

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 11 February 2021**

BALCA Case No.: 2021-TLC-00072

ETA Case No.: H-300-20333-930004

*In the Matter of:*

**AGRICOLA, INC.,**

*Employer.*

**DECISION AND ORDER OF REMAND**

This case arises from a request by Agricola, Inc. (“Employer”) to review the Certifying Officer’s (“CO”) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. In the case before me, arising from application H-300-20333-930004, Employer requested three workers from February 1, 2021 through December 1, 2021.

Following the CO’s denial of an application for certification under 20 C.F.R. § 655.161, an employer may request review by the Board of Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.164(b). Here, the Employer, who is self-represented, requested “either” an administrative review or a de novo hearing, which I interpreted as a request for expedited administrative review. *See* 20 C.F.R. § 655.171(b). I received the administrative file on February 1, 2021, and have considered the record including the Employer’s request for review and the CO’s brief.

I reverse and remand the CO’s denial of certification for the reasons below.

**LEGAL BACKGROUND**

The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a seasonal or other temporary basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B (collectively, the H-2A program); *see also* 20 C.F.R. § 655.103(d).

To qualify for the H-2A program, an employer has the burden to establish that it has a need for agricultural services or labor on a temporary or seasonal basis under 20 C.F.R. § 655.161(a). By regulation, “employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a

temporary worker will, except in extraordinary circumstances, last no longer than 1 year.” 20 C.F.R. § 655.103(d). As interpreted, either a temporary or seasonal need is generally 10 months or less. *See Ag Labor, LLC*, 2021-TLC-00015; 2021-TLC-00020, slip op. at 11 (Nov. 27, 2020) (citing *Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008)). However, this is not a bright-line rule; it is instead “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.” *Id.* (citing *Grassland Consultants, LLC*, 2016-TLC-00012 (Jan. 27, 2016)); *see also* 20 C.F.R. § 655.103(d) (up to one year).

The determination focuses on the employer’s stated need at a particular time and place, not the nature of the duties of the position or the title. *See Ag Labor LLC*, 2020-TLC-00107 & -108, slip op. at 4 (Aug. 31, 2020) (whether “the employer’s needs are seasonal, not whether the particular job at issue is seasonal”) (citing *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)). “It is not the nature or 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.” *Pleasantville Farms*, 2015-TLC-00053, slip op. at 3 (quoting *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-60, slip op. at 4 (Aug. 28, 2009)).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

By application dated December 7, 2020, the Employer requested a temporary labor certification for three Farm Laborers<sup>1</sup> with at least three months experience, AF 68-71, to perform a range of tasks:

Workers will need knowledge and experience with the following, 12 Row equipment, 10-350 HP tractor, self-propelled sprayers and harvesters. Knowledge and or ability to learn latest technology, including swath control, irrigation management (center pivots, furrow, using pipe planner) GPS guidance systems, be proficient with web based farm management software, general farm labor such as shovel work, cleaning shop, cleaning farm equipment and vehicles which will be required when weather prevents field work. Workers must be physically able to perform all duties describe including but no limited to sitting, walking and lifting 75 lbs. Maintain worksite, equipment, buildings and fences. Mowing or clipping of grass at headquarters and turn rows. Grain bins: Loading, shipping and maintenance of grain bins. March October: Insecticides applied by a tractor or industrial spray applicator.

All workers must have a valid drivers’ license either from the United States or an international driver license or be able to obtain one within 30 days.

Corn Planting Irrigation Harvesting  
Planting March through April  
Irrigation June July  
Harvest August September

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<sup>1</sup> Employer used Standard Occupational Classification (SOC) Code 45-2091.00, “Agricultural Equipment Operators.”

Soybeans Planting Irrigation Harvesting  
Planting April through May  
Irrigation June July August  
Harvest September October

Cotton Planting Irrigation Harvesting  
Planting April through May  
Irrigation June July August September  
Harvest October November

Wheat Harvesting  
Harvest May

AF 79. The Employer requested the workers from February 1, 2021 to December 1, 2021, a 10-month period. AF 70. The Employer's application was filed by its owner, Seth Rankin, who is also Employer's representative in this proceeding. AF 65-68.

On December 11, 2020, the OFLC CO issued a Notice of Deficiency to the Employer, setting out multiple deficiencies in the Application and requesting additional information. AF 47-55. The CO wrote, in most relevant part, that the Employer's initial application did not sufficiently demonstrate that the job opportunity was temporary or seasonal.

Sections A.3 and A.4 of the ETA Form 790A indicate the employer's requested dates of need are from February 1, 2021 through December 1, 2021. However, the monthly breakdown of the job duties described in Section A.8a of the ETA Form 790 reflects a period between March and November. It is unclear what the requested workers will be doing in the months of February and December.

AF 53.

In a series of exchanges with the CO over the course of December, the Employer provided additional information about its farming operations, including employee and payroll information for 2018 and 2019 as requested by the CO. AF 12-45. The Employer submitted a statement that it "grow[s] row crops, corn, cotton, soybeans, and wheat." AF 36. Employer also documented that it is a small farm in terms of employees; it has one permanent employee (Mr. Rankin, the owner) and over the course of 2018 and 2019, at most had two full-time-equivalent (FTE) employees working in addition to Mr. Rankin. Employer employed a total of seven individuals, and each of them "quit" or left for another job. AF 16, 22.

A close review of the employee payroll data shows that in 2018, Employer had no employees (in addition to Mr. Rankin) in January, February and March. In April, Employer had 1.21 FTE's, assuming a 160-hour work month.<sup>2</sup> In May, Employer had 1.93 FTE's. In June and July 2018, two employees worked a total of 336 and 328 hours respectively, which is 2.1 and 2.05 FTE's. This was the high water mark for the Employer during the two years of data

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<sup>2</sup> Recognizing that farm employees work overtime, I assume 40 hours per week and four weeks per month.

requested by the CO. In August 2018, Employer had 1.06 FTE's; in September and October, zero; and in November and December, .56 FTE's. AF 23-24.

In 2019, Employer had precisely 1 FTE, one Coleman Collins, for January, February, March and April. In May, after 64 hours worked (.4 FTE), Mr. Collins quit, and Mr. Rankin made do with a single employee working at less than half an FTE for June, July and August. AF 16-18. Employer had no employees in September, October, November or December.

By letter dated January 15, 2021, the CO denied certification. AF 5-10. After recounting the series of Employer's filings and the CO's notices of deficiency, the CO ultimately denied certification for the following reasons:

[T]he employer did not submit any other documentation to support its asserted seasonal need for 3 H-2A workers; nor did the employer provide an explanation as to why its job opportunity is seasonal other than the statements indicating that it is requesting seasonal workers for H2A, not temporary workers; and that it does not have any labor for this coming crop year due to a lack of workers. As stated previously in this notice, a lack of domestic labor is one requirement for the H-2A program; however, it does not provide evidence as to the seasonality of the employer's need.

As stated earlier in this notice, seasonal is defined as "employment [that] 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." The employer's need has failed both aspects of the definition. First, the evidence submitted by the employer does not support its claimed seasonal need of February to December. Second, the employer's submitted payroll documentation is evident that the employer is not augmenting an existing workforce partaking in ongoing operations as required by the regulations.

AF 10.

The Employer appealed. The Employer's appeal request letter included additional information, but I am barred by regulation from considering new evidence in an administrative review. *See* 20 C.F.R. § 655.171(a).

In administrative reviews, BALCA reviews CO certification decisions in the H-2A program under an arbitrary and capricious standard. *See J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015); *see also Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (three-judge panel citing *J and V Farms* with approval in H-2B case).<sup>3</sup> "Under an arbitrary and

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<sup>3</sup> As Judge Clark noted in *J and V Farms*, *see* slip op. at 3, the prior H-2A regulations specified that the decision of the ETA was to be reviewed for "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Legal sufficiency was not defined by the regulations, but had been interpreted to mean arbitrary and capricious review. *E.g. Bolton Springs Farm*, Case No. 2008-TLC-28, slip op. at 6 (ALJ May 16, 2008). The March 15, 2010 regulations removed the reference to legal sufficiency but did not substitute any other standard of review, and no comment was provided to explain the change. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). Under the current regulations, most ALJs in the BALCA context, including myself, have continued to apply an arbitrary and capricious standard of review in administrative reviews. *E.g. J.M. Yanez Const., Inc.*, 2019-TLN-00072 (Apr. 1, 2019) (H-2B); *Catnip Ridge Manure*

capricious standard, the reviewer ensures that the decision-maker below examined ‘the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *K.S. Datthyn Farms, LLC*, 2019-TLC-00086 (Oct. 7, 2019) (H-2A) (quoting *Three Seasons Landscape Contracting Service*, 2016-TLN-00045, slip op. at 19 (June 15, 2016) (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted))). “If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious.” *Id.* Even where the agency “explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency’s path may reasonably be discerned.” *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009). But a reviewer “may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (quoting *State Farm*, 463 U.S. at 43, (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947))).<sup>4</sup>

Both the CO and BALCA have analyzed H-2A employers’ seasonal or temporary needs in terms of their past use of labor. Here, however, the record reflects that at this very small farm, growing a diverse mix of products (row crops, corn, cotton, soybeans, and wheat), the Employer’s employment of workers appears to have been driven not entirely by his own need, but also to some degree by workers’ availability and willingness to work. The record reflects that the Employer has stated he has a seasonal need and complained of the absence of available workers. The record also reflects that during the two years studied, 2018 and 2019, all seven of the Employer’s U.S. workers left after relatively brief (i.e. temporary) employment. AF 16, 22. The Employer has a Eudora, AR address. AF 68. I note that Eudora, AR, is in Chicot County, population 10,118, and 75 miles from the nearest city of any size (Vicksburg, MS).<sup>5</sup>

With such a small sample size and small pool of labor, it is impossible to draw meaningful conclusions about the seasonality of need solely from the arrival and departure of the Employer’s U.S. workers. At large employers and H-2A Labor Contractors, employing dozens or even hundreds of workers, what may be idiosyncratic reasons for individual workers’ employment or departure from employment come out in the wash. For example, in *Nature Fresh Farms USA, Inc.*, 2020-TLC-00079 (June 19, 2020), cited extensively by the CO in the brief in this case, the employer sought 70 H-2A workers after employing 50 to 70 such workers during

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*Application Inc.*, Case No. 2014-TLC-00078, slip op. at 3 (ALJ May 28, 2014); *T.A.F. Shearing Co./Alejandro R. Colqui*, Case No. 2012-TLC-00095, slip op. at 1 (ALJ Sept. 19, 2012). Additionally, ETA has said that the “substance of [the appeals regulation] has remained the same since 1987.” 74 Fed. Reg. 45906, 45921 (Sept. 4, 2009). *But see Ag-Mart Produce, Inc.*, 2020-TLC-00050, 2020-TLC-51, slip op. at 8 n.21 (Apr. 7, 2020) (applying de novo standard in H-2A administrative review; citing cases).

<sup>4</sup> An employer must *expressly* request a de novo hearing in order to receive one, at which the standard of review is de novo rather than arbitrary and capricious and where the employer may submit new evidence. The catch for the employer is that the CO may also submit new evidence and refine his arguments. *See generally Overlook Harvesting LLC*, 2021-TLC-00042 (Jan. 28, 2021) (Nordby, ALJ) (upholding denial of certification based on new argument and additional evidence presented at de novo hearing).

<sup>5</sup> I take official notice of U.S. Census Bureau data, and of Google Maps. *See* 29 C.F.R. § 18.84; *see also* QuickFacts, Chicot County, AR, *available at* <https://www.census.gov/quickfacts/chicotcountyarkansas> (accessed Feb. 10, 2021).

peak periods during the months studied. *Id.*, slip op. at 6, 11. But, the number of workers employed by Nature Fresh Farms *did* vary by one or two from month to month during most of the study period. *Id.*, slip op. at 6. In *Overlook Harvesting*, in the group of applications in evidence in that case, the employer sought nearly 400 farmworkers and first-line supervisors to work in and around the populated Orlando metropolitan area, and had a track record of similarly large applications. 2021-TLC-00042, slip op. at 3-6. I hypothesize that the CO would not hold the employment of 355 versus 357 farmworkers against *Overlook Harvesting* as persuasive evidence of seasonal need or lack thereof.

Here, however, the CO gives Employer's fluctuations between zero, one and two workers dispositive weight. The CO correctly notes that "a lack of domestic labor is one requirement for the H-2A program; however, it does not provide evidence as to the seasonality of the employer's need." At the same time, the *presence* of a single domestic laborer at a particular time is not dispositive of that issue either. The fact that the Employer here had a single U.S. worker willing and able to perform some work in January 2019, does not mean that he does not actually have a seasonal need for three workers to perform the stated duties from February 1 to December 1 to augment Employer's permanent employment of its owner, Mr. Rankin.

Moreover, though past payroll records are routinely requested by the CO and relied on, nowhere in the H-2A regulations does it *require* that the CO rely on past payroll records to establish seasonal need, or that such records are the only means of proving seasonal need. At a minimum, I note that the preparation, planting, growing, and harvesting season for ordinary farm products<sup>6</sup> in most of the United States stretches from late winter through spring and summer to late fall, such that a stated seasonal need of February 1 to December 1 for a small farm passes the common sense test.

The CO concluded here that the Employer did not prove a seasonal need based on data that does not on its own support the CO's conclusion. Since the CO "entirely failed to consider an important aspect of the problem," i.e., the unreliability of the relied-upon payroll data to determine seasonal need, it is ORDERED that the denial of certification is REVERSED and this matter REMANDED for further action, to include reopening the factual record.

SO ORDERED.

For the Board:

EVAN H. NORDBY  
Administrative Law Judge

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<sup>6</sup> Exceptions include certain hardy crops that may overwinter in temperate locations, and winter-ripening products in subtropical locations, such as Florida citrus. *See, e.g. Overlook Harvesting, supra.*