



Issue Date: 21 January 2021

OALJ Case No.: 2021-TLC-00050
ETA Case No.: H-300-20323-917244

In the Matter of:

OVERLOOK HARVESTING COMPANY, LLC,
Employer.

Appearance: David J. Stefany, Esquire
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For the Employer

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

Before: **DREW A. SWANK**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF LABOR CERTIFICATION

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 December 29, 2020, Overlook Harvesting Company, LLC (Employer) filed a request for a *de novo* administrative hearing pursuant to 20 C.F.R. § 655.171(b) to review the Certifying Officer's (CO) December 23, 2020 Denial determination in regard to Employer's temporary alien agricultural labor certification (H-2A) application. The undersigned received the Administrative File (AF) on January 5, 2021. A telephone conference call with Counsel for the parties was conducted on January 5, 2021, in which the parties agreed to a telephone hearing date of January 11, 2021. On January 6, 2021, an order issued clarifying filing deadlines and formally scheduling the January 11, 2021 hearing.

On January 11, 2021, the undersigned conducted a telephonic hearing in this matter, where all parties were represented by counsel and afforded the opportunity to present witnesses, introduce exhibits, and cross-examine. This decision and order is based on the record consisting of the Administrative File forwarded by the U.S. Department of Labor, Employment and Training Administration (“ETA”), the parties’ exhibits, and the testimony offered at the hearing.¹ Furthermore, this Decision and Order is issued within ten calendar days of the hearing as required by the regulation at 20 C.F.R. §655.171(b)(1)(iii).

BACKGROUND

On November 20, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A. AF 116-178. The Employer’s application requested certification for 16 Nursery Workers under the SOC code 45-2092.01 for the period beginning February 1, 2021 and ending July 4, 2021. AF 123-124. The Employer indicated that it was operating as an H-2A labor contractor and the nature of temporary need was listed as seasonal. AF 116.

The place of employment was listed as 4715 South Hammock Road, Zolfo Springs, Florida 33890 which is in Hardee County, Florida. AF 125.

The file at AF 103-115 includes a listing of all of the applications for temporary labor certification filed by Overlook Harvesting Company submitted between August 2013 and December 2020 including the current application.

On November 25, 2020, the Certifying Officer (CO) issued a Notice of Deficiency (NOD) listing three deficiencies in the Employer’s application. AF 90-97. The first deficiency noted by the CO was that Employer had failed to establish the job opportunity as seasonal or temporary pursuant to 20 C.F.R. §655.103(d). Two other deficiencies noted by the CO have been remedied and therefore will not be addressed in this decision.

In regard to the first deficiency, the CO stated that the Employer had not sufficiently demonstrated the job opportunity was temporary or seasonal in nature citing 20 C.F.R. § 655.103(d) which defines temporary or seasonal need as “employment [that] 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.” AF 93.

The CO noted that the job opportunity listed in the application indicated that the Employer’s dates of need are February 1, 2021 through July 4, 2021 in Hardee County, Florida which is located in the Central/South Florida area. However the CO found that the Employer has a history of filing applications for this area spanning 12 months out of the year which appeared to

¹ References to the Administrative File are designated as “AF,” Employer’s Exhibits as “EX,” Certifying Officer’s Exhibits as “CX” and references to the transcript are designated as TR.

reflect that Employer has a permanent need for H-2A workers in the same area of employment year round.

The CO summarized the Employer’s recent filing history in a chart listing the following applications:

Case Number	Position Requested	Status	Beginning Date Of Need	Ending Date Of Need
H-300-20203-726386	Farmworkers	Certified – Full	09/19/2020	07/18/2021
H-300-20239-787841	Farmworkers	Certified – Full	10/25/2020	05/30/2021
H-300-20248-805501	First-Line Supervisors	Denied	11/15/2020	09/14/2021
H-300-20274-850730	Nursery Workers	Certified – Full	11/28/2020	07/04/2021
H-300-20301-889431	First-Line Supervisors	In Process	12/26/2020	6/30/2021
H-300-20323-917244	Nursery Workers	Received	02/01/2021	07/04/2021

AF 93.

The CO noted that all of the stated positions in the above applications, that is, farmworkers, nursery workers and first line supervisors, listed no experience requirement. The CO also observed that the job duties for first line supervisors in application #H-300-20248-805501 did not differ from other applications which were filed under the SOC code of 45-2092.00 – Farmworkers and Laborers, Crop, Nursery and Greenhouse. AF 93. The CO maintained that although the Employer selected seasonal as its temporary need type, it requested workers in every month of the year. Additionally, the CO observed that the job duties in all of the requested positions fall under the title of “Farmworkers and Laborers, Crop, Nursery and Greenhouse” and were in the same area of intended employment, thus demonstrating a year-round need for the requested workers. *Id.*

The CO also noted that in a previous application (H-300-20301-889431), currently on separate appeal, the CO had declined to submit requested payroll information for certifications in Lake County Florida, as it considered the Lake County positions to be “North Florida, even though three of the listed certification applications included the intent to perform work in Lake County at the time the certification application was initially filed.” AF 94.

The CO asserted that the Department views the Lake County area as in the same area of intended employment and the employer’s applications in Lake County are included in the temporary need assessment for this application. *Id.*

The CO noted that it is the Employer's burden to establish a temporary or seasonal need and that the Employer must provide evidence to support its stated seasonal period of need. Therefore the CO directed the Employer to provide a detailed explanation as to why this job opportunity is seasonal rather than permanent in nature and to submit documentation to support its seasonal need including the following:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation outside the requested period of need;
3. A statement indicating the employer's monthly staffing levels and identifying periods of normal operations and periods where its labor levels are far higher than normal;
4. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Farmworkers, Farm, Ranch and Aquacultural Animals*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system (emphasis in the original); and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 94-95.

The employer responded to the Notice of Deficiency on November 30, 2020. AF 72-89. In its response letter it noted that it was attaching payroll summaries which were submitted as part of its response to the question of temporary need. It noted that it "understand[s] the focus to be on Overlook's certification applications only for central and south central Florida during the past three years. Thus, we have not included payroll data for certifications in Lake County as it is considered as part of what we consider to be North Florida, even though three of the listed certification applications included the intent to perform work in Lake County at the time the certification application was initially filed." AF 72.

Employer also included a statement pertaining to its business operations, noting that it began using the H-2A program in 2006 to provide seasonal agricultural labor services to fixed site agricultural producers in the Florida citrus industry. AF 78. It stated that it historically provided seasonal harvest labor to its citrus grower customers during the months of November through mid to late June. Overlook explains that it has diversified its agricultural labor services to additional growers of strawberries blueberries, sugar cane, tree nurseries and vegetables. The additional services occur between November through May, except for sugar cane which is from September through December, and tree nurseries which is from mid-February to mid-October. Employer further stated that it worked for a sugar cane grower only for one season (2019) and no longer provides labor to sugar cane growers. It also stated that 2020 was the 1st year Overlook Harvesting Company provided labor to a tree nursery grower. *Id.*

The Chicago National Processing Center issued a minor deficiency notice on December 1, 2020. AF 71. It acknowledged the payroll information submitted by the Employer. However, it noted that the submitted payroll summary was separated into “unclear categories” of “temporary seasonal” and “seasonal full time and year round employees.” The CNPC stated that the submitted payroll should be “summarized monthly reports for a minimum of three previous calendar years that identify for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system.” *Id.* The Employer was directed to provide a response to this deficiency regarding the payroll records submitted.

Employer responded to the noted deficiency on December 1, 2020 and resubmitted the same response information submitted on November 30, 2020 to the original Notice of Deficiency. AF 53-70.

On December 8, 2020 the CNPC again notified Employer that it had not responded to the December 1, 2020 notice of minor deficiency. AF 52. On December 10, 2020 Employer responded that it was attaching the payroll information requested for the past 3 years including Lake County, Florida although it contended that the Lake County information is not part of Central Florida. AF 46-49. The payroll information submitted showed seasonal employees in all months between November, 2019 and September 2020.

On December 23, 2020, the CO issued a Final Determination-Denial of Employer’s H-2A application. AF 38-44. The CO determined that Employer failed to demonstrate that the job opportunity in question represented a seasonal need as outlined in 20 C.F.R. § 655.103(d). The CO acknowledged the information submitted by the Employer in response to the Notice of Deficiency. However the CO determined that the submitted information showed a need for farmworkers throughout the year except for mid-October to November 1. The CO noted that since the Employer stated it will no longer be providing labor for sugar cane operations those dates of need would not be included in the following chart which it found represented Employer’s need for workers.

Citrus Growers	November to mid to late-June
Strawberry, Blueberry, and Vegetables	November to mid-May
Tree Nursery	Mid-February to mid-October

The CO also noted that Employer had indicated that in 2020 it added the service of providing farmworker labor to a tree nursery grower. With the addition of the tree nursery labor, the CO concluded employer has a need for labor in every month of the year. The CO asserted that Employer’s response “attempts to make the applications appear to be distinct by indicating that they take place in separate areas of intended employment.”

The CO referred to the regulation at 20 C.F.R. §655.103(b) which defines area of intended employment as:

[t]he geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g. near the border of) the MSA.

AF 43-44.

The CO noted the primary location listed in the current application is: 4715 South Hammock Road, Zolfo Springs, Florida 33890 in Hardee County. The CO further observed that Hardee County is in the non-MSA located in the Central/South Florida area, adjacent to Polk County, which is in Lakeland-Winter Haven MSA located in Central Florida. AF 44.

The CO stated the basis for its conclusion as follows:

Our analysis concludes that the longest estimated commute in the Lakeland-Winter Haven MSA would be 1 hour and 41 minutes. The commute time from the current application’s primary worksite at 4715 South Hammock Road in Zolfo Springs, Florida to the previously denied application’s primary worksite at 2600 Overlook Drive in Winter Haven, Florida is one hour. Relying on the commute information for the nearby MSA, the current application’s primary worksite and its previously denied application are in the same area of intended employment.

The CO therefore concluded that the Employer has a history of filing applications in the same area of intended employment in every month of the year. *Id.* Accordingly, the CO determined that Employer had failed to meet its burden of establishing its seasonal need for 16 nursery workers as requested in its current application.

On December 29, 2020, Employer timely requested a de novo hearing regarding the CO's Denial of its H-2A application. AF 1-37

EVIDENCE AND ARGUMENT

At the de novo hearing in this matter held by telephone conference on January 11, 2021, the Administrative File (CX 1), consisting of 1460 pages, was admitted as a joint exhibit without objection. Employer Exhibits 2-8 as noted in Employer's Amended Exhibit List were admitted without objection. TR 6-7. CX 1 consisting of a case filing history and Employer's schedule of operations was also admitted without objection. TR 7.

A. Summary of Testimony

Raymond Owen Bentley, Jr.

Employer called Mr. Raymond Owen Bentley, Jr. ("Bentley") to testify. Bentley testified that he has been the president and CEO of Overlook Harvesting Company, LLC ("Overlook") since the company was founded in 2006. TR 10-12. He testified that Overlook is an H-2A farm labor contractor that provides agricultural labor services to growers. TR 11. He explained that when the company was started it was involved primarily with harvesting Florida citrus. The company has diversified its operations since that time and provides labor to growers of strawberries, blueberries, asparagus, blackberries, apples, zucchini, as well as corn detasseling, and packing house labor. TR 12. The diversification of the company services has also included an expansion into providing services to some nursery operations including ornamental plant nurseries and some tree farm nurseries. TR 13. Bentley testified that the company also began doing out of state work about eight years ago. The out of state labor services has expanded to North Carolina, Indiana, Illinois, Missouri, and Michigan. TR 13. Overlook hired about 100 seasonal employees in 2006 with about three or four additional office employees. Between 90 and 95 of the seasonal workers were H-2A workers. In year 2000 the number of H-2A workers was 950 to 1000. TR 16. Bentley testified that the 950 workers would be during the peak season in Florida, "[a]nd then as the Florida season winds down, we then would move those folks to other jobs, whether it be Michigan asparagus or North Carolina berries." TR 17.

Bentley testified that the typical season in Florida would begin in about mid to late November for citrus and strawberries, with the citrus season ending at the end of May to end of June. Strawberries would usually last to the middle to end of March and blueberries would end in the middle of May. TR 17-18. He stated that the Windmill Nursery job would be from approximately December through June. TR 18. In order to fill the labor needs he testified that he would generally reach out to his previous workforce to fill the company's labor needs, including friends, cousins, and other family members of his previous workers. He testified that he has had little success in employing U.S. workers for these positions. *Id.* Bentley testified that as the business has grown and expanded multiple applications for labor are filed in Florida. He stated that the vast majority of the company's certifications are in the area of "central south Florida." TR 19. Polk County and south is primarily where the citrus, strawberries and blueberries are picked. He noted that the company also has a job in Lake County for the Marian Gardens nursery. *Id.* He estimated that Overlook has had five to six jobs in central or south central Florida over the last two

seasons which would encompass the total number of seasonal workers referenced in his testimony. TR 20.

He discussed the current application on appeal which is at the Windmill Nursery in south Hardee County which is a wholesale greenhouse operation. TR 20. The Windmill Nursery grows ornamental plants for Home Depot and Lowes. The start date for this application is October 28th and ends on June 30th. TR 21. Overlook has two applications for this site in the current season. The first certification was for October 28th through June 30th and the second petition was for 16 workers which is the basis for the current application and appeal. *Id.* The second application was necessary because the Windmill Nursery experiences a peak sales season where additional workers were needed. He confirmed that Overlook has had several denials of certifications on the basis of seasonal need. He also confirmed a list of Florida counties where labor applications have been certified including Polk, Hillsborough, Manatee, Hardee, Highlands, Okeechobee, Indian River, St. Lucie, Desoto, Charlotte and Osceola Counties. TR 24.

Bentley testified that he has filed most of Overlook's applications for certification in the area he describes as central and south central Florida. He stated that this has been determined "by where the vast majority of the fruit is located, also by drive time." TR 25. He stated that it is his understanding that limits in commute time should be under two hours. He affirmed that if he included the Marian Gardens worksite in conjunction with the other Florida worksites the commuting distance would be well above two hours. TR 26. He stated that he filed a separate petition for the Marian Gardens location for this reason. *Id.*

On cross examination Bentley stated that Overlook has approximately 60 or 65 clients in Florida, including multiple citrus growers, small, medium and large. TR 27. The year 2020 was the first year that Overlook began the tree and plant nursery work. TR 29. He admitted that the addition of the nurseries extended the typical November to mid to late June schedule to include the months of July through mid-October. TR 30. He also admitted that technically his company now has a need in every month of the year. He claimed however that the work is in different areas of employment. *Id.* He testified that Lake County work began about three or four years ago when the company had some blueberry harvesting in that area. In 2020 the only work in Lake County was the tree nursery. Referencing the payroll records at AF 49, Bentley admitted that the information showed no seasonal workers in the months of July to September in 2019. Payroll information for 2020 showed seasonal workers for the year 2020 because of the addition of the Marian Garden tree nursery. TR 31.

He confirmed that the current application for work between February 1st and July 4th involves the Windmill Farm nursery in Zolfo Springs in Hardee County. TR 31-32. The season for tree nursery work in Florida is approximately March through November. The current application for Windmill nursery is not a tree nursery but rather is a plant nursery which has a typical growing season of December through June. TR 32.

Bentley indicated that his plan for filing an application for the Marian Gardens nursery in Lake County in the future is to file through another entity, Central Florida Labor Services, LLC, and to continue the work for Marian Gardens. TR 33. He also confirmed that an application for workers has been filed through that entity for the Marian Gardens nursery in the current year. TR

34. That application involved a period of employment of March 1, 2021 through the middle of October 2021.

Bentley also discussed an application which was ultimately withdrawn, # H-300-20248-805501 for 21 frontline supervisors with a need for workers that was filed for the period November 15, 2020 to September 14, 2021 for work in Central and South Central Florida. He admitted that the company certified that it had a need for workers until September of 2021 on that application. TR 33-34. He also confirmed that the application was denied, appealed and ultimately withdrawn. He explained that the company had requested workers until September on that application because they have work in other states and they transfer workers from Florida to the out of state work to avoid problems with having to reapply for the workers' driver's licenses. He admitted that even though the workers would have completed their work in Florida by the first week in June, the application listed September as the date the Florida work would be completed. TR 36. Therefore the period requested from November to September didn't reflect the actual need for work in Florida. *Id.* He elaborated on why an inaccurate date of September rather than June was used as the ending date for the work on the Florida application. He stated:

Yeah, so we were trying to get these guys an I-194 document that would last a little further into the season so that when they went to an additional job, whether it be in North Carolina or in Michigan, or in Indiana or Illinois, that they would still have an active 194 document where they could go easily renew their driver's license once they were transferred to a new petition.

TR 37.

Bentley also clarified that a new application for the 21 front line workers mentioned in the above withdrawn application has been filed for the period December 26, to June 30, 2021 and that application is currently on appeal with another administrative law judge. TR 39-40.

Nora Delia Lora

Ms. Nora Delia Lora ("Lora") was called as a witness by the Employer. Lora testified that she is employed by Overlook as the H-2A program director and has held this position for approximately the last 13 years. Her responsibilities include "filing petitions, worker training orientation, keeping track of the worker list, logistics of out-of-state travel." TR 42. She is also responsible for communicating with the Chicago National Processing Center in regard to Overlook's H-2A applications, including the current application. TR 43. She confirmed the filings in the record as well as the payroll information submitted.

She also confirmed a filing in the Employer's exhibits for the Marian Gardens nursery located in Groveland Florida for approximate dates of need of January 27, 2020 through the end of October. TR 49. She also confirmed a notice of deficiency and Overlook's response which she filed, as well as the Notices of Acceptance and Certification that were issued in regard to that application. See EX 3-7. TR 50-52.

In regard to the withdrawn application for 21 first line supervisors, Application # H-300-20248-805501, she confirmed that there was never an intent to actually employ those workers at the site listed on the application starting November 15, 2020 through September 14, 2021 as listed on the application. TR 52. Lora testified that these workers would have been employed in Florida until late May or early June. In late May or early June Overlook would have transferred these workers to out of state work. TR 53. The out of state work would have been for additional work in other areas of intended employment where Overlook had operations. She confirmed that other petitions had been filed for front line supervisors prior to the 2021 withdrawn petition who also started in Florida but then ultimately transferred to other areas of employment to continue additional work for Overlook. TR 53-54. She confirmed that the current application is for 16 workers at the Windmill Farms Nursery which is not a tree nursery. TR 54.

On cross examination Lora testified that she considered the Lake County work to be outside of the area of intended employment of the current application because it is over the “two hour drive.” She testified that she calculated the two hours by using other job sites not contained in the current application including CMS Grove and Sun Pure, which are job sites from other applications. TR 55-56.

In regard to the application for 21 front line supervisors she confirmed that the out of state worksites to which Overlook planned to transfer the workers after the work in Florida was completed in late May to early June, were not listed as worksites on that application. She acknowledged that they were in different areas of intended employment. She also acknowledged that it is not permissible to include work in two different areas of intended employment in one application. TR 57-58. She testified that Overlook intended to transfer these workers to various states including Michigan, North Carolina, Indiana and Illinois. TR 58.

In regard to the entity, Central Florida Labor Services, Lora testified that this entity has the same management as Overlook and is owned by Bill Bentley, Robert Bentley and Jason Bentley. TR 60. She testified that she believes this company is located in Winter Haven, Florida. She testified that the entity was created about four or five years ago. Lora testified that the Marian account was transferred from Overlook to Central Florida Labor Services, “[i]n an effort to avoid further delays on our petitions through Overlook Harvesting Company and being able to provide our customers with the workers in a timely manner.” TR 61.

John Rotterman

Certifying Officer, John Rotterman (CO) testified on direct examination that he is currently one of the H-2A certifying officers at the Chicago National Processing Center, a position which he has held since December of 2009. TR 64. The CO testified generally to the procedure for obtaining temporary labor certification in the H-2A program including that employers must establish that the need for agricultural labor services is temporary or seasonal pursuant to 20 C.F.R. §655.161. In regard to the current application he testified that members of his team conducted the initial review and he was brought in at various points for consult and direction, and he also reviewed and signed off on the denial. TR 66. He testified that Employer’s filing history was considered and that the filing history in the aggregate showed that Employer did not have a seasonal need for the labor sought. TR 67. He referenced the filing history as noted in the chart

at AF 41 which was used in the decision that a seasonal need was not present in the current case. TR 69. He noted that the applications referenced in the chart, including the current application, are considered to be in the Winter Haven intended area of employment which is in the central Florida area. *Id.*

The CO also discussed the withdrawn application at #H-300-20248-805501 for 21 frontline supervisors which was denied because it was not consistent with a seasonal need. He discussed the stated reason given in Employer's testimony that the application did not reflect the accurate dates of intended employment since the workers were only needed until June in Florida, but the workers were requested until September, because they were going to be transferred to other states. TR 70. He testified that there are numerous problems with this explanation since an employer files an application and signs it under penalty of perjury, that the contents within are accurate, and that it represents Employer's need for labor. Therefore, he testified that the application was not filed with truthful information. A further problem he noted, is that each application filed requires recruitment of domestic workers and "prefilling" an application with inaccurate information impacts whether recruitment for domestic workers was conducted. TR 71. He testified that the regulations are explicit with respect to labor contractors that an application must be limited to a single area of intended employment, citing 20 C.F.R. § 665.132. He stated that when an application is filed with multiple areas of intended employment, a Notice of Deficiency would be issued. *Id.*

The CO testified regarding the reasons stated in the denial letter in the current case found at AF 42, and specifically, that the Lake County area was considered in the temporary need assessment for the current application. TR 71-72. He noted that the CNPC looks at the first worksite on the application and whether it is in an MSA (metropolitan statistical area) and if so, the CNPC looks at the largest commute within that area. Alternatively, if the worksite is not in an MSA, he stated that the regulation is quite flexible in determining commute distance. In that case they look at the closest MSA and looks at that as a "proxy" for where the worksite is. TR 72. In the current case they looked at the closest MSA which was Winter Haven and then determined the largest commute in that MSA. *Id.* After looking at the maximum commute time in the Winter Haven MSA, they then looked to see if the Lake County positions would fit within that, and they determined they did. They used that information in their analysis as to whether it was the same area of intended employment. TR 73. The CO referenced the map at AF 98 which shows the distance between the primary worksite at Zolfo Springs, Florida in Hardee County and the Employer's place of business at Overlook Drive. As the worksite was not in an MSA they used the nearest MSA in Winter Haven, and determined the maximum commute time in that MSA is 1 hour and 41 minutes. They then applied this commute time to the Lake County application to determine whether it was in the same area of intended employment as the current application, and determined it was. TR 75. The CO testified that he disagreed with Employer's assessment that the Lake County application should be considered North Florida. *Id.*

The CO testified that the application # H-300-19331-172007 regarding the Marian Garden nursery in Lake County, with a requested need of January 27, 2020 to October 31, 2021 is part of Employer's case history. *See also* EX 4. Since the CNPC determined the Lake County applications are in the same area of intended employment as the current application, the payroll

records pertaining to the work done in that area are germane to the assessment of seasonal need in the current case. TR 77-78.

In regard to the determination of seasonal need of an H-2A labor contractor the CO testified that it is the need of the H-2A labor contractor that controls the analysis. TR 78. In regard to the Employer, Overlook Harvesting, the CO concluded that it has a permanent need for labor. The CO further stated that this is a problem because it is contrary to the H-2A statute and the implementing regulations, which requires that the need for agricultural labor or services be temporary or seasonal. He further testified that when permanent jobs are filled via the seasonal and temporary program of H-2A, there is a risk of adverse effect on the domestic workforce, because those jobs should be advertised as year round employment. TR 78-79.

On cross examination the CO testified that CNPC (Chicago National Processing Center) reached a determination of year-round need with the six applications noted in the chart at AF 41, which included the withdrawn application with a requested need of November through September, even without specifically listing or addressing the Marian Gardens application in the chart. TR 79-80. He confirmed however, that the denial letter at AF 42 noted that it viewed Lake County as in the same area of intended employment and that the Employer's applications in Lake County are included in the temporary need assessment for the current application. TR 80. He also stated that it was his understanding that at least some of the applications listed, included worksites in Lake County. Specifically at AF 190, he referenced a worksite in Umatilla, Florida in Lake County. He also confirmed that the entirety of an application must be within one area of intended employment. TR 86. The CO confirmed the table at AF 43 summarized the scope of seasonal need consistent with previous filings by the Employer, and that tree nursery work was considered in its analysis based on previous information submitted by the Employer regardless of whether it was included in the six certifications listed on AF 43. TR 87-88. The CO also confirmed that the worksites in Lake County were part of the same area of intended employment for purposes of the analysis of this application and were aggregated as part of the seasonal need. TR 97.

C. Argument of the Parties

At the close of the telephonic hearing the parties were also granted leave to file written closing briefs on or before January 14, 2021. TR 100. Both parties filed timely post hearing briefs.

1. The Employer

Employer argues that the CO improperly denied the current application for 16 H-2A nursery workers to perform work at the Windmill Farms nursery for the dates of need of February 1, 2021 to July 4, 2021 on the basis that Employer failed to establish that it had a seasonal and/or temporary need pursuant to 20 C.F.R. §655.103(d). Employer argues in part, that the Employer's previous application at Marian Gardens nursery should not be considered in the analysis of the Employer's seasonal need for labor, because it was not specifically addressed by the CO in the denial letter, despite the fact that the Lake County area generally, was addressed by the CO in the denial letter. Employer also argues that the Marian Gardens application should not be considered in the analysis because it considers the Lake County area as part of north Florida and not part of

the central and south central Florida region where many of its other worksites are located, as indicated in its other applications for temporary labor certification.

Employer argues that since an H-2A labor contractor can only include one area of intended employment on a single application pursuant to the regulations at 20 C.F.R. § 655.132(a), worksites outside of that area of intended employment should not be considered in assessing the Employer's seasonal need generally. Employer argues that if the Lake County applications are excluded, Employer's seasonal need occurs between September 19, 2020 and July 18, 2020, which is a period of approximately ten months.

Employer argues that because applications for the Windmill Farms nursery were previously certified, as well as the Marian Gardens nursery, the CO should be bound by those certifications to recertify the current application.

Employer cites the case of *Ag-Mart Produce, Inc. d/b/a Santa Sweets, Inc.*, 2020-TLC-00050, 00051 (Apr. 7, 2020) for its position that its worksites in Florida should not be aggregated in assessing its seasonal need for labor as an H-2A labor contractor. Relying on this case the Employer argues that the CO improperly attempts to aggregate all of Overlook Harvesting's job opportunities across Florida. Instead Employer asserts that an H-2A labor contractor's seasonal need should be analyzed separately for each area of intended employment.

Finally, Employer argues that since commute times between its various worksites in at least some of its previously filed applications exceeds two hours from the Marian Garden's location, the Marian Gardens location cannot be considered within a single area of intended employment, and therefore cannot be considered in the analysis of its seasonal need.

Accordingly the Employer argues that the CO's denial of certification should be reversed as Employer has established a seasonal need within the central and south central Florida area of intended employment.

2. *The Certifying Officer*

The Solicitor's brief, filed on behalf of the Certifying Officer, argues that the CO's denial of labor certification should be affirmed. The CO reiterates the basis for denial indicated in the Final Determination which states, "the employer has a history of filing applications for this area 12 months out of the year, thereby appearing the employer has a permanent need for H-2A workers in the same area of employment year round." AF 41. The CO testified that the withdrawn application was considered in the assessment of seasonal need, as well as Employer's work for tree nurseries in Lake County. TR 70-72. The CO argues that Employer had certified an end date of need in Florida of September 2021, on the withdrawn application, under penalty of perjury, but testified at the hearing that the Florida work would have been completed by the end of June, at which time the workers would have been transferred out of state. *Id.* The CO also notes that Mr. Bentley and Ms. Lora indicated that since its work in Lake County has become problematic for getting its applications certified, it has filed its current H-2A application for the Lake County nursery, for work from March to October 2021, through another entity, Central Florida Labor Services, LLC.

The CO argues that Employer has failed to meet its burden of proof in establishing that its need for labor is seasonal under the regulations, noting that the controlling standard is whether “the employer’s needs are seasonal, not whether the particular job at issue is seasonal” citing *Ag Labor LLC*, 2020-TLC-00107 and 00108, slip op. at 4 (Aug. 31, 2020) (citing *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)). The CO asserts that Employer, an H-2A labor contractor has not shown that its own need for labor is seasonal, rather than that of its fixed-site client.

The CO also asserts that Employer cannot rely on past certification of applications because each application for certification must stand on its own merits, citing multiple cases for the proposition that even though a certification may have slipped through in the past, does not stop the CO from denying certification on a legally sufficient basis.

The CO also asserts that Employer’s addition of tree nursery work to its schedule of operations reflects that its need for labor is a year-round permanent need. Even though Employer may argue that none of its applications individually exceed ten months, when the applications are considered in the aggregate, they cover a twelve month period citing *JBO Harvesting, Inc.*, 2020-TLC-00129 (Nov. 6, 2020). The CO contends the Employer’s ability to manipulate its dates of need reflects that its need is not truly seasonal.

Finally, the CO maintains that Employer has failed to prove that its worksites in Lake County area should not be considered in the current application’s analysis of seasonal need. The CO contends that the Lake County positions should be considered within the same area of intended employment as the job opportunity in the current application. However, alternatively even if they are not within the same area of intended employment, Employer has not shown that they are not properly considered in the seasonal analysis of the Employer’s need for labor.

For these reasons, the Solicitor maintains that the CO’s denial of temporary labor certification in this case should be affirmed.

ISSUE

Whether the Employer, an H-2A labor contractor, has met its burden of establishing that its need for agricultural services or labor 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)?

SCOPE OF REVIEW

The current case arises from the Employer’s request for a de novo hearing in regard to the CO’s decision to deny the Employer’s application for temporary alien labor certification under the H-2A program based upon the application and information available to the CO at that time. The regulation pertaining to appeals of the CO’s determinations in H-2A labor certification matters states, in cases where a de novo hearing has been requested, that the procedures in 29 C.F.R. Part 18 apply, and that the ALJ will schedule a hearing within 5 business days after receipt of the administrative file, if the employer so requests. 20 C.F.R. §655.171(b)(ii).

In pertinent part, the regulations further provide that after a de novo hearing “the ALJ 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 29 CFR 18.95. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, CO, OFLC Administrator, and DHS by means normally assuring next-day delivery.” 20 C.F.R. §655.171(b)(2).

Since neither the Immigration and Nationality Act, nor the regulations applicable to H-2A claims, identify a specific standard of review pertaining to an Administrative Law Judge's review of determinations by the CO, I will review the evidence presented in this case de novo, but will also review the CO's decision for abuse of discretion. *T. Bell Detasselling, LLC*, 2014-TLC-00087, slip op. at 3, fn. 7 (May 29, 2014), *citing RP Consultant's, Inc.*, 2009-JSW-00001, slip op. at 8 (June 30, 2010), and *Hong Video Technology*, No. 1988-INA-202 (BALCA Aug 17, 2001). *See also David Stock*, 2016-TLC-0040 (May 6, 2016) (where “Employer requested de novo review, the Administrative Law Judge must independently determine if the employer has established eligibility for temporary labor certification”).

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 services or labor. 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).

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 determining temporary need for purposes of the H-2 temporary alien labor certification program, it is well settled that it is “not the nature of 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.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). See *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).

As the H-2A program is designed to fill only temporary or seasonal labor needs, 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).

The Employer in this case, as noted on its application, ETA Form 9142A, is not a fixed site employer, but rather is an H-2A labor contractor (“H-2ALC”). Pursuant to the definition in the H-2A regulations, an H-2A Labor Contractor is defined as “[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 H-2A workers.” 20 C.F.R. § 655.103(b).

The fundamental requirement of the H-2A program that the requested employment be of a “temporary or seasonal nature” applies equally to fixed-site employers, as well as H-2ALCs. Additionally, it is well established that it is the needs of the employer, whether fixed site or labor contractor, that controls the analysis of seasonal need, and 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, and not whether its fixed site clients, have a seasonal or temporary need for labor. *Ag Labor LLC*, 2020-TLC-00107 & -108, slip op. at 4 (Aug. 31, 2020) (citing *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)); see also *JBO Harvesting, Inc.*, 2020-TLC-00129 (Nov. 6, 2020).

The H-2A program imposes additional filing requirements on H-2ALCs as delineated in 20 CFR § 655.132, in addition to all of the regulatory requirements imposed on employers. 20 C.F.R. §655.132. One additional requirement imposed on H-2ALCs per Section 655.132 is that each “Application for Temporary Labor Certification filed by an H-2ALC must be limited to a single area of intended employment in which the fixed-site employer(s) to whom an H-2 ALC is furnishing employees will be utilizing the employees.” 20 C.F.R. § 655.132(a). This regulation restricts each application filed by an H-2ALC to a single area of intended employment. However, this regulation does not provide a basis for an H-2A labor contractor to divide its labor needs by each application filed, each area of intended employment it services, or each region of state in which it operates, for purposes of determining whether it in fact has a seasonal, or permanent year round need for labor.

In the current case, Employer attempts to focus the seasonal analysis on whether the job opportunity is in a particular area of Florida and thus contends that its need for labor should be

analyzed separately by region, pursuant to its own calculation of which worksites or counties should be included in each region. There is no support for this in the statute or implementing regulations, which impose on H-2A labor contractors, the same fundamental requirement that is imposed by the H-2A program on all employers that utilize the program, and that is, that the employer's need for labor be on a seasonal or temporary basis.²

Additionally, BALCA has recognized that the CO may aggregate the requested dates of need indicated in a labor contractor's applications to determine if they show a year round need rather than a seasonal need. *See e.g. JBO Harvesting, Inc.*, 2020-TLC-00129 (Nov. 6, 2020) (Affirming denial of certification where a labor contractor's applications, considered in the aggregate, demonstrate a year round need for labor). In this regard it is well established that the Certifying Officer may look at the situation as a whole, including an employer's filing history, in assessing whether an employer has met the regulatory criteria for certification, including whether an employer has a seasonal need for labor, and the CO is not limited to the parameters of the current application. *See e.g. Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011 (April 14, 2000); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017).

Accordingly, the undersigned finds the CO did not abuse his discretion in considering Employer's past filing history in whole, or in part, including Employer's previous statements regarding dates of seasonal labor need, in both certified and denied applications, in assessing whether Employer has a seasonal need for labor or a yearlong permanent need.³ Also, the CO reasonably included Employer's previous filing history in the Lake County area, as well as its stated need in a previously denied application, in the analysis of Employer's seasonal need.⁴

² Employer cites to the case of *Ag-Mart Produce, Inc. d/b/a Santa Sweets, Inc.* 2020-TLC-00050 and 00051 (Apr. 7, 2020) ("*Ag-Mart Produce*"), where the ALJ determined that the CO's consideration of all of the Employer's prior applications in north, central, and southern Florida was an "overreach" by the CO, in assessing the labor contractor's seasonal need in the state of Florida. The undersigned finds that this decision departs from a long line of BALCA cases cited in the current decision, finding to the contrary, that the CO may consider an employer's complete filing history, in assessing an employer's seasonal need. These cases are firmly rooted in the fundamental regulatory requirement that an employer's need for labor must be seasonal or temporary, and in addition, that this requirement should be applied equally to all employers, regardless of whether they are fixed site employers or labor contractors. Further, the *Ag Mart Produce* decision cited above, does not cite to any statutory or regulatory basis for its conclusion that a labor contractor's seasonal need should be limited to a single area of intended employment, nor to any BALCA precedent, supporting such a conclusion. Accordingly, the undersigned does not find the conclusion reached in *Ag-Mart Produce* to be persuasive.

³ To the extent that Employer argues that a prior certification mandates future certifications this argument has been rejected by BALCA which has consistently found that each application must be viewed on its own merits. *See e.g. Wickstrum Harvesting, Inc.*, 2018-TLC-00018, at 8 (May 3, 2018) (finding that the certification of prior applications "is irrelevant to the present proceeding"); *G.H. Daniels III & Assocs.*, 2012-TLN-00037, slip op. at 5 (June 18, 2012) ("[T]he fact that ETA may have let deficiencies slip through in the past should not stop the CO denying certification on a legally sufficient basis").

⁴ Employer admitted in its response to the Notice of Deficiency that three of the applications specifically considered by the CO in the Notice of Deficiency and the Denial letter, included the intent to perform work in Lake County at the time the application was initially filed. AF 94. This also calls into question Employer's claim that Lake County worksites are part of what it deems to be "north Florida region."

Employer contends, in part, that it should not be bound by misrepresentations made in its previously denied and ultimately withdrawn application, despite the fact that the CO did not reasonably know the Employer had misrepresented its dates of need as stated in that application, until Employer admitted this during hearing testimony. The evidence and testimony establish that the denied application at # H-300-20248-805501, included a statement of need represented by the Employer as November 15, 2020 through September 14, 2021. Employer's testimony establishes that its stated dates of need in this application of November 15, 2020 through September 14, 2021, were misrepresented intentionally, because Employer intended to transfer workers hired for the area of intended employment in Florida listed in the application, at the end of June, to worksites in other states including Michigan, North Carolina, Indiana and Illinois, despite its representation that the workers were needed in Florida until September 14, 2021. TR 57-58. This admitted misrepresentation by the Employer of information contained on its prior H-2A application does not support Employer's overall credibility regarding adherence to the H-2B regulatory requirements. Notwithstanding this however, it was not unreasonable for the CO to consider the stated dates of need listed in Employer's denied and ultimately withdrawn application, or to assume that such a representation was truthful. Further, Employer's decision to file a new application with dates of need of December 26 through June 30, 2021 for the same 21 front line supervisors (currently on appeal before another administrative law judge), is an indication that Employer is trying to manipulate its dates of need to fit the criteria of the H-2A program. BALCA has long held that the ability of an employer to manipulate its dates of need to fit the criteria of the H-2A program is a reflection that its need is not in fact seasonal. *Salt Wells Cattle Co.*, 2010-TLC-134 (Sept. 29, 2010) (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 is not seasonal according to the definition established at 20 C.F.R. § 655.103(d)).

Employer also maintains that its application for labor at the Marian Gardens nursery in Lake County should be excluded from the analysis of its seasonal need because it has determined that this worksite is part of what it asserts is north Florida (despite its obvious geographical location in Central Florida), and therefore the Lake County application should not be considered in conjunction with other applications it has filed in central and south Florida. This argument also fails. The regulations do not support that a labor contractor's need for labor may be viewed independently based on an arbitrary division of a state into regions or even into areas of intended employment.⁵ As noted above, an H-2A labor contractor must prove that it has a seasonal need for labor, not a seasonal need for labor in every location it has clients, or even every location of intended employment included in an application. Therefore the undersigned finds that the CO correctly considered the Employer's applications for labor in the Lake County region.

The CO's Notice of Deficiency requested payroll information addressing the Employer's seasonal and permanent employment. AF 93-95. The Employer responded initially that it did not

⁵ Even if it were necessary for the CO to establish that the Marian Gardens location is in the same area of intended employment as Employer's other central and south central Florida worksites, the CO has done so. The CO explained at the hearing how he reasonably determined the Marian Gardens location to be within the same area of intended employment as some, if not all, of Employer's worksites in Central and South Florida, including its main place of business as listed on its applications of 2600 Overlook Drive in Winter Haven, Florida. Interestingly, workers' housing listed in the Marian Gardens application is located in Bartow, Florida, located in Polk County, a County that Employer admits is in central Florida. See EX 3 at 4.

include employment for the Lake County region in the submitted records as it considered Lake County to be in the north Florida region. AF 72. The CNPC noted in the Notice of Deficiency and in the final Denial that “the Department views Lake County as in the same area of intended employment and the employer’s applications in Lake County are included in the CO’s temporary need assessment.” AF 42, 94. Ultimately, Employer submitted its payroll information including that which pertains to the Lake County area. See AF 61-66. Employer’s submitted payroll information establishes that it has a year round need for seasonal labor which began in 2020 with the addition of the tree farm nursery work in Marian Garden’s nursery when viewed in conjunction with its other seasonal need for labor. Employer does not dispute that the tree garden nursery season in Florida is approximately mid-February to mid-October. Testimony also supports that the ornamental plant nursery season, the subject of the current application, is December through June. TR 32. When these seasons are viewed in conjunction with the Employer’s other seasonal work for growers of citrus, strawberry, blueberry and vegetables, lasting between November and June, Employer’s need for labor spans every month of the year beginning in November and ending in October.⁶ See AF 43. Accordingly, the Employer has failed to establish a seasonal need for labor in the state of Florida.

Employer’s testimony that it plans to file its Marian Gardens nursery petition in the current and future years through another related entity, Central Florida Labor Services, does not on its face change the seasonal analysis applicable to the current application. The limited testimony related to this entity reflects that Overlook and Central Florida Labor Services share common ownership and management and may in fact be considered a single employer for purposes of the H-2A program. This is true, especially in light of Employer’s testimony that the transfer of this account to Central Florida Labor Services is for the purpose of avoiding delays in the certification of its H-2A applications. See TR 61. A long line of BALCA decisions support that an employer may not circumvent the temporary need requirement by using a closely related business entity to file an overlapping application. *Katie Heger*, 2014-TLC-00001 (Nov. 12, 2013). See also *Altendorf Transportation*, 2013-TLC-00032 (March 28, 2013) (“The Employer has the burden of persuasion to demonstrate that it and [the related entity] are truly independent entities.”); *Cressler Ranch Trucking, LLC*, 2013-TLC-00007; *H Bar H Farms*, 2015-TLC-00012 (Dec. 31, 2014) (“Notably, the Employer has the burden to demonstrate that the businesses are truly independent entities”) and *Sugar Loaf Cattle Co., LLC*, 2016-TLC-00033 (April 6, 2016) (using principles developed under the NLRA to determine if two companies are so intertwined so as to constitute a single employer).

When the Employer’s filing history for temporary labor is considered in its totality, Employer’s need for labor spans every month of the year. Therefore, for the reasons stated above, the undersigned finds that the Employer has failed to meet its burden of establishing its seasonal need for labor as reflected in its current application for sixteen nursery workers in Hardee County between February 1, 2021 and July 4, 2021. This decision is based on the undersigned’s review of the administrative file, as well as the evidence, testimony, and argument presented at the January 11, 2021 hearing, as well as closing briefs.

⁶ The undersigned also finds that the CO reasonably determined that the jobs noted by Employer as farmworker, nursery worker and front line supervisor, in its various applications, may be considered the same position for purpose of the seasonal analysis as all three list no experience requirement and the duties listed for these positions did not vary significantly with all filed under the SOC code of 45-2092 (Farmworkers and Laborers, Crop, Nursery and Greenhouse). No persuasive evidence to the contrary was offered by the Employer.

CONCLUSION

After de novo hearing, Employer has failed to establish that its temporary labor application for sixteen nursery workers between February 1, 2021 and July 4, 2021, represents a temporary or seasonal need, as defined by 20 C.F.R. § 655.103(d). Therefore, the basis for the CO's Denial of Employer's H-2A application is affirmed.

ORDER

As Employer has failed to establish its temporary or seasonal need for the requested labor, it is hereby **ORDERED** that the Certifying Officer's Denial is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

DREW A. SWANK
Administrative Law Judge