



Issue Date: 15 January 2021

BALCA CASE NO.: 2021-TLC-00058

ETA CASE NO.: H-300-20338-937276

In the Matter of:

SAMANTHA D. CRAUN
DBA DAVIS BROTHERS DAIRY #2,
Employer.

DECISION AND ORDER REVERSING DENIAL
OF EMPLOYER'S H-2A APPLICATION

This matter arises under the labor certification process for temporary agricultural employment of non-immigrant workers in the U.S. under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B, (collectively the "H-2A program").

On January 4, 2021, Samantha Craun dba Davis Brothers Dairy #2 ("Employer") requested administrative review pursuant to 20 C.F.R. § 655.171(a) challenging the Denial Letter dated December 29, 2020, issued by the Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center ("NPC"). This Office was notified of the appeal, and I directed the parties to file any briefing by January 13, 2021. Neither party filed a brief.

This Office received the Administrative File on January 7, 2020. This Decision and Order is based on the written record, which consists of the Administrative File and the request for review. 20 C.F.R. § 655.171(a). As explained below, I reverse the certifying officer's (CO) denial, and remand for the parties to determine seasonal employment needs for 2018, 2019, and 2020 to inform Employer's certification application.

FACTS

Application No. H-300-20338-937276 ("December 7 Application")

On December 7, 2020, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with the Chicago NPC for three temporary foreign workers to be employed 40 hours per week as farmworkers for the period of February 1, 2021, to November 15, 2021. AF 35. Under "Statement of Temporary Need," Employer averred that she needed seasonal help to assist in the planting, cultivating, irrigating, and harvesting of corn and hay. *Id.* Workers would assist in transporting crops to storage areas and to market, the cleaning and maintenance of equipment used,

the cleaning of storage areas, and the maintenance and repair of fences. *Id.* Workers would also attend to cattle, mix feed, and assist in calving and newborn calf care. *Id.* The job description required three months of experience and the ability to lift 60 pounds. AF 36.

On December 10, 2020, the CO issued a Notice of Deficiency (NOD) because Employer had not demonstrated how the job opportunity was seasonal or temporary in nature. Employer responded on December 11, 2020. AF at 9. In the NOD, the CO noted Employer filed an unsuccessful application, H-300-20308-896815 (“November 9 Application”), which was denied for failing to support a seasonal need. The prior application, which was submitted on November 9, 2020, declared a need for seasonal workers from January 15, 2021 to November 15, 2021. AF 26. In the December 7 Application, Employer requested the same number of workers, specified the same end date of need, and listed similar requirements and duties. AF 9. According to the CO, Employer failed to show how anything changed in its operations such that it now had a seasonal need for ranch workers. AF 10.

In its response on December 11, 2020, Employer stated that the previous November 9 Application inadvertently omitted information about the monthly payroll. Employer remedied the error in the December 7 Application and submitted a payroll summary for 2018, 2019, and 2020, broken down by month, for permanent and temporary workers. AF 10; 15-16. Contrary to Employer’s contention, however, the CO found that the payroll summary did not demonstrate a seasonal need. AF 11. The CO based this finding on two facts. First, the payroll documentation showed the same number of workers in January, an off-season month, as in November, a purported time of seasonal need. AF 11. Second, during peak seasonal need, the payroll showed no increase in the hours worked by permanent workers. *Id.* Instead the labor levels remained constant throughout 2018, 2019, and 2020.

Finally, the CO found that the duties and job requirements were similar or identical to those in Employer’s previously denied November 9 Application, and the new application still did not support a seasonal need. AF 11.

Previously Denied Application No. H-300-20308-896815 (“November 9 Application”)

In denying Employer’s December 7 Application, the CO referenced NPC’s rationale for denying Employer’s prior November 9 Application. The facts of the November 9 Application are summarized here. On November 9, 2020, Employer submitted an application for three farmworker job opportunities working 40 hours per week from January 1, 2021, to November 15, 2021, which listed similar job duties and requirements as the subsequent December 7 Application. AF 62. On November 10, 2020, the CO issued an NOD. AF 87. Employer responded on November 12, 2020, and November 20, 2020, and the CO subsequently denied the application because Employer failed to demonstrate a need for seasonal employees. AF 52.

Employer stated “Temporary need is due to the seasonal agricultural activities the employer conducts for the business.” AF 46. In this initial application, Employer stated the job duties included, hay, corn, and cattle raising. AF 52. The employees would mow yards, weed eat yards, pick up trash, take out trash, clean all buildings, mow, ted, rake, bale hay, load and unload hay, cover silage pits, clean out silage pits, throw tires and drag plastic to protect the crop, fuel and maintain all equipment, gather manure, spread manure, clean and prepare water troughs, place bulls in breeding

service, remove bulls from service, check cattle for illnesses and treat as necessary, vaccinate cattle, report problems, provide feed to all animals, clean housing, repair fences, prepare feed lanes, remove manure from feed lanes, sort and lock-up cows, load and transport herd, and maintain grounds. AF 52, 71. Employer stated workers might also operate tractors, maintain equipment, work in fields, clean around barns, paint and repair farm buildings, and perform similar tasks of a general nature common to a farming operation, as well as, dig ditches, install or repair water lines, sheds, barns, stock tanks, and other structures on the farm. *Id.* Employer would require workers to load trucks with bales of hay and sacks of feed weighing from 50 to 60 pounds. *Id.*

To demonstrate a seasonal need, the CO asked Employer to provide information describing its business history, activities, schedule of yearly operations, a detailed monthly breakdown of cattle care duties, whether contractors had been used to address the need (receipts or contracts detailing such services¹), signed affidavits if family members had provided services, and any other evidence and documentation that would justify granting the requested certification. AF 53; 90. In lieu of the requested documents, Employer could provide any documents that would similarly justify a need during the requested dates. *Id.*

In response, the Employer described its operation as follows:

The farm produces hay, corn, and beef cows. Hay and corn are produced for farm consumption and for selling on the open market. Calving season begins in January and followed by breeding season in April through July. We start harvesting hay in March and will continue until Mid November depending on the weather. We start harvesting corn in September and continue through November. The job is seasonal in nature due to calving and breeding seasons taking place in the first part of the year and then having to harvest hay and corn from Spring to late fall. Mid-January to Mid November is peak workload for us on the farm.

Because many of these job duties are not clearly seasonal, the CO requested Employer's payroll records to support its seasonal need. Employer submitted temporary worker records and stated in response:

[w]e only work about half of the month in January and November so that is why there is a decline in the number of workers and hours for those months. This is the information for the full-time temporary workers that I have hired during the past three years. Two of those workers have already notified me that they will not be coming back next year so we also have a need to fill those positions.

While Employer provided payroll reports for temporary workers from 2018 to 2020, she did not provide any payroll reports for its permanent workers in the November 9 Application. AF 54.

¹ It is unclear in the record if Employer ever submitted this information, but the instructions did say they could submit any documents to justify need.

Employer provided monthly summaries of its cattle-related tasks, which listed specific breeding and calving tasks from January to July, as well as, “considerations for all cattle.” AF 79-85.

The CO concluded that Employer failed to establish that its job opportunity was seasonal in nature and denied the November 9 Application. The CO reasoned that the described job duties reflected the day-to-day operations of a cattle farm which would present at any time of year; Employer failed to establish that the job opportunity was tied to a certain time of year. AF 54. Additionally, the CO argued Employer failed to establish that it was augmenting its ongoing operations with temporary employees. AF 54. Finally, the CO stated that Employer did not explain why it did not provide payroll records for its permanent employees. AF 54.

LEGAL STANDARD

The standard of review in H-2A cases is limited. When an employer requests a review by an administrative law judge (“ALJ”) under § 655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.*

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). The 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-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015). A decision is not arbitrary and capricious if the decision-maker examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Three Seasons Landscape Contracting Serv.*, 2016-TLN-00045, slip op. at 19 (June 15, 2016) (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)).

To qualify for the H-2A program, an employer must establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015). According to the regulations:

[E]mployment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. § 655.103(d).

To determine whether an employer’s need 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.” *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). The ALJ must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal. *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)(citing *Sneed Farm*, 1999-TLC-7 (Sept. 27, 1999)). “Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year.” *Farm-Op Inc.*, 2017-TLC-00021, slip op. at 7 (July 7, 2017) (citing *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011)).

ANALYSIS

Here, the CO’s finding that Employer had not established a seasonal employment need is unreasonable and arbitrary. First, the CO did not satisfactorily explain the rationale for discounting Employer’s payroll records. Next, the CO relied on reasoning in his denial of Employer’s November 9 Application to support denying the subsequent application. But the CO failed to provide a satisfactory explanation for his conclusions in the prior denial. Thus, because the CO failed to provide a satisfactory explanation for his conclusions, the December 7 Application denial is unreasonable and arbitrary.

Payroll Documentation

The CO argues that the new information, permanent and temporary payroll documents, submitted with Employer’s application does not demonstrate need. However, the CO’s basis for this conclusion fails to articulate a satisfactory explanation, including a rational connection between the facts found and the choice made. See *Three Seasons Landscape Contracting Serv.*, 2016-TLN-00045, slip op. at 19 (June 15, 2016). When the CO inquired what had changed between applications, Employer explained that its agent inadvertently omitted a page describing the payroll for permanent employees. AF 10. The CO subsequently reasoned that the payroll did not show seasonal need for two reasons. First, the CO claimed, “the payroll documentation for temporary workers from 2018-2020 indicates that temporary workers are present during the off-season month of January, at the same level as they are in November, a seasonal month.” Second, the CO claimed “the payroll documentation for permanent workers does not show any increase in hours worked during its claimed season. Instead, labor levels remained constant throughout 2018, 2019, and 2020.” AF 11. Therefore, the CO concluded, “the employer’s payroll fails to support its claimed seasonal need of February to November.” *Id.*

The CO’s first rationale ignores Employer’s explanation regarding staffing levels in November. The CO noted that Employer has only two seasonal employees in the months of January and November, yet Employer requested an H-2A certification for three employees for approximately half of November. AF 35. Employer, however, explained that the payroll for January and November shows lower staffing levels and hours worked because the season begins partway through January and ends partway through November. AF 57. The CO offers no other explanation why this discrepancy shows that Employer’s payroll does not demonstrate a seasonal need. Instead the payroll summary consistently shows that Employer hires additional seasonal workers from February through October, and it appears Employer hires seasonal workers from January through November, albeit fewer. AF 58.

While the CO's conclusion that the payroll fails to demonstrate seasonal need does not follow, it is unclear if Employer hires between three and five seasonal workers each year or if the numbers in the chart on AF 58 include permanent staff. On remand, Employer is to clarify the precise historical staffing levels and the precise historical dates (e.g., make a table of staffing levels showing January 1 to January 15, January 15 to January 31, and so on) to determine appropriate dates for Employer's requested certification.

Next, the CO reasoned that because the payroll for permanent staff showed no fluctuation in hours, there was no seasonal need. Again, the CO provides no explanation for this conclusion and ignores the common sense explanation that a benefit of permanent employment is fixed and predictable hours. Furthermore, an employee might report steady hours, but they may be more or less busy during those hours depending on the season. From the steady employment of two permanent workers from 2018 to 2020, the CO concluded the labor levels remained constant. The CO's conclusion, however, does not follow in light of the temporary worker payroll documentation, which shows fluctuation in staffing levels throughout the year. *See* AF 10.

In conclusion, the CO did not articulate a satisfactory explanation for dismissing Employer's payroll evidence as not demonstrating a seasonal need.

Description of Duties

The CO also denied Employer's December 7 Application because the job duties were similar to those listed in Employer's November 9 Application. The CO stated "it is unclear what, if anything, has changed in the employer's operations such that it now has a seasonal need for ranch workers." AF 9-10. Given this reasoning, it is necessary to consider Employer's November 9 Application and supporting documentation.

The CO denied Employer's November 9 Application in part because it failed to attach payroll documents (which Employer remedied in the December 7 Application), but also because the CO found that the activities described were day-to-day activities of a farm. The CO reasoned that Employer's December 7 Application presented similar duties and should be denied for the same reason. While the CO consistently concluded that Employer's job description did not show a seasonal need, the CO's rationale again does not articulate a satisfactory explanation for this conclusion.

BALCA has held that to determine whether an employer's need 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." *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). The ALJ must determine if the employer's needs are seasonal, not whether the particular job at issue is seasonal. *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015).

Here, the CO focused on the particular job duties to discount evidence of Employer's seasonal need. The duties listed between the two applications are similar. Employer's December 7 Application lists broader categories of duties rather than highly specified tasks. For example, Employer stated seasonal employees would assist in the planting, cultivating, irrigating, and harvesting of corn and hay. AF 35. Workers would assist in transporting crops to storage areas and

to market, the cleaning and maintenance of equipment used, the cleaning of storage areas, and the maintenance and repair of fences. *Id.* Workers would also attend to cattle, mix feed, and assist in calving and newborn calf care. *Id.* In contrast, the November 9 Application specified discrete tasks, such as employees would mow yards, weed eat yards, pick up trash, take out trash, clean all buildings, mow, ted, rake, bale hay, load and unload hay, cover silage pits, clean out silage pits, throw tires and drag plastic to protect the crop, fuel and maintain all equipment, gather manure, spread manure, clean and prepare water troughs, place bulls in breeding service, remove bulls from service, check cattle for illnesses and treat as necessary, vaccinate cattle, report problems, provide feed to all animals, clean housing, repair fences, prepare feed lanes, remove manure from feed lanes, sort and lock-up cows, load and transport herd, and maintain grounds. AF 52, 71. While the listed job duties are not identical, the broad categories of duties in the December 7 Application would likely include all of the duties listed in the November 9 Application. Thus, I conclude the job duties are the same between the applications.

The CO did not satisfactorily explain his rationale for concluding that the job duties did not demonstrate a seasonal need. In response to Employer's November 9 Application, the CO stated, "the duties appear to reflect the day-to-day operations of a cattle farm which would present at any time of year. Therefore, the employer must provide additional information and documentation to establish its temporary and seasonal need." AF 53. In response, Employer described the farm's calving, breeding, and harvesting seasons. AF 53. "The farm produces hay, corn, and beef cows. Hay and corn are produced for farm consumption and for selling on the open market. Calving season begins in January and followed by breeding season in April through July. We start harvesting hay in March and will continue until Mid November depending on the weather. We start harvesting corn in September and continue through November."

The CO argued that the nature of Employer's need remained unclear.² Employer indicated that its need was seasonal due to breeding and harvesting seasons, but according to the CO "many of the listed job duties are not, on their face, seasonal, e.g., picking up trash, taking out trash, cleaning all buildings, fueling and maintenance to all equipment, gather manure, spread manure, clean and prepare water troughs, check cattle for illnesses and treat as necessary, vaccinate cattle, report problems." AF 54.

The CO concluded that "Employer's responses failed to establish that its job opportunity, with the duties described above, are tied to a certain time of year by an event or pattern." Employer described the breeding and calving season, as well as its seasonal harvest needs. Employer also provided the duration and which specific job duties were performed during particular months. *See Steven Cox Associates*, 2011-TLC-00087, slip op. at 3-4 (Dec. 23, 2010). The CO, however, did not address Employer's documentation detailing monthly tasks from January to July associated with calving and breeding, descriptions of the harvest, or the payroll records—except to highlight that Employer did not submit permanent employee records with the November 9 Application. AF 79-85. In previous correspondence, the CO reasoned that some of the job duties listed were day-to-day tasks that would be performed year round, but this is not enough to conclude there is no seasonal need. It must be determined if the employer's needs are seasonal, not whether the particular job at issue is seasonal. *See Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015). Based

² At this point in the November 9 Application process, the CO requested detailed payroll documents. Employer submitted temporary employee payroll, but inadvertently omitted permanent employee payroll records in the November 9 Application. However, Employer submitted all requested payroll records with its December 7 Application.

on the season there may be an increased need to perform day-to-day tasks. For example, if there are more cows due to breeding, there will be more manure to gather and spread. It does not follow that because these tasks are performed to some degree throughout the year that there is not a seasonal increase in need as well.

While the CO rightly asked for more information to determine if there was a seasonal need, he failed to articulate why he discounted Employer's explanations of the harvest and detailed monthly breeding and calving task descriptions to conclude there was not a seasonal need.^{3,4}

Accordingly, I find that the CO's denial of certification based on Employer's failure to show that the employment need was seasonal or temporary was unreasonable and arbitrary because the CO failed to articulate a satisfactory explanation for his action that rationally connected facts and his determinations.

ORDER

1. Based on the forgoing, the Certifying Officer's decision denying the application is reversed.
2. The case is remanded to determine the historical dates of seasonal worker need and corresponding dates for Employer's need. Employer is ordered to clarify the precise historical staffing levels and the precise historical dates (e.g., make a table of staffing levels showing January 1 to January 15, January 15 to January 31, and so on) to determine appropriate dates for Employer's requested certification.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

³ In the November 9, 2020 application, the CO also cited Employer's failure to submit payroll records. Employer's subsequent application addressed this, and was discussed above, thus it is not addressed again here.

⁴ In the first denial, the CO stated "Further, the employer failed to establish that it is augmenting ongoing operations with its temporary workers as required by the regulations." Neither the statute nor regulations, require an Employer show a seasonal *and* temporary need. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a); see also 20 C.F.R. § 655.103. Here, Employer has alleged a seasonal need.