

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 January 2023



BALCA Case No.: 2023-TLC-00014
ETA Case No.: H-300-22299-552134

In the Matter of:

Maligaya Development Eco-Farm
Employer.

Before: Dierdra M. Howard
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. Here, the Certifying Officer (“CO”) of the Office of Foreign Labor Certification’s Chicago National Processing Center (“OFLC CNPC”) denied the application of Employer, Maligaya Development Eco-Farm, (“Employer”) for temporary labor certification. Employer has requested expedited administrative review of the CO’s denial.

STATEMENT OF THE CASE

Employer, Maligaya Development Eco-Farm, is a farm that engages in the growth, harvest, picking and sorting of white and portobello mushrooms in Shoshoni, Wyoming. Employer is seeking ten farmworkers for temporary seasonal work.

On October 31, 2022, Employer filed an H-2A application for temporary works based upon seasonal need.¹ On November 7, 2022, the CO issued a Notice of Deficiency denying Employer’s request on the basis that it did not appear the Employer had an actual seasonal need.² Specifically, the CO asserted that farming activities at the Employer’s mushroom farm could occur year-round,

¹ See AF, pp. 218-265

² See AF, pp.12-17

rather than a specific growth and harvesting season.³ The CO requested that Employer provide supporting documentation that a seasonal need did in fact exist.⁴ The CO expressly requested that the documentation **must** include:⁵

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. An explanation as to how the employer's need, shown in its need statement, represents a seasonal need when the need is reoccurring from year-to-year;
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 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, 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;
4. If contractors or other entities were used by the employer to address the need, or portions of the need, described in this application, three years of contracts/receipts detailing the services provided and dates of said services must be provided. 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; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer 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 for certification.

On November 8, 2022, Employer filed a response to the CO's Notice of Deficiency.⁶ Employer argued that the CO had approved its previous application, LCA (H-300-22117-110838), covering the period of July 1, 2022-April 15, 2023, for farming mushrooms within the same area of intended employment, establishing a mushroom season.⁷ Employer asserted that it has a 9-month growing and harvesting season from July to April, which coincided with the period where consumer demand for mushrooms is at its highest.⁸ During this period, temporary workers are needed to meet the increased demand, which includes a limited mushroom shelf life of 14 days

³ See AF, pp. 15

⁴ See AF, pp. 16

⁵ *Id.*

⁶ See AF, pp. 9-10

⁷ *Id.*

⁸ *Id.*

from the date of harvest.⁹ Employer provided that the months of April, May and June were its down season where its permanent employees spent time modernizing and improving the facility, rather than engaging in the growth and harvesting of mushrooms, eliminating the need for temporary workers.¹⁰ Employer argued that the CO's inquiry should not be focused on whether a particular activity could theoretically take place year-round because the ability to engage in mushroom farming throughout the year was not indicative of the Employer's need for labor.¹¹ Additionally, employer argued that it currently had a customer with a weekly standing order of 20,000 to 30,000 pounds of mushrooms per week and that it could not meet the demands of this customer without temporary labor and that this customer's order should continue until April of 2023.¹² Lastly, employer acknowledged previous growing seasons which were in conflict with its current season, but provided that it was a new company and just gained the necessary management and grower expertise to identify the proper growing season and off season.¹³ Employer concluded that it remained committed to a fixed seasonal growing schedule from July to April moving forward.¹⁴

On December 7, 2022, CO issued a decision determining that the Employer failed to support a need for seasonal workers.¹⁵ The CO provided that the Employer's response was insufficient as it did not provide the supporting information or documentation specifically requested in the Notice of Deficiency to support its alleged seasonal need.¹⁶ The CO argued that the Employer did not provide it with 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 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, the total number of workers or staff employed, total hours worked, and total earnings received.¹⁷ Additionally, the CO asserted that farming mushrooms is an activity that can be performed year-round, and the employer did not provide actual documentation supporting the idea that mushroom farming is a temporary or seasonal activity.¹⁸ The employer argued that the Employers previous filing history supports a finding that mushroom farming can be performed year-round and Employer's argument that the months of April through June constitute its off season is contradicted by prior applications covering all 12 months of the year.¹⁹ Lastly, the CO stated that Employer's reference to the previously certified application had no bearing on the current application as each application is adjudicated on its own merits.²⁰

In response to the Co's decision, Employer filed the instant request for administrative review.²¹ This matter was assigned to the Undersigned on January 5, 2023, and the administrative

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See AF, pp. 10

¹³ See AF, pp. 9-10

¹⁴ See AF, pp. 10

¹⁵ See AF, pp. 187-195

¹⁶ *Id.*

¹⁷ See AF, pp. 194

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See AF, pp. 194-195

²¹ See AF, pp. 1-6

file was received on the same date. The Undersigned issued a Notice of Assignment and Expedited Briefing Schedule on January 11, 2023; however, no subsequent briefs were filed by the parties.

APPLICABLE LAW

The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows United States employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department of Labor (8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A)).

Throughout the labor certification process, the employer bears the burden of proving it qualifies for temporary alien labor certification.²² Therefore, if the employer appeals an unfavorable decision by the CO, the employer must first demonstrate it is entitled to certification and then show that the CO’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or are based on conclusions that are legally impermissible and/or inconsistent with the underlying established facts.²³ In cases where an employer appeals a denial and requests an expedited administrative review by an ALJ, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law.²⁴ An employer’s bare assertion of need without either supportive documents or evidence is generally insufficient to carry its burden of proof.²⁵ Rather, 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.²⁶ Accordingly, applications for temporary labor certification are properly denied when the employer does not supply requested information or documentation.²⁷

To qualify for the H-2A program, an employer must establish it has a need for “agricultural services or labor to be performed on a temporary or seasonal basis.”²⁸ The corresponding regulations offer definitions for both “temporary” and “seasonal” terms:

[e]mployment is of 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

²² MacFarlane Pheasants, In (Missouri), 202-TLC-00060 (April 13, 2020); Altendorf Transport, Inc., 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a).

²³ See Catnip Ridge Manure Application, Inc., 2014-TLC-00078 (May 28, 2014); Five Guys Farms LLC, 2021-TLC00174, slip op. at 2,3 (July 14, 2021) (internal citations omitted).

²⁴ GreenTop Acres, 2020-TLC-00088, slip op. at 4 (July 8, 2020) (citing J & V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016)); Midwest Concrete & Redi-Mix, Inc., 2015-TLC-00038, slip op. at 2 (May 4, 2015)

²⁵ Lodoen Cattle Company, 2011-TLC-00109 (citing Carlos Uy III, 1997-INA-00304 (Mar. 3, 1999) (en banc)).

²⁶ AG-Mart Produce, Inc., d/b/a Satna Sweets, Inc., 2020-TLC-00085, slip op. at 7 (July 13, 2020) (citing DTM Trucking, Inc., 2018-TLN-00174, slip op. at 4 (Oct. 10, 2018)).

²⁷ 20 CFR § 655.103(d); AG-Mart Produce, Inc. at 7 (internal citations omitted).

²⁸ 20 CFR § 655.161(a)

with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.²⁹

The temporary nature of a job opportunity is determined by “the nature of the need for the duties to be performed,” not the nature of the duties themselves.³⁰ Accordingly, the whole situation must be taken into consideration, not just the specific job at issue.³¹ The position should not be a permanent position disguised as a temporary one with short breaks between purported hiring periods.³²

Likewise, in “seasonal” labor certification cases the ALJ must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal.³³ When making this determination, “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.”³⁴ Therefore, denial of certification is appropriate where the employer fails to provide any evidence that indicates a higher need for workers in certain months of the year as opposed to other months in the year.³⁵

DISCUSSION

It is well established that the H-2A program is intended to fill requests for only temporary or seasonal labor needs, and therefore, the need for the particular position cannot be year-round, except in extraordinary circumstances.³⁶ In this case, the CO denied Employer’s application on the basis that the employment sought was not temporary or seasonal in nature pursuant to 20 CFR § 655.103(d) and Employer’s responses did not overcome the deficiencies outlined in the CO’s Notice of Deficiency.³⁷

In this matter, Employer failed to establish a temporary need for non-recurrent farmworker labor lasting no longer than one year under ordinary circumstances. As indicated by the CO, the Employer failed to provide all the information requested in the Notice of Deficiency to support its contention that it has a seasonal need for temporary workers. The CO specifically requested 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 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, the total number of workers or staff employed, total hours worked, and total earnings received. While the employer argued that there was a high demand for mushrooms during the months of July until April and even cited one of its largest customers in support of this assertion, its response to the CO’s Notice of Deficiency failed to provide supporting documentation as requested.

²⁹ 20 CFR § 655.103(d).

³⁰ William Staley, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009).

³¹ Haag Farms, Inc., 2000-TLC-00015 (Oct. 12, 2000); Bracy’s Nursery, 2000-TLC-00011 (Apr. 14, 2000).

³² Tranel Ranch 2019-TLC-00049, slip op. at 3 (May 22, 2019).

³³ Pleasantville Farms LLC, 2015-TLC-00053, slip op. at 3 (June 8, 2015).

³⁴ Fegley Grain Cleaning, slip op. at 3 (citing Altendorf Transport, Inc., at 11).

³⁵ Farm-Op Inc., 2017-TLC, slip op. at 7 (July 7, 2017) (citing Lodoen Cattle Co., 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011)).

³⁶ 20 CFR § 655.103(d).

³⁷ See AF, pp. 9-10

Additionally, Employer failed to provide supporting documentation that mushroom farming is a temporary or seasonal activity, when it had been established by its own past practices and applications that the act of mushroom growing, harvesting, picking and sorting can be conducted year-round. While Employer argued that its down season constituted the months of April, May and June, it provided no documentation to support the existence of an actual season, rather than the election of a period of time to conduct farm maintenance instead of growth and harvesting.

Lastly, Employer asserted that is submitted a previous H-2A application requesting a similar mushroom growing season which was ultimately certified. Employer argued that the rationale used to certify the prior application should be applied to the current matter. However, it is important to note that each H-2A application, regardless of subject matter, is reviewed and adjudicated on its own merits. While many applications may involve similar requests, processes or circumstances, each is considered independently for certification. Upon independent review of the current application, the evidence supports a finding that Employer has failed to provide the requested documentation establishing a seasonal need for temporary labor and thus, has not met its burden for certification.

CONCLUSION

Based upon the foregoing analysis, the Undersigned concludes that the CO's decision in this matter was neither arbitrary and capricious, nor inconsistent with the underlying established facts and applicable law. Consequently, the CO's decision to deny Employer's application was a reasonable exercise of discretion and must be upheld.³⁸

The Certifying Officer's Denial of Employer's Application for Temporary Employment Certification is hereby **AFFIRMED**.

SO ORDERED.

For the Board of Alien Labor Certification Appeals:

Dierdra M. Howard
Administrative Law Judge
Washington, DC

³⁸ GreenTop Acres, 2020-TLC-00088, slip op. at 4 (July 8,2020) (citing J & V Farms, LLC, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016)); Midwest Concrete & Redi-Mix, Inc., 2015-TLC-00038, slip op. at 2 (May 4, 2015).