



**Issue Date: 16 February 2021**

OALJ Case No.: 2021-TLC-00075  
ETA Case No.: H-300-20307-894669

*In the Matter of:*

**MOONLITE SERVICES, LLC,**  
*Employer.*

Appearance: Kevin Lashus, Esquire  
Fisher Broyles, LLC  
*For the Employer*

Office of the Solicitor  
U.S. Department of Labor  
Washington, D.C.  
*For the Certifying Officer*

Before: Natalie A. Appetta  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING THE CERTIFYING OFFICER'S DENIAL**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations 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.

On January 14, 2021, Moonlite Services, LLC, (Employer) filed a request for administrative review pursuant to 20 C.F.R. § 655.171(a) to review the Certifying Officer's (CO) December 11, 2020 Final Determination in regard to Employer's temporary alien agricultural labor certification (H-2A) application. I received the Administrative File (AF) February 8, 2021. On the same date, I issued an Order of Assignment and Setting Briefing Schedule.

This decision and order is based on the record consisting of the Revised Administrative File forwarded by the U.S. Department of Labor, Employment and Training Administration

(“ETA”).<sup>1</sup> Furthermore, this Decision and Order is issued within five business days of receipt of the ETA administrative file, as required by the regulation at 20 C.F.R. §655.171(a).

## **BACKGROUND**

On November 12, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* including ETA Forms 9142A, 790, 790A and Addendums. AF 53-69. The Employer’s application requested certification for four H-2A workers under the occupational title “Farmworkers, Farm, Ranch and Aquacultural Animals,” SOC Occupational Code 45-2093.00, for the period beginning January 1, 2021 through May 28, 2021. The nature of temporary need was listed as seasonal.

A statement of temporary need was included with the application. It stated:

We cannot recruit field workers for the opportunity available; so, we have a temporary need for 4 temporary foreign nationals to assist in raising and attending to livestock through the end of July. After July, the workers are not needed since all that is being done is herding and grazing the cattle which can be done by the owners without assistance.<sup>2</sup>

(AF 69).

On November 19, 2020, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) identifying one deficiency in the Employer’s application. (AF 42-47). The deficiency noted employer’s failure to establish its job opportunity as “temporary or seasonal need.” (AF 45-47). The Employer was given an opportunity to provide evidence supporting that a temporary need exists. (AF 42-47).

In regard to the deficiency, the CO determined that the Employer did not sufficiently demonstrate that the job opportunity was temporary or seasonal in nature, citing 20 C.F.R. § 655.103(d), which defines temporary or seasonal need. In pertinent part, 20 C.F.R. § 655.103(d) provides:

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.

The CO noted the Employer’s filing history in the following chart:

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<sup>1</sup> References to the Administrative File are designated as “AF.”

<sup>2</sup> A nearly identical statement was included in the Employer’s second application, except that it stated the month of May rather than July. (AF 72-73).

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date Of Need</u>	<u>Ending Date Of Need</u>
<b>H-300-20151-614026</b>	Moonlite Services, LLC	Denied	08/03/2020	05/28/2021
<b>H-300-20230-772781</b>	Moonlite Services, LLC	Denied	10/21/2020	*07/23/2021
<b>H-300-20307-894669</b>	Moonlite Services, LLC	Received	01/01/2021	05/28/2021

\*According to the employer's NOD response for Case number: H-300-20230-772781, the initial requested end date of 07/23/2021 was an error and should have been 05/28/2021. However, the end date was not updated in FLAG by the Chicago NPC prior to the issuance of a final determination.

(AF 12-13).

The CO noted that the Employer's previous applications<sup>3</sup> were denied because the Employer failed to meet its burden of proof in establishing a temporary or seasonal need and that the job duties and worksite location listed on the Employer's previous applications and the current application are the same. The CO also noted that the Employer provided a copy of payroll reports in its first application and claimed such reports did not exist in its second application. (AF 13).

In the Notice of Deficiency, the CO requested a detailed explanation and supporting documentation that a temporary need exists. The CO stated that the Employer must provide the following information:

1. A written explanation which documents its temporary need for H-2A workers. In this explanation, the employer must also provide in detail as to why its job opportunity is seasonal or temporary; and clearly state the months during the year when additional workers are needed.
2. A detailed written explanation as to why its dates of need have significantly changed from its initial request of early August through late May to its recent request of early October through late May to its current request of early January through late May.
3. 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 employer is required to submit summarized payroll reports for a minimum of two previous calendar years (2018 and 2019) for **Cattle Herder**. These payroll reports must be a summary of the employer's individual payroll records by month, and, at a minimum, identify the total number of workers, total hours

<sup>3</sup> The CO included the Employer's previous applications, Case Numbers H-300-20230-772781 and H-300-20151-614026, in the Administrative File. (AF 70-237).

worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation.

4. **The summarized payroll reports must be signed by the employer 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 Jose R De Luna for Calendar Years 2018 and 2019.**
5. **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. Please Note: If the submitted document(s) and its relationship to the employer's need is not clear to a lay person, then the employer must submit an explanation of exactly how the document(s) supports its requested period of need and number of workers.**

(AF 46-47 (emphasis in original)).

The Employer provided two identical responses to the Notice of Deficiency. (AF 29-41). It indicated that it “screwed up” in the second application, with the ending date of July 23, 2021, and the May 28, 2021 dates in the first and third application accurate, and that the second application “was completely in error,” stating,

Under my advice, our paralegal attempted to maximize the time in-country for the H-2A workers; however, she didn't understand that the change would impact the 'seasonality'. The error was attempted to be remedied on appeal after I (Kevin Lashus) discovered the error. It was my intent to ask the solicitor to remand the case to the CO of the first application to identify the error. HOWEVER, the court issued the decision without also issuing a scheduling order. Because we did not identify the Solicitor to request assistance with the remand because of our error, the ALJ issued the decision before we could ask for the remand.

(AF 29-30). The Employer also stated that it “doesn't yet have payroll records reflecting the need because this is the first time applying.” (AF 29-30). The Employer provided printouts from several web pages, gov.mb.ca, beef-cattle.extension.org, tscra.org, and animals.mom.com, including a page addressing winter calving and its advantages, a page addressing spring calving and its advantages, a page titled “Calving Seasons Compared,” and a page briefly addressing family tradition of cattle farming, spring calves and fall calves, and a page titled “When exactly is the beginning of cattle breeding season? What's the significance of having it during a particular time?” with this sentence highlighted, “We generally think of 'spring' time (February through May) as the ideal calving season (about 70 to 75% of all calves are born in this period, although it is not exactly 'spring') because the forage is regrowing as sunlight and temperatures increase and can provide adequate nutrition to the cow and her calf (through [sic].” (AF 32-36).

The CO noted that in the responses to the Notice of Deficiency issued for the current claim, the same temporary need statement was submitted with each of the three applications and noted its previous applications had been denied “because the employer failed to meet its burden of proof in establishing a temporary or seasonal need.” (AF 12-13). The CO also noted that the OALJ affirmed denial of the Employer’s second application because the Employer “failed to meet its burden to establish its eligibility for H-2A labor certification.” (AF 13, 71-77; *see Moonlite Services, Inc.*, ALJ No. 2020-TLC-00128 (Oct. 30, 2020)).<sup>4</sup> The CO indicated that the Employer has not provided an explanation “as to what has changed in its operations since its previous applications were denied for the same job opportunity” and “did not submit any supporting documentation or any supporting evidence showing it has a need for more workers in certain months than in other months of the year.” (AF 14). The CO also pointed to inconsistencies in the Employer’s applications, specifically that in its first application, it indicated that it did not have any payroll documentation because it is a family farm established in June 2019, it submitted copies of invoices and summarized payroll reports from June 2019 to July 2020 in its second application, and now, in the current application, the Employer states that it does not have payroll information available and submitted none. The CO further noted that although the Employer provided general information relating to calving season for livestock, the information “does not appear to be specific to the employer’s asserted seasonal or temporary labor need for H-2A workers but rather a general overview of the calving season.” The CO finally noted that the Employer did not provide evidence demonstrating that it requires more workers during certain months or detailed explanation as to why its job opportunity is seasonal or temporary, other than stating that it “requires livestock assistance during the winter through the birthing season.” (AF 16).

By letter received January 14, 2021, the Employer appealed the CO’s final determination. It filed no supporting brief, but stated “In particular, the Honorable office of Foreign Labor Certification erroneously determined that Moonlite Services failed to establish that its seasonal job opportunity is and will be temporary in nature.” (AF 1). The Employer indicated that it “reserves the right to fully articulate with legal authority in a brief in support of the appeal until after the Honorable Office of Foreign Labor Certification has the opportunity to deliver the administrative record to the court.” (AF 1).

On February 8, 2021, I issued an Order of Assignment and Setting Briefing Schedule, indicating that the parties may file briefs no later than February 10, 2021 at 4:30 PM EST. No party filed any briefs. This decision and order is based on the record consisting of the Administrative File forwarded by ETA. Furthermore, this Decision and Order is issued within five business days after receipt of the ETA administrative file as required by the regulation at 20 C.F.R. §655.171(a).

### **ISSUE**

Whether the Employer has met its burden of establishing that its need for agricultural labor or services as stated in its current H-2A application is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. §655.103(d)?

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<sup>4</sup> *Moonlite Services, Inc.*, ALJ No. 2020-TLC-00128 is included in the record at AF 71-77.

## SCOPE OF REVIEW

The current case arises from the Employer's request for administrative review in regard to the CO's denial of the Employer's application for temporary alien labor certification under the H-2A program. "Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, 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 CFR 655.171(a). The ALJ's decision "must specify the reasons for the action taken." *Id.*

## DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a "temporary" or "seasonal" need for agricultural labor or services. 20 C.F.R. § 655.161. 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). A "seasonal" need occurs if employment is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103(d).

It is well established that the H-2A program is designed to fill only temporary or seasonal labor needs and therefore the need for the particular position cannot be a year round need, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). Ten months has been viewed as an acceptable threshold to question whether an employer's need is temporary. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008) (finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, it is not an arbitrary rule). 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." *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999).

Duties are relevant, as duties involving the care and feeding of livestock are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. *Cowboy*

*Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011). However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis. See *Gisi Pheasant Farm*, 2011-TLC-00139 (Jan. 25, 2011) (employer overcame presumption by explaining that although it needed temporary workers from March to December to hatch, maintain, and raise the poultry, it does not need workers in January and February because by December, it has slaughtered or sold its poultry and shuts down production during the winter).

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. See *Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011 (April 14, 2000); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016). Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than in other months of the year. *Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)).

When the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the changes. *Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) (employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor); *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010) (finding that a seasonal need is tied to the weather or a certain event, and a change in the dates from a previous application for a seasonal need must be justified). An employer must justify a need for changed dates through evidence and argument; mere assertions are not sufficient. *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016).

In order to utilize the H-2A program it is the employer's burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). In regard to a seasonal need, an employer must demonstrate when the employer's season occurs and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op at 11 (Feb. 15, 2011).

In the instant case, the Employer's application requests temporary labor certification for four Cattle Herders (Farmworkers, Farm, Ranch and Aquacultural Animals) with a starting date of January 1, 2021 and an ending date of May 28, 2021 on the basis of seasonal need. (AF 61). Because the requested dates here differ from the requested dates on each other previous applications, specifically the beginning dates on each application vary from August 3, 2020, October 21, 2020 to January 1, 2021, I find the CO reasonably questioned whether the Employer had established a seasonal need on the basis of the prior two filings as noted in the Final Determination. (AF 12-16). BALCA has consistently held that the CO can review the situation as a whole and need not limit analysis to only the current application. See *Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011 (April 14, 2000); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016).

Further, legal precedent supports the CO's position that when the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the changes. *Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) (employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor). It is undisputed that the dates of need listed on the current application vary from the dates indicated on previous applications. Review of the record indicates that the Employer stated that the July 23, 2021 ending date in the second application was in error and should have been May 28, 2021, however, the Employer did not address the different beginning dates across the applications.

Based thereon, I find that the CO permissibly and reasonably requested an explanation as to Employer's seasonal need, as well as supporting documentation as noted in the CO's November 19, 2020 Notice of Deficiency, in light of the variation in the dates of need as shown on the previous two applications. Such information would have provided necessary information addressing whether Employer's need was in fact, seasonal, as well as whether the change in dates of need between the various applications was justified. Thus, I find that the CO did not abuse his discretion by issuing the November 19, 2020 Notice of Deficiency or ultimately in denying the Employer's application on the basis of failure to establish a temporary or seasonal need.

As noted herein, the Employer did not provide the requested explanation and supporting documentation requested by the CO in the Notice of Deficiency, but rather requested administrative review pursuant to 20 C.F.R. § 655.171. The Employer provided essentially the same explanation for its seasonal need in each of its applications:

We cannot recruit field workers for the opportunity available; so, we have a temporary need for 4 temporary foreign nationals to assist in raising and attending to livestock through the end of July. After July, the workers are not needed since all that is being done is herding and grazing the cattle which can be done by the owners without assistance.

(AF 69). The CO noted this explanation, but also noted that the Employer failed to provide additional supporting documentation as requested in the Notice of Deficiency. Further, the CO noted that the Employer provided payroll reports in its first application, but did not provide them in the second or current application, stating here that it "doesn't yet have payroll records reflecting the need because this is the first time applying." (AF 29-30). Review of the file shows that the Employer did not submit payroll documentation or further explanation as to why this documentation was unavailable, especially in light of the fact that it was available for the first application. While it is believable that between the Employer establishing its business in June 2019 and today, it has determined that it needs additional temporary workers, the Employer failed to provide any explanation, provide payroll records, or provide other requested documentation as required in the Notice of Deficiency. Thus, the CO's concern about the discrepancy between the three applications is reasonable.

The Employer provided general information about the calving season and highlighted a portion stating, "We generally think of 'spring' time (February through May) as the ideal calving season (about 70 to 75% of all calves are born in this period, although it is not exactly 'spring') because the forage is regrowing as sunlight and temperatures increase and can provide adequate

nutrition to the cow and her calf.” (AF 32-36). However, as also noted by the CO, the Employer failed to adequately explain how this general information applies to the Employer’s specific situation, or how it applies to its asserted need for four temporary cattle herders.

As the CO stated, the Employer failed to provide evidence to support its application and failed to meet its burden to establish a temporary or seasonal need. Thus, I find that the CO has neither erred nor abused his discretion.

### **CONCLUSION AND ORDER**

Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d) and has not established its eligibility for H-2A labor certification. Therefore, the basis for the CO’s December 11, 2020 denial of the Employer’s Application for Temporary Employment Certification is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

**NATALIE A. APPETTA**  
U.S. Department of Labor