In the Matter of:

DAVID J. WOESTEHOFF D/B/A MINNESOTA VALLEY LIVESTOCK

Employer

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This proceeding 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), and the associated regulations promulgated by the United States Department of Labor (DOL) at 20 C.F.R. Part 655. David J. Woestehoff d/b/a Minnesota Valley Livestock (“Employer”) timely filed a request for expedited administrative review of the denial of the temporary labor certification application by the Certifying Officer (CO). This Decision and Order is based on the written record, consisting of the Appeal File (AF) forwarded by the Employment and Training Administration (ETA).

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

BACKGROUND

On January 20, 2021, Employer filed an application for H-2A labor certification with the ETA. (AF 54-78.) Employer requested certification of five H-2A Agricultural Equipment Operators for an alleged period of seasonal need from March 15, 2021 to January 10, 2022. (AF 62.)

On January 27, 2021, the CO issued a Notice of Deficiency (NOD) explaining that Employer’s application had not demonstrated seasonal need. (AF 43-48). In the NOD, the CO explained that Employer had previously filed applications, which, when coupled with the application at issue, did not show a seasonal or temporary need. (AF 46.) The CO acknowledged that while the applications had different Standard Occupational Classification (“SOC”) codes, they “reflect the same overarching need for driving and hauling.” Accordingly, the CO stated that
Employer had failed to “demonstrate that the applications represent distinct occupations, which require different experience or special skills and knowledge that are not required for the position sought in the prior applications.” (AF 47.) The CO also found that, based on Employer’s current and previous applications, Employer is “able to perform similar 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.” (Id.) The CO asked employer to either (1) withdraw the application or (2) provide a detailed explanation with supporting documentation as to why its job opportunity in the subject application is seasonal rather than permanent. (AF 47-48.)

On February 4, 2021, Employer responded to the NOD via letter and enclosed payroll records from 2018 through 2020. (AF 40-42.) In the letter, Employer addressed why its needs were seasonal. The payroll records noted the number of its permanent workers and their hours worked, the number of its temporary workers and their hours worked, and Employer’s earnings. (AF 42.) Employer asserted that the payroll records prove that its need for temporary labor is seasonal. (AF 40.) Employer explained that, from March through the summer, it plants crops which are harvested in the late summer through the fall. Employer added because mid-March through the beginning of January are labor intense months, it needs farm laborers to:

Drive and operate farm machinery to plant, rock-picking, cultivate, harvest and store crops. Attach farm implements; such as plow, disc and drill to tractor. Till soil, plant and cultivate crops. Tow harvesting equipment. Drive and operate self-propelled combine, perform a variety of duties such as lubricating and repairing farm machinery, moving farm machinery and equipment, and driving trucks to transport crops to elevators or storage area.

(AF 40.)

Employer maintained that this position it sought to fill required “3 months experience ‘Ag/Farm experience with Farm Equipment use.’” (Id.) Employer added that driving a self-propelled combine was dissimilar to taking care of hogs and that the DOL was mistaken in finding otherwise. According to Employer, the jobs require different skills and cannot be performed by the same workers for reasons related to disease control. Employer also contended that, due to certain factors in the winter season, there is less need for temporary workers and its permanent workers are able to perform their job duties of moving grain from the elevators. (AF 41.)

On March 4, 2021, the CO issued a Final Determination denying Employer’s application for certification. (AF 26-35.) The CO maintained that, in spite of Employer’s assertion that the needs of its current application was distinct from its previously denied certification, both applications “include the hauling of agricultural products, three-month experience requirement, similar lifting requirements (60 pounds and 80 pounds) and roughly the same wage of $2940.00 per month; while simultaneously not requiring any training, licensing or educational requirements.” (AF 32.) The CO again stated that, although different SOC’s were assigned to the job opportunities, “both applications reflect the same overarching need for driving, hauling and machine maintenance.” (Id.) Thus, the CO concluded Employer did not demonstrate that the current and previous “applications represent distinct occupations, which require different experience or special skills and knowledge that are not required for the position sought in the prior
application.” (Id.) The CO further found that “[g]iven the absence of special skills or requirements present in this filing, and the overlapping duties, the employer failed to explain why this filing should be viewed as a separate occupation and representative of a distinct need.” (Id.)

The CO also commented on Employer’s statement of foregoing its three-month experience requirement to fit into the H-2A program. According to the CO, the requirements listed in the original application should “represent a bona fide or genuine requirement for the employer’s job opportunity.” (Id.) Employer “cannot manipulate its requirements in order to fit into the program.” (Id.) The CO also added that while Employer argued that its “permanent workers transport crops to the grain elevators in its off season of January through March . . . , the hauling of agricultural products is a key component of the job opportunity described in this application.” Based on this work description, the CO considered Employer’s need occurred year round for hauling duties, i.e., that it was not a seasonal one. Also, the CO found that though Employer mentioned that workers cannot co-mingle or that a worker cannot simultaneously perform the job duties detailed in its previous application and in the current one due to contamination reasons, “[E]mployer’s contamination practices of one application does not necessarily dictate its job opportunities as separate. Given the overlapping duties and requirements, [E]mployer failed to draw any new distinct connections between its contamination practices and the overall nature of its job opportunity.”

The CO also found that Employer’s payroll records did not demonstrate a seasonal need. (AF 33-35.) Specifically, the CO noted the total hours for both the permanent and temporary workers did not reflect significant increase in the number of hours worked until the April to May time period. (AF 34.) The CO added that all three years showed significant drops during the summer months. The CO stated that “[w]hile the employer may have a seasonal need for a portion of the time requested, or perhaps two distinct needs, the three years of payroll submitted do not support the entire period of need desired.

On March 18, 2021, the ETA received Employer’s Request for Administrative Review (“Request”). (AF 1-25.) In its Request, Employer reiterated that the need in its current application was distinct from the need in its previous application. (AF 1-2.) According to Employer, “driving a self-propelled combine is in no way equivalent to workers taking care of hogs and cannot be performed by the same workers. Having a driving requirement for vehicles to transport is not the same as being able to operate a self-propelled combines or maintenance.” (Id.)

Employer also asserts that the DOL erroneously stated that it would remove its requirement of three month experience. Rather, Employer states that it offered to give the DOL more details, if necessary, to explain the distinct need in the applications. Employer also posits that the job description in the application at issue is misconstrued by the DOL. According to employer, “hauling” is not a key component of the job description for the role in its current application. (AF 2.)

Employer also argues that its payroll records support a seasonal need for increased work from mid-March through the beginning of January. (AF 3.) Employer acknowledged that the CO
was correct in asserting that the summer months show less hours than other months but explained that the total hours for these months were still above those of January and February. Employer explained that 2019 was “an unusually wet season in Minnesota and caused some variance in the employer’s employment needs, but still shows a seasonal need.” (Id.)

Lastly, Employer claims that the DOL “references 2 companies with 2 separate needs for workers merely because the 2 companies have 1 similar job duty out of all duties listed on the application: hauling.” (AF 4.) It is Employer’s position that the companies are separate with unique Federal ID numbers, payrolls, worksites, housing, commodities, and needs. (Id.) Employer stated that the employees of each company cannot and do not work for either company due to disease control, different experience requirements, and job duties. Employer added that though the positions in the different applications required prospective applicants to have 3 months experience, one required experience working with hogs and the other experience with farm equipment. Employer continues: “just because both petitions required workers to drive (one included hauling grain and one included hauling hogs and feed), the rest of the job description was completely different duties.” (AF 4.)

On March 29, 2021, the undersigned issued a Notice of Assignment and Expedited Briefing Schedule wherein the undersigned informed the parties that they could submit written submissions (without new evidence).

Neither the CO nor Employer submitted a written submission.

ISSUES

The question to decide here is whether Employer has met its burden of establishing that its need for agricultural services or labor 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 scope of review in H-2A cases is limited. The undersigned may consider the written record and any written submissions from the parties, which may not include new evidence. See 20 C.F.R. § 655.171(a). The standard of review is de novo. That is, the undersigned may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.¹

¹ The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO’s decision. See 20 C.F.R. § 655.171(a). The undersigned finds persuasive the rationale articulated in Crop Transport, LLC, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a). See also E&A Farming, 2019-TLC-00053, slip op. at 5 (May 29, 2019) (applying de novo standard).
ANALYSIS AND FINDINGS

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, it is an employer’s burden to demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161.

Employment is “temporary” where an 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-2A 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). Ten months has been viewed as an acceptable threshold to question whether an employer’s need is temporary. See Grand View Dairy Farm, 2009-TLC-2 (Nov. 3, 2008)(finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, it is not an arbitrary rule).

To utilize the H-2A program, an employer has the 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). Regarding seasonal need, an employer must demonstrate when its 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).
In administering the H-2A program, BALCA has resisted employer efforts to use temporary labor certification under the H-2A program to address permanent or year-round employment needs to fill a particular position. In many instances 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 as seasonal a year-round need for a particular position. 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). See also 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.)

Here, in Section A.3 of its H-2A Application for Temporary Certification Form, Employer marked that the nature of its temporary need is seasonal. (AF 54.) The CO however questioned whether Employer had a seasonal need for agricultural equipment operators because Employer had failed to establish distinct occupations between this application and its previous case, H-300-20273-849819. (AF 32.) Employer contends that the company that applied for the previous certification is distinct from the company that applied for the certification at issue. (AF 1-5.)

Employer’s temporary labor certification application filing history is reproduced in the table contained below:

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<th>Status</th>
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<td>09/15/2021</td>
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<td>Received³</td>
<td>45.2091</td>
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² See also AF 46.
³ Case number H-300-21012-007317 is the certification at issue here. The status of a case as denoted in the AF conceivably refers to the case’s disposition at the ETA level. The AF describes the status of case number H-300-21012-007317 as “received.” (AF 46.)
February 18, 2020 Application (H-300-20023-270728) (AF 122-230)

On February 18, 2020, Employer applied for temporary labor certification through the H-2A program to fill four Agricultural Equipment Operator positions for the period of April 5, 2020 through December 1, 2020. (AF 122-230.) Employer described the job duties as:

Drive and operate farm machinery to plant, rock-picking, cultivate, harvest and store crops. Attach farm implements; such as plow, disc and drill to tractor. Till soil, plant and cultivate crops. Tow harvesting equipment. Drive and operate self-propelled combine, perform a variety of duties such as lubricating and repairing farm machinery, moving farm machinery and equipment, and driving trucks to transport crops to elevators or storage area. Exposure to extreme temp, repetitive movements, extensive pushing, pulling walking and frequent stooping. Must be able to drive semi-trucks Must be able to lift and carry 60 lbs frequently.

(AF 134.) The position required three months of work experience and was located in Belle Plaine, Minnesota. The place of Employment was given as 15466 West 270th S. and the workers’ housing is located at 25586 Johnson Way. (AF 135.) This application was fully certified on March 12, 2020. (AF 127-30.) The SOC Occupation code was 45-2091.00 and the SOC Occupation Title was listed as “Agricultural Equipment Operators.” (AF 132.)

October 6, 2020 Application (H-300-20273-849819) (AF 79-121)

On October 6, 2020, Employer applied for temporary labor certification for four farm laborers for the period of November 28, 2020 through September 15, 2021. (AF 105.) Employer described the job duties as:

Feeding and caring for all the hogs in the finishing barns and the piglets in the nursery multiple times a day (morning and evening at minimum). Moving piglets from nursery to the finishing barn. Weighing pigs to see when they are ready to ship to market. Sorting pigs based on weights and helping figure out when we need to schedule shipments. Vaccinating and caring for sick or injured pigs. Loading pigs into trailers and hauling them to the market to be slaughtered. Hauling feed from distributor or various storage facilities to be distributed and fed to the pigs/piglets. Hauling ground feed from feed grinding location to nursery and finishing barns. Picking up and hauling soybean meal from distributor and hauling to feed grinding location to add to pig/piglets feed. Various maintenance and other housekeeping duties to keep the barns and facilities clean and sanitary. Following strict sanitary guidelines while in and around the barns is very important to keep diseases and sickness away from the animals. Exposure to extreme temp, repetitive movements, extensive pushing, pulling walking and frequent stooping. Must have CDL truck license to haul/ship pigs to market and haul feed and soybean meal for pigs. Must be able to lift and carry 80 lbs frequently.
The position required three months of work experience and was located in Belle Plaine, Minnesota. This application was denied on October 27, 2020, because the CO found that Employer had not established that its job opportunity was temporary in nature. (AF 127-30.) Specifically, the CO opined that:

The job opportunity for described in ETA Form 790A, Section A, indicates the employer’s dates of need are from November 28, 2020 through September 15, 2021. When coupled with the dates of need in the employer’s previous filing H-300-20023-270728, the total need is equivalent to a 1 year, 5 months, and 11 day period. As such, the current case and the employer’s previous filing indicates the employer has a history of filing for H-2A workers year round.

The CO found that “though the crops and duties may vary slightly between the [February 18, 2020 and October 6, 2020 applications], they contain the same need for the underlying labor. Per the CO,

Both applications include hauling and the maintenance/repairing of machinery. Both applications also require 3 months experience, CDL license, drug test, and similar lifting requirements (60 pounds/80 pounds). Similarly both applications do not require the worker to have any education or training.

While there are different SOC’s assigned to the job opportunities, both applications reflect the same overarching need for driving, hauling and machine maintenance. The employer did not demonstrate that the applications represent distinct occupations, which require different experience or special skills and knowledge that are not required for the position sought in the prior application. Given the absence of special skills or requirements present in this filing, and the overlapping duties, the employer failed to explain why this filing should be viewed as a separate occupation and representative of a distinct need.

Furthermore, this application contains duties related to pig farming, an occupation that is not, on its face, seasonal.

According to the application, workers would have been housed at 25586 Johnson Way, which is also the address listed for the place of employment. (AF 106.) The SOC Code is 45-2093.00 and the SOC Occupation Title was listed as “Farmworkers, Farm, Ranch, and Agricultural Animals.” (AF 103.)

January 20, 2021 Application (H-300-21012-007317) (AF 54-78)

In H-400-20185-694828 (the certification at issue here), Employer requested five Agricultural equipment operators from March 15, 2021 to January 10, 2022. Employer described the job duties as:

Drive and operate farm machinery to plant, rock-picking, cultivate, harvest and store crops. Attach farm implements; such as plow, disc and drill to tractor. Till
soil, plant and cultivate crops. Tow harvesting equipment. Drive and operate self-propelled combine, perform a variety of duties such as lubricating and repairing farm machinery, moving farm machinery and equipment, and driving trucks to transport crops to elevators or storage area. Exposure to extreme temp, repetitive movements, extensive pushing, pulling walking and frequent stooping. Must have CDL or ability to obtain CDL within 30-90 days of hire. Must be able to lift and carry 60 lbs frequently.

(AF 62.) The position requires three months of work experience and is located in Belle Plaine, Minnesota. The place of Employment is 15466 West 270th St and the workers will be housed at 25586 Johnson Way. (AF 63.) The SOC Code is 45-2091.00 and the SOC Occupation Title was listed as “Agricultural Equipment Operators.” (AF 55.)

In the instant matter, the CO denied Employer’s January 20, 2021 application (H-300-21012-007317) because the CO believed that Employer’s dates of need as set forth in that application, when coupled with the dates of need provided in Employer’s October 6, 2020 application (H-300-20273-849819), resulted in a year round need and not a seasonal one.⁴ In the Final Determination, the CO made the following observation:

The employer argues that the needs of the current application is distinct from its previous denied case as one is for crop harvest and the other is for transporting pigs. However, both applications include the hauling of agricultural products, three-month experience requirement, similar lifting requirements (60 pounds and 80 pounds) and roughly the same wage of $2940.00 per month; while simultaneously not requiring any training, licensing or educational requirements. While there are different SOC’s assigned to the job opportunities, both applications reflect the same overarching need for driving, hauling and machine maintenance. The employer did not demonstrate that the applications represent distinct occupations, which require different experience or special skills and knowledge that are not required for the position sought in the prior application. Given the absence of special skills or requirements present in this filing, and the overlapping duties, the employer failed to explain why this filing should be viewed as a separate occupation and representative of a distinct need.

(AF 32.)

In its Request, Employer addressed the CO’s concerns about Employer not having a seasonal need. Employer explained that the positions in the January 20, 2021 application (H-300-21012-007317) are distinct from the positions sought in the October 6, 2020 application (H-300-20273-849819) because the workers requested in each application cannot perform each other’s

⁴“The job opportunity for [sic] described in ETA Form 790A, Section A, indicates the employer’s dates of need are from March 15, 2021 through January 10, 2022, which, when coupled with the dates of need in the employer’s previous filing H-300-20273-849819, November 28, 2020 through September 15, 2021 is equivalent to a 1 year, 1 months, and 13 day period of need. As such, the current case and the the [sic] employer’s previous filing indicates the employer has a history of filing for H-2A workers year round.” (AF 46.)
work – despite similarities in work experience and certain duties. (AF 1-5.) Employer also submitted that the companies are separate with unique Federal ID numbers, payrolls, worksites, housing, commodities, and needs.

As previously stated, there have been many instances 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 as seasonal a year-round need for a particular position. 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).

Accordingly, if two legally distinct companies are so interlocking that they essentially function as the same business entity, they will be considered one employer and their dates of need will be combined when assessing whether the employer’s needs are temporary. See Katie Heger, 2014- TLC-00001 (Nov. 12, 2013)(employer did not establish that it was a separate business with distinct business needs because it had the same worksite address as another business, and both businesses sought certification for the same number of workers with the same qualifications to perform the same job duties); Altendorf Transport, Inc., 2013-TLC-00026 (Mar. 28, 2013)(employer and another business were so intertwined that they functioned in concert to circumvent the requirements of the H-2A program because they shared the same owner, president, general manager, registered agent, and telephone number and performed the same type of farm work); Lancaster Truck Line, 2014-TLC-00004 (Nov. 26, 2013)(employer’s attempt to divide work between separate legal entities does not demonstrate a temporary need because employer had a consistent need for workers year-round, although the job duties changed by season); Larry Ulmer, 2015-TLC-00003, slip op 3 (business so intertwined they function as one); Cressler Ranch Trucking, LLC, 2013-TLC-00007 (denial proper where applicant submitted applications from separate entities with consecutive dates of need, and applications listed address that represented same geographic location and same job duties in statement of temporary need).

In situations where multiple applications for temporary labor certification are filed by closely related entities, previous BALCA decisions support that Employer bears the burden of persuasion in demonstrating that the related entities should be considered separate entities for purposes of the H-2 temporary labor certification program. See e.g., Altendorf Transport, Inc., 2013-TLC-00026 at p. 8 (Mar. 28, 2013) (“The Employer has the burden of persuasion to demonstrate that it and [another entity] are truly independent entities.”); Cressler Ranch Trucking, LLC, 2013-TLC-00007 at p. 3; H Bar H Farms, 2015-TLC-00012 at p. 5 (Dec. 31, 2014)(“Notably, the Employer has the burden to demonstrate that the businesses are truly independent entities.”). Relevant factors considered in other BALCA decisions in reaching the determination of whether such related entities should be considered so intertwined as to be the same entity for purposes of the H-2 program, include such factors as common ownership, common management, common control over operations and employment decisions, and shared worksites.
Employer argues that the two companies are completely separate and have different Federal ID numbers, separate worksites, separate payroll, separate commodities, and separate needs. (AF 4.) It has however been found that having distinct Federal numbers and addresses are not sufficient to establish that the businesses do not essentially function as one farming operation. See Katie Heger, 2014-TLC-00001 at 5 citing Altendorf Transport Inc., 2013-TLC-00026 (Mar. 28, 2013) (“finding that the employer had not established it was a separate business entity even though it had its own name, FEIN, and address”). Thus even though the place of employment and federal ID numbers in the October 6, 2020 application (H-300-20273-849819) is different from that in the January 20, 2021 application (H-300-21012-007317), it is the totality of the circumstances that will determine if Employer has met its burden of establishing that the two companies are different.

In its October 6, 2020, application (H-300-20273-849819), Employer applied for temporary labor certification for four farm laborers for the period of November 28, 2020 through September 15, 2021. In the current certification at issue (H-300-21012-007317), Employer stated its dates of need is from March 15, 2021 through January 10, 2022. On each of Employer’s application, the entities are said to be located in Belle Plaine, Minnesota. David J. Woestehoff is the point of contact listed in the January 20, 2021 application (AF 54) while Holly Merger is the point of contact listed in the October 6, 2020 application. (AF 97.) In the January 20, 2021 application, the Legal Business Name is listed as “David J Woestehoff.” (AF 54.) Nothing is written down in the “Trade Name/Doing Business As (DBA).” (Id.) In the October 2020 application, the Legal Business Name is also listed as “David J Woestehoff” and the trade name is Minnesota Valley Livestock. (AF 97.) The October 2020 application was signed by Holly Meger while the January 2021 application was signed by David J. Woestehoff. Also, the record shows that the workers from both applications would have been housed in the same location.

As the record shows, the legal business name listed on both the October 2020 and January 2021 application is David J. Woestehoff. Thus the applications list a common business name and owner. Also, the laborers requested in the October 2020 application would have been housed at the same address as the laborers requested in the January 2021 application though they had separate worksites. The point of contacts are different individuals in both applications.

After reviewing the record, the undersigned does not find that there is enough information to make a ruling on whether there are two separate and distinct companies and not a single farming enterprise. The burden is on Employer to demonstrate that the companies are truly independent entities and Employer has not met that burden. Nevertheless, Employer has demonstrated that the positions in the applications are distinct as explained below.5

5 “In determining whether employer has met its burden of showing a seasonal need for two separate and distinct positions, it should be noted that BALCA would not reasonably require that all of an Employer’s various and distinct employment needs be considered in conjunction in determining whether the Employer’s need for a particular job is year round or seasonal. For example, it would be unreasonable to consider an employer’s need for field workers in conjunction with its need for kitchen workers or office workers in determining whether its labor need for field workers is year round or seasonal. Therefore, the analysis must be on whether an Employer’s need to fill a particular agricultural position has been established as seasonal, to determine whether an employer may utilize the H-2A program to fill this position.” Mammoser Farms, 2017-TLC00001 (Nov. 22, 2016).
The October 2020 application sought workers to feed and care for hogs, lift and carry 80 pounds frequently, and have a CDL truck license to haul/ship pigs to market and haul feed and soybean meal for pigs. It also required them to have three months experience and stated the pay was $2,964.00 in wages. The January 20, 2021 application wanted laborers to drive and operate farm machinery to plant, rock-pick, cultivate, harvest, transport and store crops, amongst other duties. It also wanted workers who had a CDL license or could obtain them after hire. The potential workers were also required to be able to list 60 pounds frequently and the wage was also $2,964.00. Neither application required the workers to have any education or training.

The undersigned thus agrees with the CO’s observation that “both applications include the hauling of agricultural products, three-month experience requirement, similar lifting requirements (60 pounds and 80 pounds) and roughly the same wage of $2940.00 per month; while simultaneously not requiring any training, licensing or educational requirements.” (AF 32.) The undersigned also agrees with the CO that the “applications have different SOC’s assigned to the job opportunities” and “reflect the same overarching need for driving, hauling and machine maintenance.” (Id.) The undersigned however disagrees with the CO that Employer “did not demonstrate that the applications represent distinct occupations, which require different experience or special skills and knowledge that are not required for the position sought in the prior application.”

The CO, in part, denied Employer’s application because “all of the applications reflect the same overarching need for driving and hauling.” (AF 33.) Employer argues that the positions are not equivalent and should be regarded as such. (AF 1-2.) In the January 20, 2021 application (H-300-21012-007317), the job description is listed as:

Drive and operate farm machinery to plant, rock-picking, cultivate, harvest and store crops. Attach farm implements; such as plow, disc and drill to tractor. Till soil, plant and cultivate crops. Tow harvesting equipment. Drive and operate self-propelled combine, perform a variety of duties such as lubricating and repairing farm machinery, moving farm machinery and equipment, and driving trucks to transport crops to elevators or storage area. Exposure to extreme temp, repetitive movements, extensive pushing, pulling walking and frequent stooping. Must have CDL or ability to obtain CDL within 30-90 days of hire. Must be able to lift and carry 60 lbs frequently[,

(AF 62) whereas in the October 6, 2020 application (H-300-20273-849819) the duties entail:

Feeding and caring for all the hogs in the finishing barns and the piglets in the nursery multiple times a day (morning and evening at minimum). Moving piglets from nursery to the finishing barn. Weighing pigs to see when they are ready to ship to market. Sorting pigs based on weights and helping figure out when we need to schedule shipments. Vaccinating and caring for sick or injured pigs. Loading pigs into trailers and hauling them to the market to be slaughtered. Hauling feed from distributor or various storage facilities to be distributed and fed to the pigs/piglets. Hauling ground feed from feed grinding location to nursery and
finishing barns. Picking up and hauling soybean meal from distributor and hauling to feed grinding location to add to pig/piglets feed. Various maintenance and other housekeeping duties to keep the barns and facilities clean and sanitary. Following strict sanitary guidelines while in and around the barns is very important to keep diseases and sickness away from the animals. Exposure to extreme temp, repetitive movements, extensive pushing, pulling walking and frequent stooping. Must have CDL truck license to haul/ship pigs to market and haul feed and soybean meal for pigs. Must be able to lift and carry 80 lbs frequently.

(AF 103.)

The description of the position for the January 20, 2021 application at issue in this matter mainly concerned driving, moving, and operating farm vehicles, as well as harvesting and cultivating crops; the position for the October 6, 2020 application concerned caring for hogs, hauling them to the marker, and hauling their feed. While the CO correctly assessed that both positions require some sort of driving and hauling, the remaining duties are distinctly unalike. The similarities here are not enough to consider them the same position with variances throughout the year. So while it is important to consider other factors such as the similarities in pay and experience, the major difference in job duties lends credence to the fact that the positions are distinct occupations.

As stated, the undersigned agrees with the CO that there are similarities in the October 2020 and January 2021 applications. The duties and positions for which Employer seeks certification differ from those in the previously-denied certification. The undersigned is persuaded by the fact that the farm work is distinct in each application. For these reasons, Employer has demonstrated that it is not attempting to hire the same number of unskilled laborers for year round labor.

Temporary or Seasonal Need

As aforementioned, the applicable regulation provides:

[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.

6 BALCA has consistently held that the seasonal variations of a farm laborer position are not determinative of the Employer’s seasonal need but rather it is the need for the labor itself that must be considered in determining whether the Employer has proven a seasonal need. See 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).
When determining if an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” In the Matter of Sneed Farm, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added). To meet its burden to show a seasonal need, Employer must “establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year.” In the Matter of Altendorf Transport, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011). In other words, seasonal employment is “employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.” William Staley, 2009-TLC-00060 (Aug. 28, 2009). The overarching question is “whether the employer’s need is truly temporary.” Id. (citing 52 Fed. Reg. 16,770, 20,497-98 (1987)).

Here, Employer argues its need is seasonal. Employer’s dates of needs as reflected in its application are from March 15, 2021 to January 10, 2022. The CO raised concerns about whether Employer’s need for labor was truly temporary or seasonal and requested specific information and supporting documentation. Employer in response provided monthly payroll summaries for 2018, 2019 and 2020 and a statement detailing its need. The CO found that neither Employer’s arguments nor the payrolls demonstrated that it had a seasonal need. The CO stated:

[W]hen looking at the total hours for both the permanent and temporary workers the employer does not show a significant increase in the number of hours worked until the April/May time period. After that, all three years show significant drops during the summer months. While the employer may have a seasonal need for a portion of the time requested, or perhaps two distinct needs, the three years of payroll submitted do not support the entire period of need desired.

(AF 34.)

The undersigned disagrees with the CO’s position concerning Employer’s payroll report not supporting a temporary or seasonal need. Employer’s dates of needs are from March to January and the payroll records from 2018 to 2020 reflect increases in the total number of workers, hours worked, and revenue in this time period. Employer’s statement also establishes a seasonal or temporary need. According to Employer, its seasonal need is related to the “growing season of the grain which causes an increase in the need for workers from mid-March through the beginning of January.” Employer also stated that, from the beginning of January through the middle of March, all crops have been harvested and so its permanent staff move grain from the elevators in the off season. Thus, Employer’s need is tied to the growth and harvesting of grains which occurs from mid-March through January. Also by articulating how the duties of its permanent workers in the off season, Employer has demonstrated a difference in seasonal duties and set forth how the seasonal differences lead to a differing seasonal need for labor.

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7 Although there are some months where Employer’s total earnings received dips below what Employer earned the month prior, overall the total earnings received were not below Employer’s total earnings in the non-seasonal months. This is the same for the total hours worked. (See AF 42.)
8 Employer stated that its non-seasonal dates are January 11, 2022 to March 15, 2022. (AF 7.)
For the above stated reasons, the record supports that Employer’s current application represents a seasonal need for from March 15, 2021 to January 10, 2022. Further, Employer has established that this position is a separate and distinct position from the position in its October 2020 application for certification which was denied.

CONCLUSION

Based on the foregoing analysis, Employer has established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). The Certifying Officer’s issuance of a Denial Letter for Employer’s application for temporary agricultural labor certification under the H-2A program was in error and not supported by the evidence in the record.

ORDER

The CO’s decision in the above-captioned H-2A temporary labor certification matter is REVERSED.

SO ORDERED.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge