mr. Connell's testimony significant weight.

2) Dustin Grooms.

Mr. Grooms testified generally about his background and job duties as the farm manager

⁵ Employer's exhibits are marked with the designator "EX." The CO's exhibit is marked with the designator "CX." Citations to the transcript are by the designator "Tr." and page number (i.e. Tr. p. 1).

at Fancy Farms, a 125-acre strawberry farm business in west-central Florida, where he has worked since 2007. He explained that his parents own the farm operation and he has held the general manager position for the last four years. He testified regarding the length and nature of his business relationship with Employer as his primary source for providing seasonal field laborers. Mr. Grooms' testimony also directly corroborated that of Mr. Connell regarding the typical strawberry growing season and its distinct phases.

Mr. Grooms' testimony was sincere and largely corroborated by the testimony of other witnesses. His testimony contradicted itself on a few instances. However, he clarified the contradictions with reasonable explanations when provided an opportunity to explain. In general, the undersigned considered his testimony largely credible and assigned it sufficient weight.

3) Kenneth Parker. As the Executive Director of the Florida Strawberry Growers Association, Mr. Parker provided testimony that corroborated the testimony of Mr. Connell and Mr. Grooms regarding the nature of farming in the west-central Florida area where Employer does business. His testimony corroborated the general season for strawberry crops. He confirmed that, in his opinion, strawberries are the predominant crop in the region and that some strawberry farms also produce blueberries. He estimated the farms within the 15-mile radius around Plant City produce approximately 95 percent of all the strawberries grown in Florida. He also opined that some farmers still grow vegetables which includes peppers, squash, cantaloupes, watermelons, and some eggplants. He explained that he was aware of no local farmers who produce crops from the middle of June to the end of August. He explained that in Hillsborough County there are very few remaining citrus groves that continue to operate. He explained that this reduces the need for harvest laborers for the citrus industry. He also noted that - to his knowledge - none of the commercial ornamental nurseries in the area employ H-2A labor workers.

Mr. Parker possesses the experience and qualifications necessary to offer opinions regarding the nature of fruit, vegetable and citrus operations in the area where Employer operates. His testimony was sincere and entirely consistent with the testimony of other witnesses. His testimony did not contradict itself, and he clearly addressed and corrected portions of his testimony that may have been confusing as a result of the nature of the questions he was asked. Overall, Mr. Parker provided material and relevant information about the farming industry as it relates to Employer's need for laborers contained in applications that are the subject of this appeal. His testimony was highly credible, and the undersigned assigned it considerable weight.

4) Julio Cruz. As the owner and president of Ag Labor, LLC, Mr. Cruz provided testimony about his company's temporary labor employment need and reasons for the two applications in this case. He also supplemented the information presented in support of the applications and in response to the NODs issued for both applications. He provided additional testimony about the typical field crop labor need for farms in the area that his company services. Overall, his testimony was credible and persuasive and was accorded substantial weight.

5) Mr. John Rodderman.

Mr. Rodderman is the H-2A Certifying Officer who processed both the Supervisors and Laborers applications submitted by Employer in this matter. He testified generally about Employer's past temporary labor applications, the two distinct applications in this matter, the factors he considered in making his determinations, the reasons he issued NODs and why he ultimately denied the applications.

Mr. Rodderman's testimony was at times difficult to follow, but this was largely due to the confusing and compound nature of the questions posed to him by counsel. As a result, his descriptions of the specific factors he considered and the reasons for his determination were difficult to understand. However, with additional clarifying questions, the basis for his concerns and the factors he considered in his decision to deny Employer's applications were sufficiently addressed. Although his testimony contradicted itself on a few instances, he clarified the contradictions with reasonable explanations when provided an opportunity to explain. In general, his testimony was credible and persuasive, and the undersigned accorded it significant weight.

5. Findings of Facts. Based on the parties' stipulations, exhibits and testimonial evidence presented at the hearing, the undersigned makes the following relevant and material findings of fact in this case:

a. Employer is an H-2A Labor Contractor (H-2ALC) company founded in 2014 by Mr. Cruz. The company is headquartered in Plant City, Florida, and he employs two full-time employees who perform administrative job duties. Employer does not directly employ permanent or seasonal agricultural labor workers. As an H-2ALC, Employer enters into labor contracts to provide agricultural workers to farms (also known as "fixed-site growers") in west-central Florida. (AF1 pp. 8-11, 178, 201; AF2 pp. 259, 282; Tr. pp. 170-72)⁶

b. In particular, Employer focuses its labor contracts on providing field harvest laborers to strawberry farms located within a 50-mile radius area centered in Plant City. Typically, the workers he provides to farms primarily perform labor for the planting and harvesting of strawberry crops – although they occasionally work on blueberry crops. Employer focuses on farms that grow those two crops to provide better client service. As a matter of routine, Employer's seasonal laborers do not actually work during the entire time period of an approved temporary labor certification. (EX-6; Tr. pp. 170-75)

c. The normal strawberry crop season begins in early August of one year and ends in mid-April of the next year. In general, a strawberry growing season has several distinct phases: 1) From the beginning to late August, a farm uses field workers to lay black plastic covering over the harvest field area to control soil temperature and fumigate; 2) In September and October, the farms seed the harvest fields and then cultivate the growing of strawberry plants; 3) From November to the beginning of April, the strawberries are continuously harvested from the plants as they grow and ripen. Peak harvest season for strawberries is February and March. Field laborers

⁶ Citations to an Administrative File, exhibits or testimony that support the undersigned's factual findings are not all-inclusive. They simply reference some of the most persuasive evidence among everything in the record that undersigned considered when making the related finding.

must perform strawberry harvesting by hand. In general, the strawberry season ends by the second or third week in April because the increase in heat and humidity causes disease and insect infestation that destroys the plants. From beginning of April until early May, when the strawberry harvest is over, the vines are plowed under and plastic is returned to the harvest fields to enrich the soil. (EX-1; EX-2; EX-4; EX-5; ; Tr. pp. 120-24, 138-48, 173-78, 232-36, 245-49)

d. Predominantly, Employer enters into labor contracts with strawberry farms to provide laborers between mid-August to mid-April during the typical strawberry planting, growing and harvesting season. In general, Employer's off-season consists of the last two weeks of May, the entire months of June and July and the first two weeks of August. (EX-1; EX-2; EX-5; EX-6; EX-7; EX-8; Tr. pp. 170-75, 177-78)

e. On some past occasions, Employer's workers continued working on farms that also have blueberry crops that grow into mid-May. On a few occasions, Employer also provided field laborers on strawberry farms that grow and harvest watermelons and vegetables such as eggplant, squash, and peppers. The harvest season for these crops can extend into late May or early June. (Tr. pp. 170-75, 178)

f. In west-central Florida, where Employer contracts with farms, the annual high temperature and rain fall make it virtually impossible for local farmers to grow any field crops from approximately the second week of June through the entire months of July and August. As a consequence, Employer has not entered into farm contracts to provide field crop laborers during that time. Employer has not entered into any past significant contracts with citrus grove farmers. (EX-1; EX-2; EX-3; EX-4; EX-5; Tr. pp. 120-22, 150-55, 178-80, 210, 231-37, 239-43)

g. Circle G Strawberry Farm and Ranch was Employer's first contract farm. They have used Employer to provide field laborers for strawberry crops since 2014. Typically, they contract with Employer to provide field crop laborers from approximately mid-August to mid-April. Circle G Strawberry Farm and Ranch also grows watermelons, which are planted in February and harvested in May. Employer has also provided it with field crops laborers to harvest that crop. However, Employer believes he has never provided it with field laborers during the entire months of June, July and August because it has no growing or harvest season that generates a field labor worker need. (EX-6; Tr. pp 126, 132, 180)

h. Fancy Farms is another recurrent annual client of Employer. It has used Employer to obtain field harvest laborers for the past four years. The farm was founded in 1974, and in the earlier years of operation, it grew vegetable crops such as eggplant, squash and peppers, as well as strawberries. The farm operation now primarily focuses on growing strawberry crops. In the last decade, Fancy Farms has grown vegetables in the months of May, June and July on approximately two to three occasions. In 2019, the farm grew vegetables in months of April into June, but it did not use Employer to obtain the field labor for that crop. (AF1 pp. 964, 1024, 1065; AF2 pp. 2388, 2447; EX-6; Tr. pp. 14-42, 148-52, 156-8, 178-79, 183-84, 212)

i. In March 2020, Fancy Farm’s farm broker, who sells its strawberry crop, advised Mr. Grooms, Fancy Farms’ general manager, to cease harvesting because the COVID-19 pandemic had dramatically reduced strawberry demand. As a result, Mr. Grooms decided to attempt to grow a pepper crop into the month of June as a response to the significant impact the COVID-19 pandemic had on the strawberry market. (AF1 pp. 964, 1024, 1065; AF2 pp. 2388, 2447; EX-6; Tr. pp. 14-42, 148-52, 156-8, 178-79, 183-84, 212)

j. In an attempt to help Mr. Grooms with his effort, Employer obtained an additional labor certification for the period of May 6 to June 30, 2020 to provide field laborers to Fancy Farm for that crop. This was an application Employer had not previously intended to make. Mr. Cruz submitted it as a “seasonal” rather than a “temporary” need application because he believed the short 45-day time period for crop labor made it seasonal. (AF2 p. 2, 380-88; Tr. pp. 212-14)

k. Fancy Farms’ pepper crop effort failed completely because of insect infestation, and the field laborers provided by Employer stopped working on June 24, 2020. Fancy Farms does not intend to grow vegetables into late June in the future because of the high risk of crop failure. In the last five years, Fancy Farms has not grown crops on a 12-month cycle that included the months of June and July. (AF1 pp. 964, 1024, 1065; AF2 pp. 2388, 2447; EX-6; Tr. pp. 14-42, 148-52, 156-8, 178-79, 183-84, 212)

l. Employer’s pending Laborers and Supervisors applications currently before the undersigned request approval for temporary labor certification for seasonal workers. Specifically, the applications seek approval for 579 field crop laborers and nine supervisors for an employment period of November 23, 2020 to May 5, 2021. These temporary laborers will work at Circle G Strawberry Farm and Ranch, Fancy Farms and various other farms around Plant City, FL. The requested temporary workers in both applications will be used in the growing and harvesting of strawberries for the current crop season. In Employer’s Statements of Temporary Need included in the applications, it addressed the prior 2020 applications and noted that a “change in production schedule was not intended to be a continuing deviation from the usual best agricultural management practices for the Central Florida locale.” (AF1, pp. 178, 188, 195-7, 201; AF2, pp. 259, 265, 273-75, 282)

m. From August 2019 to the present pending applications, Employer submitted 14 temporary labor certification applications. All were based on a seasonal need for field crop laborers. Six of those applications were for supervisor positions. Eight of those applications were for field crop laborers. (AF1, p. 300; AF2, p. 49; CX-1; EX-8)

n. For the employment period of August 12, 2019 to May 5, 2020, Employer obtained two temporary labor certifications for 13 supervisors and 702 field harvest laborers. (CX-1; EX-8)

o. For the employment period of September 11, 2019 to May 5, 2020, Employer received two temporary labor certifications for 15 supervisors and 1,080 field harvest laborers. (CX-1; EX-8)

p. For an employment period starting on January 6, 2020, Employer obtained two different temporary labor certifications for 67 and 320 field harvest laborers. One employment period ended on April 6, 2020 and the other on May 5, 2020. (AF2, pp. 2591, 2724; CX-1; EX-8)

q. For an employment period of May 6 to June 30, 2020, Employer received two separate temporary labor certifications for two supervisors and 48 field harvest laborers. During this time, Employer provided temporary field laborers to Fancy Farms for its effort to grow vegetables in response to the COVID-19 pandemic's impact on strawberry demand and its strawberry crop. (AF2 pp. 2388, 2447; CX-1)

r. In combination, Employer's labor certification applications for the 2019-20 crop growing season, which started on August 1, 2019 and ended on July 31, 2020, identified beginning or ending labor needs that included part of every month except July (Aug 12, 2019 to June 30, 2020). (CX-1; EX-8, p.1)

s. On July 8, 2020, Employer received temporary labor certifications for 19 supervisors and 960 field harvest laborers during the time period of August 7, 2020 to May 5, 2021. (AF2, p. 2175; CX-1; EX-8; p.1)

t. Of the 14 applications submitted by Employer between August 2019 to present, all but two (those for May 6 to June 30, 2020) identified a beginning labor need date no earlier than August 7 of one year and an ending need date no later than May 5 of the next year. Employer's last four years of combined certifications began on August 8, 2017 and end on May 5, 2021. During that time, the beginning and ending dates of the combined certifications within each separate 12-month period amount to certification time periods of: 10 $\frac{1}{4}$ months (8/8/17 to 6/15/18); 8 $\frac{3}{4}$ months (8/10/18 to 5/3/19)⁷; 10 $\frac{3}{4}$ months (8/12/19 to 6/30/20); and 9 months (8/7/20 to 5/5/21). The actual laborer work dates for the annual combined certifications between June 2017 and June 2020 equaled 10 months or less for each 12-month period. The actual laborer work dates for the approved certification dates of August 7, 2020 to May 5, 2021 is projected to be 8 $\frac{3}{4}$ of a month. (CX-1; EX-6)

u. On July 14, 2020, Employer submitted two temporary labor certification applications for seven supervisors and 460 field harvest laborers for an employment period of September 11, 2020 to May 5, 2021. These applications were denied by the CO because he determined the applications failed to establish a seasonal need. Specifically, the CO concluded that Employer had a recurring history of filing applications in the Plant City, Florida region that demonstrated a need for supervisors and field harvest laborers that covered 11 months out of the year. Of note, the CO found that, while Employer may diversify crops throughout the year, "employer has demonstrated a near year need for the same type of agricultural labor" and its need is "limited only by its contracts with fixed site growers." Employer appealed the CO's denials of those applications and requested an expedited administrative review. Such appellate reviews limit the ALJ to considering only material submitted to the CO. And the ALJ must uphold the CO's determination unless the Employer proves the decision is arbitrary, capricious, or otherwise not

⁷ For this time period, EX-6 reflects an actual work end date which is later than the end date of certification and further reflects an actual months worked greater than months certified. The undersigned assumes this is a typographical error.

in accordance with law. Applying that legal standard, ALJ J. Kane upheld the CO's denials. (AF2 pp. 643-650; CX-1)

v. For Employer's current Supervisors and Laborers applications, the NODs also informed Employer that it had failed to demonstrate a seasonal need as required by 20 C.F.R. § 655.103(d). After reviewing both applications and comparing them to Employer's past applications, the CO identified what he concluded was an overlapping need. He believed it demonstrated that Employer had an ongoing need that spanned at least 11 months. Specifically, the CO noted "employer's business does not appear to have a seasonal need for labor." (AF1 pp. 164-171; AF2 pp. 240-47)

w. The NODs requested Employer provide: a statement of its history, activities, and scheduled operations throughout the year; summarized monthly payroll reports for the last three previous years that separately identify full-time permanent and temporary farmworkers and laborers; and any other evidence and similar documentation that would support its application. (AF1 p. 167-9; AF2 p. 243-5; Tr. p. 104)

x. Employer's response to both NODs presented a number of items and included letters that addressed potential concerns the CO may have regarding its prior May 6 to June 30, 2020 labor certification. (AF1 p. 299; AF2 pp. 236-239)

y. For the Supervisors application, Employer's July 27, 2020 letter included an explanation about its May 6 to June 30, 2020 certification. It stated that the temporary worker labor certification was for:

"... vegetable harvesting, a crop activity which we have not previously been engaged in in the area of intended employment but one fixed-site strawberry grower client of ours began diversifying into vegetables the past year and requested assistance with the harvesting. However, this job and this fixed site grower are still seasonal in nature and do not offer employment year-round. While we do understand that this is not sufficient justification, if this will interfere with the temporary nature of the berry season, we will in the future refrain from harvesting these crops past our 10-month threshold or refrain completely from harvesting them. (AF1 p. 299)

z. Employer's October 6, 2020 letter in response to the NOD for the Laborers application was more expansive and did not include the same language. Rather, it emphasized the May 6 to June 30, 2020 labor certification was a one-time effort to assist a single farm client attempting to address the impact of COVID-19 on strawberry demand and its strawberry crop. In general, the letter reemphasized that Employer fully intended to focus on providing temporary crop field labor to farms that grow strawberries and blueberries and had no intent to expand in the future to work with farms growing vegetable crops. (AF2 pp. 236-39)

aa. Mr. Cruz maintains monthly work time sheets for the temporary field crop laborers he employs each year. They demonstrate that no temporary labor workers employed by Employer

have worked 11 months or more during a previously approved temporary labor certification. He did not submit these documents to the CO because he believed the NOD directed him to produce payroll records, which he thought had been properly submitted. (EX-9; EX-10; EX-11; EX-12; EX-13; EX-14; Tr. p. 199-203)

bb. In his final determination letters denying the Supervisor and Laborers applications, the CO explained the requested dates of seasonal need in the applications - in conjunction with past applications - demonstrated that in the calendar year 2020, Employer “has requested workers for a 10 month and 20 day period of need; essentially the entire year.” He went on to determine that July was the only month for which Employer had not requested workers and concluded that Employer’s 2020 temporary labor certification applications covered all but 37 days. The COs concluded that Employer “picks and chooses fixed site growers across an almost permanent period, rather than basing its own business operations dependent on any seasonal or temporary need” (AF1, pp. 71-75; AF2, pp. 42-49; Tr., pp. 63, 102-05)

cc. As additional justification for his decision, the CO noted that Employer’s NOD “explanation links its need to the lengths of the contracts it chooses to enter into” and that Employer’s “need then is not therefore tied to a certain time of year as is contemplated by regulation, but rather limited only by its contracts with fixed site growers.” Based on these conclusions, and Employer’s complete past filing history, the CO determined that Employer failed to establish a seasonal need. (AF1 p. 75-76; AF2 p. 42-49; Tr. p 47, 61, 95, 98, 102-04)

6. Applicable Law and Analysis.

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the U. S. Department of Labor (DOL). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Burden of Proof.* Throughout the application process, the burden of proof in temporary labor certification remains with an employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). Consequently, an employer has the burden of persuasion when appealing a CO’s denial determination.

The standard of proof an employer must satisfy is to show by a preponderance of the probative evidence that its temporary labor certification application is sufficient for acceptance under the criteria established by 20 C.F.R. §655.161. *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).

In cases where an employer appeals a denial and requests an expedited administrative review by an ALJ, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015). To meet this standard of proof, an employer must demonstrate that

the CO's determination was based on facts that are materially inaccurate, inconsistent, unreliable, invalid, or based on conclusions that are inconsistent with the underlying established facts or legally impermissible. *F 3 S Partnership, LLC.*, 2014-TLC-00006, slip op. at 29.

However, when an employer appeals a denial and requests a de novo hearing before an ALJ, the parties are permitted to present additional evidence on the matter. Consequently, the presiding ALJ "must independently determine if the employer has established eligibility for temporary labor certification" *David Stock*, 2016-TLC-00040 (May 6, 2016).

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).

c. *H-2A Labor Contractors.* As reflected on ETA Form 9142A, Employer is designated as an H-2A Labor Contractor (H-2ALC). An H-2ALC is any individual or a legal entity who is not a fixed-site employer or employee or an agricultural association or employee, but who recruits, solicits, hires, employs, furnishes, houses, or transports H-2A workers. 20 C.F.R. § 655.103(b).

This definition "broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer." Employment and Training Administration, U.S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010). The regulation at 20 C.F.R. 655.132(a) provides that an H-2A labor contractor's ETA 9142 applications are limited "to a single area of intended employment in which the fixed-site employer(s) to whom an H-2 ALC is furnishing employees will be utilizing the employees."

d. *Seasonal or Temporary Need.* Seasonal and temporary need are related but distinct concepts under the regulations. "[E]mployment is of a seasonal nature when 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 exceptional circumstances, last no longer than 1 year." 20 C.F.R. § 655.103(d).

A seasonal need has generally been interpreted to be 10 months or less. *Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008). However, this interpretation has been rejected as a "bright-line" rule, and BALCA has held that 10 months should be used "as a threshold at which the CO will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature." *Grassland Consultants, LLC.*, 2016-TLC-00012 (Jan. 27, 2016).

When determining whether an employer's need is seasonal, it is appropriate "to determine if the employer's needs are seasonal, not whether the duties are seasonal." *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999); *see also Pleasant Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015) (holding fact-finder must determine if employer's needs are seasonal, not whether particular job at issue is seasonal). In order to determine if the employer's need for labor 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. *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

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. *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011). Because a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates for a seasonal need in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. *Thorn Custom Harvesting*, 2011-TLC-00196, slip op. at 3 (Feb. 8, 2011).

e. Parties' Arguments and Analysis.

In essence, Employer presents two main arguments in support of reversal of the CO's denial decision.

First, Employer urges the undersigned to apply a *Grasslands* analysis to conclude there is no binding legal precedent that requires the undersigned to determine continuous work in excess of 10 months cannot be seasonal. The undersigned understands this argument to be an assertion by Employer that BALCA's holding in *Grand View Dairy Farm* should be applied as a "general" proposition that 10 months demonstrates a seasonal need rather than as a bright line rule. Employer contends that such an interpretation is more consistent with the legislative history of the Act and the original DOL interpretation when initially promulgating the applicable regulations for the H-2A program.⁸

Second, Employer maintains that its recent additional temporary labor certification to assist Fancy Farms does not preclude it from demonstrating a seasonal need for the current applications. Employer urges the undersigned to conclude that - in light of its entire work history - Employer's one-time deviation in application time periods does not eliminate the seasonal component of its current applications. Employer contends the CO's decision finding a lack of seasonal need is based on unsupported speculation that Employer will deviate from its previous normal temporary labor certification applications again in the future.

⁸ Employer devotes a considerable portion of its 55-page brief to describing, and often repeating, the statutory legislative history of the Immigration Reform and Control Act and initial implementing interpretations of the applicable regulations. This background provides some support for its legal position regarding what qualifies as temporary or seasonal work.

The CO contends denial of Employer's application is warranted because it failed to carry its burden to demonstrate a seasonal need for two reasons. First, the CO argues Employer's application history demonstrates it has obtained multiple certifications that in combination constitute a labor need for more than 10 months of a 12-month period, which the CO considers not to be seasonal. Second, the CO asserts that Employer's prior application history illustrates it has "manipulated its purported seasonal need to fit the criteria of the temporary labor certification program."

To resolve the contested issues in this case, the undersigned must determine what type of temporary work support Employer provides as an H-2ALC. If Employer provides general field labor to any regional farm for any crop grown at any time throughout the year based on the contracts it picks and chooses, its work is not tied to a specific crop season and therefore not seasonal. If, however, Employer limits the scope of its H-2ALC contracts solely to providing temporary laborers to west-central Florida regional strawberry and blueberry farms that operate within the recognized growing and harvesting season, then its needs are tied to a seasonal event.

In urging the undersigned to reach the latter conclusion, Employer argues that its past applications demonstrate a continuing work cycle tied to the seasonal farming needs of strawberry and blueberry farms. Employer asserts that its "ordinary" seasonal need is the 10 months from August to May. Employer contends the temporary labor certification for May 6 to June 30, 2020, was a one-time "aberrant extended period of certification to allow work at just one of [Employer's] client farms for more than 10 months but still fewer than 11 months on a one time emergency basis." Employer's position is persuasive. The weight of the evidence establishes Employer as an H-2ALC that focuses on providing temporary laborers to berry farmers.

Employer is a comparatively new H-2ALC with just six years of experience in agricultural business. While this does not excuse it from knowing or complying with the applicable regulations of the H-2A program, it does provide context for the undersigned to evaluate Employer's actions and motivation for recent applications. This is particularly important when it comes to: 1) interpreting its intent for filing the May 6 to June 30, 2020 temporary labor certification application on behalf of Fancy Farms; and 2) determining whether Employer's consecutive application history shows a genuine recurring seasonal need or instead demonstrates a year-round need for agricultural workers.

BALCA has consistently permitted a CO to review an Employer's situation as a whole when determining temporary seasonal need, and a CO is not confined to considering only the existing application. *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (Mar. 21, 2017). Additionally, BALCA has upheld denials when multiple applications in the aggregate cover more than a 10-month period. *JBO Harvesting, Inc.*, 2020-TLC-00129 (Nov. 6, 2020) ("although this specific application does not exceed 10 months, when looking at it in connection to the other applications, JBO's need is clearly year-round and not a seasonal one."). Accordingly, the CO's consideration of Employer's past applications as they relate to the Supervisor and Laborers applications in this matter was entirely justified, and his conclusions from that review are not without some support.

Additionally, as noted in the ALJ decision denying Employer's appeal of its most recent prior application for temporary labor certification, "attempts by employers to *continually* shift their purported needs in order to utilize the H2 a program to fill permanent needs have been rejected." *Ag Labor LLC.*, 2020-TLC-00107, 2020-TLC-00108, slip op. at 3 (ALJ, Aug 31, 2020) (citing *Salt Wells Cattle Co., LLC* 2010-TLC-00134 (ALJ, Sept 20, 2010) (emphasis added). See also, *DeSoto Fruit and Harvesting, Inc.*, 2019-TLC-00032. (finding repeated overlapping certification applications establish permanent and not seasonal need.) Consequently, if the CO believed Employer had submitted consecutive applications in order to cover a permanent labor need, denial of the current application would be warranted.

However, the undersigned concludes Employer's past application history and actions related to Fancy Farms' recent endeavor to grow a vegetable crops do not establish that Employer is attempting to "diversify" its business operations outside of seasonal work. While Mr. Grooms described Fancy Farms efforts in May and June 2020 as a last-ditch effort to generate profits, he also noted that the farm had grown vegetables in 2019 as well. And, of particular relevance, Fancy Farms did not use Employer to obtain the temporary field labor for that effort. Fancy Farms is a strawberry farm that has predominantly used Employer for its strawberry crop field labor over the last four years. As such, the fact that Employer, Fancy Farms' primary labor source at the time, did not provide the temporary labor for that vegetable crop effort provides strong circumstantial evidence that Employer has no interest in expanding its operations. It also adds credence to Employer's assertion that its May 6 to June 30, 2020 labor certification was simply a one-time exception to assist Fancy Farms - as a loyal customer trying to respond to COVID-19 events - rather than evidence of an intent to expand the scope of its temporary labor contracts.

More importantly, however, no evidence presented in this case demonstrates a "continual" effort by Employer to shift its seasonal need to fill permanent needs. Instead, the evidence demonstrates that since June 2017, Employer's combined applications exceeded a 10-month time frame on only two occasions – for periods of 1 week and 3 weeks. Employer has never submitted consecutive or overlapping applications resulting in certification of laborers for more than 11 months during any 12-month period. Furthermore, since August 2017, Employer's applications have varied in time from approximately four months to 10 months and three weeks, which is consistent with applications tied to specific seasonal needs. The instances when Employer obtained laborers for a very brief period beyond the general 10-month seasonal benchmark amount to infrequent occurrences. And they clearly fall well short of a "continual" variation in application periods of need. Employer's certification history simply does not show it has engaged in an attempt to manipulate its temporary labor certification applications to cover a permanent labor need.

The CO also argues the fact that Employer did not characterize its May to June 2020 temporary labor certification application as "temporary" rather than "seasonal" indicates a true intent to expand the labor contracts it pursues. The CO maintains evidence for this conclusion can be found in Employer's acknowledgment in its July 27, 2020 letter. The CO contends Employer admits in the letter that its reason for assisting Fancy Farms in a way that extended Employer's temporary labor need beyond 10 months "is not sufficient justification." Additionally, the CO views Employer's promise to refrain from such contracts in the future if it

interferes with the temporary nature of the berry season as an intent to manipulate its contracts in order to qualify for seasonal temporary labor certifications. The undersigned interprets Employer's comments differently.

With the benefit of witness testimony on this point, the undersigned better understands the intent behind the Employer's actions and statements. Mr. Cruz's credible testimony demonstrates that he believes any limited period of work for which he requests a temporary labor certification is "seasonal" if it deals with crops; this is a common misunderstanding regarding the subtle differences between "temporary" and "seasonal" work - both of which can result in a "temporary labor certification."⁹ In that light, the undersigned concludes Employer's use of "seasonal" in its May 6 to June 30, 2020 application was simply a default characterization Mr. Cruz uses for all his crop applications; it does not establish that he knowingly sought to mischaracterize a new permanent need as seasonal. To the contrary, the facts illustrate that Employer's true need and intent was to get a labor certification extension that would most correctly be described as a one-time temporary extension for exceptional circumstances. Similarly, Employer's written statement about the sufficiency of its justification for the May 6 to June 30, 2020 certification is nothing more than acknowledging after the fact - when it had been specifically highlighted by the CO's NOD - that it had unintentionally obtained an additional seasonal temporary labor certification that could be viewed as demonstrating more than a seasonal need on Employer's part. Likewise, Employer's expressed willingness to refrain from such conduct in the future is really nothing more than an assurance that its business plan focuses - as it always has - solely on providing seasonal temporary field laborers to berry farmers and will remain the same in the future.

While an Employer's past application can be considered when acting on a current application, the CO is correct in noting Employer must establish that each application it files is eligible for certification on its own merit. *JBO Harvesting Inc.* 2020-TLC-00129 at 4 (holding that BALCA must review current denial on its own without regard to past certifications). Indeed, approval of prior applications is irrelevant. *Wickstrum Harvesting, Inc.*, 2018-TLC-00018, at 8 (May 3, 2018). Consequently, Employer must justify the requested seasonal temporary labor need for its current applications.

The preponderance of the evidence in this case demonstrates the current Supervisor and Laborer applications submitted by Employer seek temporary seasonal laborers solely for the purpose of cultivating and harvesting berry crops. Mr. Cruz unequivocally confirmed this intent with his testimony. The supporting documentation for the applications identifies strawberry farms as the clients to whom the requested laborers will be provided. The specific seasonal need by Employer was corroborated with testimony from two of Employer's primary clients, the general managers for Circle G Strawberry Farm and Ranch and Fancy Farms, to whom Employer will provide field crop laborers. Both persuasively confirmed that Employer's requested supervisors and laborers will perform strawberry harvesting work. Employer's requested beginning and ending dates of need for the temporary field crop laborers correspond directly with the critical phases of west-central Florida's annual strawberry growing and harvesting season. All of this clearly shows that Employer based the temporary labor requests in

⁹ Indeed, as noted in Employer's brief, a failure to clearly distinguish between the two concepts and their application also occurs among the legally educated. *Tranel Ranch*, 2009-TLC-00049 (ALJ May, 22, 2019)

its current applications directly on the needs arising from the region's annual strawberry crop season.

While the CO's concern about Employer's May to June 2020 application is certainly understandable, that prior application is insufficient to demonstrate Employer's current applications are not truly seasonal and that it intends to manipulate future applications in order to resolve a permanent labor need. The same is true of the two instances when Employer's certifications briefly exceeded the general 10-month threshold benchmark for demonstrating a seasonal need.

To the contrary, the undersigned construes the weight of the evidence in this case to establish that Employer is a specialized H-2ALC that focuses on providing temporary laborers to berry farmers during specific phases of the growing and harvesting season for those specific crops. Employer's Supervisor and Laborer applications in this matter were submitted to support those specific seasonal needs. Employer's recent labor certification deviation from this business plan was an unplanned singular exception that does not persuasively indicate the Employer intends to diversify beyond berry farm labor support. Without more in Employer's application history, the CO's determination that Employer has shown an intent to expand the scope and focus of its future applications to different crops with different seasonal needs is unjustified speculation that does not warrant denial of Employer's current applications. Accordingly, the CO's conclusion that Employer "picks and chooses fixed site growers across an almost permanent period, rather than basing its own business operations dependent on any seasonal or temporary need" is not persuasively supported by the evidence in this matter.

The undersigned concludes Employer carried its burden to establish eligibility for certification of its current Supervisors and Laborers applications for temporary labor based on a demonstrated seasonal need.

With that said, the parties should not interpret this conclusion as a repudiation of the CO's legitimate concerns and thoughtful analysis. The outcome in this case obviously differs from ALJ Kane's prior decision upholding the CO's certification denial of Employer's most recent past applications. Those applications and the ones addressed in this decision are based on essentially the same asserted seasonal need. The different results in the two cases are the function of a different standard of review that afforded the undersigned an opportunity to consider substantial additional.

In conducting a de novo review, the undersigned obtained a deeper context of the basis for the applications through testimony by witnesses. However, if in the future, Employer deviates again from the scope of these applications or that of its past typical application history, the CO's concerns may ultimately prove to be well-founded and warrant denial of future temporary labor certification applications from Employer.

7. Decision and Order. The CO's denials of Employer's Applications for Temporary Employment Certification are **REVERSED** and these cases are **REMANDED** to the CO for further processing, in an expedited manner, to the extent possible.

SO ORDERED this day.

TRACY A. DALY
Administrative Law Judge