In the Matter of:

ATP GROVES LLC,
Employer.

Certifying Officer: John Rotteman
Chicago National Processing Center

Appearance: Michael Eastman
Wauchula, Florida
For the Employer

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION


On August 10, 2021, ATP Groves LLC (“ATP Groves” or “Employer”) requested expedited administrative review of the Certifying Officer’s (“CO”) August 4, 2021 denial of its H-2A application. Administrative File (“AF”) at 2-8, 14-21. In expedited administrative review cases, an administrative law judge has five business days after receiving the AF to issue a decision on the basis of the written record, with no new evidence submitted on appeal. 20 C.F.R. § 655.171(a). This matter was assigned to me on August 11, 2021, and on August 13, 2021, I issued a Notice of Docketing and Order Setting Briefing Schedule in which I gave the parties three business days after receipt of the Administrative File to submit briefs. The Office of Administrative Law Judges received the AF on August 18, 2021. Neither the CO nor Employer filed an appellate brief.
BACKGROUND

On June 28, 2021, Employer filed an H-2A Application for Temporary Employment Certification, ETA Form 9142A. AF at 102-127. In this application, Employer requested temporary labor certification for eight workers whose job title is “Heavy and Tractor-Trailer Truck Drivers,” SOC code 53-3032.00, with a period of need from September 8, 2021 to July 8, 2022. Id. at 103, 110. Employer stated these eight workers would have the following job duties:

This job will entail extensive sitting, push [sic], pulling, repetitive movement and working outside in inclement weather. Must be able to work in groves and fields where crops will be collected and hauled to designated work-sites . . . Drivers will haul fertilizer from federalizer [sic] plants and harvested crops from fields/groves to designated processing and packing facilities . . . The driving and hauling will consist [sic] driving the semi-tractor to the work-sites contained in this application, attaching the tractor trailer and driving the tractor trailer to the processing or packing facilities identified in the petition. In addition, drivers may be required to place empty trailers in the fields/groves and/or relocate trailers throughout the designated work-sites contained in this petition.

Id. at 122. Employer did not provide a statement of temporary or seasonal need.

On July 1, 2021, the CO sent Employer a Notice of Deficiency ("NOD"), listing three deficiencies. Id. at 85-96. One of the identified deficiencies (and the sole basis for denial of certification in this case) was that the Employer did not establish a temporary or seasonal need for these workers as required by 20 C.F.R. § 655.103(d). Id. at 93-96. The CO stated that Employer’s point of contact, Michael Eastman, has previously filed applications for Heavy Truck and Trailer Drivers for ATP Agri-Services, Inc. ("ATP Agri-Services"). Id. at 94. ATP Agri-Services once applied for heavy truck drivers, SOC code 53-3032.00, under the H-2A program in 2019, which was denied for not meeting the definition of agricultural labor and services. Id. ATP Agri-Services has since had two applications certified for Farmworkers and Laborers, Crop, SOC code 45-2092.02. Id.

The CO noted that ATP Groves and ATP Agri-Services have different names and Federal Employer Identification Numbers ("FEIN") but share Mr. Eastman as a point of contact, have the same phone number, and have the same business address. Id. Aggregating the requests from ATP Groves and ATP Agri-Services, the CO concluded that Employer has a need for truck drivers 11 months out of the year. Id. The CO stated that Employer needed to explain the differences in business operations between ATP Groves and ATP Agri-Services, explain how hauling crops year-round in the same area of employment is seasonal, and submit evidence supporting Employer’s arguments, including payroll records for both businesses from the last three years. Id. at 95-96. The CO noted that the Office of Foreign Labor Certification ("OFLC") uses the Single Employer Test to determine if two businesses are sufficiently intertwined so as to be treated as a single employer. Id. at 95.
Employer responded to the NOD on July 12, 2021. *Id.* at 48-83. Employer explained that ATP Groves is an individual, fixed-site employer that is applying to the H-2A program for the first time as an individual citrus farming employer to transport crops to and from farm worksite locations and processing plants. *Id.* at 51-52. ATP Agri-Services is an H-2A Farm Labor Contractor and H-2B employer that contracts with various fixed-site employers, including ATP Groves, and the dates of need in its filing history reflect the collective needs of its clients for multiple crops, not just ATP Groves’ citrus needs. *Id.* at 52. Andrew Pace is the 100% owner of ATP Groves, which is a single partner Florida LLC, and he manages its farming activity. *Id.* Mr. Pace is also the 100% owner of ATP Agri-Services, which is a Florida corporation that is managed by a team of mid-level managers who report to Mr. Pace. *Id.* at 52-53.

ATP Groves’ period of need for H-2A workers coincides with the Florida fall-summer citrus season; ATP Agri-Services’ period of need as an H-2B employer is September to June to haul fruit and November to June to harvest processed citrus as a Florida Farm Labor Contractor. *Id.* ATP Groves and ATP Agri-Services share an office space and both use Citrus Pro payroll software, which is specific to the citrus industry, but they have separate logins, charts of accounts, bank accounts, customer lists, vendor lists, and employee lists. *Id.* at 52-53. The two businesses do not share managers or personnel, and workers are not transferred or promoted between the two entities. *Id.* at 53. ATP Groves has never employed workers, each business pays its own bills, bank accounts are not shared, and money is not intermingled. *Id.* Mr. Pace is ATP Groves’ sole decision-maker, whereas all hiring, firing, supervising, and employee decisions are made by managers at ATP Agri-Services. *Id.*

Employer did not submit payroll records for ATP Groves because it has never employed anyone, and it also did not submit records for ATP Agri-Services. *See AF at 43.* Employer’s response to the NOD also included an explanation of ATP Groves’ seasonal need for heavy truck drivers:

> Citrus fruit is only harvested and hauled to the processing plants during certain months of the year, generally September through the end of June and beginning of July. Further, the processing plants are also closed for certain months when there is no fruit available to process. As it relates to fertilizer, it is hauled and applied only at specific times during the season, in relation to the harvest, and is not a year-round activity. As reflected in the ETA Form 790, the heavy truck drivers will be employed for 10 months or less.

*Id.* at 54-55.

On August 4, 2021, the CO denied certification because ATP Groves failed to establish a seasonal need for the requested workers and because ATP Groves’ and ATP Agri-Services’ business operations were too intertwined for them to be considered separate entities under the Single Employer Test. *Id.* at 14-21. The CO determined that Employer did not have a seasonal need for truck drivers because it previously filed an application, H-300-19057-416439, for truck drivers through the end of July. *Id.* at 20. The CO concluded that this contradicted Employer’s statement that it did not need drivers after the end of June or early July, and the aggregate
business needs between ATP Groves and ATP Agri-Services require truck drivers for 11 months of the year. *Id.*

Citing to *Altendorf Transport, Inc.*, 2013-TLC-00026 (ALJ March 28, 2013) and *Katie Heger*, 2014-TLC-00001 (ALJ November 12, 2013), the CO also determined that ATP Groves and ATP Agri-Services were functionally the same employer because the two entities have the same or shared owner (Mr. Pace), officer (Mr. Eastman), office space, payroll software, insurance policy, and agent (Florida Fruit & Vegetable Association). *Id.* at 20-21. The CO also noted that Employer failed to explain why it did not submit payroll records for ATP Agri-Services in its NOD response. *Id.* at 21.

In its request for expedited review, Employer distinguished this case from *Katie Heger* and *Altendorf Transport*. Employer noted that the ALJ in *Katie Heger* determined the employer could not establish that it was a separate business entity, and the employer’s sequential periods of need (February 5, 2013 through December 15, 2013, and December 1, 2013 through February 15, 2014) disqualified its application. AF at 3. Employer argued that in *Altendorf Transport*, the ALJ noted that one of the companies at issue was created shortly after the other business’ H-2A application was denied, and the combined period of need between the two entities (December 1, 2012 through May 31, 2013, and March 11, 2013 through December 31, 2013) was 13 months. *Id.*

Employer reiterated that ATP Groves has no payroll records and also stated that ATP Agri-Services only has payroll records from the 2020-2021 citrus season because that is the first year it has employed its own drivers. AF at 4-5. ATP Groves is a fixed-site citrus farmer that only produces citrus products; it offers no other products or services. *Id.* at 4. ATP Groves has no employee history and no filing history in the H-2 program, and it is seeking H-2A workers to set up empty bulk citrus trailers before harvest, transport crops to the packing house and processing plant, retrieve citrus trailers after harvest, and transport fertilizer from the fertilizer plant to ATP Groves. *Id.*

ATP Agri-Services, on the other hand, is a service provider that owns and operates bulk citrus trailers that are set up at groves and processing plants throughout south central and south Florida. *Id.* The application referenced by the CO in its denial, H-300-19057-416439, was the first H-2A application filed by ATP Agri-Services, which “was filed in an attempt to fulfill an immediate labor need to effectively service ATP Agri-Services Inc.’s customers during that 2018-2019 citrus season and to retrieve all trailers post-harvest.” *Id.*

Employer argues that ATP Groves’ period of need should not be aggregated with ATP Agri-Services’ period of need from its H-2A filing history. If the periods of need are aggregated, Employer asserts that there is OFLC guidance to support that the combined 10 month and 3 week period of need from September 8, 2021 through July 31, 2022, is still temporary and seasonal due to setup and cleanup duties performed in the course of the regular 10 month Florida citrus season.¹ *Id.* at 5. Employer also notes that ATP Agri-Services’ application H-300-19057-416439 was denied and should not be considered with ATP Groves’ current request. *Id.* at 6. In the alternative, Employer is willing to shorten ATP Groves’ period of need to run from

¹ Employer did not cite or specify the OFLC guidance to which it was referring.
September 8, 2021 through June 30, 2022, if the periods of need for the two entities are combined. *Id.*

**DISCUSSION**

An employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. 20 C.F.R. § 655.161(a). The regulation states:

\[E\]mployment 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).

In *Katie Heger*, the CO found that a previous application had been certified for an entity named “Steven Heger” for a time period that overlapped with the period of need requested in the application and that described a position with the same job title, job duties, job requirements, and worksite address. The CO considered these facts and the “apparent interlocking nature of the two business entities” and “inferred that Steven Heger and … [Katie Heger] were, in fact, a single business entity with a year-round rather than temporary seasonal need for workers.” The ALJ in that case agreed, finding that the record did not establish that Steven Heger and Katie Heger were separate entities with distinct labor needs, and thus that “their ‘temporary’ needs merge into a single year-round need….” *Katie Heger*, 2014-TLC-00001, slip op. at 2, 4-6.

In *Altendorf Transport*, the CO found that a previous application had been certified for an entity named “VDI” for a time period that overlapped that requested in the application, that the two entities were “so interconnected” and the jobs described in each application were “so similar” that Altendorf Transport “has failed to establish how … [its] job opportunity is temporary, rather than permanent and full-time, in nature.” The ALJ in that case agreed, finding in relevant part that the two entities were “intertwined” and that the overlapping time periods in the two applications established a thirteen month period of need, and thus period of need that was neither seasonal nor temporary. *Altendorf Transport*, 2013-TLC-00026, slip op. at 3, 7-8 (internal marks omitted).

In *Sugar Loaf Cattle Co., LLC*, 2016-TLC-00033 (ALJ Apr. 5, 2016), I adopted a four-part Single Employer Test outlined in *Spurlino Materials, LLC v. NLRB*, 805 F.3d 1131 (D.C. Cir. 2015) to determine whether the two entities at issue should have been considered as one employer. The test is used by the National Labor Relations Board to analyze cases under § 2(2) of the National Labor Relations Act and consists of analyzing four factors (none of the four is controlling on its own, and all four need not be found to find two entities are acting as a single employer): (1) common ownership or financial control; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations.
In *Mid-State Farms LLC*, Judge Panagiotis analyzed the TLC cases issued before my decision in *Sugar Loaf* and determined that I erred in adopting the Single Employer Test. *Mid-State Farms*, 2021-TLC-00115, slip op. at 22 (ALJ Apr. 16, 2021). Instead, Judge Panagiotis endorses a Joint Employment Test derived from 20 C.F.R. § 655.103(b). *Id.* at 23-27. Joint employment occurs “[w]here two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker.” *Id.* at 25 (citing § 655.103(b)). The Joint Employment Test asks 1) is the entity an employer under the H-2A program, and if yes, 2) is the employer jointly employing an H-2A worker with a separate employer as set forth in § 655.103(b)? *Id.* at 31. Judge Panagiotis explained:

To determine “joint employment,” the court examines whether one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of the employment of the employees who are employed by the other company. Dual employment arises when an employee is engaged in the service of two employers in relation to the same act. It may exist if two employers exercise substantial control over the employee by participating in the selection, hiring, and paying of the employee, by having the power to discharge the employee, and by controlling the employee in the performance of his or her duties. It is also significant if the two employers contribute equally to the wages and to the maintenance of the equipment, have equal rights to the use of the equipment, and have equal control over the individual.

*Id.* at 25-26 (emphasis in original) (citations omitted).

Judge Panagiotis further stated that prior TLC decisions, including *Katie Heger* and *Altendorf Transport*, were analyzed using the “joint employment” framework. *Id.* at 27. In *Katie Heger*, both businesses had indicia of employing the same H-2A workers, as Katie Heger and Steven Heger each employed workers to work “their half of the farm,” and shared a worksite, equipment, and commodity. *Id.* In *Altendorf Transport*, Janice Altendorf had the ability to hire, fire, control, and pay workers for each of her companies. *Id.*

Analyzing the present matter using the Joint Employment Test, I find that the CO erred in determining that the business operations of ATP Groves and ATP Agri-Services were too intertwined to be considered separate entities.2 ATP Groves is an employer as defined in § 655.103(b), *i.e.*, it has a place of business, the ability to hire, pay, fire, and supervise H-2A workers, and it has a valid FEIN. The record shows that ATP Groves and ATP Agri-Services do not contemporaneously employ the same H-2A workers, as this is ATP Groves’ first H-2A application. Accordingly, the two entities are not joint employers. See *Mid-State*, 2021-TLC-00115, slip op. at 22.

---

2 I note, however, that the outcome would be the same using the Single Employer Test. Mr. Pace is the only person who makes business decisions at ATP Groves; a team of managers make the personnel decisions at ATP Agri-Services, including hiring, firing, supervising, and directing all employees. The managers at ATP Agri-Services are not shared with ATP Groves, nor is there any employee movement between the two entities. The two businesses have separate bank accounts and there is no intermingling of money between ATP Groves and ATP Agri-Services.
00115, slip op. at 32 (“Without contemporaneous employment and authority over the workers, the joint employment analysis can end there”).

I also find that the CO erred in determining that Employer has not established a seasonal need for workers. See AF at 17-21. The CO stated that 10 months is a permissible threshold at which to question the temporary nature of a period of need. Id. at 17 (citing Grandview Dairy Farm, 2009-TLC-00002 (ALJ Nov. 3, 2008)). The CO further stated that it is well-established that it may aggregate requested periods of need from an employer’s filing history when assessing the employer’s current H-2A application. Id. (citations omitted).

Employer explained that its need for heavy truck drivers is seasonal because it is tied to the Florida citrus season, typically September through the end of June or beginning of July. Id. at 54-55. The fruit is harvested and hauled to processing plants that are only open during the season and are closed during the months when there is no fruit to process. Id. Fertilizer for the crops is only hauled and applied during specific times in the season and is not a year-round activity. Id. at 55.

The CO stated that ATP Groves contradicted itself by stating that it does not need truck drivers after the end of June or beginning of July because in Application H-300-19057-416439, ATP Agri-Services applied for truck drivers through the end of July. AF at 18, 20 (Application H-300-19057-416439 period of need listed as April 16, 2019 to July 31, 2019). The CO therefore determined that ATP Groves’ and ATP Agri-Services’ true need for truck drivers is for an 11-month period from September through July, which is not seasonal. Id. at 20. Employer stated that it would be willing to amend its period of need to run from September 8, 2021 through June 30, 2022, to accommodate the CO’s concerns. Id. at 6. However, I have determined that ATP Groves and ATP Agri-Services are not joint employers, and therefore it was improper for the CO to consider the filing history of ATP Agri-Services in assessing ATP Groves’ period of need. The period of need listed on ATP Groves’ application is September 8, 2021 through July 8, 2022, which is 10 months. AF at 110. I find that Employer has adequately shown that ATP Groves has a seasonal need for H-2A workers that is tied to the Florida citrus season. Accordingly, the CO erred in denying certification in this matter.

ORDER

In light of the foregoing, it is hereby ordered that the Certifying Officer’s denial of certification in this matter is REVERSED and this case is REMANDED to the CO for further processing.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge