

UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, DC

Issue Date: 10 March 2023

BALCA Case No.: 2023-TLC-00020

ETA Case No.: H-300-22348-640854

In the Matter of:

SUNNY HILLS FARM, LLC
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“Department”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

I. PROCEDURAL BACKGROUND

On December 23, 2022, Employer submitted its Application for Temporary Employment Certification. (AF at 63-86.¹) Employer designated its temporary need for labor as seasonal. (AF at 63.) Employer requested certification for two general farm workers in North Carolina from February 12, 2023, through November 30, 2023.² (AF at 71-72.) In describing the prospective job duties of these workers, Employer explained: “The main enterprises of this farming operation are forest-raised pork, pasture raised broiler chickens, and sheep raised for meat. In addition to working with the livestock, workers will also assist with duties relating to establishing fruit and nut orchards on the farm.” (AF at 71.) Specific job duties included: assisting with birthing of lambs and piglets, feeding chickens, attending to sick animals, loading and unloading animals, installing fences, preparing land for orchards, planting trees, and operating/maintaining farm equipment. (AF at 71.) In its statement of temporary need, Employer explained: “Seasonal demands in spring and summer are extreme and involve growing pastured

¹ For purposes of this decision, “AF” stands for “Appeal File.”

² On October 12, 2022, the ETA published a final rule, which, in part, amended 20 C.F.R., subpart B. *See* 87 Fed. Reg. 61660. The final rule, in pertinent part, states that applications submitted on or after November 14, 2022, shall be processed under the 2010 H-2A final rule if the first date of need is February 12, 2023, or earlier. Accordingly, as Employer’s requested first date of need was February 12, 2023, this decision applies the 2010 H-2A final rule as opposed to the 2022 final rule. *See* 20 C.F.R. § 655.171.

broilers (spring/summer only), lambing season (spring), and growing out pigs, which is a 4-6-month cycle (summer). Most animals are sold in the fall and only breeding pairs are kept during the winter until spring when the next breeding and raising of animal cycle starts.” (AF at 81.)

On December 30, 2022, the Certifying Officer (“the CO”) issued a Notice of Deficiency (“NOD”) outlining five deficiencies, including Employer’s failure to establish a seasonal need for labor.³ (AF at 49-56.) The CO reasoned “the job duties for the requested position include livestock duties such as assisting with the birthing of lambs and piglets, carrying and spreading of feed in chicken pastures, and attending to any sick animal on the farm. These duties are presumed to occur on a year-round basis.” (AF at 51.) The CO also specifically noted that Employer did not submit documentation to support its seasonal need for workers.

To remedy this deficiency, the CO directed Employer to respond to the NOD with the following information: (1) a statement describing the employer’s business history, activities, and schedule of operations throughout the year; (2) a detailed explanation of the activities of the employer’s permanent farm workers outside of the requested period of need; (3) an explanation of the employer’s monthly staffing levels that identifies periods of normal operations and periods where labor levels are far higher than normal; (4) summarized monthly payroll reports for the three previous calendar years that identify by month employer’s permanent and temporary farm workers, their hours, and their earnings; and (5) “[o]ther evidence and documentation that similarly serves to justify the dates of need being requested for certification.” (AF at 52-53.) The CO specifically noted:

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.

(AF at 53.)

On January 4, 2023, Employer submitted its response to the NOD, which included a letter addressing the deficiencies, a monthly schedule of activities, and other documentation.⁴ (AF at 16-44.) In its response letter, Employer reiterated that the growing of animals occurs on a 4-to-6-month cycle in the “spring/summer.” Employer argued that, during these months, there is “a seasonal need to help with the animals and to do the workload required. During the winter months, the owner does not need extra seasonal help, and can take care of the animals himself. Thus, there are a very defined seasonal need despite year-round farming activities.” (AF at 16.) Additionally, Employer clarified that it purchased the farm in May 2022; thus, it does not have the requested summarized payroll reports, nor does it have any full-time employees other than

³ In the final determination, the CO only cited Employer’s inability to establish a seasonal need as the basis for denial. Accordingly, this decision will not address the other deficiencies listed in the NOD.

⁴ The additional documentation submitted with Employer’s response pertains only to the deficiencies that will not be addressed in this decision; the information is not relevant to Employer’s alleged seasonal need for labor.

the owner himself. (AF at 16-17.) Lastly, Employer included links to two videos relating to poultry and pork production in North Carolina. (AF at 18.)

On January 17, 2023, the CO issued its Final Determination denying Employer's application for H-2A temporary labor certification for two general farm workers. (AF at 6-12.) The CO determined Employer's attempt to clarify its seasonal need "points to a need in the spring summer months only," even though Employer's requested dates of need (February 12 through November 30) also spanned the entire fall season. (AF at 11.) The CO also noted that the requested workers would be establishing a fruit and nut orchard, but the CO determined these activities did not support the requested dates of need because "this is not the employers primary farming operation," and these activities would be performed only in the spring. (AF at 11.) The CO acknowledged that Employer's schedule of activities showed a need for temporary labor from February to November, but the CO determined "the schedule of operations is a forecast and does not reflect use or a past need for temporary work by the employer." (AF at 11.) The CO also pointed out that, though the videos Employer submitted addressed poultry management and care, the videos did not discuss the seasonality of poultry production. (AF at 11-12.) The CO concluded Employer's response to the NOD did not overcome the deficiency, and Employer still had not established a seasonal need for labor, as required by 20 C.F.R. § 655.103(d).

On January 24, 2023, Employer submitted its request for expedited administrative review. (AF at 1-4.) Employer first argues the CO does not dispute its seasonal need in the spring and summer months and only denied the application because Employer requested certification for dates outside the spring and summer months. To support its need for labor before and after the spring and summer months, Employer points to its schedule of activities, which includes the delivery of the third batch of broilers to the processor in October (thereby allowing for a longer growing season and thus bigger chickens and higher profitability), as well as the selling of lambs in October and the delivery of pigs in November. With regard to its planned orchard operations, Employer again points to its schedule of activities, which lists orchard-related activities beyond just the spring months. Finally, Employer asserts the CO did not consider the crucial preparation activities that must occur in February before the livestock arrives on the farm. Specifically, Employer explains it needs to physically prepare the chicken coops before each batch arrives. Employer also explains it must clean the coops after each batch is sold (which is critical to prevent the spread of chicken-related diseases), and the last cleaning is set to occur in November. Based on its assertions and explanations, Employer requests that I approve its original application. Alternatively, Employer requests that I approve its application for the "spring and summer months" (March 20, 2023, through September 23, 2023).

On March 3, 2023, this matter was assigned to me for adjudication. On March 6, 2023, I issued a Notice of Assignment and Expedited Briefing Schedule. On March 8, 2023, Employer submitted a brief, which reiterates the arguments in its appeal letter and emphasizes the seasonal and weather-dependent nature of farming activities. Counsel for the CO did not submit a brief.

II. ANALYSIS

A. Legal Standard

Employer requested administrative review. Accordingly, I must “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 C.F.R. § 655.171(a). Although no standard of review is specified in the regulation, I review the CO’s denial to determine whether it is arbitrary and capricious. *J and V Farms, LLC*, 2016-TLC-00022, at note 1 (Mar. 4, 2016); *see also Resendiz Pine Straw, LLC*, 2019-TLC-00052 (June 14, 2019). Under the “arbitrary and capricious” standard, the reviewing judge or panel must determine whether the CO “examined ‘the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *K.S. Dathyn Farms, LLC*, 2019-TLC-00086, at 5 (Oct. 7, 2019) (quoting *Three Seasons Landscape Contracting Service, Inc.* 2016-TLN-00045, at 19 (June 15, 2016) (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (alteration in original))).

Employer bears the burden of establishing its eligibility. *See Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011). The criteria for certification under the H-2A program includes “whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” § 655.161(a). The applicable regulation provides:

[E]mployment 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 1 year.

§ 655.103(d) (emphasis added). Here, Employer argues its need is seasonal.

When determining whether an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” *In the Matter of Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added). To show a seasonal need, Employer must “establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year.” *In the Matter of Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011). In other words, seasonal employment is “employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.” *William Staley*, 2009-TLC-00060 (Aug. 28, 2009). The overarching question is “whether the employer’s need is truly temporary.” *Id.* (citing 52 Fed. Reg. 16,770, 20,497-98 (1987)).

B. Seasonal Need

As explained above, the CO denied Employer's application for temporary labor certification based on a finding that Employer did not demonstrate a seasonal need for workers. Upon review of the file, I agree that Employer has not demonstrated a seasonal need for two general farm workers. First, I disagree with Employer's assertion that the CO raised no objection to its seasonal need in the spring and summer months. Inherent in the CO's denial is the finding that Employer failed to establish a seasonal need of any length. Though the CO focused on the distinction between Employer's explanation of its need (the spring and summer months) and its requested dates of need (which include months beyond spring and summer), the CO did not determine that Employer otherwise established a seasonal need in the spring and summer months. Rather, the overall crux of the CO's determination is that Employer failed to submit sufficient documentation to establish a seasonal need.

On this point, I agree with the CO. The only documentation Employer submitted regarding its seasonal need was its response letter, its schedule of activities, and the video links. In the letter, Employer's owner explained that—because most animals will be sold in the fall and only breeding pairs will be kept over the winter—he himself will be able to perform all animal-related duties during the months outside Employer's requested period of need. I find this explanation is reasonable and could support a seasonal need for labor (had Employer provided any evidentiary support for it). I also acknowledge that Employer's schedule of activities reflects that Employer needs workers from February to November to perform duties related to preparing for animals, caring for animals, delivering animals, and performing orchard maintenance.

However, this information *alone* is insufficient to establish a seasonal need for additional workers. The problem is that Employer has not submitted any documentation to support its own bald assertions of seasonal need. For instance, Employer did not adequately demonstrate how raising and selling livestock is tied to a certain time of year, nor did Employer offer any documentation to support its repeated assertion that the breeding cycle lasts 4 to 6 months.⁵ The two videos Employer submitted describe certain farming operations, but (as the CO pointed out) neither of these videos link the raising of chickens, pigs, or lambs to a specific time of year.⁶ On the surface, then, it is unclear whether raising and selling livestock must necessarily occur in the spring and summer months or whether this timing is Employer's personal preference.

Moreover, Employer offered no documentation at all to support the assertions (as set forth in its schedule of activities) regarding when it will perform the work of raising and selling livestock. I recognize and understand that Employer is a new business, and Employer's owner is currently the only permanent employee, so Employer could not submit some of the requested documentation (such as summarized monthly payroll records). However, the CO specifically notified Employer that, even if it is "a new business, without an established business history and

⁵ The same is true of Employer's orchard operations. There is no documentation in the record to support a seasonal need for labor by connecting Employer's operations to a certain time of year; Employer has merely stated its general intent to establish an orchard.

⁶ The first video discusses how to properly raise chickens, including adequate sanitation measures necessary to reduce the spread of disease. Similarly, the second video provides guidance on how to properly raise and care for pigs. Notably, the second video centers around protecting pigs from heat more than protecting them from cold weather.

activities,” Employer still “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.” (AF at 52-53.) Employer failed to do so. Employer could have supported its position with any type of relevant documentation (*e.g.*, letters of intent, purchase orders, invoices, future contracts for the sale of animals, articles describing a “season” linked to raising livestock in North Carolina, etc.). Instead, Employer chose to rely only on its own assertions of seasonal need. Bare assertions without supporting evidence are insufficient to carry the employer’s burden to establish its eligibility. *See AB Controls & Tech.*, 2013-TLN-00022 (Jan. 17, 2013); *Lodoen Cattle Co.*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999) (en banc)).

Finally, I recognize that, in its appeal, Employer requested that I modify its dates of need to reflect the start of spring and end of summer; however, an administrative law judge does not have the authority to do so. *See Overlook Harvesting Company, LLC*, 2022-TLC-00013 (Nov. 24, 2021) (noting that an administrative law judge’s authority to modify the CO’s determination is not permission to modify an employer’s application) (citing *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008)). Moreover, as set forth above, Employer has not in fact established a seasonal need in the spring and summer months.

In short, it is Employer’s burden to establish a seasonal need, and Employer did not submit sufficient documentation to establish its seasonal need for labor, even after the CO specifically requested such documentation. Because Employer has not made this required showing, I conclude the CO’s denial of Employer’s application is neither arbitrary nor capricious.

III. CONCLUSION

Based on the foregoing analysis, Employer has not established a seasonal need for labor, as defined by 20 C.F.R. § 655.103(d). Therefore, I conclude the Certifying Officer’s denial of Employer’s application for temporary agricultural labor certification under the H-2A program was not arbitrary or capricious.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**. *See* 20 C.F.R. § 655.171(a).

SO ORDERED.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge