In the Matter of:

SNAPPER CREEK NURSERY, LLC,

Employer.

Before:
Jonathan C. Calianos, Administrative Law Judge

Appearances:

For Employer:
Thomas P. Bortnyk, Non-Attorney Agent¹
MAS Labor H2A, LLC
Lovingston, Virginia

For the Certifying Officer:
Rebecca Nielsen, Esq.
Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.

DECISION AND ORDER AFFIRMING DENIAL OF EMPLOYER’S H-2A APPLICATION

This matter involves an appeal arising under the provisions of the Immigration and Nationality Act governing temporary agricultural employment of non-immigrant workers (H-2A workers) and the corresponding regulations at 20 C.F.R. Part 655, Subpart B. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 & 1188. For the reasons set forth below, I affirm the Certifying Officer’s denial of Employer’s H-2A Application for Temporary Employment Certification.

¹ Although Mr. Bortnyk is a licensed attorney, he is not representing Employer in an attorney-client capacity, but rather as a non-attorney agent on behalf of MAS Labor H2A, LLC. (Er. Br. at 1 & n.1).
STATEMENT OF THE CASE

On July 15, 2021, Snapper Creek Nursery, LLC (“Employer”), filed an H-2A *Application for Temporary Employment Certification* (“Application”) with the U.S. Department of Labor’s Employment and Training Administration, seeking certification for six Nursery Laborers on a seasonal need basis from August 30, 2021, until December 9, 2021. 2 (AF at 61-92). Employer’s Statement of Temporary Need, filed with its Application, stated in relevant part:

The employer[‘s] . . . need for agricultural labor is tied to the natural production cycle for horticultural products, which is dependent on annually-recurring conditions, including weather, sunlight, and temperature. . . .

Product demand for ornamental trees and palms is most significant during the warm weather months when customers make investments in landscaping/gardening and make more frequent use of outdoor spaces. Therefore, the employer’s business volume during that period warrants the addition of supplemental seasonal workers. Then, in the winter, consumer demand declines and the employer’s ongoing activities are diminished to levels that can be sustained by the permanent workforce. Due to this, the employer’s temporary need for workers cease in early to mid-December, after the growing season has concluded and workers finish up seasonal activities. Activities remain limited throughout end of December up until mid-February . . . .

(AF 83).

On July 21, 2021, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), finding that Employer failed to establish a seasonal need under 20 C.F.R. § 655.103(d). The CO concluded that “nursery work in Florida is not on its face seasonal” and directed Employer to provide certain documentation to cure the deficiency. (AF 53).

On July 28, 2021, Employer filed a Response to the NOD, disputing the CO’s assertion that nursery work in Florida is per se not seasonal and providing the following documentation in support of its Application: an explanation of its seasonal need, precipitation and sunrise/sunset information for Fort Pierce, Florida, articles on palm tree dormancy, a monthly sales chart and associated graph for the years 2018 through 2020, a monthly tree planting chart and associated graph for the years 2018 through 2020, monthly outsourced labor contractor costs for 2018 through 2020, summarized payroll data from 2018 through 2021, and a letter from AmericanHort. (AF 25-

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2 According to Employer, its seasonal period runs from mid-February to early-December, but because this is its first application under the H-2A program, the earliest start date it could obtain was August 30, 2021. (AF 83).

On August 16, 2021, the CO denied labor certification for failure to establish a temporary need pursuant to 20 C.F.R. § 655.103(d). (AF 7-17). The CO found that Employer’s sales, monthly tree planting, and payroll data do not support the alleged seasonal need, as the sales amount, number of trees planted, and use of labor for the non-seasonal month of January in the years 2018-2020, were higher than several of the months during the alleged season and demonstrated fluctuation month to month. (AF 12-13, 16). The CO further considered the monthly contractor costs from 2018 to 2020, and found that it does not support a consistent seasonal need from February through December. (AF 16). The CO acknowledged the article on palm tree dormancy during cold weather months, information on precipitation and hours of daylight in Fort Pierce, Florida, and letters from AmericanHort and FNGLA indicating that sunlight and precipitation can influence periods of plant growth, but found that Employer’s own data shows a need for workers in January, when the weather is at its coldest, precipitation is at its lowest, and there is less sunlight during the day. (AF 16-17).

On August 17, 2021, Employer requested an expedited administrative review before the Board of Alien Labor Certification Appeals (“BALCA”). (AF at 3-4). Employer argued that the CO “improperly manufactured a presumption that all horticultural operations in the State of Florida are inherently year-round and thus ineligible for the H-2A program, a sweeping characterization that has no basis in law or fact.” (AF 3). Employer further argued that contrary to the CO’s conclusions, the evidence submitted demonstrates a seasonal need and the CO arbitrarily and capriciously failed to consider all relevant factors. (AF 4). Finally, Employer asserted that the CO failed to consider its detailed explanation of the data, which provides “critical context . . . that is essential for understanding Employer’s seasonal ebbs and flows.” (AF 4).

The case was referred to BALCA, and on September 1, 2021, I held a conference call with the parties. A deadline for briefs was set during the conference call, and Employer filed a brief accordingly. The CO did not file an appellate brief.

**DISCUSSION**

An H-2A worker is defined as any temporary foreign worker who is lawfully present in the United States and authorized by the Department of Homeland Security to perform agricultural labor or services of a “temporary or seasonal nature” pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(a).
See 20 C.F.R. § 655.103(b). Employment is of a seasonal nature when 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.” 20 C.F.R. § 655.103(d). 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.” Id. A temporary agricultural labor certification application must be accompanied by a statement establishing either that an employer’s need to have the job duties performed is temporary—of a set duration and not anticipated to be recurring in nature; or that the employment is seasonal in nature—that is, employment which ordinarily pertains to or is 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. Grandview Dairy, 2009-TLC-00002 (2008). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

In the present matter, Employer, a producer of field and container-grown ornamental trees and palms, seeks H-2A workers based on a seasonal need. The Application is for a truncated period of need from August 31, 2021, to December 9, 2021, but the alleged season runs from mid-February to early-December.

At the outset I will address Employer’s argument that the CO’s denial was a “forgone conclusion, based on [his] conclusory statement [in the NOD]. . . that ‘nursery work in Florida is not on its face seasonal.’” (Er. Br. at 6-9). I agree that the CO’s statement, standing alone as a basis for denial, would warrant reversal, as it represents an across-the-board ban of H-2A workers for nursery positions in Florida, which is not supported by the regulations or case law. The CO in the denial letter, however, did not rely on this initial blanket assertion made in the NOD, and instead went into an in-depth analysis of the evidence provided before ultimately finding that Employer had not established a seasonal need. I find his discussion of the evidence in great detail in the final determination letter assuages any concern regarding a lack of consideration of the evidence or any prejudice based on the initial statement made in the NOD.³ (Er. Br. at 7).

³ While Employer emphasizes that the CO again made the same blanket statement in the final denial letter that nursery work in Florida is on its face not seasonal, I find that the CO was merely copying and pasting what was said in the NOD before proceeding to his analysis of Employer’s evidence submitted in response to the NOD. This is consistent with the denial letters I see in all TLC cases. I, therefore, do not find that the CO relied on the statement in his final determination.
Shifting to the merits of the Application, Employer asserted its season begins in mid-February, when temperatures begin to rise and daylight increases, at which point Employer begins preparing the field and commencing early season planting. (AF 33-34). Employer stated that work activities begin to ramp up during the spring and early summer months, before reaching their peak in June and July, when consumer demand is at its highest, and temperatures, daylight and precipitation are optimal for faster growth and greater inventory turnover. (Id.). According to Employer, operations then decline beginning in early December, at which point work activities can be managed by the permanent staff. (Id.). Employer stated that minimal planting is done in the winter months, when temperatures are cool and daylight is limited, resulting in slower growth rates and suboptimal products, and when trees, particularly palms, lay dormant and require less maintenance. (Id.).

To support this explanation of its seasonality, Employer presented letters from FNGLA and AmericanHort, stating that factors affecting horticulture seasonality include the amount of daylight and precipitation, dormancy of plants, different growing cycles for a variety of trees and consumer demand. (AF 24, 48-49). Employer also provided daylight, precipitation and temperature data for Fort Pierce, Florida, and articles supporting palm dormancy in the winter. (AF 37-42). This evidence supports a general finding that horticulture operations in Florida can be seasonal based on a variety of factors. Employer, however, must go a step further to be approved for labor certification, by establishing that its particular business experiences a distinct seasonal need requiring a supplemental H-2A workforce. To determine whether Employer has established this, I look to the specific data related to its business.

First, Employer provided sales data by month for the years 2018 to 2020. (AF 43, 44). As highlighted by the CO, in 2018, the non-seasonal month of January had higher sales than the seasonal month of October; in 2018, January had higher sales than all seasonal months except October, and in 2020, January had higher sales than the seasonal months of May, July, August and October. (AF 45). When looking at the pictorial graph of the sales by year, I further agree with the CO that the data shows fluctuation across the months and years without a defined seasonal pattern. (AF 13, 44).

Next I consider Employer’s chart and associated graph of number of trees planted by month. This data does establish that January has the lowest total number of trees planted of all the months. However, for this data, Employer grouped the years 2018-2020, together, so I cannot
determine whether this is a pattern that carries over from year to year, and as a result, it is of limited value. (AF 43, 44). Further, when looking at the associated graph, I agree with the CO that while there is a spike in tree planting in July, it also shows peaks and valleys throughout the year, inconsistent with Employer’s alleged seasonal need starting in mid-February, slowly rising to a peak in June and July, and decreasing by early December. (AF 14).

Next, is the payroll data for the years 2018 to 2020.\(^4\) (AF 46-47). While the CO focuses on the number of permanent and seasonal workers separately by month, I find it more appropriate to look at the total workers (permanent and seasonal) by month to determine if there is a distinct need for supplemental workers during the alleged seasonal period.\(^5\) In 2018, Employer had a total of 22 workers in January, which was the third highest number of workers for the year; in 2019, Employer had 12 employees in January, which was higher than the seasonal months of March and April; and in 2020, Employer had 20 workers in January, which was the second highest number of workers for the year. Additionally, in looking at the total hours worked by month, the 2020 data is particularly striking, with January having the second highest number of total hours worked. Further, in 2018, January had more hours worked than May and November, and in 2019, January had more hours worked than April. Overall, looking at the monthly total number of workers and total number of hours worked for each year, I see no discernable pattern matching Employer’s description of a seasonal need, and instead there is variability from month to month and year to year. See Lodoen Cattle Company, 2011-TLC-109 (citing Carlos UyIII, 1997-INA-304 (Mar. 3, 1999) (en banc) (stating that denial of certification is appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year)).\(^6\)

\(^4\) Employer also submitted data from 2021, but as stated by the CO, this is not considered as it represents only a partial year. (AF 16).

\(^5\) Considering the total workers per month, as opposed to just permanent or seasonal workers, in large part alleviates Employer’s concern that the CO did not account for fluctuation due to shortage of permanent staff and the need to rely on contractors to supplement the permanent employees. (Er. Br. at 13-14).

\(^6\) Employer cited to Agricola, Inc., 2021-TLC-00072 (Feb. 11, 2021) for the proposition that it is “‘impossible to draw meaningful conclusions about the seasonality of need solely from the arrival and departure of the Employer’s U.S. workers,’ particularly with ‘such a small sample size and small pool of labor.’” (Er. Br. at 14). The facts of Argicola, however, are distinguishable. In Agricola, the employer had only one full time employee, the owner, and over the course of a two year period, it had at most two additional full-time equivalent employees, and the CO, in relying on the payroll data, was considering the difference of zero, one or two employees from month to month in concluding that a seasonal need was not established. In comparison, Employer in the instant matter employed anywhere from 8 to 28 employees in any given month, and while I accept that the payroll data may not take into account a shortage of available workers, there is still enough employees month to month where some pattern of seasonality should be apparent.
The last piece of evidence provided by Employer is the monthly costs for labor contractors in 2018 through 2020. In 2018, Employer relied on contractors for 11 months of the year, and spent more money on contractors in January than in the seasonal month of March.\(^7\) In 2019, Employer relied on contractors sporadically throughout the year, and while Employer did not spend money on contractors in January, it also did not have contractor costs in the seasonal months of March, April and August. For 2020, Employer only used contractors from January until April, and the January contractor costs were greater than the seasonal months of March and April. (AF 45). Contrary to Employer’s contention, the chart simply does not show a decrease in contractors in January, followed by a steady uptick commencing in February and a taper commencing in November; instead, the contractor costs vary month to month and year to year without any discernable pattern.\(^8\)

Employer argued that the CO improperly considered all the data points in isolation, which was in error, and that the evidence considered all together, establishes a seasonal need. (AF 34; Er. Br. at 9). For example, Employer stated: “It is the combination of sales and planting during the stated period that illustrate the employer’s total season. These charts, therefore, must be viewed in conjunction with one another.” (AF 34) (emphasis in original). Viewed together, Employer asserts that while sales are normal in January, planting activities are minimal, and while planting activities are stable in early December, sales are significantly reduced. (Id.). Even if I were to accept Employer’s contention that considering the evidence together, January shows a decrease in planting, whereas December shows a decrease sales, this does not cure the fact that the data shows fluctuation in both sales and planting throughout the months and years inconsistent with a defined seasonal period. As a result, considering these two data points together does not bolster Employer’s case.

Employer lastly argued that the data for sales and planting volume alone does not account for plant maintenance or cultivation activities, and therefore this data must be viewed in conjunction with other evidence submitted. (AF 34; Er. Br. at 10-12, 17). Yet, Employer has not

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\(^7\) I assume, for purposes of this decision, that the number designations in the chart represent the corresponding months of the year.

\(^8\) Employer asserted that contractors were utilized for container planting only, and not other duties, such as plant maintenance, pesticide/chemical application, packing/shipping or installation/maintenance of irrigation systems that are part of its Application. (AF 35). While this suggests that the contractor data does not provide a complete picture of seasonal need for laborers, it also does not aid Employer in affirmatively establishing a seasonal period.
provided any documentation addressing these additional aspects of its business, which would establish when during the year they are performed or how they contribute to a seasonal need. Furthermore, while the sales and planting data may not account for these additional activities, the data on total hours worked would presumably cover all activities, and yet it still does not support a seasonal need for the reasons previously discussed.

Based on a review of all the evidence presented, I find that Employer has failed to prove its eligibility for temporary employment certification based on a seasonal need.

**ORDER**

Because Employer failed to establish that the Nursery Laborers position is on a seasonal basis in accordance with 20 C.F.R. § 655.103(d), it is hereby ORDERED that the Certifying Officer’s decision denying Employer’s *H-2A Application for Temporary Employment Certification* is **AFFIRMED**.

**SO ORDERED.**

**JONATHAN C. CALIANOS**  
Administrative Law Judge

Boston, Massachusetts