In the Matter of:

T & T INFINITY, LLC,
Employer.

Appearance: Leslie Pham  
T and T Infinity, LLC  
Cusseta, Georgia  
For the Employer

John Rottermann  
Certifying Officer  
Chicago National Processing Center  
For the Certifying Officer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION


On November 6, 2020, T and T Infinity, LLC, (“the Employer”) filed a request for expedited administrative review of the Final Determination issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File (“AF”) from the Department of Labor’s Employment and Training Administration (“ETA”) on December 2, 2020. 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 AF.
STATEMENT OF THE CASE

On October 8, 2020, the ETA received an application for temporary labor certification from Employer. AF 50-55.1 Employer requested certification for four (4) Chicken Farmers from between the dates of December 14, 2020 and October 11, 2021. AF 37. Employer indicated that the nature of its temporary need was a seasonal need, and explained that:

Our duty in chicken farming is to raise and produce meat. One year has 5 to 6 flocks. Each flock on our farm raises and produces 88,800-92,000 chickens. This requires about 2 months of labor per flock. The first step is to prepare for the new flock. A comfort zone is prepared for the chickens. The house should be caked out, leaving no caked or balled litter, which causes ammonia blindness. The feeder lid should be properly disinfected with a chlorine solution prior to setting up homes for the next flock. The feed should be supplied by one feeder lid per 100 chickens and the feed lines. All feel lids and pans should contain feed to the top. The water is supplied by the nipple drinker system and supplemental cup. Water lines should be flushed to clean the lines. Between flocks, the time is utilized to make sure certain equipment is working properly and to complete the necessary repairs and normal maintenance during this time if possible. Fans on the houses should be thoroughly cleaned. Curtains need to be cleaned inside and out. Repairs are done or curtains are replaced as needed.

The mobile manufactured home, which is for live-in workers, has kitchen facilities with the provided necessary equipment and appliances such as a refrigerator, microwave, stove, air-fryer, and sink with hot and cold water. With this equipment, workers will be able to prepare their own meals.

AF 37-40.

On October 13, 2020, the CO issued a Notice of Deficiency (“NOD”) citing two deficiencies, including (1) failure to establish seasonal or temporary need under 20 C.F.R. § 655.161(a) and (2) failure to establish workers access to grocery stores to prepare their own meals under 20 C.F.R. § 655.122(g).2 AF 24 - 30.

The CO identified a failure to establish the job opportunity as temporary in nature due to Employer’s failure to provide documentation establishing and supporting its need for seasonal workers. AF 26. The CO requested the Employer provide an explanation of “how the need is tied to a certain time of year and demonstrate that the request represents a need for labor levels far above those required for ongoing operations.” AF 26. The CO requested that Employer provide the following documentation:

1 References to the 55-page appeal file will be abbreviated with an “AF” followed by the page number.

2 The CO also cited four other areas of deficiencies, which are not at issue on appeal as the denial was based only on Employer’s failure to establish a temporary need and failure to establish workers access to grocery stores to prepare their own meals. AF 6-9, 24-30.
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 entire year;
2. A statement indicating the employer’s monthly staffing levels and identifying periods of normal operations and periods where its labor levels are far higher than normal;
3. A detailed explanation as to the activities of the employer’s permanent workers in this same occupation outside the requested period of need;
4. A summarized monthly payroll report of a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment for Farmworkers, Farm, Ranch, and Aquacultural Animals, 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.
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.

AF 26.

The CO also identified a failure to establish how workers would be provided access to grocery stores to cook their own meals in the facilities provided by Employer under 20 C.F.R. § 655.122(g). AF 28. The CO instructed Employer to amend their application to include how workers will be provided access to grocery stores. AF 28.

Employer responded with the requested documentation on October 20, 2020 (“Response”). AF 12-13. Included in its Response were statements regarding its operations and need for workers; the last page of a contract with Tyson Farms (“Tysons”); Broiler Production Settlement by Grower showing 52 week values; a Grower Master-Detail form; select pages from Forms ETA 790A and 9142 indicating amendments; IRS form1099-Misc; and a 2020 Business License from Cusseta-Chattahoochee County, Georgia. AF 7, 12-13.

On October 28, 2020, the CO issued a Final Determination denying the Employer’s application for temporary labor certification (“Denial”). AF 4-9. The CO found that Employer failed to establish that the job opportunity was temporary or seasonal in nature, and failed to clarify how workers would obtain groceries to prepare their meals.

The CO determined that Employer did not demonstrate a temporary or seasonal need pursuant to 20 C.F.R. § 655.161(a). AF 6. Rather, although Employer amended the ETA form 9142A from Seasonal Need to Other Temporary Need, the documentation established a permanent rather than temporary need for workers. AF 8. The CO noted that Employer’s need for additional workers was due to the injury of its owner and loss of “helpers” due to Covid-19. . . .” Id. However, the CO concluded that Employer “is attempting to supplement its permanent workforce to satisfy a year-round need for workers due to its contract obligations to Tyson.” Id.

In addition, the CO determined that Employer did not sufficiently demonstrate the requested
standard of how workers will obtain groceries to prepare their meals pursuant to 20 C.F.R. § 655.122 (g). AF 9. Specifically the CO concluded that Employer failed to provide how workers will access grocery stores. Id. The CO noted that Employer’s response stating they would not charge workers for meals was insufficient to overcome the requirements under 20 C.F.R. § 655.122(g). Id.

On November 6, 2020, Employer requested administrative review of the CO’s Final Determination/Denial (“Request”). AF 1-2. In its Request, Employer states workers would be provided one free meal and an allowance to pay for the groceries needed to prepare their meals. Id. Employer stated that Covid-19 has made it difficult to find temporary work and the temporary work they are able to find requires over four hours of travel back and forth to the city daily. Id. Employer also provided that they would bring over four members of their family from Vietnam to work on their farm and “have a better life.” Id.

**APPLICABLE LAW**

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (ALJ) may only render a decision “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.” A Certifying Officer’s denial of certification must be upheld unless shown by the employer to be arbitrary or capricious, or otherwise not in compliance with law. *J and V Farms, LLC, 2016-TLC-00022*, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc., 2016-TLN-00033*, at 5 (May 10, 2016) (“BALCA reviews decisions under an arbitrary and capricious standard.”) (H-2B). Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO.

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms, 2001-TLC-00006* (ALJ May 31, 2001) citing 20 C.F.R § 655.106(h)(2)(i) (relating to refiling procedures).

To qualify for the H-2A program, an employer must establish that 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). Also, “the employer either must provide each worker with three meals a day or furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals.” 20 C.F.R. § 655.122 (g). The two issues before me are whether the Employer has established a temporary need for the positions requested in its application and whether the Employer provides access to facilities and grocery stores for the workers to prepare their meals. The Department’s H-2A regulations provide:

Definition of a temporary or seasonal nature. For 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

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3 Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”
with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d).

In determining whether the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011). Accordingly, I must consider whether the Employer’s need for labor or services during its specified “season” differs from its need for such labor or services during other times of the year.

The regulations at 20 C.F.R. § 655.122 (g) provide for the requirements an employer must meet for job orders regarding meals. Specifically, the regulation provides:

The employer must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the workers for such meals.

**DISCUSSION**

First, in the NOD, the Employer was requested to demonstrate how workers would gain access to grocery stores to cook their meals. Employer does not explain how it will provide workers with access to grocery stores. In its request for review, Employer stated that workers would receive one free meal and allowance to pay for groceries. They did not raise this argument before the CO and I am only permitted to review the evidence that was before the CO at the time of its Final Determination. Therefore, I find that Employer failed to establish how workers will have access to grocery stores and does not meet the regulatory requirement under 20 C.F.R. § 655.122 (g).

Second, even if the Employer had shown compliance with 20 C.F.R. § 655.122 (g), Employer has not established that its employment need is seasonal or temporary. Employer failed to provide a statement regarding it monthly staffing levels and identifying periods of normal operations and periods where its labor levels are far higher than normal; a detailed explanation as the activities of the employer’s permanent workers in the same occupation outside the requested period of need; and a summarized monthly payroll report for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment for farmworkers, Farm, Ranch, and Aquacultural. In the end the CO denied certification because the Employer failed to establish the job opportunity as temporary in nature.

Employer’s Response provides its need for temporary workers is due to its contract with Tysons which requires production of five to six flocks of chicken ever year. Employer states if they are unable to fulfill the terms of the contract it could lead to a termination. However, Employer’s need to fulfill its contractual obligation with Tysons provides a permanent rather than
temporary need because the contract has a yearly production requirement.

Employer provides that only family members are working on the farm and Employer’s recent injury has created a strain on their ability to continue the farm’s production. Employer’s request for four workers rather than one worker establishes a permanent and ongoing need for workers. Employer argues it faces difficulties finding temporary work due to Covid-19 and is required to drive over 4 hours daily to the city to find temporary employees. However, the need for constant temporary workers establishes a permanent rather than a temporary need for workers.

Employer has not met the burden of showing that it is entitled to a temporary labor certification for its requested Chicken Farmers. After reviewing the evidence considered by the CO and all the legal arguments, I agree that Employer has not provided sufficient information to overcome the deficiencies listed in the NOD. Further, I find that Employer has not demonstrated that the decision of the CO was arbitrary or capricious. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the denial is AFFIRMED.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is AFFIRMED.

SO ORDERED.

WILLIAM P. FARLEY
Administrative Law Judge

Washington, DC

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4 In its request for review, Employer stated it wanted to bring over family members. This argument was not raised before the CO and I am only permitted to review the evidence that was before the CO at the time of its Final Determination. However, this argument fails to show a temporary need for workers.