



Issue Date: 26 January 2021

BALCA Case No.: 2021-TLC-00042

ETA Case No.: H-300-20301-889431

In the Matter of:

OVERLOOK HARVESTING CO., LLC,¹
Employer.

Appearances: David J. Stefany, Esq.
For the Employer

Nicole Schroeder, Esq.
For the Certifying Officer

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL

This case arises from Overlook Harvesting Company, LLC's ("Employer") request for review of the Certifying Officer's ("CO") decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. In the case before me, arising from application H-300-20301-889431, Employer requested 21 "First-Line Supervisors" from December 26, 2020 through June 30, 2021, at 19 worksites in Polk, Okeechobee, Hardee, Highlands, DeSoto, Charlotte, Osceola, Manatee, Indian River, St. Lucie, and Hillsborough counties in Florida.

Following the CO's denial of an application for certification under 20 C.F.R. § 655.161, an employer may request review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.164(b). Here, the Employer requested a de novo hearing. *See* 20 C.F.R. § 655.171(b). I received the administrative file on January 5, 2021, held the hearing on January 14, 2021 at the parties' request, and have considered the record including the testimony at

¹ Originally captioned upon referral to OALJ as "Overlook Harvesting Co., Inc." The parties agree that the Employer is an LLC.

hearing, the exhibits admitted at the hearing per the transcript, and the parties' pre- and post-hearing briefs.²

I find that the Employer has not proven that its need is temporary for the requested H-2A workers. I will affirm the CO's denial of certification for the reasons below.

LEGAL BACKGROUND

The H-2A program permits employers – including H-2A Labor Contractors (“H-2ALC”), as the Employer here is – to hire foreign workers to perform temporary agricultural work within the United States on a seasonal or other temporary basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B (collectively, the H-2A program); *see also* 20 C.F.R. § 655.103(d).

An H-2ALC is any individual or legal entity who is not a fixed-site employer or employee or an agricultural association or employee, who recruits, solicits, hires, employees, furnishes, houses, or transports H-2A workers. *Ag Labor, LLC*, 2021-TLC-00015; 2021-TLC-00020, slip op. at 10 (Nov. 27, 2020) (citing 20 C.F.R. § 655.103(b)). To qualify for the H-2A program, an employer has the burden to establish that it has a need for agricultural services or labor on a temporary or seasonal basis, under 20 C.F.R. § 655.161(a). In general, a temporary or seasonal need is 10 months or less. *See Ag Labor, LLC*, 2021-TLC-00015; 2021-TLC-00020, slip op. at 11 (citing *Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008)). However, this is not a bright-line rule; it is instead “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.” *Id.* (citing *Grassland Consultants, LLC*, 2016-TLC-00012 (Jan. 27, 2016)); *see also* 20 C.F.R. § 655.103(d) (up to one year).

And, the determination focuses on the employer's stated need at a particular time and place, not the nature of the duties of the position or the title. *See Ag Labor LLC*, 2020-TLC-00107 & -108, slip op. at 4 (Aug. 31, 2020) (whether “the employer's needs are seasonal, not whether the particular job at issue is seasonal”) (citing *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)). “It is not the nature or 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.” *Pleasantville Farms*, 2015-TLC-00053, slip op. at 3 (quoting *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-60, slip op. at 4 (Aug. 28, 2009)).

Under 20 C.F.R. § 655.132(a), an H-2ALC's temporary labor certification application is 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.” 20 C.F.R. § 655.132(a). The regulations define “area of intended employment” as

The geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes

² The parties have stipulated that the administrative file and hearing transcript from OALJ No. 2021-TLC-00050, before ALJ Drew Swank and arising from the Employer's application H-300-20323-917244, is part of the record before me as well.

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). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

20 C.F.R. § 655.103(b) (“Area of intended employment”). In plain English, within the same MSA is definitely in the same area of intended employment, but outside the MSA may also be.

An H-2ALC must also certify as part of its application “[t]he name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, 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.” The job description must include all qualifications and requirements, and fall within agricultural work. *See* 20 C.F.R. § 655.121, .122(b); *see also* 20 C.F.R. § 655.103(c) (“Definition of agricultural labor or services.”).

Put together, an H-2ALC’s submission of a set of fixed-site agricultural employers on a single application is an admission that as a matter of law, at a minimum, those employers *are* within the same area of intended employment regardless of MSA boundaries or driving time. But that admission is not controlling or limiting; the CO may permissibly, applying the regulatory definition of “area of intended employment,” deem other fixed-site agricultural employers on other applications by the same H-2ALC to fall into the same “area of intended employment.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By application dated November 2, 2020, assigned number H-300-20301-889431, the Employer requested a temporary labor certification for 21 “First-Line Supervisors” of Agricultural Crop and Horticultural Workers (Occupation Code 45-1011.07) from December 26, 2020 through June 30, 2021, at 19 worksites in Polk, Okeechobee, Hardee, Highlands, DeSoto, Charlotte, Osceola, Manatee, Indian River, St. Lucie, and Hillsborough counties in Florida. (AF 177). Though the Employer is seeking these workers as supervisors, Employer is requesting certification for workers with no prior experience or education. *Id.*

To obtain a certification under the H-2A program, an employer must prove that its need for labor is temporary or seasonal. *See Intergrow East, Inc.* 2019-TLC-00073 (Sept. 11, 2019) (citing 20 C.F.R. § 655.161(a)). In denying this application for not proving a temporary need, the CO relied in part on a denied and withdrawn application for 21 First-Line Supervisors from the Employer for November 15, 2020 through September 14, 2021, in the same list of counties. (AF 61-68; AF 529-844). That denied application – which was submitted to ETA and sworn to by the Employer, albeit denied – was numbered H-300-20248-805501. The CO also relied on a certified application, under H-300-20203-726386, for 11 Farmworkers/ Supervisors, across the same

counties for September 19, 2020 through July 18, 2021, (AF 1267-1460), as well as other recent applications.

In the de novo hearing process, the CO advanced additional evidence for a finding of a non-temporary need: certain seasonal agricultural labor which the Employer furnished to Marian Gardens, a tree nursery located at 619 West State Road 50, Groveland, FL, in Lake County, during the months of January 27, 2020 to October 31, 2020. That labor was approved under application H-300-19331-172007. Though the workers at Marian Gardens were sought to perform tree nursery duties, rather than harvesting or supervising harvesting, Employer sought and received certification for workers with no prior experience or education. (OALJ No. 2021-TLC-00050, Employer's Exhibit 3 (H-300-19331-172007 application)).

Here, Employer argues:

[T]he CO concluded that Overlook Harvesting's recent filing history demonstrated a permanent need for H-2A labor in the Central and South-Central Florida Area of Intended Employment by erroneously including seasonal labor which Overlook Harvesting furnished to Marian Gardens, a tree nursery located in Lake County, Florida during the months of February through October, 2020. (AF 63-68).

Er. Pre-Hearing Brief at 2. Employer asserts two primary points in support of its position:

First, it is expected that the CO will confirm at hearing that his Denial dated December 10, 2020 was predicated upon he and his analysts' review of the five certification applications represented in the filing history table as set forth in the Denial letter, inclusive of the pending certification application under appeal. (AF 63-64). Limited to these five certification applications, the unequivocal payroll history evidence submitted to the CO by Overlook Harvesting confirms that it had no seasonal labor payroll in Central and South-Central Florida during the months of July, August and September, 2020, nor in July, August and September, 2019. (AF 36-38).

Stated differently, all its seasonal payroll records confirm that its needs for seasonal laborers in Central and South-Central Florida are from October 7, 2019 through June 30, 2020, and from September 19, 2020, and July 18, 2021, which reflects a period of nine (9) months and twenty-nine (29) days, or two collective temporal periods of less than ten (10) months.

Second, Overlook Harvesting undertook a new seasonal services contract for Marian Gardens in Lake County, Florida in 2020, under Overlook Harvesting's understanding that this tree nursery worksite in Groveland, Florida was located in a different Area of Intended Employment (i.e., "north Florida") than the agricultural services it performs on behalf of fixed-site agricultural businesses located in Central and South-Central Florida.

Er. Pre-Hearing Brief at 2-3.

First, this is a de novo proceeding at the Employer's request. Both sides, permissibly, introduced new evidence in addition to the appeal file. *See* 20 C.F.R. § 655.171(b)(1)(ii); *see also Ag Labor*, 2021-TLC-00015; 2021-TLC-00020, slip op. at 11 (citing *David Stock*, 2016-TLC-00040 (May 6, 2016)). The CO may therefore introduce and argue the Marian Gardens application in Lake County, -172007, as an additional grounds for denial. I note also that I engage in my own analysis here, and do not defer to the CO's fact findings or procedures for assessing the application.

Second, as discussed above, the regulatory definition of "area of intended employment," not arbitrary designations of "north" vs. "central" vs "south-central," controls. Employer argues that the commute distances from the Marian Gardens worksite, at 619 West State Road 50, Groveland, FL, in Lake County, is too far, at greater than two hours, from certain of the worksites listed on the -889431 application to fall within the same area of intended employment. *Er. Post-Hearing Brief* at 13-14. Employer lists six of the nineteen fixed-site employers as examples of these long commutes. *Id.*

"[N]either the Regulations nor prior BALCA decisions provide any boundaries on the geographic 'reach' that a CO can use" in evaluating temporary need within an area of intended employment. *Ag-Mart Produce, Inc.*, 2020-TLC-00050, 2020-TLC-51, slip. op. at 10 (Apr. 7, 2020). And I agree, more than two hours each way is too far.

The problem for Employer is that as I discuss above, by crafting its application the way that it did and being an H-2ALC, Employer conceded that all of the worksites on the -889431 application *are* within the same area of intended employment, which in turn means that the *Employer* for its application purposes concedes that a 90-mile, just-shy-of-two-hour drive is within the same area of intended employment. From Haines City, FL, where several fixed-site employers are listed, to the southernmost fixed-site employer – a location that the Employer highlights in its *Post-Hearing Brief* – at 44991 Farabee Road, Punta Gorda, FL, is 90.9 miles and one hour, 54 minutes. (AF 186-87).

Moreover, that is an extreme case; 13 of the 24 listed fixed-site employers are identified by the Employer as being in Polk County, which is the next county south from Lake County (albeit in a different, neighboring MSA). (AF 186-87; EX 2). As noted, several of these employers' fields are listed with Haines City, FL, addresses, also in Polk County. From 619 West State Road 50, Groveland, FL, where the Marian Gardens worksite is located, to the center of Haines City, FL is about 48 miles (depending on the exact route) and an hour's drive.³ This is within a normal commuting distance and time on rural highways.

Finally, the Employer listed that some of the fields are in Osceola County, (AF 177), though it is not clear which. (AF 186-87). Osceola County is within the same MSA – Orlando-Kissimmee-Sanford – as Lake County, which triggers the bright-line rule of 20 C.F.R. § 655.103(b) that Osceola County worksites are within the same area of intended employment as Lake County worksites. (EX 2).

³ Both sides agree I should take official/judicial notice of Google Maps' driving distances and times, and I do throughout. *See* 29 C.F.R. § 18.84. Also, not every field location associated with every fixed-site employer is listed.

I find that since a majority of the fixed-site employers in the -889431 application are within a normal commuting distance of the Marian Gardens worksite, at 619 West State Road 50, Groveland, FL, or perform work at fields in the same MSA, I will consider the Marian Gardens worksite to be in the same area of intended employment as the worksites in the -889431 application for purposes of evaluating temporary need in the -889431 application overall, even if a minority of the worksites are greater than a two-hour drive from the Marian Gardens worksite. *Accord Ag-Mart Produce, Inc.*, 2020-TLC-00050, 2020-TLC-51, slip. op. at 11-12 (Apr. 7, 2020) (distance between employer’s Florida worksites, which ranged from 123 to 363 miles, placed them outside the same area of intended employment) (citing *Phillip Maxwell*, 93-INA-522 (Sept. 23, 1994) (CO’s “survey seems to be of ‘the State of California’” for Bakersfield job)).

I turn to the assessment of temporary need within the area of intended employment, as I have interpreted it. Prior applications may be considered, and are persuasive evidence, as to whether the employer’s current application states a temporary need. *See, e.g., JBO Harvesting, Inc.*, 2020-TLC-129, slip op. at 4-5 (Nov. 6, 2020); *see also Ag-Mart Produce*, 2020-TLC-00050, 2020-TLC-51, slip. op. at 10 & n.31 (collecting cases). Moreover, it is not the job duties, but the employer’s need that I am to evaluate – though the stated duties do offer evidence of the nature of the need. *See Ag-Mart Produce*, 2020-TLC-00050, 2020-TLC-51, slip. op. at 10 & n.32 (citing *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (“similarity in job requirements and duties” showed year-round need)). If an employer needed workers with a minimum amount of experience or a particular skill set or qualification, that temporary need for semi-skilled or skilled labor would be a distinct temporary need from a need for labor with no experience. *Cf. generally id.*

On three of the applications I list above, -889431, -805501, and -726386, the Employer listed substantially the same (if not *the* same, verbatim) job duties, with no experience required. (AF 189-201 (-889431); AF 650-57 (-805501); AF 1284-1294 (-726386)). Each of the supervisor applications included ordinary farmworker duties as well as supervisor duties. *Compare* AF 253, 408-416 (certified application for 356 farmworkers for fixed-site employers in the same list of Florida counties). On the Marian Gardens application for workers in Lake County, -172007, *infra*, while the duties differed, the Employer required no prior experience or qualifications related to the tree nursery duties than it did for the harvesting supervisor and farmworker duties in the -889431, -805501, and -726386 applications.

Employer explained through the testimony of a witness, Noradilia Lora, the Employer’s H-2A program director, that the Employer includes ordinary farmworker duties on its applications for supervisors so that the supervisors can work while they are completing certain certification processes, such as the process to obtain a commercial drivers’ license. Jan. 14, 2021 Transcript at 45-48. While that has some practical merit, I must rely on the duties as stated on the application, as once certified the Employer recruits for U.S. workers using the application and related job order, and is free to assign H-2A workers to perform any of the listed duties. *See* 20 C.F.R. §§ 655.150-62 (governing recruiting).

Ms. Lora *also* explained that the period of work in Florida for the first-line supervisors in the denied application -805501 was not the period stated on the application, to try to save the temporary nature of its need.

Q And so was it Overlook Harvesting's intention to have these workers performing agricultural services at the 8 work sites listed in the application, until the end date of September 14th, 2021?

A No, Ma'am.

Q And what was Overlook Harvesting's intention of when the supervisors were going to end their work on the farms, under this application?

A No later than June.

Q And then just to clarify, what work would these workers have been doing if this application had been certified after June?

A They would have been transferred to North Carolina, Indiana, Illinois or Michigan.

Jan. 14, 2021 Transcript at 40. I find it remarkable that the Employer would have a witness admit under oath to an intentional H-2A program violation – submitting a materially false application as to intended employment, even if it was denied and then withdrawn – to try to save this case. I choose to rely on the filed and sworn application in case -805501 over this testimony, and find that the period of need for first-line supervisors continued through September 14, 2021.

Aggregating the Employer's stated dates of need for workers with no experience in the same area of intended employment in the -889431, -805501, -726386, and -172007 applications, the evidence shows that the Employer's need began on January 27, 2020 and runs to September 14, 2021. That is to say, the Employer's need in this area of intended employment is year-round.⁴ *Accord JBO Harvesting, Inc., 2020-TLC-129, slip op. at 4-5.*

As noted above, the Employer has the burden of proof on the issue of temporary need. On the record before me in application -889431, for 21 First-Line Supervisors, the Employer has not proven that its need for first-line supervisors who also may be assigned farmworker duties, throughout the area of intended employment as defined here, is temporary. I affirm the CO's denial of certification.

SO ORDERED.

EVAN H. NORDBY
Administrative Law Judge

⁴ Even if I were to set aside the withdrawn application in -805501, the documented stated "temporary" need remains through July 18, 2021, which is still more than a year from January 27, 2020.