



**Issue Date: 08 February 2021**

OALJ Case No.: **2021-TLC-00053**  
ETA Case No.: **H-300-20354-941793**

*In the Matter of:*

**HARVESTCO LLC,**  
*Employer*

Certifying Officer: Chicago National Processing Center

Appearances:

Ann Margaret Pointer  
Fisher & Phillips LLP  
1075 Peachtree Street, NE  
Suite 3500  
Atlanta, GA 30309  
*For the Employer*

Matthew Bernt, Esq.  
Rebecca Nielson, Esq.  
Department of Labor  
Office of the Solicitor  
200 Constitution Avenue, NW  
Suite N-2101  
Washington, DC 20210  
*For the Certifying Officer*

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. Harvest Co LLC (“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, December 11, 2020, the DOL’s Employment and Training Administration (“ETA”) received the Employer’s *Application for Temporary Employment Certification*. (AF 217-252).<sup>1</sup> In these applications, the Employer requested temporary labor certification for 24 Farm Workers from February 8, 2021 to June 15, 2021, citing a temporary seasonal need. (AF 217-252). The Employer is a farm laborer contractor who supplies workers for farms in Florida. *Id.*

On December 15, 2020, 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 203-209). Specifically, the CO noted “the requested dates of need, coupled with the dates of need for the employer’s previous applications in the same area of employment, indicates the employer has a history of requesting workers for every season of the year with a total requested dates of need spanning a period of longer than 10 months. Based on the employer’s requested dates of need and its previously requested dates of need, the employer has not established how this job opportunity is seasonal, rather than permanent, in nature.” (AF 206). 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 107).

The Employer responded to the NOD on December 23, 2020. (AF 106-203). While the Employer submitted its payroll records, it did not summarize them as requested. (AF 117-203). In response to the request to show how the Employer’s need is seasonal and what has changed since the prior applications, the Employer explained:

The harvesting work that the employer performs is of a seasonal nature, the employer made many mistakes trying to get certified for the H-2A program, struggling to get workers to be able to fulfill the contracts she had signed she submitted a series of applications that established dates of need that are not accurate. The employer would like to correct the mistake and establish correct dates of need for the future. The dates of need will be as follows:

---

<sup>1</sup> Citations to the Administrative File will be abbreviated “AF1” and “AF2” followed by the page number.

Planting will run from September to February  
Cabbage harvesting will run from November to March  
Kale & mix Greens harvesting will run November to June.

The CO issued a Final Determination denying the Employer request for certification on January 4, 2021. (AF 97-103). 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 appears to have a year round need instead of a seasonable need. *Id.* The CO included the following table of Employer's previous and pending H-2A applications for Farm Workers/Laborers<sup>2</sup>:

Case Number	Status	Beginning Date of Need	Ending Date of Need
H-300-20039-308283	Certified	04/07/2020	07/24/2020
H-300-20129-556132	Denied	07/10/2020	03/10/2021
H-300-20211-742352	Withdrawn	10/01/2020	07/30/2021
H-300-20254-815850	Denied	11/09/2020	04/30/2021
H-300-20343-941793	Current	02/08/2021	06/15/2021

(AF 109). The CO found that while the Employer may diversify crops and work with different growers throughout the year, it is the need for workers that is assessed not the need of individual growers. It is also the nature of the need not the nature of the crops. Therefore, the CO denied certification. (AF 97-103).

The Employer requested expedited review of the CO's determination on January 11, 2021. (AF 1-96). On February 1, 2021, this case was assigned to me. I received the Appeal File the same day. In an Order dated February 1, 2021, I provided the CO until February 4, 2021 to file a brief. The Employer filed a brief. The CO did not file a brief, but filed a Motion to Strike the additional exhibits filed by the Employer with its brief. I will address that motion herein. 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

---

<sup>2</sup> The CO included in the appeal file the files for the Employer's other applications. (See AF 253-480).

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.

The Employer filed two exhibits with its brief. These exhibits are not included in the prior administrative appeal file. Therefore, they cannot be taken into consideration. The CO's Motion to Strike is, therefore, granted. The Employer also references a number of facts within its brief that are not included within the record. I will only take into consideration the evidence in the appeal file that was before the CO at the time of the determination.

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, indicate a need for workers from February 8th to November 9th. This leaves just two months where workers aren't needed. The Employer relies on the premise that the work that is to be completed at various worksites on different crops determines the temporary or seasonal nature of employment. The Employer, however, acknowledges in the first paragraph of its brief that it needs workers in fall, winter, and spring. (Brief p. 1). The Employer does not dispute the past applications or the need during these time periods. Instead, the Employer asserts that in order to obtain certification it will agree to only request employees under a 10-month time period. (Brief p. 2). The commitment to change a business plan in order to fulfill compliance is not evidence of temporary need.

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 Employer's previous applications show that the Employer needed temporary Farm Workers. The Employer's current application includes a similar job title and includes a similar work description. The Employer attempts to distinguish its need for workers in this current application by asserting that the workers worked on different

crops and at just one location. Again, this distinction between crops does not make the Employer's need seasonal. Rather, the record demonstrates that the Employer has a consistent need for year-round workers whose job duties do not change.

There are a number of issues with the Employer's argument. First, it is an Employer's **need**, and not an individual task or worksite, which dictates whether a need for workers is seasonal or temporary. *Pleasantville Farms LLC*, slip op. at 3. Looking at the whole situation, it is clear that the Employer's need, irrespective of crop or worksite, is neither seasonal nor temporary in nature. Second, the Employer identified on appeal that the need was due to extraordinary circumstances, Covid-19 (as referenced in the brief), circumstances beyond the Employer's control. However, this information was not provided to the CO prior to the determination. Furthermore, besides the Employer's conclusory arguments on appeal, there is nothing to support any of those potential arguments in the record. Finally, the Employer's statements that it will no longer request workers outside of the 10 month period and it will change its business plan, clearly show that the Employer is trying pick and choose its time of need to stay within the 10 month period, further hindering the Employer's argument.

Even if I accepted the Employer's argument that the duties are different between the two locations as they are at a separate site and different crops, the very applications show otherwise. All of the applications are for locations within a similar geography area and for workers performing essentially the same duties – planting and harvesting. (AF 217-480). 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).

Thus, the Employer has not tied its alleged employment need to a certain time of year by an event or pattern, as required by 20 C.F.R. § 655.103(d), but instead has continuously entered into contracts with agricultural producers in order to create continuous work and an unceasing need for workers. There is also no evidence in the record to show that the Employer requires labor levels far above those necessary for ongoing operations from February to November. Therefore, the Employer has not met its burden to show that it needs more workers in certain months than in other months of the year. *Farm-Op, Inc.*, slip op. at 7; *Lodoen Cattle Co.*, slip op. at 5.

The overlapping nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrates that the Employer's need for workers in its proposed season does not differ from its need for such labor during other times of the year; rather the record demonstrates that its need for farm workers and laborers is permanent and year-round, not seasonal or temporary. 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, capacious, 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