



Issue Date: 21 October 2022

OALJ Case No.: 2023-TLC-00002
ETA Case No: H-300-22221-406493

In the Matter of:

7 SOUTH AG,

Employer.

Appearance: Jason Brossart, self- represented
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Natalie A. Appetta
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

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 to perform agricultural work within the United States on a temporary basis.

On October 1, 2022, 7 South Ag (“Employer”), submitted a letter to the Certifying Officer (“CO”) reasserting its request for temporary labor certification in this matter. The CO interpreted this letter as a request for administrative review under 20 C.F.R. § 655.171(a) of the CO’s September 28, 2022 Final Determination-Denial in this H-2A temporary labor certification matter. I received the Administrative File (“AF”) on October 17, 2022. By Order dated October 17, 2022, the parties were granted leave to file briefs on or before October 20, 2022.

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 Administrative File.

BACKGROUND

On August 11, 2022, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A (“Application”). AF 55-77.¹ The Employer’s Application requests certification for one agricultural equipment operator for the period beginning October 15, 2022 and ending June 30, 2023, on the basis of a seasonal need. *Id.* In Employer’s statement of temporary need dated August 1, 2022 Employer states:

I operate a mixed farm operation that consists of small grain, row crop, and hay production. The work is consistent through out the year. The hay operation and grain operation require that the products made, hay or grain must be handled through the winter months as this is when the prices for the hay or grain are at the greatest levels. Hay especially is at a greater demand as cattle are being fed in feedlots.

The duties to be performed by employees are moving, storing, reloading, unloading and delivering the grain and hay products th[r]ough out the growing season. Maintenance will be preformed (sic) on the machinery used for the hay operation during this time as well, as time is at a premium during the growing season.

The farm is in desperate need of proficient workers, we have been looking for qualified individuals to help on the farm for several years and with the unemployment levels very low in North Dakota and there are just no qualified people available.

I am looking for motivated, self starting individuals who are capable of working on our farm. Training will be provided, but knowledge in operation of farm machinery is key. Such as, driving a loader tractor, pulling a hay trailer, driving a payloader, running a baler, rake, or tedder. Driving a manual or semi is also necessary.

AF 72.

Employer also stated that job duties consist of the following:

Drive and operate farm machinery to put up hay, feed cattle. Day to day tasks of animal husbandry. General service, lubrication, repairs to equipment. Drive truck to fetch and deliver feed, cattle and hay. Other miscellaneous and manual duties around the farm.

AF 63, 74.

By letter dated August 18, 2022, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) finding Employer had failed to demonstrate its temporary or seasonal need.

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

AF 24-28. The CO cited 20 C.F.R. § 655.103(d) which defines temporary or seasonal need as follows:

For the 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 with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

AF 27.

The CO noted that Employer had listed job duties in its applications at ETA Form 790A, item 8a as:

Drive and operate farm machinery to put up hay, feed cattle. Day to day tasks of animal husbandry [sic]. General service, lubrication, repairs to equipment. Drive truck to fetch and deliver feed, cattle and hay. Other miscellaneous and manual duties around the farm.

The CO determined that the stated "duties do not appear on their face to be seasonal and can be performed year-round." AF 27. The CO further stated that the nature of the job duties must be seasonal or temporary to participate in the H-2A program. Accordingly, the CT directed the Employer to provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature. Specifically, the CO requested 1) A statement describing the employer's business history, activities (primary products or services) and a schedule of operations throughout the entire year; 2) A statement as to how cattle are fed during the "off season" between July and September, and who, if anyone, cares for the cattle; 3) Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked and total earning received; and 4) Other evidence and documentation that similarly serves to support a seasonal need. The CO also noted that if the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents requested, the employer is not exempt from providing evidence in response to the Notice of Deficiency and must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested. The CO also noted that if contractors or other entities were used by the employer to address the need, three years of contracts detailing the services provided and dates of said services must be provided. Or alternatively if family members or other individuals not directly employed by the employer were used, signed affidavits attesting to their work schedule and duties must be provided. AF 27-28.

The Employer responded to the NOD on August 19, 2022. AF 11-23. In its cover letter dated August 17, 2022, Employer stated:

I operate a farm operation that consists of hay and feed production and delivery. The work is consistent through out the year. This is a new business venture that was started during the drought of 2021. We have severe hay and feed clients across North Dakota and into Montana.

The hay operation requires that the products made, hay or feed must be handled though out the winter months as this is when the prices for the hay or feed are at the greatest levels. Hay especially is at a greater demand in the winter as cattle are being fed in feedlots.

The duties to be performed by employees are moving, storing, reloading, unloading and delivering the hay and feed products th[r]ough out the growing season. Maintenance will be performed on the machinery used for the hay operation during this time as well, as time is at a premium during the growing season.

The farm is in desperate need of proficient workers, we have been looking for qualified individuals to help on the farm, for several years and with the unemployment levels very low in North Dakota there are just no qualified people available.

I am looking for motivated, self starting individuals who are capable of working on our farm. Training will be provided, but knowledge in operation of farm machinery is key. Such as driving a loader tractor, pulling a hay trailer, driving a payloader, running a baler, rake or tedder. Driving a manual or semi is also necessary.

AF 11.

In addition to Employer's response letter, Employer also submitted a schedule of its operations noting that the hay and feed business is a new venture that was started during the drought of 2021 and therefore there is no business history available. The schedule of operations for the hay business was noted as follows:

May to August: Mow, Condition, Rake and Bale the Alfalfa and Grass Hayland, the alfalfa is set up on a cutting rotation so every few weeks it is time to recut and bale the alfalfa. The grass acres are done in between the alfalfa cuttings when time allows.

August to October: Mow, Condition, Rake and Bale the Pearl Millet and Sudangrass, bale straw after harvest.

November to February: Haul bales to the designated storage areas, stack them, load them on semis, deliver feed to the farms, and perform scheduled maintenance on payloads, semis and hay equipment so that everything is ready for the next season.

AF 12.

Employer also noted in its response that since it is a new business which was started in 2021 it did not have any payroll records. AF 13. Employer also included information regarding its incorporation in 2009 and a copy of its EIN. AF 14-19. Also attached was information regarding the agricultural equipment that the business owns as well as seed invoices. AF 20-23.

On September 28, 2022, the CO issued a Final Determination - Denial in this case. AF 2-7. The CO acknowledged the Employer's response to the NOD but determined that the Employer failed to establish that its need is seasonal or temporary in nature. Specifically, the CO noted that the Employer confirmed in its response that the duties to be performed by employees are performed throughout the year. AF 6. The CO stated that the H-2A program requires that the work being performed 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. The CO further stated that job opportunities that occur year-round do not qualify as seasonal or temporary. The CO determined that job duties of moving, storing, reloading, unloading and delivering can be performed all year and are not tied to a certain pattern or seasonal cycle. *Id.*

The CO also noted that while Employer explained that hay is in greater demand in the winter when cattle are being fed in feedlots, the Employer did not provide any evidence that demand is higher in winter months. Although the CO acknowledged that Employer provided a copy of an invoice which shows goods provided or ordered in June and July of 2022, the CO found this information does not support Employer's claim of winter months having a higher demand for delivery of products. *Id.*

The CO also referred to the schedule of operations included in the Employer's NOD response, noting that Employer included a description of the job duties from May through February. However, the CO observed that Employer's dates of need are from October through June. Therefore, the CO concluded that if the job duties occur during both May through February, as well as October through June, then the job duties occur all months of the year. AF 7. Finally, the CO again noted that Employer stated that its farm operation consists of hay and feed production and delivery, and that the "work is consistent throughout the year." Thus, the CO reasoned that this statement is inconsistent with a seasonal or temporary need which is one that is tied to a reoccurring cycle that requires labor levels for above those necessary for ongoing operations. The CO concluded that if the Employer's work is consistent throughout the year, then the need for labor is not seasonal or temporary. Accordingly, the CO determined that the Employer failed to demonstrate a seasonal or temporary need and therefore Employer's application for temporary labor certification was denied. *Id.*

On October 1, 2022, Employer submitted a letter to the Certifying Officer reasserting its request for temporary labor certification in this matter and stating that it is in great need of help this winter season. AF 1. The Certifying Officer interpreted this letter as a request for administrative review under 20 C.F.R. § 655.171(a) of the Certifying Officer's Final Determination denial in this matter. Therefore, the CO forwarded this case to the Office of Administrative Law Judges.

By Order dated October 17, 2022, the parties were granted leave to file briefs on or before October 20, 2022. Neither Employer nor the CO filed a brief in this matter.

ISSUE

Whether the Certifying Officer properly denied the Employer’s H-2A application for temporary labor certification due to Employer’s failure to meet its burden of establishing that its need for agricultural services or labor between October 15, 2022 and June 30, 2023 is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. §655.103(d).

SCOPE OF REVIEW

The current case arises from the Employer’s request for administrative review in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program. “Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, 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, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” 20 CFR §655.171(a). The ALJ’s decision “must specify the reasons for the action taken.” *Id.* While neither the Immigration and Nationality Act nor the applicable regulations specify a standard of review, BALCA has fairly consistently adopted the arbitrary and capricious standard in reviewing the CO’s determinations. *See e.g. J&V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).²

DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers

²*J&V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016). The Act and Regulations are silent as to the appropriate standard of review to be applied on administrative review. As stated in *J&V Farms*:

Prior to the issuance of the revised regulations which went into effect on March 15, 2010, the regulations specified that the decision of ETA was to be reviewed for ‘legal sufficiency.’ 20 C.F.R. § 655.112(a) (2008). Legal sufficiency, while not defined by the regulations, was interpreted to require an arbitrary and capricious standard. *Bolton Springs Farm*, Case No. 2008-TLC-28, slip op. at 6 (ALJ May 16, 2008). The March 15, 2010 regulations removed the reference to legal sufficiency but did not substitute any other standard of review and no comment was provided to explain the change. 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). Under the current regulations, some ALJs have continued to apply the arbitrary and capricious standard of review. *Catnip Ridge Manure Application Inc.*, 2014-TLC-00078, slip op. at 3 (ALJ May 28, 2014); *T.A.F. Shearing Co./Alejandro R. Colqui*, 2012-TLC-00095, slip op. at 1 (ALJ Sept.19, 2012). Additionally, ETA has said that the ‘substance of [the appeals regulation] has remained the same since 1987.’ 74 Fed. Reg. 45906, 45921 (Sept. 4, 2009).

2016-TLC-00022, slip op. at 3 n.1 (alteration in original). *But see, e.g., Crop Transp., LLC*, 2018-TLC-00027, slip op. at 3-4 n.4 (Oct. 19, 2018) (applying de novo standard of review).

seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161. Employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). A “seasonal” need occurs if employment 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).

In determining temporary need for purposes of the H-2 temporary alien labor certification program it is well settled that it is “not the nature of 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.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *See Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). (It is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal). *See also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).

In order to utilize the H-2A program it is the employer’s burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). In regard to a seasonal need, an employer must demonstrate when the employer’s season occurs and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op at 11 (Feb. 15, 2011).

In this case the CO determined that Employer failed to provide sufficient explanation or documentation to support its seasonal need with its application materials. In the NOD the CO stated that the job duties noted by the Employer do not appear on their face to be seasonal, and rather, can be performed year-round. AF 27. Accordingly, the CT directed the Employer to provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature. Specifically, the CO requested 1) A statement describing the employer’s business history, activities (primary products or services) and a schedule of operations throughout the entire year; 2) A statement as to how cattle are fed during the “off season” between July and September, and who, if anyone, cares for the cattle; 3) Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked and total earning received; and 4) Other evidence and documentation that similarly serves to support a seasonal need.

Employer stated in its response letter that it operated a farm operation that consists of hay and feed production and delivery and that the work is consistent throughout the year. AF 11. Employer noted that the hay and feed business is a new venture that was started during the drought of 2021 and therefore there is no business history available and there were no payroll records. However, Employer did provide a schedule of its operations detailing the work performed from May to February.

After reviewing the Employer's response, the CO determined in the September 28, 2022 Final Determination that Employer failed to prove that its need for labor during the requested dates of October 15, 2022 and June 30, 2023 is based on a seasonal or temporary need. Specifically, the CO noted that the Employer confirmed in its response that the "duties to be performed by employees are moving, storing, reloading, unloading and delivering the hay and feed products throughout the growing season" and in addition that "the job duties [] are performed throughout the year." AF 6. The CO further stated that job opportunities that occur year-round do not qualify as seasonal or temporary. The CO determined that job duties of moving, storing, reloading, unloading and delivering can be performed all year and are not tied to a certain pattern or seasonal cycle. *Id.* The CO also noted that while Employer explained that hay is in greater demand in the winter when cattle are being fed in feedlots, the Employer did not provide any evidence or documentation that demand is higher in winter months.

The CO also referred to the schedule of operations included in the Employer's NOD response, noting that Employer included a description of the job duties from May through February. However, the CO observed that Employer's dates of need are from October through June. Therefore, the CO concluded that if the job duties occur during both May through February, as well as October through June, then the job duties occur all months of the year. AF 7. Finally, the CO again noted that Employer stated that its farm operation consists of hay and feed production and delivery, and that the "work is consistent throughout the year." Thus, the CO reasoned that Employer's statement is inconsistent with a seasonal or temporary need which is one that is tied to a reoccurring cycle that requires labor levels for above those necessary for ongoing operations. The CO concluded that if the Employer's work is consistent throughout the year, then the need for labor is not seasonal or temporary.

After reviewing the record in this case, the undersigned finds the CO properly determined that the Employer failed to meet its burden of proving that its need for labor between October 15, 2022 and June 30, 2023 is based on a seasonal need. Employer's application indicates that its need for labor in this case is based on a seasonal need. The applicable regulation provides as follows in regard to a seasonal need:

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.

20 C.F.R. § 655.103(d).

The CO reasonably determined that statements in Employer's response were inconsistent with a seasonal need. Specifically, Employer's own statements that its "work is consistent throughout the year" does not support its claim that it needs an additional worker on a seasonal

basis. Employer asserted in its response letter that it is a new business that began in 2021 and therefore did not have payroll or business records. However, the information that Employer submitted included documents pertaining to its incorporation in the year 2009. Accordingly, if the Employer is claiming that the business for which it is requesting a seasonal worker is a new business, it did not submit documentation to support that claim. Alternatively, even assuming that Employer is claiming that its business need for this type of seasonal worker did not begin until 2021 due to the drought conditions in his area, he did not provide the necessary documentation to support an increased seasonal labor need for the requested dates of October 15, 2022 through June 30, 2023. As noted by the CO in the Final Determination, while Employer claims that hay is in greater demand in the winter when cattle are being fed in feedlots, the Employer did not provide any documentation that demand is higher in winter months. Such documentation could have included such things as contracts for delivery during the requested period of October 15, 2022 through June 30, 2023.

Further, the schedule of operations provided by the Employer which covers the months of May through February does not coincide with the months of October through June which are the requested dates of need. As noted by the CO, if work occurs in the months of May through February and also October through June it is occurring in every month of the year. Therefore, the schedule of operations provided also fails to explain the claimed seasonal need in October through June. The CO also noted that Employer confirmed in its response letter that the “duties to be performed by employees are moving, storing, reloading, unloading and delivering the hay and feed products though out the growing season” and that “the job duties [] are performed throughout the year.” AF 6. Thus, Claimant’s own statements do not support a seasonal need for additional labor during the requested dates of October 15, 2022 through June 30, 2023.

The burden is on the Employer to establish its claim of seasonal need for labor. To prove a seasonal need, an employer must demonstrate when the employer’s season occurs and how the need for labor or services during the season differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op at 11 (Feb. 15, 2011). BALCA has consistently recognized that in temporary labor certification matters it is the Employer’s burden to provide the necessary documentation to prove its claimed need for labor. See e.g. *Empire Roofing*, 2016-TLN-00065 (Sept. 15, 2016) (“An employer cannot just toss hundreds of puzzle pieces-or hundreds of pages of document-on the table and expect a CO to see if he or she can fit them together. The burden is on the applicant to provide the right pieces and to connect them so the CO can see that the employer has established a legitimate temporary need for workers”). For the above stated reasons, the CO properly determined that Employer failed to meet its burden of proving its seasonal need.

ORDER

The undersigned finds that the CO properly determined that Employer failed to meet its burden of demonstrating its seasonal need for one agricultural equipment operator, for the period

of October 15, 2022 to June 30, 2023. The CO's determination is neither arbitrary nor capricious. Accordingly, the CO's denial of Employer's application for temporary labor certification is **AFFIRMED**.

For the Board of Alien Labor Certification Appeals:

NATALIE A. APPETTA
Administrative Law Judge