OALJ Case No.: 2021-TLC-00132
ETA Case No.: H-300-21069-136775

In the Matter of:

Hays Harvesting, Inc.,
Employer.

Before: Noran J. Camp
Administrative Law Judge

Appearances: David J. Stefany, Esq.
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For the Certifying Officer

DECISION & ORDER AFFIRMING DENIAL DETERMINATION OF THE CERTIFYING OFFICER

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 (“H-2A workers”) to perform agricultural work within the United States on a seasonal or temporary basis.

For the reasons set forth below, the April 5, 2021 denial determination of the Certifying Officer will be affirmed.

I. PROCEDURAL BACKGROUND

On or about March 8, 2021, Hays Harvesting, Inc. (“Employer”) – acting through its “agent,” H2A Complete II, Inc. (“Complete”) – filed an Application for Temporary Labor Certification under the H-2A program. AF 36. Employer is an “H-2A Labor Contractor” (“H-2ALC”) (AF-36), meaning that it is an entity that recruits H-2A workers who will be employed to work for farmers, ranchers and other “fixed-site employers.” See 20 C.F.R. § 655.103(b). The application was signed by Peter B. Hays, identified as the “Owner” of Employer (AF-41), and by Terri Forrester, signing on behalf of Complete (AF-39).

The application sought certification for 29 “seasonal” H-2A workers to do tree cultivation work from May 10, 2021 through November 15, 2021, at Becker Tree Farm and Nursery (“Becker”), in Martin County, FL. AF 36, 45. On March 18, 2021, the Certifying Officer (“CO”), issued a Notice of Deficiency (“NOD”), asserting that the application failed to show a “seasonal” need for the 29 workers. AF 25, 27. The CO cited Employer’s filing history in concluding that Employer “has a need for farmworkers in every month of the year.” AF 27. Specifically, that history showed that Claimant had previously attested that it needed H-2A workers in various counties in Southern Florida, for 49 consecutive months – from October 11, 2019 through November 15, 2021, as follows:

- 169 workers for eight (8) months (AF 382, certification approved):
  - October 11, 2019 through June 19, 2020 (AF 433).
  - “Farmworkers and Laborers, Crop, Nursery, and Greenhouse” (AF 433).
  - “Citrus” harvesting in Southern Florida (AF 435);

- 29 workers for seven (7) months (AF 259, certification approved):
  - June 20, 2020 through January 31, 2021 (AF 300)
  - “Farmworkers and Laborers, Crop” (AF 306)
  - Tree cultivation at Becker Tree Farm and Nursery (AF 318);

- 100 workers for seven (7) months (AF 91, certification denied):
  - October 31, 2020 through June 4, 2021 (AF 125)

1 The Certifying Officer acts on behalf of the Office of Foreign Labor Certification (“OFLC”), Employment and Training Administration (“ETA”), U.S. Department of Labor (“DOL”).

2 Each application was signed by “Peter B. Hays, Owner,” or “Peter B. Hays, President,” under oath. See AF 41, 130, 305, 445,
Employer’s response to the NOD asserted that it “has made operational changes and has decided to no longer seek citrus harvesting petitions so its past case filings are not a legitimate factor in evaluating its current seasonal needs.” AF 20.

On April 5, 2021, the CO denied the application. AF 13. Rejecting Employer’s “operational changes” explanation, the CO found that the explanation only “highlights the employer’s ability to select contracts that allow it to conform to the regulations of the H-2A program.” AF 17. In fact, the CO concluded,

employer’s filing history coupled with the present application shows a year round need for farmworkers in the same area of intended employment (Port St. Lucie MSA in Florida) that is limited only by the type of the contracts it chooses to accept. An employer’s ability to manipulate its “season” in order to fit the criteria of the H-2A program reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern . …

AF 17-18.

On April 9, 2021, Employer filed a request for a de novo review of the denial. See 20 C.F.R. §§ 655.164(b) (“Denied certification”), 655.171(b) (“De novo hearing”). AF 3. The basis for the appeal is that Employer “no longer seeks to provide services to citrus growers in south Florida,” and therefore its application cannot be denied based upon its past need for year-round workers. AF 3-4.

The Administrative File (“AF”) from the Employment and Training Administration (“ETA”) was transmitted to the Office of Administrative Law Judges (“OALJ”) on April 19, 2021. The parties then participated in an on-the-record telephone conference call on April 21, 2021, in which we settled the logistics of the upcoming hearing, which was scheduled for April 30, 2021.

On April 29, 2021, the parties submitted their exhibit lists and witness lists. I admitted the following exhibits:
Administrative File (“AF”) AF-i through AF-551.  
Employer’s Exhibits (“EX”) 1 through EX-11.  
CO’s Exhibits (“CX”) 1 and CX-2.

The listed witnesses were:

- Mr. Peter B. Hays, Jr., of Hays Harvesting, Inc.,  
- Ms. Skyla McCarthy, of Hays Harvesting, Inc., and  
- Mr. Matt Muenich (via affidavit), of Becker tree Farm (Employer’s Amended Witness List).

- Mr. John Rotterman, CO  
  (CO’s Witness List).

I conducted the Formal Hearing on April 30, 2021. The testifying witnesses were:

- Mr. Peter B. Hays, Jr., of H2A Complete II;  
- Ms. Skyla McCarthy, of H2A Complete II;  
- Mr. John Rotterman, CO.

The attentive reader may puzzle at the varying descriptions of Hays Jr. and McCarthy. Employer’s original Witness List included the two as its own employees – “Peter Hays, Jr., President,” and “Skyla McCarthy, Office Manager.” Both were identified as employees of “Hays Harvesting, Inc.” However, at the Formal Hearing, both Mr. Hays and Ms. McCarthy were identified, while testifying, as not being employees of Hays Harvesting, Inc., but rather, employees of Complete (Employer’s agent). They testified that they had not been employed by Employer since either November 2020 or January 2021, months before the witness lists were submitted. In fact, no actual employee of Hays Harvesting, Inc. testified at the hearing.

The government timely interposed an objection to the mis-identifications at the hearing. The government credibly asserts that it was prejudiced by mis-identification of Mr. Hays and Ms. McCarthy as employees of Employer. Had the CO known that they were not such employees, and that in fact, Employer would not call any of its employees, the CO would have considered amending his own witness list. Certifying Officer’s Brief (“CO Brief”) at 4 n.4.

The parties thereafter submitted post-hearing briefs. This Decision and Order is based on the Administrative File, the evidence and testimony adduced at the Formal Hearing, and the

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3 AF-i is the Transmittal Letter referring the case to the Office of Administrative Law Judges. AF-ii and AF-iii are the “Case Index for ET Case Number: H-500-21069-136775.”

4 On April 30, 2021, the day of the Formal Hearing, Employer submitted an Amended Witness List. This list corrected a “scrivener’s error,” by re-identifying Peter Hays, Jr., as “General Manager,” rather than “President.” Both he and McCarthy were still listed as employees of Hays Harvesting, Inc.
applicable law. See Pursuant to 20 C.F.R. § 655.171(b)(2).

II. STANDARD OF REVIEW

As noted, Employer has requested a de novo review of the CO’s denial. Pursuant to the regulation governing such appeals, 29 C.F.R. § 655.171(b), the Formal Hearing was conducted under the procedures of 29 C.F.R. Part 18. Because the review is “de novo,” I consider the CO’s decision anew, including new evidence submitted at the Formal Hearing. Accord, Ndiaye v. CVS Store No. 6081, ARB No. 05-024, 2006 WL 3508487 at *3 (Nov. 29, 2006 ) (per curiam) (“Under a de novo standard of review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court.”). Accordingly, I will substitute my own judgment for the CO’s, and am not bound by any of the CO’s determinations.

III. THE LAW

The H-2A visa program allows domestic employers to hire nonimmigrant foreign workers for agricultural labor on a “temporary” or “seasonal” basis. See Hispanic Affairs Project v. Acosta, 901 F.3d 378, 382 (D.C. Cir. 2018) (“By law, H-2A visas may issue only if the employer’s need for the worker is temporary or seasonal.”). The burden of establishing its entitlement to a certification to hire H-2A workers is upon the employer. See 20 C.F.R. § 655.161(a) (certification may issue only if “employer has established” its need, and its compliance with all applicable regulations) (my emphasis).

To meet its burden, Employer must show that its need for “seasonal” workers “is tied to a certain time of year by an event or pattern, such as a short annual growing cycle.”5 20 C.F.R. § 655.103(d) (my emphasis). Regulations under the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), more specifically define “seasonal” work as being of the kind “exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year.” 29 C.F.R. § 500.20 (my emphasis).6

IV. THE POSITIONS OF THE PARTIES

Employer rests its entire position on the following assertion:

Hays Harvesting revised its business model in accordance with the

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5 In addition, Employer must comply with all the requirements of the applicable regulations. See 20 C.F.R. § 655.161(b). Employer must show that it has “complied with the requirements of parts 653 and 654 of this chapter; complied with all of this subpart, including but not limited to the timeliness requirements in § 655.130(b); complied with the offered wage rate criteria in § 655.120; made all the assurances in § 655.135; and met all the recruitment obligations required by this subpart.” 20 C.F.R. § 655.161(b).

6 The CO asserts that “10 months is an appropriate threshold for a CO to question whether an employer’s need is of a seasonal nature.”
information provided in the Department’s Denial letter by ceasing to perform citrus harvesting work, performing work solely for Becker Tree Farm, and divesting itself of its citrus harvesting equipment and employees who historically had performed such work. Consequently, Hays Harvesting has not performed any citrus harvesting work since June 19, 2020.

Employer’s Brief (“ER Brief”) at 2-3. Because of this asserted revision in its business model, Employer argues that it is improper to consider its past work providing citrus harvesting work in determining whether it has a seasonal need.

In support of the assertion that Hays Harvesting, Inc. has a “revised … business model,” Employer relies on the testimony of Peter B. Hays, Jr. (“Hays Jr.”), an employee of H2A Complete, II, Inc. Hays Jr. testified that he knows of Employer’s new business model because of “discussions” he had with his father, Peter B. Hays, Sr. (“Hays Sr.”), the President, Owner and sole employee of Employer. However, Employer offered no direct testimony by Hays Harvesting itself, whether through Hays Sr. or otherwise. Employer offered exhibits, including ones apparently showing Employer invoices to Becker. However, it offered no evidence of its revised business model, nor of its assertion that it would not hire workers for citrus operations in the future, other than the “discussions” Hays Jr. says he had with his father. 7

The CO’s position is that Employer is simply manipulating its “need” to fit within the H-2A program, rather than seeking seasonal workers for an actual seasonal need.

V. DISCUSSION

There are many interesting issues presented by this case. 8 However, since Employer hangs its entire case on its asserted revised business plan, I will first determine whether Employer has presented sufficient evidence of this revision. Since it has not, I will not address the other possible issues raised by this case.

As noted above, Employer’s pre-hearing submissions stated that it would call as witnesses, two of its current employees – “Peter Hays, Jr., President, Hays Harvesting, Inc.” and “Skyla McCarthy, Office Manager, Hays Harvesting, Inc.” Employer’s Witness List (Apr. 29, 2021).

7 Indeed, neither Hays Jr. nor McCarthy were willing to testify that they would not simply return to Hays Harvesting and hire the H-2A workers for citrus work if the CO’s decision were reversed.

8 Is it proper for the CO to look to historical applications, including rejected applications, in considering the current application? When, if ever, does the CO have to consider a genuine change in business plan in considering the current application? Is it a genuine change in business plan when an H-2A employer, having been denied H-2A certification, immediately shifts the entirety of its operations – all of its administrative staff, H-2A recruited workers, crew leaders, equipment, housing, vans, trailers – to its “agent” which then gets the certification for the work? How to weigh allegedly incorrect advice an employer receives from its H-2A agent. Is ten (10) months the proper cut-off for determining that work is “seasonal?”
The day of the hearing, Employer filed an amended witness list changing Hays Jr.’s description to “Peter Hays, Jr., General Manager, Hays Harvesting, Inc.”9 Employer’s Amended Witness List (Apr. 30, 2021).

Only after the hearing had begun, however, did counsel for Employer disclose that, actually, it was not calling any witness employed by Hays Harvesting, Inc. That is because Hays Jr. had been an employee of H2A Complete II – not Hays Harvesting, Inc. – since January 1, 2021 (or, possibly, November 29, 2020), months before the witness disclosures were filed. And months before the March 2021 Hays application at issue here was filed. The same is true for Ms. McCarthy. Counsel for Employer never offered a “scrivener’s error” – or any other – explanation for the error in Employer’s Amended Witness List. Instead, Mr. Hays was simply put on the stand, sworn in, and testified that he was the “General manager of H2A Complete” (Tr. 20-21), and that he had not been employed by Employer since January 1, 2021 (or, possibly, November 29, 2020). Tr. 77. McCarthy’s true information was similarly revealed on the stand.10

In any event, Hays testified that he had no first-hand knowledge of Hays’s future business plans. Instead, he only had “discussions” with his father about it. Tr. 54-55, 64-65. Also, he had “no idea” if Hays would have continued citrus operations if the application had been approved. Tr. 65. Ms. McCarthy also could not provide any evidence of Employer’s future plans. Tr. 96. In short, no one with knowledge testified about Hays’s future plans. The one person who would presumably have knowledge – Hays Sr., the President, Owner and sole employee of Hays Harvesting, Inc. – was not identified as a witness, was not called to testify, and did not testify. Nor did he submit a sworn statement.

Hays Jr. appeared to testify about the matter from his own knowledge:

Hays Harvesting now is to pursue the tree farm and the nursery business and get away completely from the citrus. … The vision going forward for Hays Harvesting is pretty much to pursue the nursery tree farm business. We see an opportunity with growth there.

Tr. 40-41. However, it emerged on cross-examination that he only “knew” this based upon “discussions” he had with his father:

Q: You testified about your knowledge of Hays Harvesting future plans. What’s the basis of that knowledge?

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9 Counsel explained that the previous description of Mr. Hays as a “scrivener’s error.” Employer’s Amended Witness List at 1 n.1.

10 I will not call the witness list revelation an “ambush,” because for all I know, counsel for Employer was as surprised as anyone that Hays Jr. and McCarthy did not work at Hays Harvesting, Inc. And, it would have been an odd legal strategy in any event, since it deprived Employer of any witness who could have testified to its future plans.
A: Discussions.

Q: And do you provide any business advice to your father regarding Hays Harvesting?

A: Discussions.

Tr. 54; see also Tr. 52 (direct) (“[f]rom his and my discussion”).

I do not consider Hays’s hearsay “discussions” with his father to be reliable evidence of Employer’s future plans. I particularly will not consider it to be reliable in light of counsel’s mis-identifications of Hays Jr. and McCarthy, and the subsequent failure to call anyone with actual, first-hand knowledge Employer’s plans.11

Accordingly, on the critical issue here – whether Employer genuinely changed its business plans so that it no longer had “need” of H-2A workers for every month of the year – I have the same information the CO had. Namely, I have Employer’s sworn attestation that it needed workers every month of the year, and no evidence to rebut that attestation.

Even assuming that the workers Employer needs will work at different fixed sites – some doing citrus harvesting, some doing tree cultivation – the issue before me is whether Hays Harvesting, Inc. – not Becker Tree Farm or citrus farmers – needs workers on a “seasonal” basis, or on an every-month-of-the-year basis. The only reliable evidence before me is that Employer needs these workers every month of the year, as attested to, under oath, by its applications.12

Employer has thus failed to meet its burden to show that it needs these 29 H-2A workers on a “seasonal” basis.

11 And worse, Employer’s mis-identification functionally deprived the CO of the opportunity to call a Hays employee as its own witness, since the CO reasonably believed that Employer was calling two Hays employees to testify.

12 It is not clear what Employer expects me to do with its assertion that it needed H-2A workers for an “expansion” of the Becker Tree Farm. There is no evidence before me that such work was “seasonal.” If the work was “temporary,” there is no evidence before me that Employer submitted an application for “temporary” H-2A workers.
VI. CONCLUSION AND ORDER

For the reasons set forth above, **IT IS HEREBY ORDERED** that the April 5, 2021 Denial Determination of the CO is **AFFIRMED**.

SO ORDERED.

NORAN J. CAMP
Administrative Law Judge

Boston, Massachusetts