In the Matter of:
GREENTOP ACRES, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises from a request by GreenTop Acres, LLC (Employer) for administrative review of the Certifying Officer’s (CO) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. Part 655, Subpart B.

On January 22, 2021, Employer submitted a letter requesting the Board of Alien Labor Certification Appeals (BALCA) to review the CO’s denial of certification in the above-captioned H-2A temporary labor certification matter. The matter was assigned to me, Administrative Law Judge Larry W. Price, on February 1, 2021. I received the appeal file on the same day.

Per the regulations, an ALJ must either (1) hold a hearing within five business days of receiving the administrative file and render a decision within ten calendar days after the hearing, or (2) conduct expedited administrative review and issue a written decision within five business days after receiving the administrative file. (20 C.F.R. §§ 655.171(a)–(b). Here, Employer’s letter dated January 22, 2021 requested expedited administrative review. (AF at 11).¹

For the reasons set forth below, the CO’s denial of certification will be affirmed.

Statement of the Case


¹ Throughout this Decision and Order, I will use “AF” to signify the Administrative File, followed by a corresponding page number.
On December 15, 2020, the CO issued a Notice of Deficiency. (AF at 50–55). The CO’s chief deficiency is that Employer has failed to provide sufficient documentation and support for its temporary and seasonal need. (AF at 52). The CO further asserted that Employer’s history of submitting applications for farmworkers would indicate that Employer has a need for farmworkers year round, rather than seasonally or temporarily. (AF at 53–54). The CO points to the similarities between the job description in the instant case and the job descriptions in Employer’s previous applications to highlight that Employer’s need for farmworkers is not seasonal, but constant. Those descriptions are as follows:

H-300-20337-935251: Prepare sites for seeding corn silage; prepare fertilizer; seed and plant corn silage; apply fertilizer and fungicide. Operate farming equipment to harvest and store corn silage. Distribute corn silage feed to animals. Move cattle in stalls, prepare animals for calving, assist in delivery of offspring, clean stalls and facilities.

H-300-20225-765987: Prepare sites for seeding corn silage; prepare fertilizer, seed and plant corn silage; apply fertilizer and fungicide. Operate farming equipment to harvest and store corn silage. Distribute corn silage feed to animals. Move cattle in stalls, prepare animals for calving, assist in delivery of offspring, clean stalls and facilities.

H-300-20151-614210: Responsible for operating and performing all field operation services using agriculture equipment and technologies to till soil, harvest crops, seeding; perform routine maintenance and repairs on all machinery & equipment; execute preventative maintenance and notify Manager of current or potential mechanical or electrical issues.

H-300-19224-964492: Prepare sites for seeding corn silage; prepare fertilizer, seed and plant corn silage; apply fertilizer and fungicide. Operate trucks, tractors and other farming equipment to distribute corn silage feed to animals. Maintain equipment, move cattle in stalls, prepare animals for calving, assist in delivery of offspring, clean stalls and facilities.

(AF at 53–54).

The CO argues that, while the duties vary slightly, they overlap a great deal and are all tasks that could be viewed as general farm work duties. Further, the CO argues that it is especially significant that, while each job posting does not exceed 10 months per application, collectively, Employer uses temporary workers performing general farm work duties in every month of the year. Thus, the CO concludes, the work cannot be considered tied to a certain time of the year as is required for a showing of seasonal need. (AF at 54).

Additionally, the CO notes Employer’s failure of to provide summarized monthly payroll reports for a minimum of three previous calendar years in this application and previous applications. (AF at 54).

To remedy these deficiencies, the CO required Employer to provide the following:
1. A statement describing the employer’s (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the year;

2. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Farmworkers the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and

3. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF at 54–55, emphasis in original).

On December 15, 2020, Employer submitted a response to the Notice of Deficiency providing monthly payroll summaries for three previous calendar years. Additionally, Employer wrote:

Harvest time starts approximately from the beginning of August and ends around the end of October to early November. At this point, we use family members of the business to work during this period. It would be helpful to have additional employees to help as the family members have employment elsewhere.

(AF at 41–48).

On January 7, 2021, the CO issued Denial Letter denying Employer’s application for failure to establish seasonal need. (AF 28–39). The CO wrote:

The court in In the Matter of Grandview Dairy, 2009-TLC-00002 (2008) found that 10 months is a permissible threshold at which to question the temporary nature of a stated period of need. The dates of need described on the employer’s ETA Form 790A, Section A.3 and A.4, coupled with the dates of need for the employer’s previous applications shows the employer’s need for Farm Workers and Laborers exceeds 10 months.

The employer’s recent program history is show below.

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Employer</th>
<th>Status</th>
<th>Beginning Date of Need</th>
<th>Ending Date of Need</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-19224-96492</td>
<td>GreenTop Acres, LLC</td>
<td>Denied</td>
<td>10/16/2019</td>
<td>08/15/2020</td>
</tr>
<tr>
<td>Application ID</td>
<td>Employer Name</td>
<td>Status</td>
<td>Date Denied</td>
<td>Date End</td>
</tr>
<tr>
<td>--------------------</td>
<td>------------------------</td>
<td>--------------</td>
<td>-------------------</td>
<td>--------------</td>
</tr>
<tr>
<td>H-300-20151-614210</td>
<td>GreenTop Acres, LLC</td>
<td>Denied</td>
<td>08/01/2020</td>
<td>05/31/2021</td>
</tr>
<tr>
<td>H-300-20225-765987</td>
<td>GreenTop Acres, LLC</td>
<td>Denied</td>
<td>10/16/2020</td>
<td>08/15/2021</td>
</tr>
<tr>
<td>H-300-20337-935251</td>
<td>GreenTop Acres, LLC</td>
<td>Received</td>
<td>02/01/2021</td>
<td>08/15/2021</td>
</tr>
</tbody>
</table>

The employer’s most recent filing (H-300-20225-765987) was denied as the employer failed to respond to the NOD, which was issued as the employer’s initial filing failed to demonstrate a seasonal need. Prior to that, the employer’s filing for H-300-20151-614210 was also denied for failing to establish seasonal need. That denial was appealed and affirmed by BALCA, *In the Matter of Greentop Acres LLC.*, 2020-TLC-00088 (July 8, 2020). (AF at 30–31). Thus, the CO concluded, Employer is requesting to use workers for the same job opportunity in every month of the year, and, therefore, it has failed to demonstrate that their need is tied to a certain time of year by an event or pattern (AF at 39).

Additionally, the CO stated that the job descriptions on each application, including the present application, have not been seasonal on their face. Rather, the duties listed reflect the day-to-day operations of a cattle farm at any time of the year. (AF at 32). The similarity of job duties between all four applications, the CO wrote, indicates that the employer has a need for Farmworkers year round. (AF at 33). The CO stated:

> [A]lthough the dates of need do not exceed 10 months for each application listed individually, collectively the filing history indicates the employer is using temporary workers in every month of the year, demonstrating the employer has a year-round need for Farmworkers at the same worksite. Therefore, the work cannot be considered tied to a certain time of the year as is required for a showing of seasonal need.

(AF at 33–34).

With respect to Employer’s response including three years of monthly payroll, the CO wrote:

The NOD requested the employer to explain what had changed, i.e. crops, commodities, etc. that it now has a seasonal (sic.). However, the employer’s response did not offer any explanation that addresses a change in its operations that its need is seasonal.

(AF at 38). The CO argued that Employer’s submitted payroll shows that it is seeking to employ H-2A workers in service of its ongoing operations, rather than, as is required by the regulations, augmenting an existing workforce with labor levels far above ongoing operations. (AF at 39).

On January 26, 2021, Employer submitted an appeal request letter. (AF at 8–11). On January 17, 2021, Employer submitted a second request for administrative review, including Employer’s certification as a limited liability company, an amendment to its articles of
organization, and its agent/registrant information from the State of Ohio. (AF at 1–7). In its appeal request letter, Employer wrote:

GreenTop Acres is a newcomer in crop farming and just started to utilize the H2a program in 2018. We made a clerical mistake in its Ag Machine Operator H-2A application; however, the mistake should not penalize the employer from utilizing the H-2A program for its seasonal Farmworker position. We are in good faith trying hard to provide as much information as possible promptly. However, with the on-going pandemic situation in 2020, things are very hectic at the farm, making it hard to respond on time leading to the denial of H-300-2025-765987 on September 4, 2020.

For the current H-300-20337-935251, this is a follow-up refiling for the same position as stated in H-300-2025-765987. We refile the case because we are finally able to compile the 2017 to 2019 payroll summary as requested and we are desperately in need of the Farmworker. Right now, the two owners are juggling between working at the crop farmland and managing the company.

We believe we have provided a thorough explanation and detailed information for our company’s seasonal need for a Farmworker. The Ag Machine Operator was only a one-time occasional need.

We hereby request an expedited administrative review on our H-2A certification (H-300-20337-935251) to hire the Farmworker to work in our field during this period.

(AF at 11).

Employer also included the following table, explaining each application, in its letter:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Employer Name</th>
<th>H-2A Position</th>
<th>Status</th>
<th>Beginning Date of Need</th>
<th>Ending Date of Need</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-300-19224-964492</td>
<td>GreenTop Acres LLC</td>
<td>Farmworker – Crop</td>
<td>Approved</td>
<td>9/10/2019</td>
<td>10/16/2019</td>
<td></td>
</tr>
<tr>
<td>H-300-20151-614210</td>
<td>GreenTop Acres LLC</td>
<td>Ag Machine Operator</td>
<td>Denied</td>
<td>6/17/2020</td>
<td>05/31/2021</td>
<td>We should have requested for 8/1/2020 to 11/30/2020 and a one-time occurrence</td>
</tr>
<tr>
<td>H-300-2025-765987</td>
<td>GreenTop Acres LLC</td>
<td>Farmworker – Crop</td>
<td>Denied</td>
<td>9/4/2020</td>
<td>8/15/2021</td>
<td>This is our annual seasonal need. We passed the deadline to provide the 2017-2019 payroll summary response due to a pandemic situation in the US. We have been busy dealing with various situations on the farm, hence a denial.</td>
</tr>
</tbody>
</table>
We have the 2017-2019 payroll summary completed; hence this is a follow-up refiling from above. Please note that the end date is the same. The start date was changed due to 75 – 60 calendar days before the start date of work H2A filing requirement.

This case was docketed with BALCA on February 1, 2021, and the CO transmitted the Appeal File to BALCA on February 1, 2021. Employer requested expedited administrative review, which binds the Court to issue a Decision and Order within five business days of receiving the appeal file. 20 C.F.R. § 655.171(a).

Discussion

When an employer requests administrative review of an unfavorable decision made by the CO, the administrative law judge must affirm, reverse, modify the CO's decision, or remand to the CO for further action, and specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Neither the statute nor regulations supply a standard of review. Under BALCA precedent, the CO’s decision will be upheld unless that decision is arbitrary, capricious, or otherwise not in accordance with law. GreenTop Acres, 2020-TLC-00088, slip op. at 4 (July 8, 2020) (citing J&V Farms, LLC, 2016-TLC-00022, slip op. at 3 (March 4, 2016)).

To qualify for the H-2A program, an employer must establish 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). Section 655.103(d) defines both “temporary” and “seasonal;” it states:

[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).

Here, the CO concluded that Employer failed to demonstrate a temporary or seasonal need because the record tends to show Employer’s need for workers is year-round rather than seasonal. Employer previously filed three applications for temporary labor certification: H-300-20225-765987, H-300-20151-614210, and H-300-19224-964492. Only H-300-19224-964492, an application for one Farmworker to begin on October 16, 2019 and end on August 15, 2020 was approved. (AF 82—114, 115–165, and 166–266).
Employer argues that its application for an Ag Machine Operator, H-300-20151-614210, was denied due to a “clerical error.” Employer stated that the need arose due to two owners deciding not to work and operate the farming machine in 2020. Further, Employer explained that it should have emphasized that it was a one-time request, and that they should have requested a work period of four months rather than the requested ten months. This mistake, Employer argued, should not impact other H-2A applications. (AF at 9).

However, even assuming that the need described in H-300-20151-614210 was indeed a one-time, four-month need, rendering Employer’s reoccurring annual need only ten months, Employer still needs to show that the ten-month need for a Farmworker is tied to a pattern or event occurring in that particular season.

Employer asserts that the application at issue as well as its most recent, previous application, H-300-2025-765987, represent its true seasonal need for one Farmworker. That need would start on October 16, 2020 and end on August 15, 2021. (AF at 8–9). Employer explains that the job description for this and its previous Farmworker applications are the same or very similar because they represent the same seasonal job. (AF at 9). The job description for one Farmworker for Employer’s desired start and end dates includes the following duties:

Prepare sites for seeding corn silage; prepare fertilizer, seed and plant corn silage; apply fertilizer and fungicide. Operate farming equipment to harvest and store corn silage. Distribute corn silage feed to animals. Move cattle in stalls, prepare animals for calving, assist in delivery of offspring, clean stalls and facilities.

(AF at 10). Employer describes these duties as 50% farming, 35% moving cattle into stalls, preparing cattle for calving and assisting in the delivery, and cleaning the cattle’s stalls and facilities, and 15% operating trucks, tractors, and other farming equipment. (AF 10–11).

Employer described its dairy farm operation, stating that it has two essential activities: (1) producing milk from dairy cows 24 hours, 7 days a week, 365 days a year, and (2) growing crops for feeding the cows. Employer further states that harvest of those crops starts around the beginning of August and ends around the end of October to early November. During the harvest, Employer stated, it would be helpful to have additional employees to help ease family members’ farm work duties. (AF at 42).

However, Employer’s explanation does not controvert the CO’s conclusion that these duties reflect the general, day-to-day operations of a dairy farm any time of the year. (AF at 32). Essentially, the CO argues that even if Employer’s need is “seasonal” in that Employer would like an H-2A worker during the same ten-month period each year, the need for the kind of work to be performed is not tied to a unique event or pattern during that reoccurring ten-month period. (See AF at 32–33).

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2 Employer explained that the present application (H-300-20337-935251) is a follow-up of its previously denied application (H-300-20225-765987). The present application reflects the remaining time between start and end date of the season outlined in the first application. Employer further explained that it believes that the denial of the prior application is due to its inability to meet the deadline in providing the payroll information for years 2017–2019. (AF at 8–9).
Although Employer asserted that it has a heightened need during the harvest, Employer’s application for an H-2A Farmworker spans ten months, rather than the four-month harvest season. Although there might reasonably be some additional harvest-related work prior to and after the harvest season that would justify a longer-than-four-month hiring period, Employer’s listed job duties appear to include day-to-day operations of a dairy farm (e.g., moving cattle, preparing cattle for calving, assisting in delivery of calves, etc.) rather than work tied to the harvest season.

I am to uphold the CO’s decision unless it is arbitrary, capricious, or otherwise not in accordance with law. GreenTop Acres, 2020-TLC-00088, slip op. at 4 (July 8, 2020) (citing J&V Farms, LLC, 2016-TLC-00022, slip op. at 3 (March 4, 2016)). Here, besides conclusory statements of need, Employer has not submitted anything in this case that would suggest its need for one Farmworker for a ten-month period 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). Accordingly, I find no adequate reason to disturb the CO’s rationale for denying the application.

ORDER

Based on the foregoing, IT IS ORDERED that the Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

LARRY W. PRICE
Administrative Law Judge

LWP/KRS/jcb
Newport News, Virginia