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OALJ Case No.: 2021-TLC-00003

ETA Case No.: H-300-20246-800813

*In the Matter of:*

O'BRYAN COMPOSTING, LLC,

*Employer.*

Appearances: LEON R. SEQUEIRA, Esq.  
Prospect, KY  
*For the Employer*

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Office of the Solicitor  
*For the Certifying Officer*

Before: Christopher Larsen  
Administrative Law Judge

**DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION**

This consolidated 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, if the Secretary of Labor first certifies (a) there are not sufficient domestic workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services in question; and (b) the employment of foreign workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. section 1188, subsection (a).

In 20 C.F.R. Part 655, Subpart B, the Secretary sets out the procedures by which the Department of Labor makes that certification. 20 C.F.R. section 655.100.

In this case, O'Bryan Composting, LLC ("Employer") requests administrative review<sup>1</sup> under 20 C.F.R. section 655.171, subsection (a), of the Certifying Officer's ("CO") denial of its temporary alien agricultural labor certification ("H-2A") application to hire 28 animal breeders to work in Owensboro, KY, from November 15, 2020, until March 15, 2021 (AF, pp. 48-49). Under my Order issued October 30, 2020, both parties have filed briefs.

On administrative review, I must either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. I base my decision on the written record, including the Certifying Officer's Administrative File ("AF") and the briefs filed by the parties. 20 C.F.R. section 655.171, subsection (a).<sup>2</sup>

### **STATEMENT OF THE CASE**

Employer filed its application (AF, pp. 40-78) on or about August 25, 2020. On September 8, 2020, the CO issued a Notice of Deficiency (AF, pp. 29-33). In that Notice, the CO reviewed Employer's filing history, comprising nine previous H-2A certification applications, together with this application (AF, pp. 31-32), and observed

The current application is primarily focused on livestock care. The employer's previous certification (H-300-19352-20182) included both planting and harvesting of crops, as well as assisting with livestock care. From the employer's history, it appears the employer requires help with its livestock year round.

Though the crops and duties may vary slightly between the past and current applications, they contain many overlapping and similar duties. Therefore, the employer's filing history is

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<sup>1</sup> Originally, Employer requested a *de novo* hearing under 20 C.F.R. § 655.171, subsection (b), but the parties stipulated on October 27, 2020, to administrative review instead.

<sup>2</sup> The parties contend I must uphold the CO's decision unless it was arbitrary, capricious, or not otherwise in accordance with the law (Employer's Brief, p. 2; CO's Brief, p. 3). But before the current regulations became effective on March 15, 2010, the regulatory standard of review was "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Some BALCA panels interpreted "legal sufficiency" to imply an "arbitrary and capricious" standard of review. *See J and V Farms, LLC*, 2015-TLC-00022, slip op. at 3, n. 1 (Mar. 4, 2016) (citing *Bolton Springs Farm*, 2008-TLC-00028, slip op. at 6 (May 16, 2008)). But the earlier regulations did not define "legal sufficiency." *See id.*; 20 C.F.R. § 655.112(a) (2008). The current regulations omit the reference to "legal sufficiency" and do not address the deference, if any, BALCA should give to the Certifying Officer's decision. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). The current regulations' silence leaves the question open, and requires BALCA judges to determine an appropriate standard of review. Happily, in this case it makes no difference, since I would reach the same result even under an "arbitrary and capricious" standard.

not following a set season or pattern in the area of intended employment. Therefore, the work cannot be considered being tied to a certain time of year as is required for a showing of seasonal need.

The employer has shown through its previous and current applications that it can perform similar Farmworker and Laborer duties year round in the same area of intended employment, thereby demonstrating that its work is not tied to a certain time of year by an event or pattern.

(AF, p. 32). Employer contends “the conclusory and definitive nature” of these statements shows “the CO prejudged the issue of the Employer’s seasonal need before the Employer even had an opportunity to respond to the alleged deficiency” (Employer’s Brief, p. 4, fn. 1). Nevertheless, the CO asked Employer to “provide information and documentation to support its seasonal need,” noting “[t]he burden to demonstrate a ‘temporary’ or ‘seasonal’ need for agricultural services rests with the employer” (AF, p. 32).

On September 23, 2020, Employer responded to the Notice of Deficiency (AF, pp. 11-19). Employer argued the past applications on which the CO relied were not comparable to the present application:

The CO misleadingly describes our current application as being for “livestock care” when the application is for animal breeders. The CO also misleadingly describes our previous certification as being for planting and harvesting crops and assisting with livestock care. Then the CO misleadingly states that “crops and duties may vary slightly between the past and current applications and they contain many overlapping and similar duties.” The CO goes on to state the rather astonishing conclusion that “the work [described in our application] cannot be considered being tied to a certain time of year as is required for a showing of seasonal need.”

(AF, p. 11). In Employer’s view, “[t]he CO apparently seeks to try and combine our separate applications for different numbers of workers to perform different types of work at different times in an attempt to create the impression of a single ongoing need for labor to fill one specific position” (*Id.*).

In fact, according to Employer, “[w]e apply for H-2A workers to support our US workforce for employment at two different times of year to perform different agricultural tasks under two completely different job categories” (*Id.*). “We . . . typically apply for H-2A workers for a period of November through March to perform animal breeder-related work, including swine farrowing, nursery and finisher duties.

That is our current application” (AF, p. 12). Employer insisted its need for additional animal breeders is “seasonal:”

Swine have a tendency to breed from November through June and do not normally breed in late summer and fall in order to avoid having piglets during winter months. We, however, specifically breed sows to birth over the winter months in order to take advantage of market conditions the following summer when there is a higher demand and decreased supply of pork, as it typically takes swine about six months to reach maturation for the market. Our herd produces piglets year-round. But having piglets born over the winter months creates a great deal of additional work because of the challenges brought on by colder weather that just do not exist at other times of the year. As a result of these wintertime challenges, we require additional labor to care for the newborn piglets. The cold weather leads to higher mortality rates, which means exponentially more work in maintaining the farrowing houses, which includes assembling and repairing curtains to keep out the weather, installation, repair and rotation of heaters, as well as constant resupply of fuel. We also undertake increased efforts to combat disease and treat higher rates of sickness among the herd and the newborn piglets. That involves additional efforts to disinfect and wash surfaces and deal with the resulting difficulties with frozen water pipes and frozen surfaces. Activities such as removing manure from barns that are relatively simple in warm weather are complicated by cold weather with frozen manure, water, tools and equipment. We also have to increase efforts to continually combat rodent infestations (they too like a warm environment in the winter). Also, pigs naturally resist moving in cold weather, so we also have to devote significant time and effort manually to getting pigs to move around during the day in order to decrease sickness, disease and developmental issues. During the warmer months, these challenges are non-existent or can be addressed by our permanent U.S. workforce, but the additional work required in the winter requires additional labor to maintain the herd.

(AF, p. 14).

Additionally, Employer provided payroll information and other details about the size of its domestic workforce, the number of H-2A workers it hires to care for swine, and the number of H-2A workers it hires for crop-related work (AF, pp. 14-15, 17-19). According to Employer, it hires “about 28 H-2A workers to assist with animal breeder duties between November and March, which is about 40% above our

average total US employee numbers during that period and about 50% above our number of U.S. employees performing those duties during that period”<sup>3</sup> (AF, p 15).

On October 8, 2020, the CO denied the application on the grounds Employer had failed to “establish that its job opportunity is temporary or seasonal in nature” (AF, p. 6). The CO rested his conclusion on three observations:

First, the Employer’s “filing history indicates the employer has a past practice of filing for H-2A workers almost year round,” citing the same nine previous applications as in the Notice of Deficiency (AF, pp. 6, 31). In the CO’s view, the history shows “the employer requires help with its livestock year round.” The job duties of the past H-2A workers, and the job duties of the proposed H-2A animal breeders, in the CO’s view, “contain many overlapping and similar duties,” so “the employer’s filing history is not following a set season or pattern . . . . Therefore, the work is not tied to a certain time of year as is required of a seasonal need” (AF, p. 7).

Second, because Employer admittedly breeds swine year-round, the job opportunity by definition is not “seasonal,” in the CO’s view. “Seasonal” work 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. section 655.103, subsection (d). But “the employer’s NOD response indicates it breeds swine year round. Therefore, the job duties described in this application, animal breeding, are not tied to a certain time of year as required by the regulations” (AF, p. 8).

Third, “the employer indicates that it chooses to breed swine in the winter to take advantage of market conditions. Here, the employer ties the need in this application to market conditions instead of a certain time of year by an event or pattern. The employer also demonstrates that its need for animal breeders is one that can be manipulated to better suit the employer’s economic needs” (AF, p. 8).

## DISCUSSION

### *Employer’s Past Applications*

In both the Notice of Deficiency (AF, pp. 31-32) and in the Denial (AF, pp. 6-7), the CO presents, in the form of a chart, a list of nine previous labor certification applications from the Employer, together with the current application. I summarize them again here, in the order in which they appear on the Index to the Administrative File:

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<sup>3</sup> These conclusions are based on estimates, because Employer does “not classify and track US employees by specific job categories. We know what specific work to attribute to our H-2A workers because they are hired for specific tasks, but our US employees perform any number of tasks that may or may not fit neatly into a particular job category. Because the swine-related work is fairly constant throughout the year, other than in the winter, we are able to identify the general US labor levels associated with that work each month” (AF, p. 15).

<u>Case No.</u>	<u>Job Opportunity</u>	<u>Temporary Period</u>	<u>Job Duties</u>
H-300-19352-201826 (AF, pp. 81-135)	48 Farmworkers and Laborers, Crop	3-1-2020 to 11-30-2020	AF, p. 116
H-300-19043-183091 (AF, pp. 136-191)	4 Farmworkers and Laborers, Crop	4-23-2019 to 11-30-2019	AF, pp. 174-175
H-300-19007-248934 (AF, pp. 192-253)	36 Farmworkers and Laborers, Crop	3-6-2019 to 11-30-2019	AF, p. 225
H-300-18248-673413 (AF, pp. 254-342)	29 Animal Breeders	11-15-2018 to 3-15-2019	AF, pp. 288-289
H-300-17352-205413 (AF, pp. 343-417)	36 Farmworkers and Laborers, Crop, Nursery, and Greenhouse	3-1-2018 to 11-30-2018	AF, p. 389
H-300-17251-363239 (AF, pp. 418-515)	28 Animal Breeders	11-15-2017 to 2-15-2018, extended to 3-15-2018	AF, pp. 429-430, 454-456
H-300-17108-626549 (AF, pp. 516-578)	41 Farmworkers and Laborers, Crop, Nursery, and Greenhouse	6-27-2017 to 11-30-2017	AF, p. 549
H-300-17046-564961 (AF, pp. 579-642)	4 Farmworkers and Laborers, Crop, Nursery, and Greenhouse	4-25-2017 to 11-30-2017	AF, p. 613
H-300-16335-129807 (AF, pp. 643-708)	13 Farmworkers and Laborers, Crop, Nursery, and Greenhouse	2-6-2017 to 11-30-2017	AF, p. 679

In the current application, of course, Employer seeks to certify 28 animal breeders to work from November 15, 2020, until March 15, 2021. The job duties are described at AF, p. 57.

The descriptions of the job duties in the applications are detailed, but, having reviewed them, I am hard-pressed to find substantial overlap. Three of the applications (including the current one) are for Animal Breeders, and the job duties in all three applications are remarkably similar to one another. They are quite distinct from duties involving care of agricultural crops. Three of the applications are for Farmworkers and Laborers, Crop, and the job duties in all three applications are again remarkably similar to each other, and quite distinct from caring for animals. The remaining four applications are for Farmworkers and Laborers, Crop, Nursery, and Greenhouse. Again, the job duties in all four applications are remarkably similar to one another, and remarkably dissimilar to the Animal Breeder job duties. Even the “Alternative Work” described in the seven Farmworker applications differs from the duties of the Animal Breeder.

Even more convincingly, in H-300-17251-363239, the CO noted the very same deficiencies he identified in this case. Citing four previous applications,<sup>4</sup> the CO in case no. H-300-17251-363239 concludes “many of the job duties are similar and overlapping for all applications,” and argues “the employer has not established how this job opportunity is temporary, rather than permanent and full-time, in nature” (AF, pp. 463-464). In response to that Notice of Deficiency, the Employer provided a detailed discussion of how the duties of the Animal Breeder differed from those of the Farmworker and Laborer jobs (AF, pp. 454-456). After receiving this explanation, the CO certified the application (AF, pp. 432-435), and even extended it (AF, pp. 418-419).

Of course, the fact that the CO certified the H-300-17251-363239 application does not require him to certify this one. But by citing case no. H-300-17251-363239 as a basis for denial of this application, the CO himself raises the question of why he treats the present application differently. Either the CO in this case denied the application without considering the Employer’s earlier explanation, AF, pp. 454-456, or the CO has decided the earlier explanation, for some reason, is now inadequate. But on the record before me, he offers no explanation whatever. For all the record shows, he simply decided to reach the opposite result on a whim – the very definition of “arbitrary and capricious.”

For all of these reasons, the past applications do not support the CO’s decision in this case.

### *Seasonal Need in Year-Round Operations*

Because Employer raises swine year-round, the CO concludes the job duties described in this application, animal breeding, are not tied to a certain time of year as required by the regulations” (AF, p. 8).

Here, the CO paints with too broad a brush. In some cases, “the care and feeding of animals are presumed to occur on a year-round basis and therefore reflect a year round need for workers. *However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis*” (emphasis added). *Cowboy Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011), slip op. at p. 4; *see also Gisi Pheasant Farms*, 2011-TLC-00139 (Jan. 25, 2011). In this case, Employer demonstrates a need for additional workers to care for the animals during the colder winter months. The CO cannot simply wave this explanation away by erroneously concluding animal breeding is a year-round undertaking as a matter of law.

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<sup>4</sup> In fact, to case numbers H-300-16335-129807, H-300-17046-564961, H-300-17108-626549, and H-300-17251-363239, all four of which the CO relies upon again in denying the application in this case.

### *Temporary Need and Market Conditions*

The CO's third justification for denial is that Employer's application is not "tied to a certain time of year by an event or pattern," 20 C.F.R. section 655.103, subsection (d), because Employer "chooses to breed swine in the winter to take advantage of market conditions." Thus, in the CO's view, "the employer ties the need in this application to market conditions instead of a certain time of year by an event or pattern. The employer also demonstrates that its need for animal breeders is one that can be manipulated to better suit the employer's economic needs" (AF, p. 8).

In *Altendorf Transport*, 2011-TLC-00158 (Feb. 15, 2011), a grain hauler's need for "seasonal" drivers was not "tied to a certain time of year by an event or pattern," because

The Employer cannot predict when the farmers will sell their grain, and although the Employer has framed its projected need dates as based on the weather, it also depends on the price that the farmers can get at market. The trucking in this application is not related to the time of year that the grain is actually harvested, but rather when the stored grain is taken to market. The Employer has explained that the time the grain is taken to market related to the time the farms *[sic]* decide to sell their crop, which is dependent on the commodities markets. Tr. 27. Based on this information, the Employer's increased need for over-the-road truck drivers is not tied to a certain time of year by an event or pattern, but rather depends on the price of the grain. Because the commodities market by nature is fluctuating and largely unpredictable, it does not appear that the Employer's need for over-the-road truckers is tied to a particular time of year by an event or pattern.

(Slip op. at 12.) But in this case, the Employer is not using seasonal H-2A workers in order to be able to move more quickly when prices are high during the summer months. The Employer in this case is using seasonal H-2A workers in order to have more pork to sell in the summer months, when the pork supply tends to be low. And seeking legal, ethical advantage over competitors is precisely what business are organized to do.

Here, the Employer's need for seasonal workers is tied to a particular time of year, namely, the colder winter months. The CO seems to think that because raising swine in the winter months gives Employer a competitive advantage in the summertime, it should not be able to use seasonal H-2A workers to do it. But if, as in this case, an Employer's need for seasonal workers is "tied to a certain time of year by an event or pattern," the mere fact that the Employer generates profits by employing seasonal H-2A workers to meet that need is not disqualifying. Undoubt-

edly every seasonal H-2A employer in the United States gains some competitive advantage by hiring seasonal H-2A employees, or they would have no reason to do it.

I conclude the CO is wrong to conclude this Employer's need is not "seasonal" simply because it allows the Employer to market its products year-round.

**ORDER**

The Certifying Officer's denial of certification is REVERSED. Employer has demonstrated a seasonal need.

I remand this matter to the Certifying Officer for further processing.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge