



Issue Date: 23 February 2021

OALJ Case No.: 2021-TLC-00079
ETA Case No: H-300-20351-963840

In the Matter of:

DARRIN HOUT FARMS,
Employer.

Appearance: Lesli Downs
For the Employer

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

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On February 4, 2021, Darrin Hout Farms (“Employer”) requested administrative review of the Certifying Officer’s February 3, 2021 denial of Employer’s H-2A temporary labor certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on February 16, 2021. By Order dated February 16, 2021, the parties were granted leave to file briefs on or before February 19, 2021

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the Administrative File.

BACKGROUND

On December 22, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A (“Application”). AF 58-79.¹ The Employer’s Application requests certification for 3 agricultural equipment operators for the period beginning February 14, 2021, and ending December 1, 2021, on the basis of a seasonal need. *Id.* In Employer’s statement of temporary need Employer’s representative states:

Mr. Hout normally trades his farming equipment each year; however, he will not be doing so this year. As a result, all equipment must be thoroughly cleaned and repaired prior to spring planting. Mr. Hout must begin this process in February in order for equipment to be ready when field cultivations begins in April. Additionally, Mr. Hout planted 2000 additional acres of corn in 2020 which yielded over 250,000 additional bushels of grain that has been stored in grain bins on Mr. Hout’s farm. Farm stored grain must be hauled prior to spring so bins are emptied and ready for the next crop. In previous years, there was no need for equipment repairs and prepping because equipment was new each year. Furthermore, the employer did not have the additional 250,000 bushels of grain to haul. For these reasons, Mr. Hout needs workers to arrive earlier in 2021 as compared to 2020 to ensure equipment is ready and grain bins are emptied by April.

Additionally, Mr. Hout anticipates needing laborers through November to complete harvest based on this year’s season. This year (2020), Mr. Hout’s harvest, field work, and fertilization is still not complete. Mr. Hout’s H2A workers’ contracts ended on November 1st leaving him extremely short-handed with fall harvest still ongoing. Mr. Hout anticipates the 2021 season will follow suit, and must have an adequate labor force to complete fall harvest next year.

AF 78.

By letter dated December 29, 2020, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) finding Employer had failed to demonstrate its temporary or seasonal need. AF 43-47. The CO cited 20 C.F.R. § 655.103(d) which defines temporary or seasonal need as follows:

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

AF 46.

¹ References to the appeal file will be abbreviated with an “AF” followed by the page number.

The CO noted that Employer had filed another application for the same period which had already been denied. That file is included in the Administrative File. *See* AF 80-154. A similar but abbreviated statement of temporary need in that application stated:

Darrin Hout Farms has acquired approximately 250,000 more bushels of grain for the upcoming season as compared to 2020. Additionally, Mr. Hout normally trades his equipment each year; however, due to the current economic climate, Mr. Hout will be keeping his equipment and repairing and rebuilding it for next season. Due to the significant increase in farm land and necessary equipment maintenance, Mr. Hout has extended his dates of need to accommodate the changes in his operation.

AF 46.

The CO noted in the previous filing that payroll reports submitted with the prior application did not establish a seasonal need for the entire requested period of February 1st through December 1st and they demonstrated a need beginning no sooner than April 1st. *Id.* Further, the CO stated that Employer had not provided documentation that the stated maintenance to its equipment would take additional months to perform. Similarly the CO noted that Employer had failed to document its need in the current case. The CO stated:

The employer must provide a written schedule of equipment maintenance including equipment type, maintenance required, and estimated time of repair/maintenance. The employer must also include documentation to support its statements that it has 250,000 additional bushels of grain that has been stored in grain bins, as well as the described additional harvest need for the upcoming season that has resulted in an additional four weeks of need in November.

AF 47.

The Employer responded to the NOD on January 5, 2021. AF 34-42. Employer included the following statement in support of its seasonal need for the period requested.

1) Mr. Hout normally trades his farming equipment each year (thus, no repairs are required); however, he will not be doing so this year. As a result, all equipment must be thoroughly cleaned and repaired prior to spring planting in April. Mr. Hout must begin this process in February in order for equipment to be ready when field cultivations begins in the spring. DOL claims the employer didn't provide any documentation that the stated maintenance to its equipment would take additional months to perform. It's unclear what is meant by this statement. Clearly, if Mr. Hout is doing his own maintenance and repairs and hasn't done so in previous seasons, more time will be necessary to get this done prior to spring planting when equipment must be ready. Attached is a list of equipment that must be checked, maintained, and parts repaired/replaced. Of course, performing such maintenance on equipment requires "additional months to perform".

2) Mr. Hout planted 2000 additional acres of corn in 2020 which yielded well over 343,000 additional bushels of grain that has been stored in grain bins on Mr. Hout's farm. Farm stored grain must be hauled prior to spring so bins are emptied and ready for the next season's crop. Because of the significant increase in crop produced, laborers are necessary earlier in 2021 to ensure grain is hauled and grain bins are emptied prior to spring harvest. Attached are the production totals for 2019 and 2020 that illustrate the drastic increase in bushels produced on Mr. Hout's farm.

3) Regarding a slightly later ending date, fall harvest and tillage has lasted through November for the last five years. Mr. Hout anticipates 2021 will be no different and must have ample labor to complete the season before the colder temperature make the ground too hard to accomplish these tasks.

AF 13-14.

In its response, Employer asserts that the tasks listed in items 1 and 2 above require more time to complete earlier in the season and, therefore, the need for labor beginning in February is justified. In addition, Employer states that workers are needed later in the season as noted in item 3 to complete harvest duties. Employer argues that it must be able to adjust its dates of need due to changes on the farm. Although the Employer maintains that its need is seasonal, it argues that the exact dates of need within the season may fluctuate and therefore need to be adjusted from time to time. Employer notes that additional labor is not needed in the months of December through January due to the drastic drop in temperature in the region and due to ground hardening and significant snow cover. Regarding the CO's previous claim that its payroll records only illustrate a seasonal need for a portion of the time, Employer asserts that it did not have the two conditions listed above, that is, the 343,000 additional bushels of grain that would need to be hauled prior to spring, nor the need for pre-spring cleaning and repair of equipment because in the past equipment had been traded for other equipment. Accordingly, Employer claimed that its payroll would not reflect these two changes in its operation as they did not need workers for these purposes in the past. Employer argues, "One cannot use payroll, alone, to determine seasonality as payroll does not always reflect the true need of the employer. Changes to an operation, crops, and being understaffed are all examples of why payroll is not always an accurate picture of an employer's seasonal need." AF 14.

In support of its position, Employer submitted a detailed statement listing the farm's equipment, the required maintenance, and the number of days Employer estimated that the tasks would take. AF 25-27. Employer also submitted a detailed listing of the bushels of grain it produced in 2020 in support of its statement that it produced an additional 343,000 bushels of grain that still need to be transported from grain bins so that the bins are emptied for the next crop. AF 19-22.

On February 3, 2021, the CO issued a Final Determination - Denial in this case. AF 7-12. The Final Determination notes incorrectly that Employer is seeking 11 agricultural equipment operators; Employer is actually seeking 3 H-2A agricultural equipment operators. The Final Determination repeats the information in the Notice of Deficiency (although the notice of deficiency correctly noted that Employer is seeking 3 agricultural equipment operators). In the

Final Determination, the CO acknowledged that the Employer submitted evidence in response to the Notice of Deficiency, including the detailed statement of necessary equipment maintenance occurring in 2021 and Employer's estimate of the time required to do the maintenance and repairs. The CO noted that the schedule indicated repair work would require a total of 114 days. From this total the CO calculated that at the rate of 20 workdays per month, the necessary repair work would take nearly 6 months to complete (114 days/20 = 5.7 months). AF 6. Apparently the CO assumes that only one worker would perform the repairs, rather than the three workers requested (or the 11 H-2A workers that the Final Determination incorrectly notes).

The CO referred to Employer's previously certified application, H-300-20009-242823 (certified in 2020) whereby Employer "established a season of eight months; between April to November."² AF 6. The CO then inexplicably adds his own calculation of six months for repairs to a previous certification of eight months, and therefore determines that Employer's need exceeds 13 months, despite the fact that Employer is requesting a period of need of February 15, 2021 through December 1, 2021, a period totaling 9.5 months. Thus, the CO determined that Employer failed to prove a seasonal need and in fact has a year round need for labor. Accordingly the CO denied the application for "11 Ag Equipment Operator job opportunities." AF 6.

On February 4, 2021, Employer timely filed a request for administrative review of the CO's denial of its H-2A application. AF 1-6.

By Order dated February 16, 2021, the parties were granted leave to file briefs on or before February 19, 2021. Employer filed a timely brief, which the undersigned received on February 19, 2021. No brief was submitted on behalf of the CO.

ISSUE

Whether the Certifying Officer properly determined that Employer failed to meet its burden of establishing that Employer's need for agricultural services or labor between February 14, 2021 and December 1, 2021, is "temporary or seasonal" as defined by the applicable regulation at 20 C.F.R. §655.103(d).

SCOPE OF REVIEW

Where the employer has requested administrative review, as in the current case, the applicable regulation provides:

[W]ithin 5 business days after receipt of the ETA administrative file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the

² This is also an inaccurate statement by the CO as the record establishes that Employer was certified in 2020 for three agricultural equipment operators for the period of April 1, 2020 to November 1, 2020, a period of seven months. See AF 3.

action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery.

20 C.F.R. § 655.171(a).

DISCUSSION

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

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

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

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161. Employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). A “seasonal” need occurs if employment is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103(d).

In determining temporary need for purposes of the H-2 temporary alien labor certification program it is well settled that it is “not the nature of the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *See Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). (It is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal). *See also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).

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

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

The record in this case shows that Employer was certified in the previous year (2020) for three H-2A agricultural equipment operators for the period of April 1, 2020, through November 1, 2020. AF 133. The current application reflects that Employer is requesting three agricultural equipment operators for the period of February 14, 2021, through December 1, 2021. Thus, Employer is seeking its three agricultural equipment operators for an additional one-and-one-half months at the beginning of its period of need, and an additional month at the end of its period of need, for a total of nine-and-one-half months.

BALCA cases support that when the dates of need listed on an application vary from the dates listed on previous applications, the employer is required to justify the reasons for the change. *Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011)(employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor).

In the instant case, Employer provided the documentation requested by the Certifying Officer in the Notice of Deficiency. Specifically, the Employer provided a detailed schedule of the necessary repairs and maintenance on its farm equipment as well as an estimate of how many hours would be required. AF 25-27. Employer reasonably explained that it did not need to perform this maintenance in prior years because it traded its equipment in, and therefore, in prior years, any necessary maintenance had already been performed when it received its equipment in the spring. Employer also submitted a detailed spread sheet of the number of additional bushels of grain produced in 2020, in support of its claim that these additional bushels of grain would need to be transported from grain bins in order to clear the bins for the upcoming season. AF 19-22. Again, Employer notes that this work was not necessary in the previous year. Employer also argues that it did not have sufficient labor to complete the necessary harvest work in the fall in several prior years, and therefore requested that its period of need be extended to December 1, 2021, as opposed to November 1, as in the previous year. Employer also previously submitted payroll records, although it argues that these records cannot reflect the additional period requested in the current application, as Employer had not utilized temporary labor in the additional months previously; thus the additional labor is not represented on its payroll records. In that regard Employer states, "Changes to an operation, crops, and being understaffed are all examples of why payroll is not always an accurate picture of an employer's seasonal need." AF 35.

In the final determination, the CO acknowledged the submitted documentation. However, it appears that the CO did not accurately consider the Employer's reasonable explanations or important facts and considerations in the record. Further, the CO's analysis of the submitted documentation is flawed. One indication of the CO's inadequate consideration of the record is the fact that the final determination notes that Employer is seeking eleven agricultural equipment operators. AF 10, 12. A review of the record shows that Employer is actually seeking three H-2A agricultural equipment operators. AF 66. Although Employer's ETA Form 790 notes it is seeking

eleven temporary workers, it is requesting that only three of these positions be filled through the H-2A program. *Id.* The three requested H-2A positions are correctly noted in the CO's Notice of Deficiency (AF 46), but the Final Determination inaccurately notes that Employer has applied for eleven agricultural equipment operators and concludes that "this application is denied for 11 Ag Equipment Operators job opportunities." AF 12.

Further, the CO's analysis of the Employer's detailed statement regarding the necessary maintenance and repairs on farm equipment in 2020, and estimate of time required, is clearly flawed. Employer submitted a detailed statement listing each piece of farm equipment, and the maintenance and repairs required, as well as an estimate of the necessary time needed to complete the noted repairs and maintenance, specifically addressing each piece of equipment. Although the CO correctly notes that Employer estimated the total number of work days required as 114 days, the CO calculated the necessary time to complete the work as approximately six months (114 days/20 = 5.7 months). AF 6. The flaw in the CO's calculation is that it assumes the work will all be done by one worker. Further exacerbating this error, the CO then concludes that Employer's period of need is actually six months greater than the eight months³ requested in the previous year for a total of more than 13 months. Thus the CO concludes Employer has a year-round need for labor.

First of all, the CO incorrectly assumes that the additional days of equipment maintenance will be performed by one worker. If the number of additional days for required equipment maintenance in 2021 (114 days) is divided by the three H-2A workers requested, the total days required is much closer to the total of 30 additional work days between February 14, 2021, and April 1, 2021, requested by the Employer in the current application. Further, there is no reason for the CO to assume that none of the Employer's other staff would be performing at least a part of this additional maintenance. The CO's conclusion that Employer is now requesting a period of over 13 months of labor cannot be supported by the record in light of the fact that Employer is only requesting a period of need beginning February 14, 2021, and ending December 1, 2021, which totals 9.5 months. Accordingly the undersigned finds that the CO's conclusion that Employer has a year-round need for labor of over 13 months is not reasonable, nor is it based on factual information in the record.

The CO also fails to adequately consider the other explanations provided by the Employer regarding the change in its requested period of need for the three H-2A agricultural equipment operators requested. Although the Employer is required to support the change in the requested dates of need in the current and prior applications, Employer has provided the necessary documentation and explanation for the changes.

After considering the documentation provided by the Employer, as well as the explanations supporting the additional months of need in the current application, the undersigned finds that Employer has met its burden of proving the requested period of need between February 14, 2021, and December 1, 2021. *See Rodriguez Produce, 2016-TLC-00013* (Feb. 4, 2016)(an employer must justify a need for changed dates through evidence and argument). Employer has substantiated

³ The CO also inaccurately notes the previous certification as totaling eight months, when it in fact totals seven months from April 1, 2020, through November 1, 2020.

the additional period of employment between February 14, 2021, and April 1, 2021 with the documentation that shows the need for the additional equipment maintenance. Employer's records provide additional support for the period of need, which show the additional bushels of grain produced in 2020. These records likewise support the Employer's explanation that the additional bushels of grain will require transport from the grain bins so that the bins will be available for the upcoming year. Employer has further provided a reasonable explanation for the additional one month, from November 1, 2021, to December 1, 2021, with the assertion that the fall harvest and tillage has lasted through November in past years and that he anticipates this to be the case in 2021.

Employer had provided some payroll documentation previously requested. *See* AF 84. However, Employer reasonably asserts that these records cannot reflect the additional months of temporary labor requested in the current application, as temporary labor had not been used in the past for the additional months requested. *See Sur-Loc Flooring Systems, LLC*, 2013-TLN-00046 (Apr. 23, 2013)(reversing denial where the employer sufficiently justified the number of workers requested in its application and made good faith effort to provide alternative supporting documentation to the requested payroll records).

CONCLUSION

After reviewing the totality of the evidence in the record, I find the basis for the CO's denial is not supported by the evidence, as outlined above. In addition, I find Employer has met its burden of proving its seasonal need for three agricultural equipment operators for the requested period of February 14, 2021, through December 1, 2021.

ORDER

Accordingly, IT IS HEREBY ORDERED that the CO's denial of Employer's application for temporary labor certification is **REVERSED** and this case is remanded to the Certifying Officer for further processing of this application for three agricultural equipment operators for the requested period of February 14, 2021, through December 1, 2021.

For the Board of Alien Labor Certification Appeals:

SEAN M. RAMALEY
Administrative Law Judge