In the Matter of:

OVERLOOK HARVESTING COMPANY, LLC,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: David J. Stefany, Esq.
Allen Norton & Blue, PA
Tampa, Florida
For the Employer

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

Before: Peter B. Silvain, Jr.
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations 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”).¹ 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.²

¹ 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).
² 20 C.F.R. § 655.171.
STATEMENT OF THE CASE

On January 8, 2021, Overlook Harvesting Company, LLC (the “Employer”), filed the following documents with the CO: (1) Form ETA 9142A, H-2A Application for Temporary Employment Certification (“Application”); (2) Appendix A to Form ETA 9142; (3) From ETA 790, 790A, and Addendums; (4) Workers’ Compensation Insurance Documentation; (5) Housing Documentation; (6) Work Contract; (6) Food Service Agreement; (8) FLC Documentation; and (9) Surety Bond. (AF2 343-296). The Employer identified itself as an H-2A Labor Contractor (“H-2ALC”) seeking certification for twenty-eight Fruit Harvesters from March 22, 2021, to May 9, 2021, based an alleged seasonal need during that period. (AF 234, 240).

By letter dated January 15, 2021, the CO issued a Notice of Deficiency (“NOD”) stating that the Employer failed to establish a temporary or seasonal need under 20 C.F.R. § 655.103(d) based on its history of filing applications for the same geographical area twelve months out of the year.6 (AF 202-214). The CO found that the Employer’s request for workers, whose job duties all fell under Farmworkers and Laborers, Crop, Nursery, and Greenhouse, in the same area of employment, every month of the year, showed that its need was not tied to a pattern of events and was year round. (AF 204-207). The CO informed the Employer that, in accordance with 20 C.F.R § 655.142, it could submit a modified application explaining how its need is “tied to a certain time of year by an event or pattern” and why its need should be viewed as seasonal when the Employer has described a need for workers every month of the year. (AF 207).

On January 26, 2021, the Employer submitted its response to the CO’s NOD. (AF 22-98). In its letter, the Employer stated that its seasonal need for labor is in both South-Central Florida in Polk and Osceola Counties as well as “the separate Area of Intended Employment for North Florida” in Lake County. (AF 23). The Employer added that “seasonal need is properly analyzed based upon an acceptable single Area of Intended Employment, not by lumping together all the counties in Florida in which Employer has entered into service contracts with fixed-site agricultural businesses.” (Id.).

On March 1, 2021, the CO denied the Employer’s Application. (AF 13-20). The CO found that the Employer’s response failed to demonstrate that its job opportunity is seasonal or temporary rather than permanent in nature as required by 20 C.F.R. § 655.103(d). (AF 16).

By letter dated March 8, 2021, the Employer appealed the CO’s decision and requested a de novo hearing. (AF 3). This matter was assigned to me on March 15, 2021. That same day, I issued a Notice of Docketing acknowledging the Employer’s appeal. Thereafter, I held a conference call with the parties for scheduling purposes. During the call the parties requested that,

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3 In this Decision and Order, “AF” refers to the Administrative File.
4 An H-2ALC 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, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.” 20 C.F.R. § 655.103.
5 SOC (O*Net/OES) occupation title “Farm Workers and Laborers, Crop” and occupation code 45-2092.02. AF 41-43.
6 I note that the NOD also outlined six other deficiencies in the Employer’s Application. (See AF 207-214). Because these deficiencies have been remedied, however, I need not address them in this Decision and Order.
in lieu of live testimony, they be allowed to rely on the testimony contained in the hearing transcripts from three related H-2A certification matters, 2021-TLC-00042, 2021-TLC-00081, and 2021-TLC-00105. On March 19, 2021, I issued a Notice of Hearing and Pre-Hearing Order granting the parties request and permitting them until end of day to submit any additional documentary evidence. That same day, I received Joint Stipulations from the Employer and the CO’s Exhibits (“CX”) 1-4, which I hereby admit into the record. Thereafter, on March 25, 2021, the Solicitor and the Employer submitted post hearing briefs, and the record is now closed.

DISCUSSION AND APPLICABLE LAW

Pursuant to the deadlines set forth at C.F.R. § 655.171(b)(1), the hearing in this matter was scheduled for March 22, 2021. As the Employer requested a de novo hearing, I must independently examine the evidence and testimony contained in the record to determine the Employer’s eligibility for temporary labor certification. The burden remains with the Employer throughout the process.

The issue before me is whether the Employer has shown that its need for agricultural labor or services as stated in its current H-2A application is “temporary” or “seasonal” within the meaning of 20 C.F.R. § 655.103(d). To succeed on an H-2A temporary labor certification application, an employer must establish that the need for the agricultural services or labor to be performed is on a temporary or seasonal basis. Employment is of a seasonal nature where “it is tied to a certain time of year by event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requests labor levels far above those necessary for ongoing operations.” Whereas employment is considered temporary when “the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.”

In determining whether a need is temporary, it is well settled that it is “not the nature of the duties of the position which must be examined[,]” but rather, “the nature of the need for the duties to be performed which determines the temporariness of the position.” Thus, it is necessary for an employer to establish “when [its] season occurs and how the need for labor or services

7 I note that both counsel for the CO (the “Solicitor”) and the Employer were parties in those cases.
8 That same day, I received Joint Stipulations from the Employer and the CO’s Exhibits (“CX”) 1-4, which I hereby admit into the record.
9 “CX 1” is a case history chart of H-2A applications submitted by the Employer, “CX 2” is a Notice of Deficiency issued by the CO in H-300-21036-059385, filed by JJT Services, a purported “alter ego” company of the Employer, “CX 3” is the transcript from the hearing on March 4, 2021, in 2021-TLC-00081, and “CX 4” is the transcript form the hearing on January 14, 2021, in 2021-TLC-00042.
10 David Stock, 2016-TLC-00040 (May 6, 2016).
12 20 C.F.R. § 655.161(a).
13 20 C.F.R. § 655.103(d).
14 Id.
during this time of year differs from other times of the year."\textsuperscript{16} This is true regardless whether the employer is a fixed-site grower or an H-2ALC.\textsuperscript{17} Therefore, denial of certification is appropriate where an employer fails to provide any evidence that it needs more workers in certain months than other months of the year.\textsuperscript{18} Finally, it is well established that a CO 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 its need for labor is seasonal.\textsuperscript{19}

Here, the Employer has not established that its employment need is seasonal or temporary. Although the Employer is acting as an H-2ALC for various entities with multiple worksites, the similarities in job titles, job duties, and geographic locations stated in this Application and those recently filed are at odds with the periods of need outlined in those same applications. Particularly, if the Employer’s need was purely seasonal, one would expect consistency in the time periods requested given the similarities in job duties and geographic locations set forth in its applications. The periods of need documented in the Employer’s history of applications, however, do not correspond, but instead, evidence a year round need for similar workers, performing the same jobs, in the same area of employment.

Specifically, in this Application, the Employer’s period of need for twenty-eight fruit harvesters is from March 22, 2021, to May 9, 2021. (AF 242). The workers’ job duties include citrus harvesting, grove clean-up, blueberry harvesting, and blueberry farm clean-up. (AF 263). Notably, however, these duties are substantially the same, if not verbatim, job duties specified by the Employer in its previous applications from ETA cases H-300-20203-726386, H-300-20239-787841, H-300-20248-805501, and H-300-20261-829656, where the stated period of needs are vastly different, running from September 19, 2020 to July 18, 2021, October 25, 2020 to May 30, 2021, November 15, 2020 to September 14, 2021, and November 20, 2020 to May 30, 2021. (\textit{Compare} AF 242, 263, \textit{with} AF 2176, 2189, AF 1938, 1962, AF 1542, 1555, and AF 1289, 1313; \textit{see also} CX 1). Thus, when considered together, these applications make clear that the Employer’s needs are not tied to a specific season. Rather, the Employer’s filing history demonstrates a year round need for workers performing the same duties, in the same geographical area.

Moreover, contrary to the Employer’s assertions, the CO has not abused its discretion in finding that the worksites in its Application are in the same area of intended employment as those in previously filed applications. In particular, the Employer argued that the area of intended employment in this Application is South-Central Florida, and thus, different from prior applications with worksites in Lake County. For various reasons, however, I find the Employer’s argument unpersuasive.


\textsuperscript{17} \textit{See} \textit{Ag Labor LLC}, 2020-TLC-00107 & 2020-TLC-00108, slip op. at 4, 6 (Aug. 31, 2020) (“[I]t is an Employer’s need, and not an individual task or worksite, which dictates whether a need for workers is seasonal or temporary.”); \textit{see also} \textit{Pleasantville Farms LLC}, slip op. at 3 (June 8, 2015); \textit{JBO Harvesting, Inc.}, 2020-TLC-00129, slip op. at 5 (Nov. 6, 2020).

\textsuperscript{18} \textit{See} \textit{Lodoen Cattle Co.}, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011).

\textsuperscript{19} \textit{See}, e.g., \textit{JBO Harvesting, Inc.}, 2020-TLC-00129 slip op at 3, 5 (Nov. 6, 2020) (affirming denial of certification where a labor contractor’s applications, considered in the aggregate, demonstrated a year round need for labor, rather than a seasonal need); \textit{see also} \textit{Rainbrook Farms}, 2017-TLC-00013 (Mar. 21, 2017); \textit{Stan Sweeney}, 2013-TLC-00039 (June 19, 2013).
First, 20 C.F.R. § 655.132(a) limits an H-2ALC’s application “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.” Thus, regardless of whether or not worksites are within the same “Metropolitan Statistical Area (MSA),” as defined by 20 C.F.R. § 655.103(b), if contained in the same H-2ALC application, they are considered a “single area of intended employment” under 20 C.F.R. § 655.132(a). As the Employer’s past applications consistently included worksites located in both Polk and Lake Counties, the Employer, as an H-2ALC, already conceded that these counties are within the same area of intended employment.\(^{20}\)

Furthermore, pursuant to 20 C.F.R. § 655.103(b), any locations within the same MSA constitutes the same area of intended employment.\(^{21}\) In the present case, the Employer’s Application lists a worksite in Osceola County, which is located in the same MSA as Lake County. (AF 260, CX 1 at 3). Accordingly, the Employer’s argument that this Application provides workers for fixed-site growers in a different area of intended employment must fail.

Lastly, I reject the Employer’s argument that its receipt of H-2A certifications in the past should be determinative in the present proceeding. An employer must establish that each application it files is eligible for certification on its own merits.\(^{22}\) Therefore, the mere fact that the Employer has had several H-2A applications certified in the past is not grounds for reversal of the CO’s denial.

For the reasons described, I find that the recurrent nature of the present and previous application periods in conjunction with the similarities in job duties and geographical location demonstrates that the Employer’s need for workers is year round. Accordingly, I find the CO’s denial of certification based on the Employer’s failure to show that its need is temporary or seasonal reasonable and not arbitrary, capacious or not in accordance with the law.

\(^{20}\) Specifically, in ETA cases H-300-20301-889431, H-300-20248-805001, and H-300-20203-726386, the Employer’s applications listed worksites in both Polk and Lake Counties, as well as other worksites located in southern-central Florida. (AF 939-940, 1552-1553, 2186-2187). Moreover, in its applications from ETA cases H-300-20261-829656 and H-300-20239-787841, the Employer included a worksite in St. Johns County, which is even further north than Lake County. (AF 1303-1309, 1952-1959).

\(^{21}\) 20 C.F.R. § 655.132(a) (“The 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.”).

\(^{22}\) See JBO Harvesting, Inc., 2020-TLC-00129, slip op. at 4 (“Essentially, we must look at the current denial on its own, without regard to the past certifications.”); see also ATP Agri-Services, Inc., 2019-TLC-00050, slip op. at 9 (May 17, 2019) (“[T]he fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial.”); Wickstrum Harvesting, Inc., 2018-TLC-00018, slip op. at 8 (May 3, 2018) (finding that the certification of prior applications “is irrelevant to the present proceeding”); G.H. Daniels III & Assocs., 2012-TLC-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.”).
ORDER

Based on the foregoing, it is hereby ORDERED that the CO’s decision denying the Employer’s Application is AFFIRMED.

PETER B. SILVAIN, JR.
Administrative Law Judge