

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 08 February 2021**

**Case No.:** 2021-TLC-00063

**ETA Case No.** H-300-20318-912467

In the Matter of:

**PALOMA HARVESTING,**  
*Employer.*

Certifying Officer: John Rotterman  
Chicago National Processing Center

Appearances: Christopher J. Schulte, Esq.  
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Washington, DC  
*For the Employer*

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United States Department of Labor  
*For the Certifying Officer*

Before: Hon. Dan C. Panagiotis  
Administrative Law Judge

**DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION**

**1. Jurisdiction and Nature of Appeal.** 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 temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States. The Certifying Officer (CO) in this matter denied Employment and Training Administration (ETA) Forms 9142A and 790, which comprised Paloma Harvesting’s (Employer) application for a seasonal temporary labor certification.

Pursuant to 20 C.F.R. § 655.141(b)(4), Employer appealed the denial and requested a *de novo* hearing and review of the application before an Administrative Law Judge (ALJ).<sup>1</sup>

## **2. Procedural History.**

a. On December 01, 2020, the Chicago National Processing Center (Chicago NPC) received an application from Paloma Harvesting for thirty (30) Farmworkers and Laborers job opportunities. (AF 2021-TLC-00063; ETA No.: H-300-20318-912467).<sup>2</sup>

b. On December 07, 2020, the Chicago NPC issued a Notice of Deficiency (NOD) to the employer.

c. On December 22, 2020, after considering Employer's NOD responses, the CO concluded Employer failed to amend its start date of need to no earlier than January 15, 2021; and failed to establish a seasonal need as outlined at 20 C.F.R. § 655.103(d), and denied the application.

d. A final denial letter was sent by the CO on January 15, 2021. (AF p. 5)

e. After notice of Employer's appeal, the CO transmitted the Administrative File for the Farmworkers and Laborers application to BALCA on January 21, 2021.

f. The undersigned conducted a hearing by video five (5) business days later on January 28, 2021.<sup>3</sup>

g. Counsel for Employer and the CO filed post-hearing briefs on February 03, 2021.<sup>4</sup>

**3. Statement of the Case.** The parties contest whether the Farmworkers and Laborers application at issue sufficiently establishes the seasonal need requirements of 20 C.F.R. § 655.103(d) necessary for certification approval. Employer asserts the CO erred by concluding Employer's request to amend the date of need is an attempt to "manipulate" its season to meet H-2A program rules. Employer further argues that the CO erred by concluding Employer's "combined season" between the application at issue and a previously-certified application effectively makes the application non-seasonal by demonstrating a need for year-round field crop laborers.<sup>5</sup>

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<sup>1</sup> During a prehearing teleconference with the undersigned, Employer's attorney requested an expedited hearing pursuant to 20 C.F.R. § 655.171(b)(ii). The Administrative File was received on January 21, 2021.

<sup>2</sup> The Administrative File is cited as "AF."

<sup>3</sup> In appeals where a *de novo* hearing is requested, the presiding ALJ must issue a decision within 10 calendar days after the hearing. 20 C.F.R. § 655.171(b)(1)(iii). The tenth day in this case landed on a Sunday. Pursuant to 29 C.F.R. § 18.32 (a)(1)(iii) the period continues to run until the end of the next business day.

<sup>4</sup> Employer's brief is marked as EB. The Certifying Officer's brief is marked as CB.

<sup>5</sup> The application before the court was originally denied because of two deficiencies: 1) Emergency Situation 20 C.F.R. § 655.134(b), and 2) Temporary Need 20 C.F.R. § 655.103(d). The only issue treated on appeal was based on the deficiency of seasonal temporary need. Had the Emergency Situation issue remained viable on appeal, the Court would have upheld the CO's determination that the application was untimely. Nonetheless, the timing issue is now moot because of the lapse of time from the filing of the initial application to the appeal and the Employer has conceded the point, thus the Court need not address it. (EB, p. 1).

#### **4. Material and Relevant Evidence Considered.**

a. *Exhibits Admitted Into Evidence.* In a *de novo* hearing, an employer is permitted to submit additional evidence beyond what was presented to the CO. 20 C.F.R. § 655.171(b). This is true even if such evidence could have been submitted to the CO in response to a NOD and was not. *Westward Orchards*, 2011-TLC-00411, slip op. at p. 20 (July 8, 2011). Per stipulation, the Court admitted the documentary evidence contained in the Administrative File in this matter. At the hearing, Employer offered two (2) additional exhibits. The CO offered four (4) exhibits.<sup>6</sup> All of the exhibits were admitted without objection. The undersigned has considered all exhibits admitted into evidence in this matter.

b. *Testimonial Evidence.* The undersigned fully considered the testimony of each witness who appeared at the hearing, resolved all issues of credibility, and determined what weight should be given to each. These witnesses gave, in summary, the following relevant sworn testimony:

1) Damian Hernandez

Mr. Hernandez is the Vice-President of Paloma Harvesting. Paloma Harvesting is an H-2A Labor Contractor (H-2ALC) that provides farm laborers to perform harvesting services to fixed-site growers in the northern and central areas of Florida. Paloma has provided laborers to farms in the area of St. Johns, Manatee, and Alachua Counties. Paloma traditionally provides laborers to harvest cabbage, broccoli, cauliflower, kale, collards, and watermelons.

He testified about the general timeframe for harvesting vegetables and watermelons in the north and central areas of Florida, which typically starts in December and runs through April or May of the following year. Mr. Hernandez explained that Paloma also harvests a variety of other crops from September to June. The vegetables start first. Paloma starts the harvest of watermelons in April which is normally completed around the 15th-20th of June, but can extend into July. Mr. Hernandez noted that at no point does watermelon harvesting extend beyond July 4th in Florida.

Mr. Hernandez also testified that the watermelon harvesting season in north Florida is typically between four to six weeks long, but under certain conditions could last up to eight weeks. Paloma does not harvest watermelons in Florida beyond July. He moves the crew to Georgia and Maryland during the summer months of July and August. According to Mr. Hernandez, Florida weather during July and August is rainy and hot, both of which are not conducive to growing crops.

When questioned on why he needed workers during July and August in the application at issue, Mr. Hernandez explained that two of his customers, Davis Farm and C & V Custom Ag Services, Inc., had contracted with Paloma for a one-time late harvest of sweet peas. Those contracts were canceled, however, after Paloma submitted the application. He was informed that laborers would no longer be needed for the months of July and August 2021. This is why he sought to amend his application to a shorter time frame. Mr. Hernandez's testimony was credible, contained relevant evidence and was accorded significant weight.

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<sup>6</sup> Employer's exhibits are marked "EX." The CO's exhibits are marked "CX." Citations to the transcript are marked "Tr." and page number (i.e., Tr. p. 1).

## 2) Tim Vaughn

Tim Vaughn is the President of C & V Custom Ag Services, Inc., a Florida corporation that has been in business since 1998. C & V is located in north-central Florida, an hour and a half west of Jacksonville. Mr. Vaughn testified about the general seasonal period for cabbage and peas grown in north-central Florida. In general, sweet peas are planted in March and are ready for harvest in the middle of May, depending on how dry or cool the weather is when they are planted. June and July are the months when harvesting is at its peak. Harvesting tapers off after that.

Mr. Vaughn explained that during the typical months of June, July, and August he harvests a small amount of sweet peas and peanuts. He normally uses local labor to harvest the small batch of peas he usually plants and he uses machines to harvest peanuts. He typically uses farm laborers from Paloma only until around the first of June. He explained that C & V entered into a contract with Paloma in the fall of 2020 to provide laborers until August of 2021, later than usual, to harvest an expected larger crop of sweet peas due to a new contract with a buyer. That buyer canceled that contract, however, which eliminated the need for Paloma to provide laborers in the months of July and August.

Mr. Vaughn was a credible witness. His testimony was salient in defining the parameters of the growing seasons in north-central Florida and in explaining the perceived need for workers in July and August 2021 due to an anticipated extended sweet pea season and the reversal of that need when the contract for that crop was canceled. This testimony carries substantial weight.

## 3) Mr. John Rotterman

Mr. Rotterman is the H-2A Certifying Officer who processed the Farmworkers and Laborers application submitted by Employer in this matter. He testified extensively about Employer's past temporary labor certifications, the application at issue in this matter, the factors he considered in making his determinations, the reason he issued the NOD and why he ultimately denied the application. He gave additional testimony regarding Metropolitan Statistical Areas, Areas of Intended Employment and his experience with growing seasons in Florida. He further explained his reasons for believing Employer was attempting to "manipulate" the dates of his application to conform to a previously approved ten (10) month growing season.

In general, Mr. Rotterman's testimony was credible and contained relevant evidence. At times, however, his testimony was difficult to follow. There was some ambiguity as to how geographic growing areas were defined. Those boundaries seemed to be malleable at the discretion of the CO, essentially making them whatever the CO wanted them to be. There were additional vague responses as to whether or not he considered Florida to have "year-round" growing seasons. His testimony at first indicated that there was and is a 12 month need for harvesting in that state, which would effectively negate any definition of "seasonal" under the regulations at issue. He then appeared to retreat from that testimony. The undersigned finds this testimony conflicting.

**5. Findings of Facts.** Based on the parties' stipulations, exhibits, and the testimonial evidence presented at the hearing, the undersigned makes the following relevant and material findings of facts in this case:<sup>7</sup>

a. Employer is an H-2ALC company founded in 2006 by Mr. Hernandez. The company is headquartered in East Palatka, Florida. As an H-2ALC, Employer enters into labor contracts to provide agricultural workers to farms (also known as "fixed-site growers") in north and central Florida. (AF pp. 60-61, 69; Tr. p. 9).

b. Employer focuses its labor contracts on providing field harvest laborers to vegetable farms located within 100-mile radius of Palatka, Florida. Typically, the workers he provides to farms perform labor for the harvesting of cabbage, broccoli, cauliflower, kale, collards, and watermelons. (AF p. 77; CX-B, p. 15; CX-C, p. 12; Tr. p. 9). Employer's seasonal laborers routinely do not actually work during the entire expected time period of an approved temporary labor certification. (Tr. pp. 16-17, 19).

c. The normal sweet pea crop season in north-central Florida begins in March and normally ends in July. The length of the season depends on the climate and humidity levels when the sweet peas are planted in March. The peas typically are harvestable beginning in early-mid May. The peak harvest season for sweet peas is in June and July. Field laborers must perform sweet pea picking by hand. In general, the sweet pea season ends in July due to lower crop yields because of heat and insects. (Tr. pp. 89-90).<sup>8</sup>

d. The normal cabbage crop season in north-central Florida begins in September and ends in May of the following year. (Tr. p. 16). If the cabbage is planted later in the fall, then harvesting could extend to June. (Tr. p. 29). Peak harvest for cabbage is in April and May. Beyond June, cabbage crops are destroyed by bug infestation and heat. (Tr. pp. 91-92).

e. The normal watermelon season in north-central Florida begins in April and ends in July. (Tr. pp. 16-17). The 4th of July marks the end of watermelon season. (Tr. p. 17).

f. Employer enters into labor contracts with vegetable and watermelon farmers to provide laborers in north-central Florida between September of one year and June the following year, during the typical cabbage, broccoli, cauliflower, kale, collards, and watermelon harvesting season. (Tr. pp. 16-17). Employer's typical off-season for that area is a two-month period between July and August. (Tr. pp. 30-31). During its off-season, Employer provides farm laborers to harvest watermelons in other states, including Georgia and Maryland. (Tr. pp. 23-24; Tr. p. 30).

g. On one previous application, Employer obtained a temporary labor certification to provide farm laborers in western Florida during the summer months of July and August. (Tr. p. 21; CX-D, p. 6). That application provided laborers to a different growing area to harvest cabbage until August 2020.

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<sup>7</sup> Citations to stipulations, exhibits or testimony that support the undersigned's factual findings are not all-inclusive. They simply reference some of the most persuasive evidence among everything in the record that undersigned considered when making the related finding.

<sup>8</sup> Sweet pea harvesting sometimes can extend into early August but "on a lot smaller scale." (Tr. p.89).

h. In north-central Florida the annual high temperature and rain fall make it untenable for farmers to grow any field crops from approximately the middle of July through the middle of September. (Tr. pp. 31-32).

i. Davis Farm was Employer's first contract for an anticipated extended sweet pea harvest. The contract requested thirty (30) farm laborers from December 1, 2020 to August 15, 2021. (AF pp. 75, 81). These laborers were necessary to handpick customary crops of cabbage, kale, and greens. (AF p. 77). The contract also anticipated using Employer's laborers to harvest sweet peas during the months of July and August 2021. (AF p. 76; Tr. pp. 11-12; EX-B). Davis Farm typically uses Employer's laborers for the cabbage, kale, and greens from December until April or May. (Tr. pp. 11-12).

j. Davis Farm advised Paloma after the application was filed, that due to Covid-19 pandemic concerns, the buyer for the extended sweet pea contract canceled. Because of the canceled contract, Paloma's laborers would no longer be needed for July and August 2021. (EX-B; Tr. pp. 11-12, 17-18).

k. C & V Custom Ag Services, Inc. is another recurrent annual client of Employer. (Tr. pp. 86-88, 89; AF pp. 76, 82; EB pp. 1-2). Their contract also requested thirty (30) farm laborers from December 1, 2020 to August 15, 2021. (AF pp. 76, 82; EB pp. 1-2; Tr. pp. 11-12, 17-18, 33, 85-86). Employer was to provide farm laborers to hand pick cabbage, kale, broccoli, cauliflower, greens, sweet peas, squash, and peppers. (AF p. 82; Tr. pp. 12, 17, 84-86, 89). This is the first and only year that Employer was contracted to provide laborers to harvest sweet peas for the grower in the months of July and August 2021. (Tr. pp. 12, 17-18, 33, 84-86). C & V has grown sweet peas in the summer months of July and August in the past, but typically uses local labor due to the small acreage grown. (Tr. pp. 88-89). C & V normally uses Employer's laborers only until the first of June. (Tr. p. 86).

l. C & V later notified Mr. Hernandez that the buyer for its sweet peas canceled its order. (EX-A; Tr. pp. 11-12, 85). Because the sweet pea contract was canceled, C & V would not need Paloma's laborers during July and August 2021. (EX-A; AF pp. 9-10; Tr. pp. 11, 17, 19, 33, 85-86).

m. Employer's pending application before the undersigned requests approval for a temporary labor certification for seasonal workers. Specifically, the application seeks approval for thirty (30) field crop laborers for an employment period of December 1, 2020 to August 15, 2021. (AF pp. 5, 17, 68). The requested temporary workers will be used in harvesting cabbage, broccoli, kale, cauliflower, greens, squash, peppers, and watermelon. (AF pp. 77-82; Tr. pp. 9-11, 18-19, 84-86). Employer's application form ETA-9142A states that the need for laborers is seasonal. (AF p. 60).

n. Employer previously filed for and obtained three certifications for temporary, seasonal workers for Florida in 2020. (CX-B; CX-C; CX-D; AF pp. 47-49, 90, 93-94, 113-114). Two of the applications were for Alachua County, Florida; and the other was in a different intended area of employment, Manatee County, Florida. (CX-D; Tr. pp. 21-23, 47-50).

o. In combination, Employer's labor certification applications for the 2020-21 crop growing season, started on May 10, 2020, stopped on July 10, 2020, started again on September 1, 2020, and was to end on August 15, 2021. (CX-A). When coupled with Employer's most recent previous application, and without amendment to the current application, the dates span 11 and a half months. If amended to delete July and August 2021, the span is 10 months.

p. The NOD issued by the CO on January 15, 2021 informed Employer that it had failed to demonstrate a seasonal need in application H-300-20318-912467 as required by 20 C.F.R. § 655.103(d).

q. After reviewing the application and comparing the Employer's previous application, the CO identified what he concluded was an overlapping need. He believed it demonstrated that Employer had an ongoing need that spanned at least 11 months. The CO found that Employer's need was not limited by a growing season or specific aspect of a longer cycle as the regulation requires. Instead, the CO concluded Employer's need was limited only by the length and quantity of contracts that it chooses to enter into. (AF pp. 17-18, 32-33).

r. The NOD requested Employer to explain how its need should be viewed as seasonal, when it appeared to exist in every month of the year. The NOD required that the Employer's explanation should be supported by documentary evidence. (AF p. 33).

s. Employer responded that it had conferred with its grower clients to confirm a more precise period of need and believed that the CO's concerns could be addressed through changes to the current application. Employer explained that:

The growers confirmed that the work they had originally projected as running into mid-August is no longer needed. Thus, Paloma gives the CO written permission here to amend the end-date of this application to July 1, 2021.

t. In the final determination letter denying the Farmworkers and Laborers application, the CO explained that based on the employer's requested dates of need, the employer had not established how this job opportunity was seasonal, rather than permanent and full-time, in nature. (AF pp. 17-18). The CO found Employer's current application for farmworkers from December 1, 2020 through August 15, 2021 in Alachua, Florida, and its previous application from September 1, 2020 through December 25, 2020 at a worksite in Old Town, Florida, a distance from Alachua of one hour and two minutes, show that Employer demonstrated a need for Farmworkers and Laborers in every month in the one year period from September 2020 through August 2021 in the same area of intended employment. (AF p. 9; Tr. p. 45).

u. As additional justification for his decision, the CO noted that "the employer's need is not limited by a growing season or specific aspect of a longer cycle as the regulation requires, but only by the length and quantity of contracts that it chooses to enter into." (AF p. 18). The CO noted, "[t]he employer also states that it is not manipulating its need to fit into the H-2A program. However, the employer contradicts its statement by providing permission to amend the end date of need to July 1, 2021; thus making its aggregate need exactly 10 months." (AF p. 10; Tr. p. 43).

v. 20 C.F.R. § 655.132(a) provides that an H-2A labor contractor’s ETA 9142 applications are limited “to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees.” The CO’s testimony creates ambiguity as to how such geographic growing areas are defined. Those boundaries seemed to be malleable at the discretion of the CO, essentially making them whatever the CO wanted them to be. The testimony shows that Employer was not aware of how the CO defines “area of intended employment.”

w. The CO testified that Employer filed previously for certification for labor through August 31, 2020 in a “neighboring” area to the application at issue. (EB p. 6; Tr. pp. 48-50, CX-D). During the hearing, when asked by Solicitor as to whether Manatee County, Florida is in the same area of intended employment as the application on appeal, he answered:

A No.

(Tr. p. 48).

x. The evidence is undisputed that work in other states by Employer occurs in different areas of intended employment.

## **6. Applicable Law and Analysis.**

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the U.S. Department of Labor (DOL). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Burden of Proof.* Throughout the application process, the burden of proof remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). Consequently, the employer has the burden of persuasion when appealing a CO’s denial determination.

The standard of proof an employer must satisfy is to show by a preponderance of the probative evidence that its temporary labor certification is sufficient for acceptance under the criteria established by 20 C.F.R. § 655.161. *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).<sup>9</sup>

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<sup>9</sup> In cases where an employer appeals a denial and requests an expedited administrative review by an ALJ, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-000022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015). To meet this standard of proof, an employer must demonstrate that the CO’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, invalid, or based on conclusions that are inconsistent with the underlying established facts or legally impermissible. *F 3 S Partnership, LLC*, 2014-TLC-00006, slip op. at 29. Since Employer has sought a *de novo* review, this standard of review does not apply.

When an employer appeals a denial and requests a *de novo* hearing before an ALJ, the parties are permitted to present additional evidence on the matter. Consequently, the presiding ALJ “must independently determine if the employer has established eligibility for temporary labor certification.” *David Stock*, 2016-TLC-00040 (May 6, 2016).

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. The decision of the ALJ must specify the reasons for the action taken. . . . The decision of the ALJ is the final decision of the Secretary.” 20 C.F.R. § 655.171(b)(2).

c. *H-2A Labor Contractors*. As reflected on ETA Form 9142A, Employer is designated as an H-2ALC. An H-2ALC is any individual or legal entity who is not a fixed-site employer or employee or an agricultural association or employee, but who recruits, solicits, hires, employs, furnishes, houses, or transports H-2A workers. 20 C.F.R. § 655.103(b). This definition “broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer.” Employment and Training Administration, U.S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010). The regulation at 20 C.F.R. § 655.132(a) provides that an H-2A labor contractor’s ETA 9142 applications are limited “to a single area of intended employment in which the fixed-site employer(s) to whom an H-2ALC is furnishing employees will be utilizing the employees.”

d. *Seasonal or Temporary Need*. Seasonal and temporary need are related but distinct concepts under the regulations. “[E]mployment is of a seasonal nature when 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 exceptional circumstances, last no longer than 1 year.” 20 C.F.R. § 655.103(d).

A seasonal need has generally been interpreted to be 10 months or less. *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008). However, this interpretation has been rejected as a “bright-line” rule, and it has been held that 10 months should be used only “as a threshold at which the CO will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature.” *Grassland Consultants, LLC*, 2016-TLC-00012, slip op. at p. 5 (Jan. 27, 2016).

When determining an employer’s need for labor, 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); *see also Pleasant Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015) (holding fact-finder must determine if employer’s needs are seasonal, not whether particular job at issue is seasonal). In order to determine if the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services

during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

Denial of certification is appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011). Because a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates for a seasonal need in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. *Thorn Custom Harvesting*, 2011-TLC-00196, slip op. at 3 (Feb. 8, 2011).

*e. Parties' Arguments and Analysis.*

In support of reversal of the CO's denial decision, Employer argues that the CO cannot rely on *post hoc* rationalizations in order to justify his reasons for denying the application; that a consistent need of laborers for 10 months out of the year can be seasonal; and an H-2ALC's season cannot be tied to a general availability of work in different areas of intended employment. The CO contends denial of Employer's application should be affirmed because it failed to carry its burden to demonstrate a seasonal need.

1. Employer

a. Employer contends that the CO cannot rely on any previous certifications to justify his denial, when those certifications were not part of the Administrative File. (EB, p. 10-11; CX-D; Tr. pp. 45-47, 50-52). During the hearing, Employer asked the CO whether he considered the other certifications offered as exhibits by CO's counsel, labeled CX-A, B, C, and D.<sup>10</sup> (EB, p. 10; Tr. pp. 54-55). The CO testified "I don't remember," and acknowledged that the "Appeal File"<sup>11</sup> included all of the information he considered prior to issuing the denial. (*Id.*).

The crux of the Employer's argument is that the Administrative File should contain all of the information the CO considered when making his determination. (EB, pp. 10-11; Tr. pp. 54-55). In the NOD and denial letter, the CO only cites applications *H-300-20220-757467* (9/1/2020 through 12/25/2020) and *H-300-20318-912467* (12/1/2020 through 8/15/2021). (AF pp. 17, 42). The Administrative File does not contain the certifications included in exhibits CX-B *H-300-20070-394711*, CX-C *H-300-20094-458335*, or CX-D *H-300-19312-135321*.

b. Employer maintains that as an H-2ALC, its need for work is limited by the seasonal need of the growers with which it enters into contracts. (EB, pp. 2-6, 13). Mr. Hernandez maintains that his work in north-central Florida consistently begins in September and ends by July 4th of the

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<sup>10</sup> During the pre-hearing teleconference, the parties were given a deadline to submit exhibits and witness list. Timely submissions were made by CO for exhibits labeled CX-A, CX-B, and CX-C. Counsel for CO submitted an amended exhibit list after the deadline which included CX-D. Employer timely filed its exhibit labeled EX-A. Employer filed an amended exhibit and witness list after the deadline which included EX-B. At the hearing, the undersigned addressed the late-filed exhibits by CO and Employer. Counsel for the parties were given an opportunity to object to the late-filed exhibits. The parties did not object to the other's late-filed exhibits. All were admitted into evidence. (Tr. pp. 5-6). The parties, in their post-hearing briefs, now attack the credibility of the late-filed exhibits.

<sup>11</sup> Employer's brief refers to the Administrative File as the "Appeal File." (EB, p. 10).

following year. (EB, p. 13; Tr. pp. 15-17). Employer's position is that there customarily is no work for Paloma in the area of north-central Florida during the months of July and August. (EB, pp. 13-14; Tr. pp. 31-32). As such, Employer submits that its contracts to harvest sweet peas in July and August are not indicative of its normal seasonal needs.

In line with its argument that an H-2ALC's season is tied to the contracts it enters into, is Employer's argument that a consistent need for laborers for 10 months out of a year can be seasonal. (EB, p. 2; Tr. pp. 12-14; 16-17). Employer is in the business to provide laborers to harvest crops, specifically: cabbage, broccoli, cauliflower, kale, cucumbers, collards, and watermelon. (Tr. p. 11; AF pp. 80-82; CX-B, p. 15; CX-C, p. 12; CX-D, p. 16). Employer provides these services by entering into contracts with fixed-site growers in north central Florida. How and when Employer works is governed by the planting and harvesting seasons of the crops themselves.

c. Finally Employer submits that work done in other areas of Florida or other states cannot be used against it to deny the current application. Mr. Hernandez testified during the hearing, that Florida's July and August weather is too hot and rainy to sustain the agricultural work that it normally provides to growers. (*Id.*; Tr. pp. 31-32). He normally moves to other states during those months. Employer contends that these areas in other states require different applications because they have different seasons and should not be used to deny the current application.

## 2. Certifying Officer

The CO contends denial of Employer's application is warranted because it failed to carry its burden to demonstrate a seasonal need for two reasons.

a. The CO argues Employer's application history demonstrates multiple certifications that in combination constitute a labor need for more than 11 months of a 12 month period, which the CO considers not to be seasonal.

b. The CO asserts that Employer's prior application history, together with Mr. Hernandez's testimony, establish that the Employer has been manipulating its "season" to fit its work into the H-2A program.

## 3. Analysis

To resolve the contested issues in this case, the undersigned must determine what type of temporary work Employer provides as an H-2ALC. If Employer provides general field labor to any north-central Florida regional farm for any crop grown at any time throughout the year based on the contracts it picks and chooses, its work is not tied to a specific crop season and therefore not seasonal. If, however, Employer normally limits the scope of its H-2ALC contracts to providing temporary laborers to north-central Florida regional cabbage, broccoli, cauliflower, collards, and watermelon growers that operate within a recognized growing and harvesting season, and the inclusion of sweet peas into July and August was an aberration which ultimately did not materialize, then its needs are tied to a seasonal event.

In urging the undersigned to reach the latter conclusion, Employer argues that its past applications demonstrate a continuing work cycle tied to the seasonal farming needs of cabbage and watermelon farms. Employer asserts that its “ordinary” seasonal need is the 10 months from September to June. Employer contends the temporary labor certification for December 1, 2020 to August 15, 2021 is a one-time occurrence fueled by the need to provide laborers to harvest sweet peas for two of its valued customers, Davis Farm and C & V, through July and August. Further, Employer asserts that when these two contracts were canceled, which eliminated the need for laborers during July and August, the removal of the extra two months would fit squarely within the 10 month rule of thumb for seasonal/temporary labor. Employer’s position is persuasive. The weight of the evidence establishes Employer is an H-2ALC that focuses on providing temporary laborers to cabbage, broccoli, kale, and watermelon farmers. Testimony provided by Mr. Vaughn and Mr. Hernandez establish that watermelon season in north-central Florida ends by July 4th. The testimony also provided that the sweet pea season peaks between June and July. Mr. Vaughn further testified that he normally uses his own employees to pick peas.

Employer’s filing history as an H-2ALC provides context to evaluate Employer’s actions and motivation for recent applications. This is particularly important when it comes to: 1) interpreting its intent for filing the December 1, 2020 to August 15, 2021 temporary labor certification application pertaining to Davis Farm and C & V; and 2) determining whether Employer’s consecutive application history shows a genuine recurring seasonal need or instead demonstrates a year-round need for agricultural workers.

A CO is permitted to review an Employer’s situation as a whole when determining temporary seasonal need, and a CO is not confined to considering only the existing application. *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rainbrook Farms*, 2017-TLC-00013 (Mar. 21, 2017). Denials have been upheld when multiple applications in the aggregate cover more than a 10-month period. *JBO Harvesting, Inc.*, 2020-TLC-00129 (Nov. 6, 2020). The CO’s consideration of Employer’s past application, H-300-20220-757467, as it relates to the Farmworkers and Laborers application in this matter, was justified.<sup>12</sup>

On the other hand, “attempts by employers to *continually* shift their purported needs in order to utilize the H-2A program to fill permanent needs have been rejected.” *Ag Labor LLC.*, 2020-TLC-00107, 2020-TLC-00108, slip op. at 3 (Aug. 31, 2020) (emphasis added). *See also*, *DeSoto Fruit and Harvesting, Inc.*, 2019-TLC-00032 (finding repeated over-lapping certification applications establish permanent and not seasonal need). Therefore, if the CO believed Employer had submitted consecutive applications in order to cover an established permanent labor need, denial of the current application would be warranted.

In the NOD, Employer was notified that its application failed to meet the requirements for emergency waiver. (AF pp. 31-32). The employer was given the option to modify its start date of need to no earlier than January 15, 2021 in order to be in compliance with 20 C.F.R. § 655.121(a).

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<sup>12</sup> At the hearing, the CO testified to a belief that his office reviewed additional applications by Employer, namely CX-B, C & D. When pressed he admitted he was not totally sure if they were reviewed at the time of denial, that the Administrative File should be assumed complete, and that if those applications were not in the AF it was reasonable to assume that he did not consider them at the time of the denial. (Tr. pp. 54-55).

*Id.*<sup>13</sup> The employer was also given the choice to appeal the action. The NOD also questioned the temporary need because the prior application combined with the present application showed a continuous need for laborers for 11 and a half months.<sup>14</sup>

<u>Case Number</u>	<u>Employer Name</u>	<u>Status</u>	<u>Beginning Date Of Need</u>	<u>Ending Date Of Need</u>
-300-20220-75746	Paloma Harvesting	Determination-Issued-Certified	9/1/2020	12/25/2020
-300-20318-91246	Paloma Harvesting	Received	12/1/2020	8/15/2021

Upon notice of the deficiency, Employer offered to amend its end date of need from August 15, 2021 to July 1, 2021, because “its fixed-site growers provided a more precise period of need represented in its current request.” (AF p. 10). The CO did not accept this explanation because it appeared as though Employer was “manipulating” the dates to fit within the 10 month period. *Id.*

In a *de novo* review parties are allowed to introduce evidence that was not part of the Administrative File when the CO made his determination. Employer offered, filed, and introduced written and testimonial evidence (without objection) that both Davis Farm and C & V canceled their contracts to harvest sweet peas in July and August when the buyers opted-out of their contract with the growers. (EX-A; EX-B; Tr. pp. 11, 17, 19, 84-85). Therefore, contrary to the expected need at the time of the application, the actual need to provide laborers through August does not exist.

The testimony elicited at the hearing establishes that Employer’s need for laborers is seasonal. Mr. Vaughn testified that cabbage season will generally last until May, depending on the weather. He noted that last year it ended in May, but since they are planting later this year it is likely that the season will end in June or July. Mr. Vaughn also testified that as the weather gets “hotter, the quicker it gets over with. . . . The bugs get worse so it’s hard to determine exactly when it’ll quit.” (Tr. pp. 91-92). Mr. Hernandez testified that his normal work for Mr. Davis and Mr. Vaughn will start in December and go until April or May. (Tr. pp. 11-12).

Employer also harvests watermelon after the cabbage season ends. Mr. Hernandez testified that the watermelon season in north-central Florida begins in April and ends in July. (Tr. pp. 16-17). The 4th of July marks the end of watermelon season. (Tr. p. 17). He also testified that after the 4th of July, Employer’s work is complete in Florida until the following September. (Tr. pp. 16-

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<sup>13</sup> Although this issue is now moot and not part of this appeal, it is important to highlight the different treatment between amending the start date and end date for the period of need; the former would have been allowed but the latter has been construed by the CO as “manipulation.” Had the start date been amended and the end date remained the same, there would have been a break between applications of 6 weeks, allowing the current application to begin in January 15, 2021 and end August 15, 2021, a span of only 8 months. Presumably the application could then have been approved.

<sup>14</sup> Technically 11 and a half months can still be within the regulatory definition of seasonal. 20 C.F.R. § 655.103(d).

17; EB, p. 5). After July, Employer moves his entire operation to Georgia, then Michigan, Maryland, and Delaware. This is because, according to Mr. Hernandez, Florida weather during the months of July and August is too hot and rainy to support agricultural operations. (EB, p. 5; Tr. pp. 21-23, 31-32).

The uncontroverted testimony by Mr. Hernandez and Mr. Vaughn establishes *inter alia* a growing season for cabbage and watermelon in north-central Florida. The testimony also establishes that cabbage season usually ends in May, but sometimes can extend until July, depending on the weather. This same testimony establishes that watermelon season ends, at the latest, on July 4th. Employer has agreements to harvest cabbage, broccoli, cauliflower, squash, peppers, and watermelons. Those established seasons provide a need for seasonal labor.<sup>15</sup>

The CO construes Employer's consecutive application filings to show a pattern of "manipulation" by Employer to fit within the H-2A guidelines.<sup>16</sup> The CO testified that Employer filed previously for certification for labor through August 31, 2020 in a "neighboring" area to the application at issue. When asked by Solicitor as to whether Manatee County, Florida is in the same area of intended employment as the application on appeal, however, he answered: "No." (Tr. p. 48).<sup>17</sup>

The Department of Labor has previously indicated the term "area of intended employment" is used "primarily for recruitment purposes to ensure that the designated SWAs [State Workforce Agency] receive the job order so that U.S. workers have the opportunity to apply for the job." Federal Register, Vol. 75, page 6884, 6885 (February 12, 2010). *See also T. Bell Detasseling LLC*, 2014-TLC00087 (May 29, 2014). ("It does not appear the term was ever intended to be used by a CO to place limits on H-2A applications as the Department considered and rejected the CO's rigid approach to defining an area of intended employment. . . .")

The CO relies on exhibit CX-D to show that Employer had previous work in the summer months of July and August in a "nearby" area of intended employment. (Tr. pp. 48-50; CB, pp. 7-8; EB, pp. 6-7).<sup>18</sup> The hearing testimony shows otherwise. Mr. Hernandez was questioned during the hearing on this issue, to which he replied the work in July/August 2020 was to have involved only "cabbage" harvesting, but the work had been "canceled," so they did not actually provide

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<sup>15</sup> To illustrate this point, Mr. Vaughn testified that his farm is in "big trouble" because, at the time of the hearing, his cabbage crop was "ready to harvest", and there is "no labor." (Tr. p. 89).

<sup>16</sup> In the CO's brief, the Board was asked to take judicial notice of U.S. Census Bureau's Metropolitan and Micropolitan Statistical Areas of the United States and Puerto Rico published in March 2020. (CB, footnote 2). The undersigned reviewed the documentation and takes judicial notice of the U.S. Census Bureau's Metropolitan map as it relates to a reference for an area of intended employment for H-2A temporary worker applications. 29 C.F.R. § 18.84 allows an ALJ to take judicial notice either by motion or on its own.

<sup>17</sup> The definition of *area of intended employment* in pertinent part means:  
...the geographic area within normal commuting distance of the place (worksite address) 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). 20 C.F.R. § 655.5.

<sup>18</sup> The CO has provided a map of Florida, which is labeled CX-E. (CB, p. 18). This exhibit was not previously introduced or admitted as evidence. The undersigned takes judicial notice of the map, however, in light of the hearing testimony, gives it no weight.

labor for that period. (EB, pp. 4-5; Tr. p. 21). Mr. Hernandez explained that, although one of the certifications mentioned work lasting into July 2020 “. . . even when we put the July date, we finished before that date. We didn’t get to July.” (*Id.*; Tr. p. 29).<sup>19</sup> In accord with this testimony, and because the term “area of intended employment” was not intended to be used to place limits on H-2A applications, CX-D is given little weight.

The CO testified that he did not have any evidence of Employer having a history of applications exceeding 10 months when he denied the application. (Tr. p. 80). More pointedly, when asked whether he had any evidence of prior “manipulation” by Employer, the CO stated “I don’t believe so.” (Tr. p. 81).

While past applications can be considered when acting on a current application, an Employer must establish that each application it files is eligible for certification on its own merit. *JBO Harvesting Inc.*, 2020-TLC-00129 at 4 (holding that BALCA must review current denial on its own without regard to past certifications). Indeed, approval of prior applications is irrelevant. *Wickstrum Harvesting, Inc.*, 2018-TLC-00018, at 8 (May 3, 2018). Consequently, Employer must justify the requested seasonal temporary labor need solely for its current application.

The undersigned concludes Employer’s past application history and current actions related to Davis Farm and C and V Custom Ag’s recent endeavor to grow sweet peas do not establish that Employer is attempting to diversify its business operations outside of its normal seasonal work. If anything, it shows an attempt to offer support to its long-time clients, on a one-time basis, to provide laborers to harvest a crop during a particularly trying and unprecedented year of uncertainty. Mr. Vaughn, President of C & V, testified that this was the first year he contracted with Employer to harvest sweet peas. (Tr. pp. 85-88). Although Mr. Vaughn and Mr. Hernandez testified to willingness to contract in the future (Tr. pp. 29, 88), this review is limited to application *H-300-20318-912467*.<sup>20</sup>

A preponderance of the evidence in this case demonstrates the current Farmworker and Laborer application submitted by Employer needs to be amended, as it now only seeks temporary seasonal laborers for the purpose of cultivating and harvesting cabbage, cauliflower, kale, collards, cucumbers, broccoli, and watermelon. Mr. Vaughn unequivocally confirmed that the contract with Employer to harvest sweet peas in July and August has been canceled. While his testimony was equivocal on *future* contracts with Employer, that issue is not properly before the undersigned at this time, and it does not have any bearing on whether sweet peas will be harvested in July-August 2021. The supporting evidence and testimony, along with the filing history, persuasively show that Employer’s requested Farmworkers and Laborers will perform cabbage, broccoli, kale,

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<sup>19</sup> 20 C.F.R. § 655.132(b)(1) requires the H-2ALC to provide the *expected* beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are *expected* to perform at such fixed site. (emphasis added). *Expected* means to anticipate or look forward to the coming or occurrence. Merriam-Webster’s College Dictionary (11th ed. 2003). During the hearing, the Solicitor asked Mr. Hernandez if he was notified of the change of dates for Davis Farm and C & V before or after he applied for H-2A workers. Mr. Hernandez responded “After.” (Tr. p. 19). Employer provided the beginning and end dates in its application based upon knowledge at the time of applying. (AF pp. 80-82). After the contracts were canceled, Employer requested to amend its end date of need.

<sup>20</sup> If an application is filed in the future, then it will be appropriate to analyze the particular seasonal need associated with that application. Anything beyond that at this time is mere speculation.

cauliflower, and cucumber harvesting work under the subject application. Employer's amended end date of need for the temporary field crop laborers corresponds directly with the critical phases of north-central Florida's annual cabbage and watermelon growing and harvesting seasons.

While the CO's concern about Employer's January 1 to August 31, 2020 application is understandable, that prior application is not in the same area of intended employment, did not actually require laborers in July/August 2020, and is insufficient to demonstrate Employer's current application is not truly seasonal or that it intends to manipulate future applications in order to resolve a permanent labor need.

The undersigned construes the weight of the evidence in this case to establish that Employer provides temporary laborers for specific harvesting seasons for specific crops. Employer's Farmworkers and Laborers application in this matter, as amended, conforms to those specific seasonal needs. The Court finds that Employer's original application dates, which were a deviation from their usual business plan, constituted a singular exception to support its long-time clients, in an unprecedented year due to Covid-19 pandemic, and does not persuasively indicate that Employer intends to diversify to harvesting sweet peas in the future.<sup>21</sup> Without more, the CO's determination that Employer has shown an intent to expand the scope and focus of its business in future applications to different crops with different seasonal needs is unsupported speculation that does not warrant denial of Employer's current application.

This conclusion is not intended to discount the CO's legitimate concerns and reasoning for initially denying the application. His office handles thousands of applications and no doubt has more of an expanded view of the entire process and overall trends in applications for a particular geographic area. The CO's instinct regarding "manipulation" in this case may or may not be borne out by future events. It is not the province of this court, however, to engage in such hypotheticals.

In conducting a *de novo* review, the undersigned has obtained additional context for the application, and its requested amendment, through witness testimony and admitted evidence. The undersigned concludes Employer has carried its burden to establish eligibility for certification of its current Farmworkers and Laborers application for temporary labor based on a demonstrated seasonal need.

**7. Decision and Order.** The CO's denial of Employer's Application for Temporary Employment Certification is **REVERSED** and this case is **REMANDED** to the CO for approval and further processing, in as expedited a manner as possible.

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<sup>21</sup> Indeed, if future applications for certification show that Employer does intend to diversify into sweet peas harvest, then those future applications could well warrant a denial based on a permanent need for laborers.

**SO ORDERED** this day.

**DAN C. PANAGIOTIS**  
**ADMINISTRATIVE LAW JUDGE**