OALJ Case No.: 2021-TLC-00094
ETA Case No.: H-300-21008-002060

In the Matter of:

DEFISHER FRUIT FARM,
Employer

Certifying Officer: Chicago National Processing Center

Before: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER
AFFIRMING THE DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations presented at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. DeFisher Fruit Farm (“the Employer”) timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties.

STATEMENT OF THE CASE

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).

On, January 18, 2021, the DOL’s Employment and Training Administration (“ETA”) received the Employer’s Application for Temporary Employment Certification. (AF 49-73).1 In

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1 Citations to the Administrative File will be abbreviated “AF1” and “AF2” followed by the page number.
these applications, the Employer requested temporary labor certification for 10 farm workers, laborer crop, nursery, and greenhouse workers from March 9, 2021 to November 20, 2021, citing a temporary seasonal need. (AF 49-73).

On January 22, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) finding the Employer failed to establish that its job opportunity is seasonal or temporary pursuant to 20 C.F.R. §655.103(d). (AF 34-38). The CO noted that based on the Employer’s prior applications, it cannot determine the Employer’s actual dates of need and it is unclear whether a seasonal need exists. (AF 34-38). The Employer requested workers for March 9, 2021 through November 20, 2021, but in prior applications requested workers for February 1, 2021 through November 20, 2021, August 5, 2020 through December 25, 2020, and May 26, 2020 through December 1, 2020. Accordingly, the CO asked the Employer to explain how its job opportunity is seasonal or temporary, and to show how its business has changed when taking into consideration the prior applications. (AF 34-38). The CO also requested that the Employer submit payroll records, summarizing separately the hours and pay for full-time verse temporary or seasonable workers. The CO also provided that the Employer could provide any other documentation to support their need.

The Employer responded to the NOD on January 27, 2021. (AF 12-33). While the Employer cured the first defect, it failed to show seasonal or temporary need. The Employer submitted payroll records, but did not summarize them as requested. (AF 12-33). The Employer asserted that its needs changed due to changes in its business practices and its new focus on pressed apple juice. The Employer, however, did not provide support or documentation for these changes in business structure other than a general statement.

The CO issued a Final Determination denying the Employer’s request for certification on February 17, 2021. (AF 4-11). The CO determined that the Employer failed to show a seasonal or temporary need. Id. The CO reasoned that based on the Employer’s prior applications the Employer did not establish a clear timeframe for its need. The Employer failed to adequately explain the variance in the requests. The payroll documents submitted by the Employer also did not comply with the CO’s request and did not show workers were needed between February and September. (AF 7-8). The CO included the following table of Employer’s previous and pending H-2A applications2:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Status</th>
<th>Beginning Date of Need</th>
<th>Ending Date of Need</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-20087-441430</td>
<td>Certified</td>
<td>05/26/2020</td>
<td>12/02/2020</td>
</tr>
<tr>
<td>H-300-20157-63119</td>
<td>Certified</td>
<td>08/05/2020</td>
<td>12/25/2020</td>
</tr>
<tr>
<td>H-300-20324-919670</td>
<td>Denied</td>
<td>02/01/2021</td>
<td>11/20/2020</td>
</tr>
<tr>
<td>H-300-21008-002060</td>
<td>Current</td>
<td>03/09/2021</td>
<td>11/20/2020</td>
</tr>
</tbody>
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(AF 8). Based on the documentation submitted by the Employer, the CO found no seasonal or temporary need. Therefore, the CO denied certification. (AF 4-11).

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2 The CO included in the appeal file the files for the Employer’s other applications. (See AF 74-275).
The Employer requested expedited review of the CO’s determination on February 19, 2021. (AF 1-3). On March 1, 2021, this case was assigned to me. I received the Appeal File the same day. In an Order dated March 1, 2021, I provided the CO until February 4, 2021 to file a brief. The parties did not file briefs. The record is closed and the case is ready for decision.

The only issue before me is whether the Employer established a temporary or seasonal need for the positions listed in its application, as defined by 20 C.F.R. § 655.103(d). This decision is based on the administrative file, the arguments of the parties, and the applicable laws and regulations. This decision is issued within five business calendar days after receiving the Appeal File, as required by 20 C.F.R. § 655.171(b)(1)(iii).

Scope of Review

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge (“ALJ”) under §655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The Employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Any additional evidence filed with the Notice of Appeal that was not previously filed with the CO cannot be considered. BALCA may affirm, reverse, modify, or remand the CO’s decision based only on the administrative file and “after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.” 20 C.F.R. 655.171.

BALCA must uphold the CO’s decision unless the Employer proves that the decision was arbitrary, capricious, or not otherwise in accordance with the law. Mapleview Dairy, LLC, 2020-TLC-00013, slip op. at 4 (Dec. 4, 2019). It is also settled that, throughout the labor certification process, the burden of proof in alien certification remains with the Employer. See, e.g., Garber Farms, 2001TLC-00006 (ALJ May 31, 2001) citing 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures).

Temporary and Seasonal Need

The issue before me is whether the Employer’s need is temporary and seasonal in nature. To succeed on an H-2A application, the Employer must establish “the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” § 655.161(a). “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.” § 655.103(d).

The fact-finder must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal. Pleasantville Farms LLC, 2015-TLC-00053, slip op. at 3 (June 8, 2015). Therefore, “it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year.” Fegley Grain Cleaning, slip op. at 3 (citing Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 11
(Feb. 15, 2011)). Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011). As a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates for a seasonal need in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. *See, e.g.*, *Southside Nursery*, 2010-TLC-157, slip op. at 4 (ALJ, Oct. 15, 2010); *Thorn Custom Harvesting*, 2011-TLC-196, slip op. at 3 (ALJ, Feb. 8, 2011).

Similarly, employment is “temporary” where the 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). It is well-established that “[i]t 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.” *William Staley*, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009). Accordingly, to determine an employer’s need for labor, the fact-finder must look at the whole situation and not narrowly focus on the specific job at issue. *Haag Farms, Inc.*, 2000-TLC-00015 (Oct. 12, 2000); *Bracy’s Nursery*, 2000-TLC00011 (Apr. 14, 2000). However, the employer’s application for temporary labor certification is properly denied when the “consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer’s need does not differ from its need for such labor during other times of the year.” *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014)(finding that an “overlapping need for the same H-2A labor year round. . . exceed[ed] the “seasonal and temporary” period for H-2A certification.”)

Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected. *See, e.g.*, *Salt Wells Cattle Co.*, 2010TLC-134 (ALJ, Sept. 29, 2010). In *Salt Wells Cattle Co., LLC*, the ALJ explained:

An employer’s ability to manipulate its “season” in order to fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).

2011-TLC-185 (ALJ, Feb. 8, 2011). In order to determine if the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011). Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011).

Here, the Employer has not established that its employment need is purely seasonal or temporary. As noted by the CO, the Employer’s past certified applications, combined with its current requests show that it is undetermined when the Employer actually needs workers. The Employer asserts that its needs are changing and they are still determining their needs. (AF 1-3). The Employer also asserts that they have experienced growth and a change in the business to
pressed apple juice. The Employer suggests that the payroll records were interpreted incorrectly, but failed to provide an adequate summary when presented with the response to the notice of deficiency.

The CO must examine the facts and determine the Employer’s actual need. It is well established that the CO may properly consider the Employer’s previously certified dates of need when determining whether a need is temporary. *Farm-Op, Inc.*, slip op. at 10. To allow otherwise would provide employers with an opportunity and ability to continually shift their purported periods of need in order to utilize the H-2A program. The previous applications and the current request a similar need, but for different dates.

The Employer failed to explain why its requested dates of need are different from the prior applications. Even in the request for review, the Employer states it has a need between “late February and late November”, but the current application states a need between March 9th and November. (AF 1-3; 49-73). The Employer asserts that its needs are changing and they are still determining their needs. (AF 1-3). Merely stating a change in the business without presenting actual facts to support the assertion is not sufficient. There is no documentation to illustrate or explain the change within the record. The inconsistent current and previous applications further illustrate the Employer’s failure to establish a seasonal need.

The past precedent is clear. 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 Nature Fresh Farms USA, Inc.*, 2020-TLC-79 (June 19, 2020); *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *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); *LVJ Pimentel Resources, LLC*, 2020-TLC-104 (August 25, 2020). It is the Employer’s burden to present evidence of the change in need. They did not do so here.

Accordingly, I find that the CO’s denial of certification based on the Employer’s failure to show that the employment need was seasonal or temporary was reasonable and not arbitrary, capricious, or not in accordance with the law. Accordingly, the Employer has not established a seasonal need for labor, as defined in § 655.103(d).

**ORDER**

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s decision is AFFIRMED.

JOSEPH E. KANE  
Administrative Law Judge