DECISION AND ORDER AFFIRMING CERTIFYING OFFICER’S
DENIALS OF CERTIFICATION

These matters arise 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 at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) on a temporary basis. Employers who seek to hire foreign workers under this program must apply for
and receive labor certification from the U.S. Department of Labor (“Department”). A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges (“OALJ”).

PROCEDURAL HISTORY

2021-TLC-00073

On January 4, 2021, JBO Harvesting, Inc. (the “Employer” or “JBO”), which is an H-2A Labor Contractor (“H-2ALC” or “Labor Contractor”), filed the following documents with the CO: (1) a completed Form ETA 9142A, H-2A Application for Temporary Employment Certification (“Application A”); (2) Appendix A to Form ETA 9142A; and (3) ETA Form 790, Agricultural Clearance Order. (AF-73 at 84-121.) The Employer requested certification for twelve nursery workers from February 16, 2021, until November 30, 2021, based on an alleged seasonal need for workers during that period. (AF-73 at 84, 89.)

By letter dated January 8, 2021, the CO issued a Notice of Deficiency (“NOD”) outlining four deficiencies in the Employer’s Application A. (AF-73 at 71-78.) On January 15, 2021, the Employer responded to the NOD. (AF-73 at 57-70.) The same day, the CO issued a Minor Deficiency E-mail (“MDE”) highlighting two remaining deficiencies in the Employer’s Application A. (AF-73 at 56.) The Employer responded on January 20, 2021. (AF-73 at 26-55.)

By letter dated January 29, 2021, the CO denied the Employer’s Application A. (AF-73 at 17-23.) The CO determined that the Employer failed to show a seasonal or temporary need for workers, as defined in 20 C.F.R. § 655.103(d). (AF-73 at 20.) After reviewing the Employer’s extensive filing history, the CO noted that the Employer had filed multiple applications for farmworkers under SOC occupation code 45-2092, with the same worksite locations, in the same area of intended employment, with the same or comparable job duties. (AF-73 at 20.) The CO emphasized that comparing Application A with these prior applications, the Employer had a permanent, rather than a temporary, need for workers. (Id.) Furthermore, the CO stated that although no application on its own listed a period of need exceeding ten months, the Employer’s collective filing history showed a year-round need for farmworkers in the same area of intended employment. (Id.) Moreover, the CO found no apparent change in the Employer’s business operation to justify the Employer’s argument that it no longer had a need for labor outside of

2 20 C.F.R. § 655.171.
3 “Application A” refers to the Employer’s Application in case number 2021-TLC-00073.
4 “AF” refers to the Administrative File. As this proceeding involves two cases consolidated for hearing and decision, two Administrative Files are of record. In this Decision and Order, “AF-73” refers to the Administrative File for 2021-TLC-00073; and “AF-82” refers to the Administrative File for 2021-TLC-00082.
5 SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092.00 (AF-73 at 85.) Although the Employer listed SOC occupation code 45-2092.01 on its Application A (AF-73 at 85), that occupation code, 45-2092.01 (Nursery Workers), is no longer in use. See https://www.onetcodeconnector.org/ (“This occupational code is no longer in use. In the future, please use 45-2092.00 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse instead”).
February to November. (AF-73 at 23.) Because the CO concluded that the Employer’s job opportunity was not tied to a certain time of year by an event or pattern, he denied the Employer’s Application A. On February 2, 2021, the Employer requested a de novo hearing. (AF-73 at 1-16.)

2021-TLC-00083

On January 4, 2021, the Employer filed with the CO a separate Form ETA 9142A, H-2A Application for Temporary Employment Certification (“Application B”), along with Appendix A to Form ETA 9142A, and ETA Form 790, Agricultural Clearance Order. (AF-82 at 58-91.) This time, the Employer requested certification for eleven “palm harvesting, cleaning, and loading” workers (hereinafter “palm workers”) from February 16, 2021, until November 30, 2021, based on an alleged seasonal need for workers during that period. (AF-82 at 58, 66.)

By letter dated January 7, 2021, the CO issued a Notice of Deficiency (“NOD”) outlining three deficiencies in the Employer’s Application B. (AF-82 at 44-49.) On January 14, 2021, the Employer responded to the NOD. (AF-82 at 31-42.) On January 20, 2021, the CO issued a Notice of Required Modifications (“NRM”) highlighting one remaining deficiency in the Employer’s Application B. (AF-82 at 26-30.) The Employer responded the same day. (AF-82 at 23-25.)

On February 10, 2021, the CO denied the Employer’s Application B. (AF-82 at 12-19.) Similar to the Final Determination he issued in Application A (2021-TLC-00073), the CO concluded that the Employer failed to show a seasonal or temporary need for workers under 20 C.F.R. § 655.103(d) (AF-82 at 15-19.) The CO again noted that the Employer had filed multiple applications for farmworkers under SOC (O*Net/OES) occupation code 45-2092, with the same worksite locations, in the same area of intended employment, with the same or comparable job duties. (AF-82 at 15.) The CO compared Application B with the Employer’s prior applications, including Application A, and concluded that the Employer failed to show how its business or operations had changed since the time it filed its prior applications for farmworkers. (AF-82 at 17.) Therefore, the CO found that the Employer had a permanent, rather than a temporary, need for workers, and he denied the Employer’s Application B. (AF-82 at 12-19.) On February 12, 2021, the Employer requested a de novo hearing. (AF-82 at 1-11.)

Consolidation

On February 12, 2021, I held a conference call with the parties. During the call, the Employer waived the time constraint for holding a hearing under 20 C.F.R. § 655.171(b)(1)(ii). On February 16, 2021, the Employer filed a Motion for Continuance. On February 18, 2021, I held another conference call with the parties, during which they agreed to continue the hearing to a later date.

6 “Application B” refers to the Application in case number 2021-TLC-00082.
7 SOC (O*Net/OES) occupation title “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” and occupation code 45-2092.00. (AF-82 at 59.)
8 20 C.F.R. § 655.171(b)(1)(ii) provides that the “ALJ will ensure that the hearing is scheduled to take place within 5 business days after the ALJ’s receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence.”
I issued a Notice of Hearing and Pre-Hearing Order in 2021-TLC-00073 on February 22, 2021. Thereafter, by order dated March 1, 2021, I granted the CO’s Motion to Consolidate 2021-TLC-00073, which was already pending before me in the Cincinnati District Office, with 2021-TLC-00082, which was pending before Judge Berlin in the San Francisco District Office. The same day, 2021-TLC-00082 was reassigned to me. I received AF-73 on February 11, 2021, and AF-82 on March 1, 2021.

I held a consolidated video hearing in both claims on March 10, 2021. At the hearing, I admitted EX 1 and ALJX 1 and 2 into the record. John Rotterman, the Certifying Officer in these two cases, Jesus Barajas, the owner of JBO, and Dr. Stephen Futch, an expert in agricultural operations, testified at the hearing on March 10, 2021. I have only summarized the testimony pertaining to the narrow issue in this case. Both the Employer and the CO filed closing briefs, and the record is now closed.

The sole issue on appeal is whether the Employer, a H-2A Labor Contractor, has met its burden to establish that its need for agricultural services or labor is seasonal, as defined under 20 C.F.R. § 655.103(d). Under the regulations, I must “affirm, reverse, or modify the CO’s determination, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to” 20 C.F.R. § 18.95. My authority to modify the CO’s determination does not permit me to modify the Employer’s applications. After holding a de novo hearing, I have based my decision on the evidence admitted at hearing, the administrative files, and the testimony of the witnesses who testified at the hearing.

THE PARTIES’ ARGUMENTS

The CO argues that JBO has failed to meet its burden of proving that its need for H-2A workers is seasonal within the meaning of 20 C.F.R. § 655.103(d). Although the CO concedes that he previously certified the Employer’s applications for farmworkers, he testified that he began denying the Employer’s applications, including the two at issue in this case, after realizing that the Employer had been using the H-2A program on a year-round basis. The CO argues that the Employer has failed to show that it has changed its business model such that it now has a seasonal need for H-2A workers. Therefore, the CO urges me to affirm the CO’s decisions denying the Employer’s H-2A applications.

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9 At the hearing, I erroantly referred to this as the “Claimant’s Exhibit” as opposed to the “Employer’s Exhibit.” (Tr. at 107.) EX 1 is Dr. Stephen Futch’s curriculum vitae.
10 ALJX 1 is the Administrative File in 2021-TLC-00073. ALJX 2 is the Administrative File in 2021-TLC-00082.
11 “Tr.” refers to the transcript of the hearing held on March 10, 2021.
12 The Employer and the CO filed closing briefs by March 16, 2021, in accordance with the deadline I established at the hearing. On March 17, 2021, the Employer filed a supplemental brief.
13 At the hearing, the CO stipulated that citrus propagation and palm harvesting in Central Florida are seasonal, and labor is typically required from the middle of February until the end of November. (Tr. at 112.)
14 20 C.F.R. § 655.172(b)(2).
15 See, e.g., Grand View Dairy Farm, 2009-TLC-00002 (Nov. 3, 2008) (“The authority to modify the CO’s determination is not authority to permit the Employer to modify the application based on how the ALJ rules in the matter. Rather, if the Employer now wishes to modify its requirements in response to my affirmance of the CO’s denial, the procedure is for the Employer to file a new application with the CO”).
16 20 C.F.R. § 655.171.
The Employer argues that it has changed its business model and it now only needs H-2A workers from mid-February through the end of November for citrus propagation and palm harvesting. Jesus Barajas, JBO’s owner, testified that he now specializes “in specific skills with specific farmers,” as opposed to providing the “more generic” services that he used to provide. (Tr. at 46, 77-79, 102.) Under his old business model, he was “doing everything across the board” to supplement the work needed by various farmworkers. (Tr. at 80-81, 98.) The Employer argues that its new business model, combined with the CO’s stipulation that citrus propagation and palm harvesting are seasonal, demonstrates that it has a seasonal need for H-2A workers.

DISCUSSION

I. Legal Standard

The H-2A regulations provide, in relevant part, that in order to bring nonimmigrant workers to the U.S. to perform agricultural work, an employer must demonstrate that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that employing foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.17

To qualify for the H-2A program, an employer must establish that it has a need for agricultural services or labor “to be performed on a temporary or seasonal basis.”18 The Department’s H-2A regulations define these terms as follows:

For the purposes of this subpart, 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.19

In this case, the Employer is an H-2A Labor Contractor, not a fixed site employer. The regulations provide that an H-2A Labor Contractor is “[a]ny person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association... who recruits, solicits, hires, employs, furnishes, houses, or transports” any H-2A worker.20 Under 20 C.F.R. § 655.132, an H-2ALC “must meet all of the requirements of the definition of employer in [20 C.F.R.] § 655.103(b).” Additionally, each application that an H-2ALC files “must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees.”21

17 8 U.S.C. § 1188(a)(1); see also 20 C.F.R. § 655.103(a).
18 20 C.F.R. §655.161(a).
19 20 C.F.R. § 655.103(d).
20 20 C.F.R. § 655.103(b).
21 20 C.F.R. § 655.132(a).
II. Analysis

Having considered the evidence of record, and for the reasons explained below, I find that the Employer has failed to show that it has a seasonal need for H-2A workers.

a. THE EMPLOYER’S PRIOR APPLICATIONS AND PAYROLL RECORDS DEMONSTRATE A YEAR-ROUND NEED FOR H-2A WORKERS

BALCA has long recognized that the CO may aggregate the requested dates of need contained in an H-2A Labor Contractor’s applications to determine if they show a year-round need rather than a seasonal need. Therefore, I find that the CO properly considered the Employer’s application filing history in determining whether the Employer has a seasonal need or a year-round need for labor. I too have considered the Employer’s application filing history, contained in ALJX 1 and 2, in determining whether the Employer has a seasonal need for H-2A workers.

The record includes the Employer’s filing history from the following H-2A applications:

<table>
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<tr>
<th>ETA Case Number</th>
<th>Employer</th>
<th>Status</th>
<th>Start Date of Need</th>
<th>End Date of Need</th>
<th>Job Title</th>
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<td>H-300-18199-782285</td>
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<td>09/01/2018</td>
<td>06/30/2019</td>
<td>Nursery</td>
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<td>05/15/2019</td>
<td>Citrus</td>
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<td>Certified</td>
<td>11/30/2018</td>
<td>06/30/2019</td>
<td>Palm</td>
</tr>
<tr>
<td>H-300-19032-337569</td>
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<td>Certified</td>
<td>03/18/2019</td>
<td>09/30/2019</td>
<td>Nursery</td>
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<td>H-300-19158-338287</td>
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<td>07/22/2019</td>
<td>09/15/2019</td>
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<tr>
<td>H-300-19225-744657</td>
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<td>Withdrawn</td>
<td>09/27/2019</td>
<td>06/15/2020</td>
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<td>H-300-19232-398320</td>
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<td>10/04/2019</td>
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<td>H-300-19232-401438</td>
<td>JBO</td>
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<td>10/04/2019</td>
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<table>
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<tr>
<th>Application Number</th>
<th>Certification Status</th>
<th>Date of Certification</th>
<th>End Date</th>
<th>H-2A Worker Type</th>
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<td>07/30/2020</td>
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<td>H-300-19354-210176</td>
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<td>06/30/2020</td>
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<tr>
<td>H-300-19342-186252</td>
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<td>H-300-20156-625759</td>
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<td>H-300-20183-688950</td>
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<td>H-300-20200-722780</td>
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<td>Denied</td>
<td>02/16/2021</td>
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</table>

As evidenced by the table above, the Employer has had an ongoing, year-round, need for H-2A workers from September 2018 until November 2020. Because the CO denied the Employer’s five most recent applications, including the two at issue in this case, the Employer has not employed H-2A workers since November 2020.

In addition to the Employer’s H-2A application history, the Employer’s payroll records from 2018, 2019, and part of 2020 support the conclusion that the Employer has hired H-2A workers on a year-round basis. (AF-73 at 218.) In 2018, the Employer hired H-2A workers in every month except for July and August. (AF-73 at 218.) In 2019, the Employer hired H-2A workers every month of the year. (Id.) In 2020, the Employer hired H-2A workers from January through August. (Id.) The Employer submitted these records to the CO in August 2020, in conjunction with ETA case number H-300-20200-722780. (Id.) The Employer did not supplement the record with

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23 This application corresponds to OALJ case number 2020-TLC-00103 (ALJ Berlin dismissed this case on September 28, 2020).
24 This application corresponds to OALJ case number 2020-TLC-00129 (ALJ DeMaio affirmed the CO’s denial of certification on November 6, 2020). (AF-73 at 187-191).
25 This application corresponds to OALJ case number 2021-TLC-00082.
26 This application corresponds to OALJ case number 2021-TLC-00073.
more recent payroll records. At the hearing, Mr. Barajas testified that JBO did not hire any H-2A workers in December 2020 or January 2021. (Tr. at 97.) Although the Employer sought certification to hire H-2A workers during those two months, the CO denied those applications. The fact that the Employer did not hire H-2A workers in December 2020 or January 2021 is solely related to the CO’s decision to deny the Employer’s applications, not to the seasonal nature of the Employer’s needs. The Employer would have hired H-2A workers during December and January had the CO certified the Employer’s applications. Therefore, I find that the Employer’s payroll records show that the Employer has a year-round need for H-2A workers.

Based on the Employer’s application filing history and payroll records, I find that the record shows that the Employer has a year-round, rather than a temporary, need for H-2A workers.

b. THE EMPLOYER HAS NOT DEMONSTRATED THAT IT HAS CHANGED ITS BUSINESS MODEL

The Employer’s primary argument on appeal is that because it has changed its business model, it no longer needs H-2A workers on a year-round basis. In other words, the Employer seeks to distance itself from its previous business model and prior applications. Although the Employer alleges that it has transformed its business model, it has not presented evidence to support its assertion that it now provides farmers with specialized labor for palm harvesting and citrus propagation.

At the hearing, Mr. Barajas discussed the duties of the nursery worker job, such as tree grafting, tree staking, and chip budding, as well as the duties of the palm worker job, such as harvesting, preparing palm for loading, and cleaning and scarifying palm. (Tr. at 51-55, 67-73; AF-83 at 77; AF-73 at 100.) He conceded that all of the work was “under the same SOC code,” but he said it was “by no means the same type of work.” (Tr. at 82.) He explained that “it takes a lot of training to have this knowledge,” adding that it would take “much more training than just… a week or so.” (Tr. at 54.) When asked about the discrepancy between his testimony and his application, in which he did not require palm workers to have any experience, he explained that the State of Florida’s State Workforce Agency (“SWA”) did not permit him to “require any training” or experience. (Tr. at 55-56, 61-62.) He conceded that he required three months of experience for citrus workers on a prior application, but reiterated that Florida no longer allows him to require experience. (Tr. at 105.) Mr. Barajas stated that if an American worker were to apply for the palm worker or nursery worker job, it might take “a certain amount of time,” such as a “week, two weeks” before that worker could do the job. (Tr. at 70-71.) He then reiterated that training lasts “[a]nywhere from one to two weeks.” (Tr. at 71-72.) However, he emphasized that experience was “preferable.” (Tr. at 55.)

Dr. Stephen Futch testified as an expert witness on behalf of the Employer. He described the differences between palm tree harvesting and citrus propagation, and he opined that the skillsets needed for each job were not interchangeable. (Tr. at 113-118.) He stated that having someone with a few months of experience would be “beneficial.” (Tr. at 120.) When asked how long it would take to prepare someone with no prior experience with nursery work to do the tasks associated with citrus propagation, he stated, “You’re going to have to – preparing for weeks for them to become highly proficient is that to the level where they’re getting 95 percent of the buds to take.” (Tr. at 120-121.) He emphasized that having someone with prior budding experience was
“probably going to increase the success of them making a successful budder.” (Tr. at 120.) When asked the same question about palm harvesting, he stated, “I think you can train someone in the palm tree quicker, in a matter of, you know, a week or two, and if they have a strong back and a strong will to work.” (Tr. at 121.)

As summarized above, Mr. Barajas testified that palm workers and citrus workers require specialized experience. However, both applications pending before me are for “Farmworkers and Laborers, Crop, Nursery, and Greenhouse,” under SOC (O*Net/OES) occupation code number 45-2092.00. The Standard Occupation Classification Manual states that farmworkers under this occupation code perform all of the following:

Manually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops. Use hand tools, such as shovels, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizers; transplanting, weeding, thinning, or pruning crops; applying pesticides; or cleaning, grading, sorting, packing, and loading harvested products. May construct trellises, repair fences and farm buildings, or participate in irrigation activities.27

As can be seen, although the Employer attempts to differentiate palm workers and nursery workers, both are farmworkers with job duties that fall within the above-mentioned definition. Moreover, on every prior application charted above, the Employer also sought certification for farmworkers under SOC (O*Net/OES) occupation code number 45-2092.00, even though the job titles varied by application. (AF-73; AF-82.) Because it has consistently sought to hire farmworkers under the same SOC (O*Net/OES) occupation code, I am not persuaded by the Employer’s argument that it is currently specializing in hiring farmworkers that will be doing substantially different work from the farmworkers it previously hired or sought to hire.

In addition to seeking certification for the same type of H-2A farmworker that it previously hired year-round, the Employer’s argument on appeal is further undermined by the fact that it is not seeking nursery workers or palm workers that have any specialized skills or experience. Although Mr. Barajas testified that he is now providing a specialized service, which requires workers with specialized skills, knowledge, and experience, the Employer’s current applications show otherwise. For example, in its application for nursery workers, the Employer wrote, under the section regarding “Minimum Job Qualifications/Requirements,” that potential applicants do not have to have any minimum education, any months of work experience, or any months of training. (AF-73 at 90.) Similarly, in its application for palm workers, the Employer again certified that potential applicants do not have to have any minimum education, any months of work experience, or any months of training. (AF-82 at 67.) The nursery job requires the ability to lift fifty pounds, while the palm-harvesting job requires the ability to lift sixty pounds. (AF-73 at 90; AF-82 at 67.) Other than that, the requirements and minimum job qualifications are identical. Although the Employer testified that it has significantly changed its business model, its current applications do not support its argument that nursery work and palm harvesting are significantly

different from each other or significantly different from the work the Employer previously had its H-2A workers perform.

Finally, the testimony of Mr. Barajas and Dr. Futch suggests that JBO would have to train an inexperienced worker for one or two weeks in order for that worker to do the job of a nursery worker or palm worker. While Mr. Barajas and Dr. Futch testified that having workers with experience is “preferable” or “beneficial,” they both agreed that training an untrained worker only takes a few weeks. Jobs that require one or two weeks of training are far from specialized in the manner the Employer professes. Therefore, I find that the testimony of record does not support the Employer’s argument that it has changed its business model and now specializes in providing highly skilled and experienced workers to farmers.28

In sum, the Employer has consistently sought farmworkers under the same SOC (O*Net/OES) occupation code, does not require any minimum qualifications or experience for nursery workers or palm workers, and submitted testimony that training inexperienced workers only takes one or two weeks. Therefore, I find that the Employer has failed to show that it has transformed its business model such that it now only has a temporary need for H-2A workers from February through November.

28 If the Employer truly has a need for skilled or experienced workers, it must show, on a future application, that its experience requirement is consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupation and crop, as required by 20 C.F.R. § 655.122(b).

29 See, e.g., Matter of Artee Corp., 18 I. & N. Dec. 366 (BIA), 1982 WL 190706 (Nov. 24, 1982) (“It 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”); Egley Grain Cleaning, Inc., 2015-TLC-00067 (Oct. 5, 2015); Little Wicomico Oyster, LLC, 2018-TLC-00029 (Nov. 1, 2018); Resendiz Pine Straw, LLC, 2019-TLC-00052 (June 14, 2019).


C. THE SEASONAL NATURE OF CITRUS PROPAGATION AND PALM HARVESTING IS NOT DISPOSITIVE

In determining temporary need for purposes of the H-2A program, judges have long held that the nature of the need for the duties to be performed, not the nature of the duties of the position, determines an employer’s temporary or seasonal need.29 Therefore, an employer, whether it is a fixed site employer or an H-2A Labor Contractor, controls the analysis of seasonal need, not the duties of the job opportunity. BALCA has consistently held that an H-2A Labor Contractor must establish that its own need for labor is seasonal or temporary, not whether its fixed site clients have a seasonal or temporary need for labor.30

At the hearing, counsel for the Employer argued that the CO’s stipulation – that citrus propagation and palm harvesting in Central Florida are seasonal – “ends the case.” (Tr. at 125.) Contrary to his argument, the issue presented by these cases is whether JBO has a seasonal need for workers, not whether the farmers with whom JBO contracts have a seasonal need for farmworkers. Mr. Barajas conceded that when he previously filed applications, “the contracts were all different” and his need for workers depended on the contracts he had with farmers. (Tr. at 82.) He asserted that he now only has two contracts, one for citrus propagation and the other for palm
harvesting. (Tr. at 84.) However, he conceded that the contracts he has entered into dictate his “need at this point” (emphasis added). (Tr. at 85.) When asked if he would take the contracts he lost, he stated, “If the other contracts came back, I probably would not take them. And it all depends on what the specifications are going to be, because like I said, we’re specializing in services, not just the labor part of this” (emphasis added). (Tr. at 88.)

While Mr. Barajas testified that JBO is only seeking farmworkers to fulfill these two contracts, I am not persuaded that when these contracts are fulfilled, he will not engage in other contracts, for other periods of alleged seasonal need. If that happens, the Employer’s “seasonal” need will change, as it has done previously. It bears emphasis again that the seasonal needs of the palm or citrus farmer are not determinative of the Employer’s seasonal need. Rather, I must consider the Employer’s need for the labor in determining whether the Employer has proven a seasonal need. Other than stating that it has changed its business model, the Employer has not shown any documentary evidence demonstrating that it has adopted a new business model. If I were to accept the Employer’s bare assertion that it has changed its business model, without any supporting documentation, and when the applications indicate otherwise, then any H-2ALC can establish a seasonal need with a new contract, regardless of prior filing history. This would set a precedent contrary to the underlying purpose of the H-2A program.

As the issue arose at the hearing, I want to emphasize for the record that I do not find any evidence suggesting that the Employer has tried to manipulate its applications or abuse the H-2A program. Rather, the record shows that the Employer has consistently hired H-2A workers by trying to follow the Department’s regulations. Moreover, I found credible Mr. Barajas’s testimony that he always sought to adhere to the law. The CO approved some of the Employer’s applications in error, but he stopped doing so once he realized the Employer was hiring H-2A workers on a year-round basis. Despite Mr. Barajas’s honest efforts to comply with the H-2A program, he conceded that “a lot of” domestic workers “are looking for full-time” employment. (Tr. at 100-101.) The very purpose of the H-2A program is to hire foreign workers to perform agricultural services or labor on a temporary or seasonal basis, but only if employing foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. Because the Employer has not demonstrated a seasonal need for workers within the meaning of 20 C.F.R. § 655.103(d), his applications for temporary labor under the H-2A program are not entitled to certification.

CONCLUSION

The Employer’s application filing history and payroll records show a year-round need for H-2A workers. Moreover, although the Employer argues that it has transformed its business model, it has not demonstrated that it employs a specialized workforce and it has not distinguished its present business model from its previous one. Finally, even assuming that citrus propagation and palm harvesting in Central Florida are seasonal, the Employer, an H-2A Labor Contractor, has not shown that it has a seasonal need for workers from mid-February through the end of November. Rather, because the Employer’s need for H-2A workers is dictated solely by the contracts it enters into with farmers, its need for H-2A workers is subject to the same year-round labor needs it has historically demonstrated. Accordingly, I find that the Employer has not established a seasonal need for labor, as defined in 20 C.F.R. § 655.103(d).
ORDER

In light of the foregoing, I hereby AFFIRM the Certifying Officer’s decisions denying the Employer’s applications for temporary labor certification.

JOHN P. SELLERS, III
ADMINISTRATIVE LAW JUDGE