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

Issue Date: 16 August 2023

BALCA CASE NO.: 2023-TLC-00052

ETA Case No.: H-300-23122-983874

In the Matter of:

OKO'A FARMS,
Employer.

DECISION AND ORDER AFFIRMING THE DECISION OF THE CERTIFYING OFFICER

This matter came before the undersigned for hearing on August 7, 2023. Both the Certifying Officer ("CO") and Oko'A Farms ("Employer") appeared at the hearing and were provided an opportunity to present evidence and argument. Based on the evidence of record, the undersigned now issues this Decision and Order.

I. Factual and Procedural Background

Employer submitted an application for temporary labor certification pursuant to the H-2A temporary agricultural worker program. (Administrative File ("AF"), at 63–86.) Employer is a family farm located in Hawaii that grows fruits and vegetables. (AF, at 79.) Employer sought seven farm workers in Hawaii from July 7, 2023, until April 1, 2024. (AF, at 70–71.) The stated need on the application was seasonal. (AF, at 63.) The requested workers will prepare the field, plant the field with new crops, care for existing crops, weed, apply chemicals, and harvest the crops for market. (AF, at 70.) The jobs have no education, training, or experience requirement. (AF, at 71.) Employer, however, also requested a specific group of workers from El Salvador, for which it sought classification "as H-2A nonimmigrant to renew and extend their visas and continue to serve as farm workers for the company during the present year since they have proven to be valuable employees due to their agricultural and farm experience." (AF, at 79.)

According to Employer's March 16, 2023, statement attached to the application, the busiest time of year for the farm is April through January. (AF, at 79.) This is the busiest season according to Employer's March 16, 2023, statement because the vegetables are planted and produced during this period. (AF, at 79–80.) The January 2023 statement mentions the need for the workers to cover the demands for the large number of clients during the year. (AF, at 83–84.)

The Office of Foreign Labor Certification then issued a Notice of Deficiency. (AF, at 41–55.) The Certifying Officer identified eight deficiencies. (AF, at 44–55.) One of the stated deficiencies was seasonal need. (AF, at 46–47.) The CO found that Employer's prior applications requested periods covering May 9, 2022, to March 6, 2023, March 27, 2023, to January 15, 2024, and April 28, 2023, to February 2, 2024. (*Id.*) These prior applications are also contained in the record. (AF, at 87–436.) The description of work in the prior applications is substantially similar to the current application; the jobs describe the same basic work functions. (*See* AF, at 70, 112, 320, 399, 428.) Based on these prior applications, the CO determined that Employer has a need for labor that spans almost the entire year, and the need for labor does not appear tied to a certain time of year or event. (AF, at 47.)

In response to the Notice of Deficiency, Employer submitted a letter documenting "the year-long growing season our climate zone provides. We can find use for workers through the H-2A program at any time of year. Because a layperson cannot understand our unique request, we would like to rescind our request for H-2A employment beyond 10 months." (AF, at 25.) Employer also agreed to amend the start date of the date of need because it "can use available workers at any time" pursuant to the H-2A program. (*Id.*) Employer also noted in the response that it needed the workers to account for a newly leased sixteen acres of farmland. (*Id.*)

The Office of Foreign Labor Certification denied the application on July 5, 2023. (AF, at 7–16.) The Denial Letter contained five deficiencies. (AF, at 9–16.) Deficiency 2 addressed temporary or seasonal need. (AF, at 10–12.) The CO noted that the H-2A program is designed to address temporary labor shortages, but that based on Employer's responses to the Notice of Deficiency, it appears to seek permanent

employees. (AF, at 12.) The CO found that Employer failed to demonstrate a seasonal or temporary need.

This denial contained a "**NOTICE OF APPEAL RIGHTS**." This notice provided that:

> As provided by Departmental regulations at 20 Code of Federal Regulations (CFR) § 655.164(b), you have the opportunity to request an expedited administrative review or de novo hearing before an Administrative Law Judge (ALJ) under 20 CFR § 655.171. To obtain this review or de novo hearing, you must file a written request, which must be received by the Chief ALJ and the Certifying Officer (CO) who issued the decision within ten (10) business days from the date of the CO's decision. You may file a written request by sending it to the Chief ALJ, U.S. Department of Labor . . .
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> To simultaneously submit a copy of the written request to the CO, you may use the email address: TLC.Chicago@dol.gov. Alternatively, the copy may be sent to the CO at this address: U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, Attention: H-2A Appeals; H-300-23122-983874, 11 West Quincy Court, Chicago, IL 60604.

(AF, at 7–8.) In addition, the Notice of Appeal stated that "If you do not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with 20 CFR § 655.171, the decision is final, and the Department of Labor will not accept any appeal." (AF, at 8.)

Employer then submitted a request for review of the denial to BALCA, requesting a *de novo* hearing on July 13, 2023. The Chief Administrative Law Judge assigned the matter to the undersigned for hearing and decision on July 14, 2023. The undersigned then entered a Notice of Assignment on July 17, 2023, which BALCA served on both the Office of Foreign Labor Certification and the Office of the Solicitor. (Notice of Assignment, July 17, 2023.) Once the undersigned received the administrative file, the undersigned set this matter for hearing on August 7, 2023. (Order Setting Hr'g, July 25, 2023.)

After the undersigned set the matter for hearing, the CO moved to dismiss Employer's appeal. The CO contends that dismissal is required under the regulations

because Employer did not serve the CO with a copy of the request for review.[1] According to the motion, the CO first became aware of the appeal when it received the undersigned's Notice of Assignment on July 18, 2023. (CO's Mot. Dismiss, at 2.)

On August 7, 2023, the matter came before the undersigned for hearing. Employer appeared through Ryan Earehart, a fifty percent partner in the business; Mr. Earehart is not an attorney. (Hr'g Tr. 5:8–6:1, 30:16–17.) At hearing, the undersigned admitted the administrative file into the record. (Hr'g Tr. 14:9–11.) Neither party offered any other documentary evidence. (*See* Hr'g Tr. 13:23–3.) Ryan Earehart was the only witness to testify at hearing. (Hr'g Tr. 29:30–64:10.) The undersigned also gave the parties until Friday, August 11, 2023, to file post-hearing briefs. (Hr'g Tr. 66:7–15.) The CO filed a post-hearing brief; Employer, however, did not file a brief.

At hearing, Mr. Earehart explained that his company grows fruits and vegetables for retail and wholesale supply on the island of Maui in Hawaii. (Hr'g Tr. 30:18–23, 33:16–18.) Employer grows over a hundred different types of crops during the year. (Hr'g Tr. 39:17–18, 47:13, 49:19–20.) The business started in 2014, and it has grown to over a million dollars in sales. (Hr' Tr. 30:24–31:1, 42:18–19.) Mr. Earehart has been with the company since its founding. (Hr'g Tr. 30:24–31:1.) The company currently employers sixteen full-time people; it does not employ any temporary or seasonal workers other than H2-A workers. (Hr'g Tr. 33:23–34:1, 35:1–4, 60:3–11, 61:23–25.) Approximately seven or eight of the individuals are farm workers. (Hr'g Tr. 57:19–21, 59:19–22, 61:9–13.)

Mr. Earehart explained that Employer has a busy season and that the slowest time of year is the summertime, although they do have a year-round growing season and the need for full-time workers throughout the year. (Hr'g Tr. 32:2–8; 44:17–19, 49:24–25.) The Hawaiian climate allows for this year-round growing season. (Hr'g Tr. 33:22, 44:20–21.) During June, July, and August it is more difficult to grow produce because of the heat and bug pressure, but Employer still grows some crops and continues to plant as much as possible. (Hr'g Tr. 32:8–11, 44:21–45:3, 58:6–8.) For example, the dragon fruit season is in the summer months. (Hr'g Tr. 20–21.) But

[1] At the hearing, the CO also moved to dismiss the appeal on the grounds that the request for review failed to meet the requirements of Section 655.171(a)(3) & (5). (Hr'g Tr. 8:10-12.)

Employer's peak growing season is September through May. (Hr'g Tr. 45:8–11, 57:22–25.) According to Mr. Earehart, he does need more workers during the months of September through May, but he could not articulate a difference in labor needs between these months and June, July, and August. (Hr'g Tr. 58:18–60:1.)

Because Employer is unable to find local workers to do the type of agriculture work needed on the farm, the company has turned to the H2-A program. (Hr'g Tr. 32:13–17, 43:11–15.) Employer heard about the H2-A program through other government agencies that work with farms in Hawaii and want to support local agriculture. (Hr'g Tr. 42:9–25.) However, as Mr. Earehart explained, he can use H2-A workers at any time of the year because Employer grows crops year-round and needs workers year-round. (Hr'g Tr. 32:18–33:13, 45:12–20.) This includes during the summer months even if Employer "back[s] off" the planting to account for the heat and insects; Employer has a need "to plant every month of the year" because of the number of different crops it plants. (Hr'g Tr. 48:19–25.) In short, Employer's crop yield may decrease in the summer months due to the high heat, but Employer still needs additional agricultural laborers during this period. (Hr'g Tr. 49:13–14.) Because Employer grows so many different types of crops, the company is always finishing one harvest and getting ready for the next, irrespective of the month. (Hr'g Tr. 52:14–25.)

Employer would prefer a program that allowed year-round workers, but the H2-A program was the one recommended to Employer by the other government agencies. (Hr'g Tr. 50:4–14.) Mr. Earehart testified that these agencies explained that the H2-A program would work best for Employer because:

> they understand that we have a year-round growing season and they said, "Well, if you can only get them for 10 months and they've got to go home for two months", okay, that's great. So, our recommendations from the UCA guys, that's why we made our application.

(Hr'g Tr. 50:10–14.) Employer has a "strong need year round" for workers. (Hr'g Tr. 50:17.)

II. Analysis

A. The Motion to Dismiss

The regulations provide that an employer seeking review of a certifying officer's decision must request either administrative review or a *de novo* hearing before an

administrative law judge within ten days from the date of the decision. 20 C.F.R. § 655.171(a). This is an inter-agency exhaustion requirement. 20 C.F.R. § 655.171(a); *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760 (Oct. 12, 2022) ("an employer must request such review in accordance with § 655.171 in order to exhaust its administrative remedies").[2] As the Supreme Court has noted, "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford v. Ngo*, 548 U.S. 81, 91–92, 126 S. Ct. 2378, 2386 (2006) (addressing the related doctrine of administrative exhaustion prior to bringing suit in federal court). Pursuant to the relevant regulation, an employer's request for review "must be received by the Chief ALJ, and the CO who issued the decision within 10 business days from the date of the CO's decision . . . ."[3] 20 C.F.R. § 655.171(a)(1). In addition to requiring receipt by the CO and the Chief ALJ, the regulations contain a number of additional requirements specifying the contents of the request for review, including: (1) clearly identifying the particular decision for which review is sought; (2) containing a copy of the CO's decision; (3) clearly stating whether the employer seeks administrative review or a *de novo* hearing; and (4) setting forth the "particular" grounds for the request, including the specific factual issues employer contends are at issue in the appeal.[4] 20 C.F.R. § 655.171(a)(2)–(5).

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[2] Not all administrative exhaustion requirements are jurisdictional. *See Henderson ex rel. Henderson v. Shienseki*, 562 U.S. 428, 435, 131 S. Ct. 1197, 1202–23 (2011) (distinguishing between jurisdictional rules and claims processing rules); *Santos-Zacaria v. Garland*, 598 U.S. 411, 143 S. Ct. 1103, 1113 (2023) ("Exhaustion is typically nonjurisdictional for good reason.") The regulation does not identify the § 655.171(a) requirements as jurisdictional, and the undersigned finds that as a member of BALCA, the undersigned has jurisdiction to hear this appeal whether Employer undertook the exact proper administrative procedural steps or not.

[3] The regulation also contains an exception, which is not applicable to this case, for cases involving revocation. 20 C.F.R. § 655.171(1); 20 C.F.R. § 655.161(b)(1).

[4] This final requirement is ambiguous and suggests a "particularity" pleading requirement that could lead to a pre-hearing challenge of nearly every request for review that would serve little practical purpose other than tying up BALCA in motions to dismiss akin to Rule 12(b)(6) motions in federal court, especially in light of the fact that no formal complaint is required and the regulations require BALCA to hold a hearing within fourteen business days after receiving the administrative file. Moreover, the language in the regulation is more akin to Rule 9(b) addressing pleading fraud than Rule 8(a) of the Federal Rules of Civil Procedure. *Compare* Fed. R. Civ. P. 8(a) (requiring only a "short plain statement of the claim"), *with* 9(b) ("a party must state with particularity the circumstances constituting fraud or mistake"). Yet, requiring such a heightened pleading standard in this

The CO contends that "dismissal is warranted due to Employer's failure to provide a copy of [the request for review] to the CO simultaneous with its submission of the [request] to the Court." (CO's Mot. Dismiss, at 3.) The CO relies on the opinion of Judge Bell in *In re Torres*, 2023-TLN-00046, ALJ's Order Granting Certifying Officer's Mot. Dismiss (Dep't of Labor Mar. 20, 2023) (Bell, ALJ). In *Torres*, Judge Bell dismissed a case involving an appeal of an application for three non-agricultural workers for the failure to serve both BALCA and the CO within ten business days. (*Id.* at 3.)

As an initial matter, no requirement for simultaneous service exists under the applicable regulation for agricultural workers. Rather, Section 655.171(a) requires only that both the Chief ALJ and the CO issuing the decision *receive* a copy of the request for review within ten business days from the date of the decision. In short, the regulation requires receipt, not service by Employer. And not only is there no requirement of simultaneous service as argued by the CO, but the regulations applicable to agricultural workers do not even require that the CO receive the request *from the employer* within ten business days. The CO must only receive the request; the regulations do not state from whom or where that receipt must come from. If that receipt were to come from BALCA after Employer filed the request with the Chief ALJ within ten business days, then Employer has satisfied its obligations under the regulations.

In contrast, the Agency could have crafted the regulation like 20 C.F.R. §655.61, which addresses temporary non-agricultural workers. Unlike the regulations for temporary agricultural workers applicable to this appeal, Section 655.61 provides that

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administrative forum when parties are not even required to file a complaint serves little practical purpose. Finally, there is no leeway in the regulations to hold these cases in abeyance while the undersigned determines whether a request for review meets such a heightened standard and first adjudicates the motion to dismiss; to do so would result in the undersigned violating the regulations. And the undersigned could simply provide an employer the opportunity to amend the request to set forth the grounds with more particularity, endlessly delaying the hearing until this standard is met. While the undersigned recognizes it was the intent of this provision to "provid[e] the ALJ and the CO adequate notice regarding the nature of the appeal" to allow for the "prompt and fair processing of appeals," tying up these cases in motions to dismiss challenging the sufficiency of factual allegations "pled" in the notice of appeal to BALCA defeats that purpose. *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760 (Oct. 12, 2022). Regardless, the undersigned need not wrestle with these issues in this case.

an employer must "send" the request for review to BALCA "with a copy simultaneously sent to the CO who issued the determination, within 10 business days from the date of the determination . . . ." 20 C.F.R. §655.61(a)(1). Thus, for non-agricultural workers, the clear text of the regulations requires simultaneous service of the request for review by the employer to both BALCA and the CO. *See id.* But the Agency did not include this same language for agricultural workers. *Compare* 20 C.F.R. § 655.171(a)(1) (requiring only receipt by the Chief ALJ and the CO with ten business days), *with* 20 C.F.R. §655.61(a)(1) (requiring employer to simultaneously send a copy of the request to BALCA and the CO). In fact, this change was intentional. *See Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760 (Oct. 12, 2022). As set forth in the preamble to the regulations:

> It also proposed that the request for review must be received by—rather than sent to—the Chief ALJ and the CO within 10 business days of the CO's decision. The Department believes that specifying a time for receipt of the request for review is reasonable because it enables the Department to more easily determine if a request was filed in a timely manner.

(*Id.*) The CO glosses over this fact in the Motion to Dismiss and ignores the differences in the language of the regulations. But words matter, specifically the words in regulations and statutes, because they are the starting point of statutory interpretation. *See generally, Slack Technologies, LLC v. Pirani*, __ U.S. __, 143 S. Ct. 1433, 1439–40 (2023). If the Agency wanted to require simultaneous service for agricultural workers, it knew how to do so because it required it for non-agricultural workers. Yet, the regulations require only receipt within the requisite period for agricultural workers.

Despite the undersigned's disagreement with the CO regarding the specific regulatory requirements in agricultural cases versus non-agricultural cases, that does not mean that Employer technically satisfied the requirements for exhausting its administrative remedies in this case. As stated above, the regulations still require that the CO who issued the decision receive the request for review within ten business days. 20 C.F.R. § 655.171(a)(1). Here, the CO issuing the decision did not receive the request for review within ten business days, only receiving a copy of the request on Friday, August 4, 2023, well after the expiration of the deadline. (Hr'g Tr. 9:16–22.)

Although the CO did not receive a copy of the request for review within the required time period, the CO did receive notice of the Employer's appeal within the ten day time period as a result of the undersigned' Notice of Assignment. Thus, in contrast to Judge Bell's statement in *Torres*, the CO was notified of a request for review within the relevant time period in this case.[5] In fact, had counsel or the CO then reached out to Employer, who is self-represented, and asked for a copy of the request for review upon receipt of the Notice of Assignment, the CO likely would have had receipt of the request within ten business days as required.

While the CO received notice of the appeal by means of the undersigned's Notice of Assignment, the fact remains that the CO did not receive a copy of the actual request for review as required by Section 655.171(a)(1). And the regulation is clear that a notice requirement is not sufficient because it imposes, in addition to receipt, various specific requirements as to the contents of the notice of appeal. 20 C.F.R. §§ 655.171(a)(2)–(5); *see also Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61760 (Oct. 12, 2022). A requirement that notice is sufficient would be inconsistent with such an interpretation because the CO might be aware of the appeal but would still be unaware of the particular grounds of the challenge to the CO's decision as set forth in the request for review submitted to the Chief ALJ.

The regulation states that the request for review "must" be received by the CO within ten days. 20 C.F.R. § 655.171. Yet what remedy should exist when an employer fails to ensure that the CO received the request for review within ten days, but the Chief ALJ received the request and the CO received notice of the appeal within the

[5] Judge Bell noted in *Torres* that "Where, as here, the CO is never notified that a request for administrative review has been submitted, the process by which expedited review is made available is pushed past the breaking point." *Torres*, 2023-TLN-00046, at 3. The CO filed a motion to dismiss in *Torres* less than a month after the employer's notice of appeal and approximately five weeks after the issuance of the decision of the certifying officer, it is unclear how the CO was never notified of the appeal if the CO filed a motion to dismiss in *Torres* and Judge Bell held a hearing in the case. Regardless, the undersigned finds the policy concerns expressed in *Torres* unpersuasive. The expedited nature of these appeals is for the benefit of employers due to the nature of the temporary agricultural work, not the CO. *See* 8 U.S.C. § 118(e) (requiring the Secretary to provide expedited review procedures for the employer); *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61663, 61704 (Oct. 12, 2022) ("The appeal process continues to include an expedited administrative review procedure, or an expedited de novo hearing at the employer's request, in recognition of the INA's concern for prompt processing of H-2A applications.")

relevant time period?[6] The regulations provide little help. Section 655.171(a)(1)(4) is the only section of the regulation that contains a statement as to what happens for the failure to comply. If the request fails to clearly state that the request is for a *de novo* review, then an employer waives the right to hearing. 20 C.F.R. § 655.171(a)(4). The regulations are silent as to what happens if an employer fails to comply with the other required subsections. *See* 20 C.F.R. §§ 655.171(a)(1), (2), (3), (5). Is dismissal always required due to a strict failure to follow the procedural requirements as set forth in the regulations such as the CO advocates and Judge Bell found in *Torres* for non-agricultural workers? What if an employer complied with every requirement other than including a copy of the CO's own decision with the request for review it sends to the CO? The undersigned wonders whether the CO would stay consistent and concede a similar strict result for the failure of a CO to timely produce the administrative file to BALCA. *See Buy Sod USA, LLC,* 2023-TLC-00021; 2023-TLC-00022; 2023-TLC-00023; 2023-TLC-00024; 2023-TLC-00025; 2023-TLC-00026, ALJ's Order Addressing Resp. Show Cause Remanding Case (Dep't Labor Mar. 20, 2023) (Alford, ALJ). Seemingly, if the regulatory requirements are to be strictly construed and the consequences of the failure to comply construed strictly against the party that fails to comply, that interpretation should apply equally to the CO and to the employer.

Regardless, the undersigned need not address these issues today because the ultimate result would be the same whether the undersigned found Employer failed to exhaust its administrative remedies and dismissed this case or reviewed this case *de novo*. Moreover, the undersigned finds that the fact that Employer is self-represented in this case weighs against adjudicating this matter at the motion to dismiss stage rather than on the merits. The issues presented in the Motion to Dismiss are more complicated and far reaching for BALCA than set forth in the motion and in *Torres*, and the undersigned would require additional briefing prior to adjudicating such an issue, but time is something the undersigned lacks under the regulations. Thus, in an abundance of caution, the undersigned will undertake a *de novo* review of this case.

B. Employer's Request for Review

[6] Or even where the CO does not receive notice within the relevant time period.

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform "agricultural labor or services, as defined by the Secretary of Labor. . . . ." 8 U.S.C. § 1101(a)(15)(H); *see also Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 382 (D.C. Cir. 2018). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work needed. 20 C.F.R. § 655.103(a); *Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 980 (D.C. Cir. 2021); *Mendoza v. Perez*, 754 F.3d 1002, 1007 (D.C. Cir. 2014). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a); *Overdevest Nurseries*, 2 F.4th at 980.

An employer seeking certification for workers under the H-2A program must establish that the need for agricultural labor or services is on a temporary or seasonal basis. 20 C.F.R. § 655.161(a); *Hispanic Affairs Project*, 901 F.3d at 382 ("By law, H-2A visas may issue only if the employer's need for the worker is temporary or seasonal."); *Midwest AG Electric Inc.*, 2021-TLC-00191, ALJ's Decision & Order Reversing Decision Certifying Officer, at 6 (Dep't Labor Aug. 27, 2021) (Alford, ALJ). The regulations define both temporary and seasonal. 20 C.F.R. § 655.103(d). Section 655.103(d) 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.

Id.

Here, one of the grounds upon which the Certifying Officer denied the application was because Employer failed to demonstrate a seasonal or temporary need. Upon a *de novo* review of the record, including both the administrative file and the testimony at hearing, the undersigned finds that Employer has failed to establish a

seasonal or temporary need as required under the regulations. Employer grows over a 100 different fruits and vegetables throughout the year because of the year-round growing season where the farm is in Hawaii. As Mr. Earehart acknowledged at hearing, he does not necessarily need seasonal or temporary workers; rather he needs year-round workers, but the H2-A program was recommended to him by another government agency to help grow his business and produce food and make up for any potential labor shortage in the local market. (*See* Hr'g Tr. 50:4–10.)

In addition, Mr. Earehart testified that the dates on the application are not based on seasonal or temporary need, but to maximize the ten month allowed time period of the workers in the United States because there is always work to do on the farm. (Hr'g Tr. 32:18–33:13, 45:12–20; *see also* AF at 25.) Even during the "slower" summer months, the work performed by the farm workers is the same and the need for labor is present because Employer has a year-round need for additional labor to expand production on his farm. (Hr'g Tr. 47:1). This is consistent with a climate that allows for a year-round growing season as Employer rotates crops, including both fruits and vegetables, rather than having to focus on a single large crop that might have a peak labor need when the harvest arrives every year. As a result, the application he submitted, which covered the non-peak summer months of July and August, was not tied to the seasonality of Employer's work. (*See* Hr'g Tr. 48:14–25.)

Of course, a year-round growing season does not automatically preclude an applicant from the H2-A program. An employer could still have a spike in need due to labor demands over the course of the year—perhaps one crop is more labor intensive than others or perhaps an employer has a temporary need due to some specific event. But the record before the undersigned does not support any seasonal or temporary need for the dates set forth in the application. Rather, the record supports the need for year-round labor; Employer even acknowledged as much at hearing, stating that if a program existed to get year-round workers, he would prefer that program. (Hr'g Tr. 50:4–14.) Employer also acknowledged that it plants and harvests crops year-round, and the work tasks of its agricultural workers generally stay the same year-round, although they might vary some crop by crop.

While Employer advocated for various reasons why the farm was a good fit for the program, such as the fact it is a family farm trying to grow food in Hawaii, a state that ordinarily imports ninety percent of its food (Hr'g Tr. 41:11–15, 42:16–18), and the impact the program had on the prior workers who were able to start their own farms in El Salvador after working at the farm (Hr'g Tr. 41:16–23), these are not factors the undersigned can take into account in adjudicating this appeal, despite the fact they may have significant societal value. The undersigned's inquiry is a limited one, and it is limited to whether Employer has demonstrated a seasonal or temporary need for the requested agricultural workers. The undersigned finds that the answer to this question is a clear no; Employer has not met its burden in this case. Accordingly, the undersigned **AFFIRMS** the decision of the CO to deny the application.[7]

III. Conclusion

The undersigned **AFFIRMS** the decision of the Certifying Officer to deny the application.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge

[7] Because the undersigned finds, after a *de novo* review of the record, that Employer's failure to demonstrate seasonal or temporary need was reason alone to deny the application, the undersigned takes no position on the remaining deficiencies.