BALCA Case No.: 2021-TLC-00139

ETA Case No.: H-300-21071-142416

In the Matter of:

DeFISHER FRUIT FARM
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 (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“DOL” or the “Department”) at 20 C.F.R. Part 655. 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 Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

BACKGROUND

On March 18, 2021, Employer submitted an H-2A Application for Temporary Employment Certification for 10 Farm Workers. AF 60-86. The “Type of Employer Application” was listed as “Joint Employer.” AF 60. The “Nature of Temporary Need” was listed as “seasonal” and the “Period of Intended Employment” was listed as May 11, 2021 to November 20, 2021. AF 60; 71. In its Statement of Temporary Need, Employer explained:

We have been denied a work order for H2A employees twice this year. Our seasonal need for additional employees has changed, due to our growing farm business, and in turn, we require an earlier start date on our H2A work order. We have a critical need for them from February 10th until November 20th each year. We have tried to establish and explain this to the Department of Labor, however, we are having a difficult time doing so. Now that it is past that point in the year, having been denied that start date, we are requesting a work order beginning in May. This is the work order start date that we have had in the past. We will also continue to have a need for a second work order, per season, in the month of August, as we have done in the past.

1 For purposes of this Decision, “AF” stands for “Appeal File.”
We are receiving new orders for fresh-pressed apple juice on a regular basis, especially earlier in the season (specifically February and March) and are having a hard time fulfilling them, due to lack of help. We have full-time farm employees but can only stretch them so far. We have been searching and failing to find local people who want to come in and work.

We can handle production using solely our full-time, year-round crew in December and January, which is why we do not need H2A employees during this period. This is because our outdoor work on the farm is slow, and we can utilize our full-time employees for other jobs, such as juice pressing, during this period. As things get busier, closer to spring, our need for seasonal help grows dramatically.

Our business is in a growth phase, and our production has increased greatly in comparison to what it was a couple of years ago. It is crucial to the survival of our growing business that we employ additional H2A employees on our farm during this seasonal period of time (February through November).

AF 81.2

On March 25, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). AF 46-51. The CO identified one deficiency in Employer’s application. According to the CO, Employer failed to establish its alleged seasonal need under 20 C.F.R. § 655.103(d). The CO explained that Employer had previously submitted another application (H-300-21008-002060), which had a period of intended employment as March 9, 2021 through November 30, 2021. AF 49. This prior application was denied by both the CO and an Administrative Law Judge because Employer failed to establish its alleged seasonal need of March through November. AF 49; see also AF 94-98 (ALJ Decision), 109-115 (CO Denial Letter). The CO further explained that the current application includes the same joint employer, Rosario Brothers LLC, as another prior application (H-300-20324-919670), which was also denied for failure to establish a seasonal need. AF 49; see also AF 172-177 (ALJ Decision), 183-188 (CO Denial Letter). The CO added that in two of its prior applications (H-300-20324-919670 & H-300-20157-630119), Employer listed “operating fruit pressing and sorting machines while simultaneously using workers in every month of the year except in the month of January,” which shows that Employer’s “need does not appear to be seasonal in nature.” AF 49-50.

The CO included the following chart depicting Employer’s filing history.

<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 - Full</td>
<td>05/26/2020</td>
<td>12/01/2020</td>
</tr>
<tr>
<td>H-300-20157-630119</td>
<td>Certified Full</td>
<td>08/05/2020</td>
<td>12/25/2020</td>
</tr>
</tbody>
</table>

2 Attached to this statement was a report displaying “the growth [Employer] had in the last two years.” This report shows “the number of customer invoices created February through November 2018, versus February through November 2020.” According to Employer, “there were 3.75x more invoices created during this period in 2020 than 2018.” AF 81-85
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Status</th>
<th>Start Date</th>
<th>End Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-20324-919670</td>
<td>Appeal – Pending ALJ Decision³</td>
<td>02/01/2021</td>
<td>11/20/2021</td>
</tr>
<tr>
<td>H-300-21008-002060</td>
<td>Denied – ALJ Decision</td>
<td>03/09/2021</td>
<td>11/20/2021</td>
</tr>
<tr>
<td>H-300-21071-142416</td>
<td>Current Application</td>
<td>05/11/2021</td>
<td>11/20/2021</td>
</tr>
</tbody>
</table>

AF 50. The CO also added: “In addition to failing to establish a seasonal need for temporary foreign labor, operating fruit pressing and sorting machines while simultaneously requesting workers in every month of the year, the employer’s need does not appear to be seasonal in nature.” AF 50.

Accordingly, the CO asked Employer to explain why its job opportunity is seasonal or temporary, and to explain why “its dates of need have significantly changed from its established season of June through March to its current request of February through November.” AF 50. The CO directed Employer to submit the following:

Supporting evidence in the form of summarized payroll reports is required to substantiate the employer’s temporary need for the H-2A worker(s) in the case. The joint employers are required to submit summarized payroll reports for a minimum of two previous calendar years (2019 & 2020) for Farm Workers. These payroll reports must be a summary of the joint employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation.

The summarized payroll reports must be signed by the joint employers (DeFisher Fruit Farm & Rosario Brothers LLC) with the following statement attesting that the information was compiled from the employer’s accounting records or system: I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by DeFisher Fruit Farm & Rosario Brothers LLC for Calendar Years 2019 & 2020.

The employer may also submit any other documentation it deems appropriate to support its claim of a seasonal need for the dates of need requested.

AF 50-51.

On March 31, 2021, Employer submitted its response to the Notice of Deficiency. AF 15-45. Included with its response were: (1) a response letter (AF 16); (2) a January 26, 2021 letter from Orbis Beverage Brands (AF 17); (3) 2019 – 2020 payroll documentation (AF 18-31); (4) a copy of Employer’s 2018 – 2020 invoices (AF 33-36); and (5) Rosario Brothers Farm 2019 – 2020 payroll documentation (AF 38-45). In its response letter, Employer wrote:

³ Contrary to the CO’s assertion, an ALJ has already issued a Decision and Order denying this application. See AF 172-177.
We have been denied a work order for H2A employees twice this year. Our seasonal need for additional employees has changed, due to our growing farm business, and in turn, we require an earlier start date on our H2A work order. We have a critical need for them from February 10th until November 20th each year. We have tried to establish and explain this to the Department of Labor, however, we are having a difficult time doing so. Now that it is past that point in the year, having been denied that start date, we are requesting a work order beginning in May. This is the work order start date that we have had in the past. We will also continue to have a need for a second work order, per season, in the month of August, as we have done in the past.

We are receiving new orders for fresh-pressed apple juice on a regular basis, especially earlier in the season (specifically February and March) and are having a hard time fulfilling them, due to lack of help. We have full-time farm employees but can only stretch them so far. We have been searching and failing to find local people who want to come in and work.

We can handle production using solely our full-time, year-round crew in December and January, which is why we do not need H2A employees during this period. This is because our outdoor work on the farm is slow, and we can utilize our full-time employees for other jobs, such as juice pressing, during this period. As things get busier, closer to spring, our need for seasonal help grows dramatically.

Our business is in a growth phase and our production has increased greatly in comparison to what it was a couple of years ago. It is crucial to the survival of our growing business that we employ additional H2A employees on our farm during this seasonal period of time (February through November).

AF 16.4

On April 28, 2021, the CO issued a Denial Letter. AF 4-13. As it did in the NOD, the CO cited to and summarized Employer’s prior applications. AF 7-8. The CO also appears to have quoted portions of an ALJ decision denying Employer’s prior application (H-300-21008-002060). Compare AF 8 with AF 97-98. Most alarming, in attempting to summarize Employer’s response letter to the NOD in the current case (H-300-21071-142416), the CO mistakenly quoted Employer’s response letter to the NOD in another case (H-300-21008-002060). AF 9-10; compare AF 16 (Employer’s NOD Response Letter in H-300-21071-142416) with AF 135-136 (Employer’s NOD Response Letter in H-300-21008-002060). Employer’s response letter to the NOD in the current case is found at AF 16, and is entirely different from response letter quoted by the CO at AF 9-10. The CO proceeded to analyze Employer’s response letter from the prior case (H-300-21008-002060) to determine whether it overcame the deficiency in the current case (H-300-21071-142416). AF 10.

The CO also attempted to analyze the payroll documentation submitted by Employer. AF

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4 This statement mirrors the Statement of Temporary Need that Employer included with its application. Compare AF 16 with AF 81.
10-11. However, upon further inspection, the CO again simply copied the table summarizing the payroll documentation and the analysis of that table from the Denial Letter in Employer’s prior application (H-300-21008-002060).\textsuperscript{5} Compare AF 11 with AF 114. This is further evidenced by the fact that the CO’s analysis refers to “[E]mployer’s claimed season of March to November,” which is the period of intended employment in Employer’s prior application (H-300-21008-002060). In contrast, the period of intended employment in Employer’s current application (H-300-21071-142416) is May to November.

The CO did, however, include additional tables and graphs summarizing the payroll data submitted by Employer in the current case.\textsuperscript{6} Compare AF 12 with AF 18. Regarding this payroll data, the CO wrote:

[B]oth payroll charts display a higher month in January, which is an off-season month that in May, which is when the employer is seeking its start date of need. The employer has been denied twice before for the same deficiency and yet the employer has repeatedly failed to provide the payroll information in a summarized format as requested and has also failed to establish its seasonal need.

AF 12-13. Based on the foregoing, the CO concluded that Employer “failed to support its claimed seasonal need of March to November.” Given that Employer’s current application has a period of intended employment of May 11, 2021 to November 20, 2021, this again supports the notion that the CO largely copied the analysis in the Denial Letter in this matter from Denial Letters and ALJ decisions dealing with Employer’s prior applications.

On May 6, 2021, Employer filed the instant appeal. AF 1-3. In its Appeal Letter, Employer wrote:

I am appealing to you in yet another attempt to get much needed workers to our farm. We have made two other attempts to get H2A workers here and in both attempts we were denied. I do understand that in the past back in 2017, 2018 and even 2019 we had applied for different contracts at different times and in one of our statements we did explain that we had a joint contract with another farm of which we are no longer doing a joint contract with. We are working with Rosario Brothers in this joint contract and did in 2020 as well. We have tried to explain and establish that our needs have now changed and will be from February 10th or close to that till around November 20th.

The contracts that we have applied for requesting workers for these times clearly shows that we do only want them from the requested time until November 20th because we have not requested any workers to stay any longer than November 20th. I am not sure how to go about establishing that our season needs are from February

\textsuperscript{5} The payroll data included in this table does not seem to match the payroll data Employer submitted in response to the NOD in this matter. Compare table at AF 11 with AF 18.

\textsuperscript{6} In summarizing the July 2020 payroll data, the CO’s table incorrectly notes that temporary employees worked 58 hours in July 2020. AF 12. In actuality, temporary employees worked 584 hours in July 2020. See AF 18.
until late November, and that we are unable to find local workers to fill these jobs. We can only stretch our fulltime workers so much to have them try to cover all our needs. I did mention that in my last letter that we do resort to moving around our full-time workers to keep our business running but no where did I mean that we would be displacing our full-time workers and replacing them with H2A. I meant that our full-time workers cannot keep up with everything and that we need the H2A workers to do the seasonal jobs that come up.

I am attaching all the information that I had sent to US DOL that they had requested. One of the things we did send to them was our invoices from 2019 where we had 19 and then in 2020 it went up to 71 invoices for product. We also attached a letter from one of our clients stating that their needs are from early spring through summer for the festivity season in NY. Therefore, we would need to start working hard come February March time to get things ready to go for the busy truly short festival season in NY due to our very cold winters.

I really have nothing more to show then what we already have and am just trying to have you see that we truly only do need workers seasonal from February until middle of November. In 2020 when we realized that our customers’ needs were changing, so we changed. You will notice that our work orders (H-300-20087-441430) went from 05/26/2020 to 12/01/2020 and the other work order (H-300-20157-630119) from 08/05/2020 to 12/25/2020, this was the start of us changing our season due to the customers needs as we did not request anyone into the new year as we did in years past. I have included a sheet showing combined hours per month per year. You will notice how our hours have changed from 2019 to 2021, showing a drastic decrease in January and where it increases in March and April and would have been higher in March & April had we had workers.

I do hope this time we have made you realize our need for additional seasonal workers and just how important they are to our farm. This is not based on desire but defiantly based on extreme necessity as there are just not workers available to work in this area or any that want to work on farms. I have included an article to show you the shortage of workers in this area and just how much this can impact a farm.

AF 2-3.

DISCUSSION

Legal Standard

Employer requested administrative review. Accordingly, the Tribunal must “on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” 20 C.F.R. § 655.171(a). Although no standard of review is specified in the regulation, the undersigned review the CO’s denial to
determine whether it is arbitrary and capricious. *J and V Farms, LLC*, 2016-TLC-00022, at note 1 (Mar. 4, 2016); *see also Resendiz Pine Straw, LLC*, 2019-TLC-00052 (June 14, 2019).

Employer bears the burden of establishing its eligibility. *See Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011). The criteria for certification under the H-2A program includes “whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” § 655.161(a). The applicable regulation provides:

> 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) (emphasis added). Here, Employer argues its need is seasonal.

When determining whether 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)).

**Seasonal Need**

In this case, Employer has requested 10 Farm Workers for a period of intended employment of May 11, 2021 to November 20, 2021. AF 71. The nature of temporary need was listed as seasonal. AF 60. In the Notice of Deficiency, the CO concluded that Employer failed to establish its alleged seasonal need. The CO cited to Employer’s most recent application (H-300-21008-002060), which had a period of intended employment of March 9, 2021 to November 20, 2021 and was denied by the CO and an ALJ. *See AF 94-98, 109-115.* The CO also noted that another one of Employer’s prior applications (H-300-20324-919670), which had a period of intended employment of February 1, 2021 to November 20, 2021, was denied. The CO included a table detailing all of Employer’s prior applications. AF 50. Because Employer failed to establish its seasonal need, the CO directed Employer to submit additional information including: “[S]ummarized payroll reports for a minimum of two previous calendar years (2019 & 2020) for Farm Workers. These payroll reports must be a summary of the joint employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation.” AF 50-51.
Employer’s response to the NOD included an explanation that it has an annual need for additional labor from February 10 to November 20. AF 16. However, because its two prior applications were denied, which had proposed start dates of February 1, 2021 and March 9, 2021, Employer requested a start date of May 11, 2021 in the current application. AF 16. Employer correctly noted that a prior application (H-300-20087-441430), which also had a start date in May, received certification. AF 16; see also AF 322-326. Regarding its current application, Employer explained:

We are receiving new orders for fresh-pressed apple juice on a regular basis, especially earlier in the season (specifically February and March) and are having a hard time fulfilling them, due to lack of help. We have full-time farm employees but can only stretch them so far. We have been searching and failing to find local people who want to come in and work.

We can handle production using solely our full-time, year-round crew in December and January, which is why we do not need H2A employees during this period. This is because our outdoor work on the farm is slow, and we can utilize our full-time employees for other jobs, such as juice pressing, during this period. As things get busier, closer to spring, our need for seasonal help grows dramatically.

AF 16.

Employer’s response also included tables and payroll documentation for 2019 and 2020, which detail its full-time and seasonal employees, the hours worked per month by its full-time and seasonal employees, and the earnings received by its full-time and seasonal employees. AF 18-31. This information was responsive to the CO’s request in the NOD. See AF 50-51. The Tribunal is persuaded that this information supports Employer’s alleged seasonal need of May to November.7 In 2019, Employer’s full-time employees worked more hours during the in-season months of May (362), June (422), July (351), August (467.5), September (458.5), October (470.5), and November (346.5) than they did in off-season months of December (317) and January (200). AF 18. The same pattern is largely present in 2020, as full-time employees worked more hours in June (245.5), July (277), September (297), October (494), and November (247.5) than they did in December (220) and January (197). AF 18. Accordingly, the undersigned believes the payroll data supports Employer’s requested date of need of May 11, 2021 to November 20, 2021. The increase in hours worked by its full-time staff during these months reflects that its need for labor from May through November differs from other times of the year. Altendorf Transport, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

In the Denial Letter, the CO concluded that Employer’s response to the NOD again failed to establish its seasonal need of May to November. For several reasons, the Tribunal finds that the CO’s analysis and conclusion was arbitrary. The undersigned recognizes that in assessing the existence of a temporary need, the CO can look at the situation as a whole and need not confine the analysis to the existing application. Haag Farms, 2000-TLC-00015 (Oct. 12, 2000). However,

7 The Tribunal is cognizant of Employer’s statement that its real period of need is February 10 to November 20. AF 16. However, because its earlier applications were denied, Employer was forced to use a later start date in the current application.
the Tribunal is perplexed at the extent to which the CO relied on the decisions ruling on Employer’s prior applications. In ruling on Employer’s current application (H-300-21071-142416), the CO relied on the reasoning and analysis of the CO and ALJ ruling on Employer’s prior applications (H-300-21008-002060 & H-300-20324-919670). In fact, in explaining why the evidence submitted by Employer in this case failed to establish its seasonal need, the CO quoted Employer’s response letter from a prior application (H-300-21008-002060) as opposed to the one submitted in the current matter (H-300-21071-142416). AF 9-10; compare AF 16 (Employer’s NOD Response Letter in this case) with AF 135-136 (Employer’s NOD Response Letter in H-300-21008-002060). Thus, it is apparent to the undersigned, whether intentionally or negligently, that the CO did not make a good faith effort in ruling on Employer’s current application. Furthermore, contrary to the CO’s assertion, the similarity in job duties between the current application and the prior applications is not dispositive. Rather, the inquiry is whether Employer’s need for labor is seasonal. Sneed Farm, 1999-TLC-00007 (Sept. 27, 1999) (it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal”). Additionally, the CO’s summary of payroll data at AF 11 does not correspond with the payroll data employer submitted in this matter. Compare AF 11 with AF 18. Lastly, to the extent the CO summarized and analyzed the payroll data that Employer submitted in this matter, the Tribunal disagrees with the CO that this data does not support Employer’s period of need of May to November. The increase in hours worked by its full-time staff during these months reflects that its need for labor from May through November differs from other times of the year. Accordingly, the undersigned finds that Employer has sufficiently demonstrated that its need for labor is seasonal.

CONCLUSION

Based on the foregoing analysis, the undersigned concludes the CO acted arbitrarily in denying Employer’s application for temporary agricultural labor certification under the H-2A program. The undersigned also concludes Employer has established that its need for labor is seasonal, as defined by 20 C.F.R. § 655.103(d).

ORDER

Accordingly, it is hereby ORDERED that the Certifying Officer’s determination is REVERSED. See 20 C.F.R. § 655.171(a). This matter is REMANDED to the Certifying Officer for further processing consistent with this decision.

For the Board:

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey