



Issue Date: 09 November 2020

OALJ Case No.: 2021-TLC-00001
ETA Case No.: H-300-20246-801861

In the Matter of:

KOOPMAN DAIRIES, INC.,
Employer.

Appearance: Wendel V. Hal, Esquire
Hall Law Office, PLLC
For the Employer

Erik Vande Stouwe, Esquire and Rebecca Nielsen, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Natalie A. Appetta
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 October 6, 2020, Koopman Dairies, Inc. ("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 October 16, 2020. A telephone conference call with Counsel/representatives for the parties was conducted on October 13, 2020, in which the parties agreed to a telephone hearing on this matter, which was set for October 28, 2020.

On October 28, 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.¹ 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 September 10, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* including ETA Forms 9142A, 790, 790A and Addendums. AF 70-90. The Employer’s application requested certification for three H-2A workers under the occupational title “Farm Mechanics and Service Technicians” for the period beginning November 16, 2020 through February 14, 2021.

The nature of temporary need was listed as seasonal. A statement of temporary need was included with the application. Stated job duties were described as tasks “only performed during the winter months when crop farming has halted, and the machinery is no longer in use.” AF 79. The duties include “inspection, service, and if necessary, repair” of every piece of equipment, follow “a checklist to go over the vital parts, oil/lube/grease, clean the equipment with either water or air, check tires for pressure and thread, check axles and bearings. Make repairs based on findings.” Additionally, “Every ventilator (approximately 1800 total) in all barns must be cleaned, service, check and repaired if necessary,” and “perform major repairs on equipment, such as new transmission, part/whole engine, clutch, belts, fuel lines, electrical, bearings/axles.” AF 79. Job requirements included a lifting requirement of 50 pounds, 12 months of experience and 12 months of on the job training. AF 80.

On September 15, 2020, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) identifying two deficiencies in the Employer’s application. AF 59-64. The first deficiency noted employer’s failure to establish its job opportunity as “temporary need” and the second deficiency relates to the “job qualifications and requirements.” AF 63-64.

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.

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

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 63.

The CO noted the Employer’s filing history in the following chart:

Case Number	Employer Name	Status	Job Title	Beginning Date of Need	Ending Date of Need
H-300-16364-317897	Koopman Dairy	Determination Issued - Certification	Agricultural Equipment Operator	03/01/2017	12/31/2017
H-300-17345-349455	Koopman Dairy	Determination Issued - Certification	Agricultural Equipment Operator	02/15/2018	11/15/2018
H-300-18261-603374	Koopman Dairy	Determination Issued - Certification	Farm Equipment Mechanic	11/16/2018	02/14/2019
H-300-18339-576221	Koopman Dairy	Determination Issued - Certification	Agricultural Equipment Operator	02/15/2019	11/15/2019
H-300-19246-022446	Koopman Dairy	Determination Issued - Certification	Farm Equipment Mechanic	11/16/2019	02/14/2020
H-300-19336-17349	Koopman Dairy	Determination Issued - Certification	Agricultural Equipment Operator	02/15/2020	11/15/2020
H-300-20246-80186	Koopman Dairy	Received	Farm Equipment Mechanic	11/16/2020	02/14/2021

The CO determined that, based on the Employer’s requested dates of need in the cases described in the chart, the Employer “has not established how this job opportunity is seasonal, rather than permanent and full time, in nature.” AF 62. The CO noted that the Employer’s filing history demonstrates a need for labor which spans the entire calendar year and although the Employer is filing applications for two different job titles, the applications for Agricultural Equipment Operator and Farm Equipment Mechanic “include duties related to repairing farm equipment.” AF 63. The CO also noted that the tasks listed for Agricultural Equipment Operator (45-2091) on O*NET include adjust, repair and service farm machinery and therefore the Employer’s filing history suggests a year-round need for workers to operate, repair and maintain agricultural equipment. AF 63. The CO therefore directed the Employer to explain why its job opportunity is seasonal or temporary and include (1) a statement describing the Employer’s business history, activities, schedule of operations, (2) a statement explaining why the Employer’s need is seasonal when the duties outlined for Agricultural Equipment Operators span from mid-February to mid-November, (3) summarized payroll reports “for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Agricultural Equipment Operators and Farm Equipment Mechanics, the total number of workers or staff employed, total hours worked, and total earnings received,” signed by the Employer and attesting that the information was compiled

from the Employer’s actual accounting records, and (4) other evidence and documentation that serves to justify the dates of need being requester for certification. AF 63.

The Employer responded to the Notice of Deficiency on September 23, 2020. AF 22-56. The Employer explained its seasonal need for the current application. The Employer explained that “repair or maintain agricultural equipment” is not included in its job description for the certification of Agricultural Equipment operator because the Employer has permanent U.S. workers for that service. It further explained that it “has a seasonal peak need for a Farm Equipment Mechanic” during the dates of requested need because during the winter season, “the machines used for crops are no longer in use” and the Employer uses the winter “to tear down and take apart the machines to ensure that all the equipment is in top working order for the upcoming season.” AF 22. The Employer further explained and addressed the CO’s concern that the Employer’s need might be a year-round need for a permanent employee:

Addressing the deficiency raised that this need might be a year round need, you stated that the Farm Equipment Mechanic is a Job Zone Three position. It has already been noted that an education, training, and experience is required for this position. An Agricultural Equipment Operator does not require any education, little to no training, or experience. If someone knows how to change the oil in your car, it does not mean that they can rebuild or overhaul your engine. An Agricultural Equipment Operator may be able to change oil in a piece of agricultural equipment, but they may not know how to rebuild the engine like a Farm Equipment Mechanic. These two occupations have different SOC codes, education requirements, training requirements, and experience requirements. It seems comparing apples to oranges to put them together to constitute a year-round need.

AF 23. The Employer further explained that the job duties for a Farm Equipment Mechanic and Agricultural Equipment Operator have no overlap. AF 24. Further, it explained that the Farm Equipment Mechanic is needed during the months the equipment is not being used for farming to take the equipment completely apart, change parts and lube the equipment to ensure it is in proper working order. AF 24. The Employer also provided the requested business history and summarized payroll reports.

The Employer provided the following schedule of operations for its calendar year for the combination of full-time and H-2A worker (Combination), the full-time employees (FT) and the Employer (Employer), which I have organized into a chart for readability:

Month	Combination – FT and H-2A Employees	FT Employees	Employer
January	<ul style="list-style-type: none"> • Mechanical repairs of all crop related equipment • Mechanical repairs of all fans in dairy barns • Cleaning of all fans in dairy barns 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season

Month	Combination – FT and H-2A Employees	FT Employees	Employer
February	<ul style="list-style-type: none"> • Mechanical repairs of all crop related equipment • Mechanical repairs of all fans in dairy barns • Cleaning of all fans in dairy barns • Prep fertilizing equipment • Start on fertilizing bare fields • Start on field prep for seeding • Rock picking 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
March	<ul style="list-style-type: none"> • Fertilizing fields • Continue on field prep for seeding • Prep seeding equipment • Start small grain harvest • Rock picking 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
April	<ul style="list-style-type: none"> • Fertilizing fields • Finish small grain harvest • Rock picking • Start corn planting 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
May	<ul style="list-style-type: none"> • Fertilizing fields • Spraying fields • Continue corn planting • First cut of hay 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
June	<ul style="list-style-type: none"> • Fertilizing fields • Spraying fields • Finish corn planting • Second cut of hay 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
July	<ul style="list-style-type: none"> • Spraying fields • Harvest early corn • Field prep for sorghum seeding • Fertilizing • Third cut of hay 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
August	<ul style="list-style-type: none"> • Spraying fields • Finish harvest early corn • Finish field prep for sorghum seeding • Fertilizing • Rock picking • Plant sorghum 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season

Month	Combination – FT and H-2A Employees	FT Employees	Employer
September	<ul style="list-style-type: none"> • Harvest late corn • Start field prep on small grain crop • Fertilizing • Rock picking 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
October	<ul style="list-style-type: none"> • Finish field prep on small grain crop • Fertilizing • Rock picking • Plant small grain crop 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
November	<ul style="list-style-type: none"> • Fertilizing • Rock picking • Harvest Sorghum crop • Mechanical repairs of all crop related equipment • Mechanical repairs of all fans in dairy barns • Cleaning of all fans in dairy barns • Get all sprinkler systems winter ready 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season
December	<ul style="list-style-type: none"> • Mechanical repairs of all crop related equipment • Mechanical repairs of all fans in dairy barns • Cleaning of all fans in dairy barns • Get all sprinkler systems winter ready 	<ul style="list-style-type: none"> • Milking of cattle • Herd care, animal health, breeding of herd 	<ul style="list-style-type: none"> • Accounting and bookkeeping • Management and overseeing all operations • Planning, procurement and prep for coming crop season

On October 2, 2020, the CO issued a final determination denying the application, indicating that the Employer did not cure either of the deficiencies in its H-2A application requesting temporary labor certification for three Farm Equipment Mechanic job opportunities. AF 13-20. The CO reiterated that the Employer had not established how its job opportunity is seasonal, rather than permanent and full-time. AF 16. The CO determined that the Employer had not established that the job opportunity is distinct from its prior filing. The CO indicated that the position Farm Equipment Mechanics and Service Technicians, SOC Code 49-3041, “is a Job Zone Three occupation with medium preparation needed and has a Specific Vocational Preparation (SVP) range of 6.0 to <7.0” with expected experience of over one year and including two years for any worker applying for the job. AF 11. The CO also indicated that the Employer did not require this education or experience level and therefore “it was unclear if this application represented a need separate from that of its prior filing” and the Employer “declined to submit any documentation on this point.” AF 11. The CO concluded that the duties in this application are inconsistent with SOC Code 49-3041 and the job opportunity does not appear distinct from the job opportunity in its previous application for Agricultural Equipment Operators, which creates a year-round need for the job opportunity sought.

The CO also determined that the employer had not established that its need is seasonal. The CO did not find that the Employer established that the equipment maintenance would be tied to the winter months, as in the context of a dairy farm, fan maintenance and livestock care would be year round. Further, the CO noted that the FAQ on the OFLC website specifically points out that the majority of dairy farm activities are year round and cannot be classified as either temporary or seasonal. The CO concluded that the Employer did not establish a seasonal need as defined at 20 C.F.R. § 655.103(d) and denied the application.

EVIDENCE AND ARGUMENT

A de novo hearing in this matter was held on October 28, 2020. The Administrative File (AF) was admitted without objection. TR 8. The Solicitor offered the Administrative File as Solicitor's Exhibit (SX) 1 and also offered the O*NET online Agricultural Equipment Operators page as Exhibit 2, the O*NET online Farm Equipment Mechanics and Service Technicians pages as Exhibit 3, and the O*NET online Job Zone Three list of professions as Exhibit 4. TR 9. The Employer offered six exhibits: a chart showing the breakdown of visa hours for 2018-2019 as Exhibit 1, the O*NET summary for Agricultural Equipment Operator and its link as Exhibit 2, the O*NET Code Connector for Agricultural Equipment Operator as Exhibit 3, the O*NET Summary for Farm Equipment Mechanics and Service Technicians as Exhibit 4, the O*NET Code Connector for Farm Equipment Mechanics and Service Technicians as Exhibit 5, and an excerpt from Executive Office of the President, 2018 Standard Occupational Code. TR 10-11. All exhibits were admitted without objection. TR 10-12.

Both parties identified Monique Koopman, owner of Koopman Dairies, Inc., and John Rotterdam, the Certifying Officer, as witnesses.

A. Summary of Testimony

John Rotterdam

John Rotterdam, the Certifying Officer, was called as a witness by the Employer. He testified that he started working for the Employment and Training Administration in December 2009, previously worked as a private sector immigration attorney, and never worked for the DOL Bureau of Labor Statistics. TR 28-29. He testified that the reasons for the denial are grounded in the information in the filing, which was represented as factual. TR 33. He testified that the qualifications for the job opportunity listed were "abnormally low for the job as listed" and more consistent with the qualifications for an Agricultural Equipment Operator. TR 42-43. He testified to the usual education, training and experience requirements for Farm Equipment Mechanics, as described on the O*NET website summary for the position. TR 50. He agreed that he had no personal knowledge of the work performed at Koopman Dairies and indicated that he was not certain of the extent he knew that Koopman Dairies has both dairy and crop operations before the hearing. TR 54-55.

Mr. Rotterdam was also called as a witness for the Solicitor. He testified he is an H-2A Certifying Officer in the Chicago National Processing Center and has been in that position since December 2009. TR 101. He explained the purpose of the H-2A program as to allow farmers or

labor contractors to temporarily or seasonally hire foreign workers, when domestic workers are not available, for temporary agricultural work, and addressed the procedure employers follow to apply for the visas. TR 102.

Mr. Rotterdam discussed the Agricultural Equipment Operator position and noted that the skills required include equipment maintenance, performing routine maintenance on equipment and determining what kind of maintenance is needed, and that it is Job Zone one. TR 106-107. He explained that the duties of a Farm Equipment Mechanic are at a “substantially higher level and more focused” than those of an Agricultural Equipment Operator. TR 107. Mr. Rotterdam testified that Ms. Koopman’s testimony that the mechanics at her farm would work under the supervision of an American-trained mechanic is consistent with the rest of her application, showing abnormally low requirements for the job. TR 107-108. He explained that working under trained mechanics, less than typical experience requirements, absence of educational requirements, and absence of licensure were the basis of the Notice of Deficiency. TR 109-110. Mr. Rotterdam stated that based on the application, the agricultural equipment operator SOC contains routine maintenance, which is what it appears that the workers requester are going to be expected to do under the supervision of more skilled mechanics. TR 112. He also further explained the Notice of Deficiency and stated that the H-2A program deals in seasonal need and temporary need, and does not recognize peak load need. TR 117.

He also further addressed the education and experience on O*NET, agreeing that essential experience and other jobs qualifies for specific vocational preparation. TR 119. Mr. Rotterdam agreed that depending on circumstances, an apprenticeship program may or may not be associated with the farm equipment mechanic position. TR 121. He agreed that the agricultural equipment operator job has an SVP of less than 4, which is one month up to including three months of experience required. TR 122-123. He also stated that up until recently, and when he started in 2009, agricultural equipment operator allowed 12 months of experience and two or three years ago, the requirements backed down on O*NET. TR 123-124.

Monique Koopman

Monique Koopman, one of two owners of Koopman Dairies, was called as a witness by the Employer. She testified that she owns Koopman Dairies with her husband. TR 57. She described the general history of Koopman Dairies and how it transitioned into both a dairy and farming land for feed for the cows, currently about 6,000 cows for milk and 6,500 young stock, with almost 90 full-time employees. TR 57-58.

She explained that fertilizing equipment runs February through December, mowers run from March to November. TR 58. She testified that she started with an Agricultural Equipment Operator visa (H-2A worker) in 2016 and added the mechanical visa (H-2A worker) in 2018, as they had more fans and sprinklers and were unable to cover peak times. TR 59. She testified that the dairy side of the business is not seasonal, but the crop side is more seasonal. TR 59. The H-2A workers are not involved in the dairy side of the business. TR 62.

Ms. Koopman testified about the monthly schedule of farming work. The crop season typically begins in February with fertilizing, preparing the soil for seeds, picking rocks from the

fields, then in March continues with the same, plus harvesting small grain, then corn planting starts in April. TR 59. Agricultural Equipment Operators do this work. TR 63. The work does not involve assembling, disassembling or repairing machinery, as that work is done in the winter. TR 63. There is a U.S. crew of farm mechanics working year round and they “make sure that everything stays together;” if machinery develops a problem, the agricultural equipment operator stops and contacts one of their mechanics to explain the problem. TR 64. Work in May includes fertilizing fields, spraying fields, corn planting and a first cut of hay. TR 65. The dairy work continues, but is non-seasonal, non-H-2A work. TR 65. In May, Ms. Koopman testified, “the operators are still our main focus.” June work includes fertilizing and spraying fields, finishing corn planting and doing a second cut of hay and in July, work includes spraying the late corn, starting harvest of the early corn, preparing the fields for sorghum seeding, fertilizing and doing a third cut of hay, if weather permits. TR 65-66. August work includes spraying fields, finishing the harvest of early corn, finishing the field preparation for sorghum, rock picking, fertilizing and finally planting sorghum. TR 66. In September and October, field work continues. TR 66. In the first half of November, there is rock picking and harvesting the sorghum crop and by the second half, crop season is over. TR 66.

Ms. Koopman discussed the fans, explaining that the fans are on a thermostat system and typically run beginning in March and continuing until late October or early November. TR 66. If they break down in the summer, the permanent mechanical crew repairs or replaces it. TR 66. In the winter, workers go through every fan, check, clean and maintain, doing preventative maintenance, which helps the fans run from March through November. TR 66. There are 2,700 fans and it is a lot of work that cannot be done in the summer months because if the fans are not running, the barn gets too hot and the cows get uncomfortable. TR 67-68. Uncomfortable cows will not give milk. TR 68. She also discussed the seasonal/peakload work hours, explaining that the hours for equipment mechanics have work in November, December, January and February and are no longer needed in March because work goes back into the fields and then seasonal operators are needed. TR 70-71.

She addressed the work to be performed in connection to the denied application for Farm Equipment Mechanics. She explained that the farm equipment is used all summer, often from February through late October, and in the winter, repair and maintenance is completed. TR 71. Ms. Koopman provided an example, explaining that in the winter, a mower has been working from February through late October, and in the winter, all the knives are removed and replaced, all the fittings are greased, hydraulic hoses are replaced, reflectors and lights are checked and possibly replaced, any dents are pushed out, and sometimes it is painted, if paint is peeling. TR 71-72. She also explained that in the winter, the sprinklers for cooling the cows in summer are dismantled, checked, repaired if necessary, and reassembled. TR 72. Ms. Koopman testified that the tasks in the job description for Farm Equipment Mechanics, 49-3041.00 on O*NET, are 100% the tasks performed by the mechanic and preferably 0% tasks performed by agricultural equipment operators. TR 73. She testified that the mechanic job is more skilled than the agricultural equipment operator job. TR 74.

Ms. Koopman addressed the list of equipment submitted, explaining that their own permanent mechanical crew performs fan maintenance, if necessary, during the months when the fans are in use, but preventative maintenance is performed in the winter. TR 77. The farm

equipment mechanic application is for a seasonal job. TR 78. She testified that the full-time mechanics do not necessarily work on milking equipment, as the milking parlors are repaired and serviced by an outside company. TR 79-80. Full-time American mechanics supervise the work by the seasonal mechanics and do their own jobs as well. TR 80. They are more skilled than the seasonal mechanics. TR 81. She testified that not every machine is overhauled yearly. TR 84. When machines are overhauled, she agreed that the American-trained mechanics perform overhauls and she added that visa holders assist. TR 85.

She agreed that there is no education requirement for her farm equipment mechanics, but they need 12 months of work experience. TR 90. She stated that it is possible for an agricultural equipment operator to be a farm equipment mechanic, but “it’s very hard for an operator in those operating months to acquire 12 months of training because the operator job, it’s a full-time job.” TR 90-91.

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 November 3, 2020. Both parties filed timely post hearing briefs.

1. The Employer

In its brief, the Employer reiterates its argument made in its closing statement at hearing and in its submissions to the CO, included in the administrative file. In short, the Employer argues that it has established a qualifying temporary or seasonal need for farm equipment mechanics.

The Employer argues that it needs additional seasonal, temporary mechanics between November and February because during that time, the farm equipment is not in use and it therefore can be serviced, maintained and prepared for the next spring’s growing season. The Employer explains that mechanical repair and daily maintenance is completed throughout the growing season as needed, but winter provides the opportunity for comprehensive repair and maintenance, such as rebuilding engines, inspecting for worn parts, dent removal and repainting. It argues that the winter mechanical work must be completed in the short time between the growing season and additional farm mechanics are needed to supplement the domestic workforce during the winter because of the increased peak load need.

The Employer further asserts that the positions of the agricultural equipment operators and farm equipment mechanics are distinct positions, with separate duties that rarely overlap, and a higher skill level for the farm mechanics, consistent with the descriptions in O*NET. The Employer also argues that its requirements for the farm mechanic position are not abnormally low, as characterized by the CO, as it requires 12 months of experience and 12 months of on-the-job training. It further asserts that the O*NET requirements do not require formal training, and notes that it does not require formal training.

2. The Certifying Officer

The Solicitor submitted a closing brief on behalf of the CO urging that the undersigned affirm the CO's determination and reiterating its closing statement at hearing. 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 asserts that the job opportunity here is being characterized as farm equipment mechanic to disguise a year round need for permanent mechanics. The CO points to the qualifications the Employer listed in the application and states they are uncharacteristically low for the position of farm equipment mechanic, as such positions usually require vocational schools, related on the job experience or an associate's degree and here, the Employer only calls for 12 months of experience and no additional education. The CO states that the lack of education along with the low experience requirements demonstrate that the job opportunity is not for a farm equipment mechanic, but instead is consistent with agricultural equipment operator. The CO concludes that instead, the job opportunity demonstrates a year-round need for agricultural equipment operators.

The CO also argues that the Employer has not established that the job opportunity is a seasonal need. He states that the need for maintenance is not seasonal. The CO points to the Employer testifying that the dairy operations are year round, but the ventilation fans are part of the dairy operations and require seasonal maintenance as a demonstration of Employer failing to establish seasonal need. The CO also argues that the spreadsheet hours submitted by the Employer are inaccurate, untrustworthy and do not provide sufficient evidence that the Employer's need for mechanics is seasonal. The CO concludes that the evidence supports that the application for farm equipment mechanics is a continuance of the position of agricultural equipment operator and thus does not establish a temporary or seasonal need under the H-2A program.

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). A seasonal need has

generally been interpreted to be 10 months or less. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008). 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).

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). Although duties related to livestock are presumed to occur year round and to reflect a year-round need for workers, an employer can establish that duties related to livestock are not year round. *S Cowboy Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011); *see Gisi Pheasant Farm*, 2011-TLC-00139 (Jan. 25, 2011).

In administering the H-2A program, BALCA has resisted efforts to use temporary labor certification under the H-2A program to address permanent or year round employment needs to fill a particular position. There have been several cases where employers have gone to great lengths in their attempts to characterize what is in fact, a year round need for a particular position, as a seasonal need. Some of these attempts have involved employers who have filed multiple labor certification applications through separate but related business entities or submitted applications by related individuals in order to portray a year round need for a particular position, as seasonal. *See Katie Heger*, 2014 TLC-00001 (November 12, 2013). (Certification denied where two applications covering entire year reflected "same job title, job duties, job requirements and were filed by different but related parties for the same worksite). *See also Sugar Loaf Cattle Co., LLC*, 2016-TLC-00033 (April 6, 2016).

Similarly, denial of certification has been affirmed where it was determined that two applications involved only minor seasonal variations in a year round position. *Lancaster Truck Line*, 2014 -TLC-00004 (November 26, 2013) (Minor seasonal variation in position with the same job title does not establish employer's need for this position as seasonal despite applications filed by separate legal entities).

Although the H-2A regulations are silent as to whether an employer can establish a temporary need under a theory of "peakload need," the regulatory history indicates that the meaning of "temporary" was intended to be the same under the H-2A and H-2B program. *Altendorf Transport*, 2011-TLC-00158 (Feb. 15, 2011). Therefore, the H-2B definition of "peakload need" is properly applied to the H-2A program. In order to establish a peakload need, the employer "must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation." 8 C.F.R. § 214.2(h)(6)(ii)(B)(3).

The issue presented in the current case is whether the two positions, Farm Equipment Mechanic and Agricultural Equipment Operator, are separate and distinct positions or merely the

same position with seasonal duties that vary between the summer and winter seasons. Significantly the two positions in this case were given two different SOC codes. *See Mammoser Farms, 2017-TLC-00001* (Nov. 22, 2016) (Board reversing the CO where there were distinct differences in the two positions and the positions had been assigned different SOC codes by the state workforce agency).

In its brief, the Solicitor argues that certification should be denied because the employer's application for its Farm Equipment Mechanic and its previous application for Agricultural Equipment Operator actually represent the same position with minor seasonal differences. *See Mapleview Dairy, LLC, 2020-TLC-00013* (December 4, 2019). (Certification denied where it was determined that winter and summer duties of a maintenance worker actually represent the same job opportunity.) It asserts that this case is different from *Mammoser Farms, 2017-TLC-00001* (Nov. 22, 2016), where the ALJ determined that the employer had a unique seasonal need for groundskeepers in the winter in Buffalo, NY, due to the heavy snowfalls and differs from *Vermillion Ranch Ltd. P'ship, 2104-TLC-00002* (Dec 5, 2013), which distinguished positions as warm weather sheep herders from cold weather sheep herders.

However, I find that the evidence supports that this case is similar to *Mammoser Farms*, and I find its discussion to be persuasive, as here, Employer has demonstrated that the positions of Agricultural Equipment Operator and Farm Equipment Mechanic are distinct positions, as supported by the differing SOC codes, as well as the separate and distinct duties and experience requirements of the two positions which supports that they are different seasonal positions, as further discussed below.

At the hearing, the CO attempted to characterize the duties required of the Employer's Farm Equipment Mechanic as listed in the H-2A application as less than the normal and accepted duties for the position of Farm Equipment Mechanic as noted in the O*NET job description for this position. TR 109-110. In regard to the education requirement for the Farm Equipment Operator position, the O*NET description states that "most occupations in this job zone require training in vocational schools, related on-the-job experience, or an associate's degree." EX 4. The CO argues that the Employer did not require any education and therefore employer's farm equipment mechanic position was not consistent with this requirement. TR 109-110. The Employer points out however, that it required one year of on the job training which is in fact consistent with the O*NET requirement which lists "related on the job experience" as one way of meeting the requirement. TR 90.

The CO testified that the duties of a Farm Equipment Mechanic are at a "substantially higher level and more focused" than those of an Agricultural Equipment Operator. TR 107. However, the Employer testified that the duties and skill level of its Farm Equipment Mechanics meet this standard. The Employer's testimony establishes that the job descriptions, training requirements, and job duties are different between the positions of agricultural equipment operator and farm equipment mechanic. TR 64. Although repairing and maintaining equipment is in the O*NET job description for agricultural equipment operator, the Employer testified that it uses its full time mechanics for maintenance and repair during the summer and does not require training or education for the agricultural equipment operator position. EX 3; TR 64, 77. The agricultural equipment operators do not assemble, disassemble, or repair machinery. TR 63. On

the contrary, the farm equipment mechanic position requires 12 months of on-the-job training and 12 months of experience. TR 90; AF 158. Further, the Employer has provided credible testimony that the skills required of the farm equipment mechanics are greater than those of the equipment operators. TR 74.

The CO also argues that the O*NET lists an SVP (specific vocational preparation) for the farm equipment mechanic position of 6.0 to <7.0 which generally equates to an experience requirement of over one but less than 2 years. TR 106-107. The experience requirement listed on the Employer's application for the farm equipment mechanic is one year. AF 70-90. Although the Employer's one year requirement is slightly less than the over one year requirement for a similar position, I do not find that it is abnormally low, as the CO argues. Also significant is the fact that the SVP range listed on the O*NET for the agricultural equipment operator position is < 4, which is consistent with the Employer's experience requirement for its agricultural equipment operators which Employer testified was three months. EX 3. The two different experience requirements listed on the Employer's job requirements for the two positions lends support to its argument that the jobs are separate and distinct and require different skill levels.

The CO argues that because the Employer does not have an education requirement or a specific apprenticeship program for its Farm Equipment Mechanics, contrary to one example in the O*NET website, the positions of agricultural equipment operator and farm equipment mechanic are the same position. Further, the CO asserts that because the farm equipment mechanics are supervised by full-time American mechanics, their positions are more akin to equipment operator positions, as the O*NET description indicates that farm equipment operators require more training than agricultural equipment operators. However, contrary to the CO's assertion, I find that it is not unreasonable that temporary farm mechanics working for only four months at a farm are supervised by the full-time mechanics, who work with the farm's equipment year round. The fact that the H-2A mechanics are supervised does not negate the fact they have to be skilled mechanics to perform the position. Similar to *Mammoser Farms*, the CO here focused on the fact that one of many job duties was similar, that is, both jobs included the use or repair of the same equipment. Also similar to *Mammoser Farms*, the farm equipment mechanics here perform no crop-related duties, while the agricultural equipment operators perform exclusively crop-related duties. It is also of note that these two positions were assigned two different Standard Occupational Classification (SOC) codes by the state workforce agency consistently in the Employer's applications between 2017 and now, Agricultural Equipment Operator (45-2091.00) and Farm Equipment Mechanic (49-3041.00).

At hearing, Ms. Koopman credibly testified that the farm equipment mechanics are tasked with work that is only able to be completed between November and February, outside of the long summer planting season, including preventative maintenance of ventilation fans, replacement of worn parts, full inspection of equipment, removal of dents, repainting, and rebuilding engines, and it is more work than her full-time staff can complete in four months. TR 71-74. She testified that any repair necessary or maintenance during the summer is completed by full-time mechanics, if equipment breaks down or needs repair, but this is not the full maintenance completed in winter, when the machinery is not being used in the fields. TR 66, 70-71. Ms. Koopman also testified that the farm equipment mechanics have work during the

peakload in November, December, January and February and are no longer needed in March because work goes back into the fields and then seasonal operators are needed. TR 70-71.

The Employer's testimony and the specific breakdown of duties as noted in its chart support that the Farm Equipment Mechanic position and the Agricultural Equipment Operator position are separate and distinct positions. EX 1. Employer specifically testified that its Agricultural Equipment Operators do not repair equipment. If a problem arises they contact the full time mechanics to perform any maintenance required. TR 64. Employer also testified that the Agricultural Equipment Operators are not required to have any experience as mechanics. In contrast, the Farm Equipment Mechanics are required to have twelve months of on the job training as mechanics. TR 90. This supports that the requirements of the two jobs are not interchangeable. Further the Farm Equipment Mechanic only performs the more extensive equipment maintenance and repair on the equipment in the months when the equipment is out of service for the winter. Testimony and Employer's chart breaking down the hours needed monthly for mechanical work further establish that the Employer has a temporary peakload need for several extra mechanics during the winter to repair its numerous pieces of farm equipment. EX 1; AF 25-30.

Although the CO argues that fan maintenance is related to the dairy operations and not a seasonal activity, Ms. Koopman credibly explained why such preventative maintenance is seasonal and able to be performed only during winter with her explanation that during the summer, the 2,700 fans must be on to cool the cows and ensure they are comfortable enough to continue producing milk, but during the winter, the fans are turned off and can be cleaned and prepared for the next summer's use.² TR 67-68.

The CO asserts that maintenance of equipment is a year round endeavor, and indeed, certain maintenance and repair is year round. However, the Employer has distinguished its summertime troubleshooting repair of equipment as problems arise from its complete winter maintenance of equipment with testimony describing the thorough checks, repairs and rebuilding that can only be performed in winter, when the equipment is not being used daily for farming. TR 71-72. The Employer has also addressed why more temporary mechanics are needed during the winter, testifying that the summer season is long and the winter season is short, with a large number of pieces of equipment to repair between November and February, before they are needed again in the spring for planting. TR 70-71. Thus, the Employer has established that the workers requested for the farm mechanic positions will perform distinctly different duties than the agricultural equipment operators to fulfill a specific seasonal need in the Employer's agricultural operation. I also find that the duties of the two positions do not overlap and the requirements of the positions differ significantly.

CONCLUSION

For the reasons stated above, I find that that Employer has met its burden of proving its temporary need for three workers under the job title "Farm Mechanics and Service Technicians" for the period beginning November 16, 2020 through February 14, 2021, on the basis of a

² Ms. Koopman also testified that the milking equipment is repaired and serviced by an outside company. TR 79-80.

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 October 28, 2020 hearing, and closing briefs. Therefore, the CO's denial of the Employer's application for temporary labor certification for three farm equipment mechanics for the period beginning November 16, 2020 and ending February 14, 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.

NATALIE A. APPETTA
Administrative Law Judge