OALJ Case No.: 2021-TLC-00090  
ETA Case No.: H-300-21011-005243

In the Matter of:

WALTERS GRAIN AND SUPPLY CO.,  
d/b/a COMMONWEALTH GIN,  
Employer.

Before:

JONATHAN C. CALIANOS  
Administrative Law Judge

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

This matter involves an appeal arising under 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 vacate the Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification and remand the matter to the Certifying Officer for processing consistent with the decision in this case.

STATEMENT OF THE CASE

On January 11, 2021, Employer, Walters Grain and Supply Co. (“Employer”), filed an H-2A Application for Temporary Employment Certification (“Application”) with the U.S. Department of Labor’s (“DOL”) Employment and Training Administration. (AF1 at 47). Employer seeks temporary certification for two seasonal “cotton ginning maintenance” positions whose daily tasks include:

- Operate, maintain, troubleshoot, and repair a PLC/touchscreen based gin plant

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1 (AF at [page number]) refers to the Administrative File.
• Operate a skid steer tractor and bale and seed scales
• Repair and maintain equipment
• Clean blockages and lint filters
• Refill supplies
• Sweep floors and remove trash buildup
• Un-tarp modules
• Load and unload a cotton seed house
• Roll up and store module tarps
• Operate mote press and secure wires to mote bale
• Operate cotton trash bale press
• Handle and store cotton trash bales
• Instruct on how to unchoke equipment and keeping key pieces of equipment clean
• Rake cotton off storage yard
• Take and process cotton samples

(AF at 50, 60).

On January 29, 2021, the Certifying Officer (“CO”) issued Employer a Notice of Deficiency (“NOD”), identifying one deficiency with the Application. (AF at 29). On February 4, 2021, Employer responded to the NOD and provided additional documentation addressing the deficiency. (Id. at 15, 21-24). On February 17, 2021, the CO denied Employer’s Application because Employer failed to adequately address the deficiency. (Id. at 19). The CO denied the Application because “the employer has not demonstrated that its job opportunity represents a seasonal need as outlined at 20 CFR sec. 655.103(d).” (Id.).

On February 22, 2021, Employer requested a de novo hearing before the Office of Administrative Law Judges. (Id. at 2). With its request, Employer included an additional explanation in response to the denial issued February 17, 2021. (Id.). On March 8, 2021, pursuant to the conference call I held, Employer decided to proceed with a de novo review under 20 C.F.R. § 655.171(b). The parties submitted a Joint Pre-Hearing Statement (“JPHS”), and the trial was held via Microsoft Teams on March 11, 2021. At the hearing, Employer called Leonard Bruce Alphin Jr., its manager, and Harrison Ashley, of the National Cotton Council of America, to testify. (JPHS at 3). The Solicitor called John Rotterman to testify. (Id.). The parties stipulated to the following:

• On or about January 25, 2020, Employer filed an H-2A Application for Temporary Employment Certification with the Chicago National Processing Center;

On January 29, 2021, the CO issued a NOD to Employer in compliance with 20 C.F.R. § 655.141;

On February 4, 2021, Employer filed a response to the NOD;

On February 17, 2021, the CO issued a Final Determination denying Employer’s Application;

The Final Determination complied with 20 C.F.R. § 655.164;

On February 22, 2021, Employer’s counsel timely filed a de novo hearing request with the Chief Administrative Law Judge on behalf of Employer;

The CO previously certified Employer’s application for two First-Line Supervisors for the ginning season, for the period of October 16, 2020, to December 31, 2020; and

Employer is a cotton gin operating in Windsor, Virginia.

(JPHS at 1-2).

The parties identified the following issue for adjudication:

Whether Employer’s need for two First-Line Supervisors sought in the H-2A application is “seasonal” within the meaning of 20 C.F.R. § 655.103(d).

(JPHS at 2).

At the end of the hearing, I made three findings. First, I found that the job descriptions in the current Application differed from Employer’s previously certified application spanning from October to December. (TR at 117). I also found that Employer needed two employees to perform the maintenance of the gins. (Id. at 119). Finally, I found that Employer showed that it had a seasonal need for labor under 20 C.F.R. § 655.103(d). (Id. at 118-119). I ordered the parties to brief two issues: (1) whether Employer has a temporary need for H-2A workers for two different seasons; and (2) whether Employer’s use of the H-2A program to fill the ginning maintenance positions is proper. (Id. at 119-120). The parties submitted post-hearing briefs, and the record is now closed.  

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2 (TR at [page number])” refers to the trial transcript. The parties did not have access to the transcript at the time of briefing.

3 (Er. Br. at [page number]) and (Sol. Br. at [page number]) refer to Employer and Solicitor’s briefs, respectively.
DISCUSSION

I. Employer Has a Temporary Need for Labor for the Cotton Gin Maintenance Positions Under the H-2A Program.

   A. A Temporary Need Exists for the Cotton Gin Maintenance Positions

Under 20 C.F.R. § 655.103(d), Employer must “require labor levels far above those necessary for ongoing operations” to be entitled to certification under the H-2A program. 20 C.F.R. § 655.103(d). In response to the NOD, Employer submitted its payroll records for First Line Supervisors spanning from 2018 to 2020. (AF at 9-10). The payroll records indicate the number of permanent and temporary employees who worked, the total hours worked, and the total earnings received per month. (Id.). In the Application, Employer specified its beginning date of need as March 15, and the end date of need as September 30. (AF at 50). Further, Alphin testified at trial that during the period of 2018 to 2020, permanent full-time employees performed the ginning maintenance operations work. (TR at 64). However, because the two permanent employees who maintained the cotton gins were only both classified as the same type of employee in 2020, I will only focus on the 2020 payroll records. 4 In 2020, the total hours worked April through September span between 830 and 1335 hours. (Id.). During January and February of 2020, permanent employees worked 526 and 574 hours, respectively. (Id.). This data shows a clear difference in hours worked by permanent employees during the maintenance months of April through September as compared to the non-seasonal need months of January and February.

The payroll records clearly delineate an increased need for workers during the months of April through September when compared to January and February, the two months where Employer did not utilize the H-2A program. Accordingly, I find that Employer demonstrated it has a temporary need for H-2A workers, as it has “require(d) labor levels far above those” required in January and February over the past three years. 20 C.F.R. § 655.103(d).

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4 Alphin noted that one of the full time employees was classified as a temporary employee in 2018 and 2019, because he did not work the required hours to be considered full time. (TR at 68). Further, because the Application only encompasses part of March, I will perform an analysis with the first full month of need – April.
B. Employer has Two Seasons of Need for H-2A Workers

Alphin noted that there were two distinct needs for H-2A workers. Employer’s prior two certified applications spanned from October 16, 2020, to December 31, 2020. (AF at 7). The H-2A workers from these two applications filled general labor positions, including cleaning, and also filled supervisory positions. (TR at 37). These employees worked in the gin while it was operating. (Id.).

Conversely, the individuals under the current Application would be charged with rebuilding the gin equipment and performing maintenance on the equipment while the gin was not operating. (Id. at 39). The workers need to have specialized knowledge in how to rebuild the gins. (Id.). Without this specialized knowledge, the workers risk cutting off their hands or other bodily injury. (Id. at 40). The maintenance work on the cotton gins is crucial to Employer’s operation, because “if we can’t repair the gin properly … our existence is threatened” and “we could lose our business.” (Id. at 41-42). Harrison Ashley of the National Cotton Council of America noted that “maintenance is extremely important to the farmers because the farmers can’t take a chance on the gin breaking down” because until the gin is repaired, “they don’t have a marketable commodity.” (Id. at 12). The maintenance season is important because the maintenance and repairs “will determine how efficient and how well that cotton gin will gin during the time of the ginning season.” (Id.).

Alphin acknowledged that the ginning season might begin in September, in which case the maintenance workers would be expected to gin cotton. (Id. at 73). Nevertheless, the workers would only gin cotton in the event that the ginning season started in September, and would perform purely maintenance work prior to then. (Id.).

Employer demonstrated a distinct maintenance season that is separate from the ginning season. As Ashley noted, maintenance is crucial because without maintenance, the gins may break down and the gin will not produce cotton. Further, Ashley indicated that the quality of maintenance of the gins is a predicting factor in how well the gin will work in the ginning season. Because the production of cotton during the ginning season is distinct from the maintenance season where the machines are repaired, Employer has demonstrated a two-season need for labor under the H-2A program.
II. **Employer Needs H-2A Workers to Fill the Maintenance Positions.**

Having determined that Employer demonstrated a temporary need for H-2A workers for the two seasons, I will now discuss whether permanent U.S. workers could fill the two open positions. The Solicitor argues that Employer has a permanent and not temporary need for workers. (Sol. Br. at 4). Further, the Solicitor suggests that the job descriptions for the prior certified application match the current application. (*Id.* at 5).

A. **Employer has a Need for H-2A Workers**

The H-2A program is intended “to supplement an employer’s permanent workforce.” *Ag-Mart Produce Inc.*, 2020-TLC-00018, slip op. at 8 (Jan. 10, 2020). Here, Employer’s use of the H-2A program is to supplement its permanent workforce by hiring mechanics to repair the gins during the off season. Alphin testified as to the need for the two H-2A workers. Specifically, he explained that Employer had two former full-time employees who left at the end of the 2020 ginning season. (TR at 64). One employee was hired in 2017, the other in 2018. (*Id.*). The employees worked year round, but from March through September, they solely focused on repairing and rebuilding the gins. (*Id.* at 66). The two employees left at the end of 2020 to seek better employment opportunities, and are no longer available to work the positions. (*Id.* at 68).

Alphin testified that the two H-2A workers sought in the Application were to perform the maintenance functions performed by the two full-time employees who left.\(^5\) (*Id.*). Regarding gin maintenance, Alphin noted “we have zero work available for the skill set we are looking to employ.” (*Id.* at 52). While Employer might be able to complete the maintenance work quicker if he hired two permanent employees, Alphin testified that it “doesn’t make viable economic sense” to hire permanent employees because the employees would be working on top of each other and safety might be compromised. (*Id.* at 78). Further, Alphin explained that he had no use for permanent employees throughout the year, he only needed the temporary maintenance workers while the gin was not operating. (*Id.* at 80). He noted that the two prior permanent employees

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\(^5\) Alphin testified that the other functions performed by the two full-time employees who left were assigned to other workers, but he still needed two seasonal laborers to perform “the role of a mechanic” which his other employees could not do. (TR at 83).
worked as “general laborers” and “were doing tasks that were not necessary” during January to March, and only worked as mechanics during March through December. (Id. at 65, 83).

Because Employer only needs maintenance workers to repair the gins and not permanent labor throughout the year, I find that Employer is properly seeking labor under the H-2A program.

**B. Employer Complied with Requirements to Find U.S. Workers for the Positions**

i. **Standard for Recruitment of U.S. Laborers**

Under 8 U.S.C. § 1188(a)(1)(A)-(B), Employer must certify:

(A) [T]here are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) [T]he employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.


ii. **Employer has Taken Sufficient Steps to Find Local Labor**

When applying for workers under the H-2A program, Employer has a duty to make assurances that it will cooperate with the State Workforce Agency (“SWA”) and “accep(t) referrals of all eligible U.S. workers who apply.” 20 C.F.R. § 655.135(c). Here, Employer meets the requirement. As part of its application, Employer submitted the Agricultural Clearance Order Form ETA-790, which included information which was submitted to the SWA. (AF at 48). This information would be used by the SWA to determine whether local U.S. workers were available to fill the two positions. (Id.). I find that Employer met its pre-Application requirement of certifying that it would cooperate with the SWA.

Once an application is accepted by the CO, Employer must conduct “positive recruitment” where “there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.” 20 C.F.R. § 655.154(a). Employer must also contact the employees who formerly held the position and “solicit their return to the job.” 20 C.F.R. § 655.153. Acceptance of the Application is the prerequisite to the employer conducting the “positive recruitment” activities under § 655.154(a) and reaching out to former employees under § 655.153. Although acceptance has not yet been issued in this matter, Alphin
testified that he would hire U.S. workers who applied for the position. (TR at 84). Further, Employer noted that if acceptance were issued, it would advertise the positions to local U.S. workers. (Er. Br. at 2). Even though acceptance has not been issued for this Application, I find that Employer is taking steps toward compliance by preparing to advertise the positions to local workers and contacting the two former permanent employees.6

iii. **Employers Use of H-2A Workers will not Adversely Affect U.S. Workers**

Employer argues that the two cotton ginning maintenance positions do not adversely affect wages of U.S. workers because it pays the workers higher than minimum wage. (Er. Br. at 2). In order to not adversely affect U.S. workers, an employer must pay recruits the wage which is the highest out of the following wages: the Adverse Effect Wage Rate (“AEWR”)7, prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or federal or state minimum wage. 20 C.F.R. § 655.120(a). The highest hourly rate for a worker in Virginia is the AEWR, which is $13.15 per hour.8

In its application, Employer indicated that it would pay the two workers $16.17 per hour, which is more than three dollars per hour over the AEWR for Virginia. (AF at 50). Because Employer will pay the H-2A employees more than the AEWR, the positions will not adversely affect the local wage under 20 C.F.R. § 655.120(a).

**CONCLUSION**

As discussed above, Employer has successfully demonstrated that it has a temporary need for cotton gin maintenance workers. Further, Employer’s need for the workers falls within the intent of the H-2A program, as the workers would supplement and not replace Employer’s workforce. Finally, Employer has properly complied with procedures ensuring that it will seek

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6 In its post-hearing brief, Employer assures that if acceptance is granted, it will post the two positions on seasonaljobs.gov and will reach out to the two employees who previously held the positions. (Er. Br. at 2).

7 The Adverse Effect Wage Rate is set annually by the Office of Foreign Labor Certification as governed by 20 C.F.R. 655.1300. See https://www.dol.gov/agencies/eta/foreign-labor/wages/adverse-effect-wage-rates.

8 The hourly rates are as follows: (1) the Adverse Effect Wage Rate is $13.15 per hour; (2) the minimum wage in Virginia is $7.25 per hour; and (3) the federal minimum wage is $7.25 per hour. See id.; https://www.dol.gov/agencies/whd/minimum-wage/state; https://www.dol.gov/general/topic/wages/minimumwage. There is no prevailing wage rate set for Virginia. (AF at 33). It is unclear whether there is a collective bargaining wage set at Walters Grain and Supply Co., but as part of its application, Employer certified that it would pay the collective bargaining wage if it was the highest wage. (Id. at 57).
local workers for the maintenance positions before obtaining foreign labor via the H-2A program, and its use of H-2A workers will not adversely affect the local economy.

ORDER

Because Employer has established: (1) a temporary need for H-2A workers under 20 C.F.R. § 655.103(d); (2) that it has two separate seasonal needs for H-2A workers; and (3) that it only needs temporary assistance which cannot be filled by U.S. workers, it is hereby ORDERED that the Certifying Officer’s denial of Employer’s Application for Temporary Employment Certification is VACATED and that this matter is REMANDED to the Certifying Officer for further processing in accordance with the decision in this case.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts