



**Issue Date: 18 February 2021**

**BALCA Case No.: 2021-TLC-00078**  
ETA Case No.: H-300-20337-935532

*In the Matter of:*

**CHENAULT LAND & CATTLE, LLC**  
*Employer*

**Before: Judge Francine L. Applewhite**

**DECISION AND ORDER AFFIRMING FINAL DETERMINATION**

The above-captioned case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor program (“H-2A”) permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. This proceeding is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the request for administrative review of the Certifying Officer’s (“CO”) Final Determination denying the H-2A temporary labor certification application filed by Chenault Land and Cattle, LLC, (“Employer”).

Procedural History

On January 4, 2021, the Employment Training and Administration, Office of Foreign Labor Certification (“OFLC”) received the Employer’s Application for Temporary Employment Certification (“Application”). (AF<sup>1</sup> 141-195). The application requested approval for 15 farm workers (crop) under the H-2A labor certification program.

After reviewing the Application, on January 6, 2021, the CO issued a Notice of Deficiency. (*Id.* at 130-135). On January 12, 2021, the Employer responded to the Notice of Deficiency. The response included its Schedule of Operations and a copy of its 2018 to 2020 payroll summaries. (*Id.* at 65-128).

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<sup>1</sup> As used herein, “AF” refers to the OFLC’s Administrative File in the above-captioned matter.

On January 25, 2021, the CO issued a Final Determination denying the Employer's Application. (*Id.* at 58-64). Thereafter, the Employer filed an "H-2A Appeal and Request for Review." (*Id.* at 1-57).<sup>2</sup>

### H-2A Application

The Employer asserts a seasonal need. (*Id.* at 141-195). Specifically, the Employer requests 15 farm workers for the period of February 18, 2021 to December 15, 2021.<sup>3</sup> In reference to the job description, the Employer states:

Workers will attend to cattle on a farm setting: Duties may include mixing feeds and additives: fill feed and water troughs. Feed and water livestock; take cattle to pasture for grazing; wash and groom cattle; light maintenance of livestock stalls. Workers will assist in planting, cultivating, and harvesting feed. [sic] grain, and/or hay for cattle. Workers will also assist with maintenance of tools and equipment; farm maintenance and other work that is directly related to the activities for which the workers were hired.

(*Id.* at 149.). The Employer also submitted a "Statement of Temporary Need." (*Id.* at 160). The Employer asserts that "cattle are a live animals that must be tended to." (*Id.*). In addition to its cattle operation, the Employer also focuses on hay cultivation and storage from June through August. However, the Employer's attached "certification request" described the schedule for the duties of bailing and storing hay as February 15, 2021 to December 15, 2021. (*Id.* at 175). The certification request also included the schedule for hand-feeding, breeding, and selling cattle from February 15, 2021 to December 15, 2021.

### Notice of Deficiency (NOD)

On January 6, 2021, the CO issued the NOD. (*Id.* at 130-135). The CO noted two grounds of deficiency: (1) Emergency Situation (20 CFR 655.134(b); 20 CFR 655.130(b)); (2) Temporary Need 20 CFR 655.103(d). (*Id.* at 133-135).

In reference to the first ground of deficiency, the CO stated that the Department of Labor had received the Employer's Application on January 4, 2021 with a requested start date of February 15, 2021. February 15, 2021 is within 45 days of the submission of the Employer's Application. The time period for filing may be waived pursuant to 20 CFR sec. 655.134(a), however the Employer must ask for a waiver, which the Employer did not request. Thus, the CO requested a modification of the application start date to no earlier than February 18, 2021

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<sup>2</sup> Pursuant to the Notice of Appeal Rights included with the CO's January 25, 2021 denial, the Employer had seven (7) calendar days to request an administrative review, which must be done via facsimile or other means "normally assuring next day delivery." (AF 59). The Employer's appeal is dated January 27, 2021 and the associated envelope contained within the record shows that the appeal was sent on January 29, 2021 via "UPS Next Day Air." (*Id.* at 1-57). However, the Employer's appeal contains a date stamp noting that it was "[r]eceived Feb. 04, 2021 Foreign Labor Certif. Nat'l Proc. Ctr. - Chicago." (*Id.* at 1). Based on the overall record and noting delays caused by the COVID-19 pandemic, I find that the Employer timely filed its H-2A Appeal and Request for Review.

<sup>3</sup> Initially, the Employer requested February 15, 2021 as a start date. This start date was amended following the request for modification contained in the NOD. (*See* AF 130-135).

allowing the Employer's Application "to be in compliance with departmental regulations at 20CFR sec. 655.121(a)(1) and 20 CFR sec. 655.130(b)." (*Id.* at 133).

Concerning the second ground of deficiency, the CO explained that to be compliant with 20 CFR sec. 655.103(d), "the job opportunity must be on a seasonal or other temporary basis." (*Id.*). The CO further defined such a basis as "employment [that] is tied to a certain time of year by an event or pattern... and requires labor levels far above those necessary for ongoing operations." (*Id.*). The CO then summarized how the Employer's prior applications for farm workers compared to the existing application in terms of the start and end dates requested. The CO also include a modification request to remedy this deficiency. Specifically, the CO stated that the "[E]mployer must explain what has changed about either its operation or this job opportunity such that a seasonal need now exists," given that the Employer did not previously establish a seasonal need in its prior applications. (*Id.* at 135). In addition, the CO mandated that the Employer submit supporting documentation in the form of a minimum of three years of summarized monthly payroll. The CO required that the monthly payroll be categorized separately "for full-time permanent and temporary employment in the requested occupation Farm Workers Crop [sic] the total number of workers or staff employed, total hours worked, and total earnings received." (*Id.*).

#### Employer's Response to NOD

On January 12, 2021, the Employer replied to the NOD. (*Id.* at 65-128). Addressing the first deficiency, the Employer attached documents with the amended start date of February 18, 2021.

Addressing the second deficiency, the Employer provided a brief history of its past applications and explained the varied start and end dates contained therein. The Employer stated that in 2019, it requested a June start date due to the "time filing requirements," but the correct end date of November. (*Id.* at 66). In terms of the 2020 period, the Employer stated that it failed to hire temporary workers for the "true period of peak-load need" and thus, applied to the H-2A program in the late spring. (*Id.*). However, in its 2020 application, the Employer included "end date that is not in keeping with the actual, true, and annually recurring period of peak-load need for the cattle industry Kentucky," in order to make up for the prior months. (*Id.*).

As to the current application, the Employer noted that they began the application earlier and thus, was able to request the February 15, 2021 start date. Although the Employer originally requested a December 31, 2021 end date, the Employer acknowledged that this end date was not a "true reflection of the employer's temporary period of need" and requested to amend its Application to include an end date of November 30, 2021. (*Id.* at 67).

As requested, the Employer included its payroll summary from the past three years as well as a corrected "Schedule of Operations." The payroll included categories of permanent versus temporary farm laborers, total numbers of workers, total hours worked, and total earnings received. The Employer asserted that its payroll summaries from the past three years "very easily support the true period of temporary need for the petitioning farm." (*Id.*).

## CO's Final Determination

On January 25, 2021, the CO issued a final determination denying the Employer's Application. (AF 58-64). The CO stated that the Employer did not establish that its job opportunity is "temporary or seasonal in nature." (*Id.* at 61).

Specifically, the CO noted that 20 CFR § 655.103(d) requires that the job opportunity be on a seasonal or temporary basis. The CO stated that the Employer's filing history shows a need for workers for "every month of the year except January." (*Id.*). Upon reviewing the payroll summaries, the CO concluded that temporary farmworkers were utilized in February through November, despite the fact that the "employer has requested workers for the month of December in two of its three applications." (*Id.* at 64). In addition, the CO determined that Employer's additional documentation did not support the Employer's claim of seasonal need. Rather, the "Schedule of Operations" document failed to include any explanation of how the contained tasks are not year-round. (*Id.*). Furthermore, the CO asserted that "the document containing hyperlinks to various pages to its website, the Depreciation Report, and the 'List of Sires' provides no insight as to how the employer's need for workers is seasonal." (*Id.*). Moreover, the CO surmised that the Employer's ability to adjust the dates of need for each application shows that its need for workers is not connected to a certain time of year or pattern. Accordingly, the CO stated that the Employer failed to show that its need was temporary or seasonal in nature.

## Standard of Review

The scope of an administrative review in H 2-A cases is limited to consideration of the written record and any written submissions from the parties, which may not include new evidence. (20 C.F.R. § 655.171(a)). The decision on administrative review must specify the reasons for the actions taken and must affirm, reverse, or modify the decision of the CO, or remand to the CO for further action. (*Id.*) The governing regulation mandates that the presiding administrative law judge "must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (*Id.*; *See also J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) ("BALCA reviews decisions under an arbitrary and capricious standard.") (H-2B)). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Moreover, the Administrative Law Judge may not consider evidence not before the CO at the time of the CO's determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

## Discussion

An H-2A worker is defined as any temporary foreign worker who is lawfully present in the United States and authorized to perform agricultural labor services of a "temporary or seasonal nature." (8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 20 C.F.R. § 655.103(b)). Pursuant to 20 CFR § 655.103(d), seasonal work is that which 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 CFR § 655.103(d)). 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.” (*Id.*). Moreover, an employer seeking to hire employees under the H-2A program bears the burden of proving that it is entitled to a temporary labor certification. (8 U.S.C. § 1361).

The CO denied this matter on the basis that the Employer failed to establish a seasonal or temporary need under 20 CFR § 655.103(d). (AF 64). The Employer asserted that its payroll summaries “very easily support” its need for the requested time period. (*Id.* at 67). However, the Employer’s request for 15 workers from February to November does not align with the payroll summaries submitted. First, the 2020 Farm Laborer payroll summary shows that, at most, three temporary workers are employed between February and November, a significant difference from the requested 15 workers. (*See* AF 70). Second, the 2019 Farm Laborer payroll summary shows, at most, an increased need for eight temporary workers from June to October. (*See* AF 86). Third, the 2018 Farm Laborer payroll summary also shows, at most, an increased need of ten temporary workers, for the months of June to August/September. While the 2018 and 2019 payroll summaries support an increase in need for workers from approximately June to September/October, none of them show an increased need for 15 farm workers for the period requested. (*See* AF 84-86).

Similarly, the other evidence provided, to include the “Schedule of Operations,” the Depreciation Report, the list of hyperlinks and the “List of Sires” does not demonstrate an increased need for 15 workers for the period between February and November. (*See* AF 65-195). In sum, the Employer’s assertions of need for the requested time period remain unsupported. Accordingly, I find that the Employer failed to establish a seasonal or temporary need under 20 CFR § 655.103(d).

Thus, the Employer has failed to show that the CO’s decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The CO did not err in denying certification. Therefore, the denial is **AFFIRMED**.

### **ORDER**

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED**.

**SO ORDERED.**

**FRANCINE L. APPLEWHITE**  
Administrative Law Judge