



Issue Date: 01 June 2023

BALCA Case No.: 2023-TLC-00037

ETA Case No.: H-300-23067-831783

In the Matter of:

YE OLDE DAVIS FARMS, INC.,
Employer.

**DECISION AND ORDER AFFIRMING THE
DENIAL OF CERTIFICATION**

This case arises under the temporary agricultural labor or services provision (H-2A) of the Immigration and Nationality Act and its implementing regulations.¹ The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On 1 May 23 the Board of Alien Labor Certification Appeals (BALCA) received Employer's request for administrative review regarding the Certifying Officer (CO) at the Department of Labor's Employment and Training Administration's denial of temporary labor certification and then received the administrative file on 11 May 23. On 3 May 23 this matter was assigned to Judge Rosenow, District Chief Administrative Law Judge, in the Covington, Louisiana district office, for decision.

On 24 Mar 23 Employer requested certification of 15 farmworkers (later updated to 18) from 10 May 23 until 20 Sep 23 to work in Vero Beach, Florida.² After a Notice of Deficiency was issued and Employer responded, the CO denied the application on 14 Apr 23. Employer requested administrative review before BALCA on 1 May 23. The CO filed a brief on 22 May 23.³

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188, 20 C.F.R. Part 655, Subpart B ("2022 H-2A Final Rule").

² AF 107.

³ The Certificate of Service filed with the CO's brief was dated 4 Nov 20. While it is unclear if the Solicitor served the brief on Employer initially, I find any service error was harmless as the issue was cured by a Certificate of Service dated 25 May 23.

This Decision and Order is based on the written record, which consists of the Appeal File,⁴ Employer's request for review, and the CO's brief. I will affirm the CO's denial of Employer's request for temporary labor certification.

LEGAL STANDARD

BALCA's standard of review in H-2A cases is limited. The Administrative Law Judge must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.⁵ BALCA will affirm, reverse, or modify the CO's determination, or remand to the CO for further action.⁶ BALCA will reach this decision after due consideration of the documents in the Appeal File that were before the CO at the time of the CO's determination, the request for review, and any legal briefs submitted.

Temporary or Seasonal Nature

It is the employer's burden to establish that it is entitled to certification.⁷ Likewise, it is the employer's burden to demonstrate that its need for agricultural labor is temporary or seasonal.⁸ A need for labor is seasonal "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."⁹

It is the employer's need for the labor, as opposed to job duties, that must be "seasonal."¹⁰ "Attempts by employers to continually shift their purported periods of need to utilize the H-2A program to fill permanent needs have been rejected."¹¹ An application for temporary certification is properly denied when the "consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the Employer's need does not differ from its need for such labor during other times of the year; the need is year round."¹²

⁴ Herein referred to as "AF".

⁵ 20 C.F.R. § 655.171(d)(2).

⁶ *Id.* at (d)(3).

⁷ See *Altendorf Transport, Inc.*, 2011-TLC-158, at 13 (Feb. 15, 2011) ("It is the Employer's burden to establish eligibility for temporary labor certification."); *Salt Wells Cattle Company, LLC*, 2011-TLC-00185, at 4 (Feb. 8, 2011).

⁸ 20 C.F.R. § 655.103(d).

⁹ *Id.*

¹⁰ *E.g.*, *Ag Labor LLC*, 2020-TLC-107/108, at 4 (Aug. 31, 2020) (citing *Pleasantville Farms LLC*, 2015-TLC-53, at 3 (June 8, 2015)).

¹¹ *HarvestCo, LLC*, 2021-TLC-53, at 5 (Feb. 8, 2021) (citing *Salt Wells Cattle Co.*, 2010-TLC-134 (Sept. 29, 2010)).

¹² *Larry Ulmer*, 2015-TLC-3, at 4 (determining that "overlapping need for the same H-2A labor year round" "exceed[ed] the 'seasonal and temporary' period for H-2A certification.").

Peakload Need

Although the H-2A regulations are silent as to the standard for establishing peak load need, BALCA has held, given the singular origin of the H-2A and H-2B programs, there is no reason that the H-2B "peak load need" definition would be improper as applied to the H-2A program.¹³ To qualify as a peak load need under H-2B regulations, the employer "must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation."¹⁴ If an employer fails to sufficiently explain how its request for temporary labor certification meets the regulatory criteria for a peak load, temporary need, denial is appropriate.¹⁵

DISCUSSION

The CO previously certified the following H-2A temporary employment positions for Employer:

Certified	Dates of need	Location	Case no.
15 Farm Laborers	18 Nov 21 – 17 Sep 22	Vero Beach, FL	H-300-21260-591722
15 Farm Laborers	17 Sep 22 – 1 May 23	Vero Beach, FL	H-300-22183-329417

Employer's Instant Request for Certification

On 24 Mar 23, Employer applied for H-2A temporary employment certifications for 15 farm laborers to work an organic farm in Vero Beach, Florida from 10 May 23 to 20 Sep 23.¹⁶ On 27 Mar 23, Employer requested that the number of workers be increased to 18.¹⁷ Employer explained the current request was for workers to perform duties for its traditionally spring/summer crops. It noted that its previous requests were for workers for its traditionally fall/winter crops and that the instant request was for a different set of crops.

The CO's Notice of Deficiency

The CO found several deficiencies, including Employer's failure to establish Temporary or Seasonal Need and issued a Notice of Deficiency on 30 Mar 23. The CO noted each of the previous requests along with the current request had the same address

¹³ *Allendorf Transport*, 2011-TLC-158 (Feb. 15, 2011).

¹⁴ 8 C.F.R. § 214.2(h)(6)(ii)(B)(3); *Jamaican Me Clean*, LLC, 2014-TLN-8 (ALJ Feb. 5, 2014).

¹⁵ *D & R Supply*, 2013-TLN-29 (Feb. 22, 2013).

¹⁶ AF 107.

¹⁷ AF 93.

listed for the primary worksite, the same Standard Occupational Classification Code (SOC), and each of the applications involved the same or similar agricultural activities.

However, in assessing the employer's need, it is the nature of the need and the not the crops which must be examined. Here, although the specific crops being harvested may change throughout the course of the year, the employer appears to have a year-round need for the same type of underlying labor. In effect, the employer's need does not appear to be limited by a growing season or specific aspect of a longer cycle as the regulation requires, but only by the length of the altering growing cycles of different crops it chooses to produce. As the employer grows different crops throughout the year, the employer appears to have an ongoing (or permanent) need for workers.

The CO informed Employer of what must and may be included in its response in order to cure the deficiency, including what documents, statements, and other evidence Employer could submit.

Employer's Response to the Notice of Deficiency

Employer responded on 6 Apr 23, curing each of the deficiencies identified except for the failure to establish Temporary or Seasonal Need. In response to the NOD, the employer submitted:

- 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;
- An explanation as to the activities of the employer's permanent workers in the same occupation outside the requested period of need;
- A statement indicating the employer's monthly staffing levels;
- Summarized monthly payroll reports for three previous calendar years;
- A chart of monthly activities; and
- An article titled "About Gardening in Florida's Hot Summer" produced by Shell's Feed & Garden Supply.

Employer provided the following charts to show payroll and staffing levels in 2021-2022:

PEAKLOAD NEED SUMMARY FOR H 2A WORKERS

Payroll Reporting Period for Farm Laborer: Calendar Year 2021

Month	Employment		
	Total Number of Farm Laborer	Total Hours Worked Farm Laborer	Total Earnings Received
January	n/a	n/a	n/a
February	n/a	n/a	n/a
March	<i>n/a</i>	n/a	<i>n/a</i>
April	n/a	n/a	n/a
May	n/a	n/a	<i>n/a</i>

June	<i>n/a</i>	<i>n/a</i>	<i>n/a</i>
July	n/a	n/a	<i>n/a</i>
August	1	80	1,040.00
September	1	160	2,080.00
October	1	200	2,600.00
November	3	329	4,366.00
December	3	417	5,467.00

Permanent and Temporary Workers for Farm Laborer: Calendar Year 2021

Month	Employment		
	Permanent Workers	Temporary Workers	Total Workers
January	n/a	n/a	n/a
February	n/a	n/a	n/a
March	n/a	n/a	n/a
April	n/a	n/a	n/a
May	n/a	n/a	n/a
June	n/a	n/a	n/a
July	n/a	n/a	n/a
August	1	0	1
September	1	0	1
October	1	0	1
November	3	0	3
December	3	0	3

Payroll Reporting Period for Farm Laborer: Calendar Year 2022:

Month	Employment		
	Total Number of Farm Laborer	Total Hours Worked Farm laborer	Total Earnings Received
January	3	382.00	5,046.00
February	14	1844.00	27,667.50
March	18	4497.62	70,896.28
April	19	6074.38	94,262.60
May	18	5079.14	80,914.36
June	18	4683.69	73,672.12
July	18	5885.56	93,825.41
August	17	4501.49	70,490.19
September	18	3834.57	60,303.01
October	16	3445.43	53,191.17
November	17	3544.26	55,045.43
December	18	4804.61	74,035.21

Permanent and Temporary Workers for Farm Laborer: Calendar Year 2022

Month	Employment		
	Permanent Workers	Temporary Workers	Total Workers
January	3	0	3
February	4	10	14
March	4	14	18
April	4	15	19
May	4	14	18
June	4	14	18

July	4	14	18		
August	3	14	17		
September	4	14	18		
October	5	11	16		
November	7	10	17		
December	5	13	16		

Although we previously had the land and the company registration, we did not have employees working the farm until August 2021. The H2A workers entered the US and started working between the middle of February 2022 and April 2022. There were several months when some of the H2A workers voluntary returned to their home county briefly and then came back on their H2A visa and continued working during the authorized H2A period.

Employer attributed the difference in its current need from its previous needs by explaining that it is a new employer who did not predict the high temperature’s effect on the summer crops, and now needs workers to build irrigation systems and greenhouses in addition to planting and maintaining all the crops. Employer also plans on planting new summer avocado and mango orchards.

The CO’s Denial

On 14 Apr 23, the Certifying Officer (CO) denied the application, as it found Employer had not cured the deficiency.¹⁸

[Employer’s] statement does not fully support the employer's requested period of need (May 10, 2023, to September 20, 2023), which covers not only the summer but also parts of the spring and fall. More importantly, the statement does not address how the job opportunity is seasonal while requesting workers in every month of the year.

The CO analyzed Employer’s 2021 and 2022 charts of Permanent and Temporary workers by month, its monthly chart of activities, and considered Employer’s explanations, but found that Employer failed to demonstrate a seasonal need for H-2A workers per the regulations and denied Employer’s request.

Employer’s Request for Review

Employer argues that the CO failed to:

- appropriately consider the Employer's explanation in its response to the NOD;
- consider the region in which Employer is located;
- consider that the critical question is not whether the job duties, or in this case, the crops, are seasonal, but whether the employer's *need* for labor is seasonal;

¹⁸ AF 17-19.

- correctly interpret the Employer's summarized monthly payroll records, as they show a peakload need for 14 additional temporary workers from May through September 2022.

Employer contends: 1) the crops are sufficiently diverse to constitute completely different job opportunities 2) the planting of avocado and mango orchards can only be done in the summer 3) the installation, repair and maintenance of its greenhouses is only done in the summer. These three jobs, taken in the aggregate, constitute a new seasonal job opportunity that is not present in the winter/fall job opportunity.

Employer requests I reverse the CO's denial of employer's Application for Temporary Employment Certification, or that I grant partial certification or remand to the CO for partial certification in the form of reducing the total number of months and affixing the employment start date as 1 Jul 23.

The CO's Brief

The CO argues that Employer's H-2A application history shows its need for farmworkers is year-round, not seasonal. It argues that Employer conceded it has requested H-2A farmworkers for 23 consecutive months from November 2021 through September 2023 to perform similar or the same tasks and activities.

It argues that that the different applications do not represent a seasonal need for farmworkers, but an ongoing need for farmworkers to perform a range of job duties. Planting and harvesting crops, and planting and harvesting orchards, are similar tasks, highlighting the employer's need for farmworkers to plant and harvest year-round.

The CO additionally argues that while Employer is now using installation and maintenance of irrigation systems as a reason its summer need differs from its winter need, each of Employer's applications mention that its farmworkers need to assist in installing and maintaining irrigation systems.¹⁹ Likewise, it argues that installing and maintaining greenhouses is not a seasonal need for labor but a summertime job duty.

The Solicitor requests that I affirm the CO's denial of Employer's H-2A application for failure to establish a seasonal need.

Employer's Failure to Establish Entitlement to Certification

It is the employer's burden to establish that it is entitled to certification.²⁰ The CO found Employer had not established entitlement to certification, as Employer's consecutive

¹⁹ See AF 107, 158, 276.

²⁰ See *Altendorf Transport, Inc.*, 2011-TLC-158, at 13 (Feb. 15, 2011) ("It is the Employer's burden to establish eligibility for temporary labor certification."); *Salt Wells Cattle Company, LLC*, 2011-TLC-00185, at 4 (Feb. 8, 2011).

periods of need in conjunction with similar job requirements and duties demonstrated that Employer's need does not differ significantly from its need for such labor during other times of the year. The CO based its decision on the descriptions and dates of need from Employer, the history of Employer's requests, and all the documentation provided by Employer.

The CO's brief does not address Employer's request to view the case under the "peakload" theory of need. In reviewing Employer's charts of Permanent and Temporary workers from 2021 - 2022, Employer started employing workers in August 2021, and its H-2A workers gradually started working between February and April 2022. It consistently had at least 3 permanent workers on payroll since November 2021, and gradually added to its permanent work force, with at least 5 permanent workers the last quarter of 2022. Employer only started using *temporary* workers in February 2022, and maintained at least 10 temporary workers each month after that in 2022.

The data does seem to suggest that from March – September 2022 Employer used more temporary workers (14-15) than it did in other months (10-13 in the last quarter of 2022), but Employer hired more permanent workers during those months (5-7 permanent employees in the last quarter of 2022 as opposed to 3-4 from March – September). From March 2022 forward, Employer never employed less than 16 workers total (October) or more than 19 workers (April). Based on the chart provided, it appears business operations are generally on an incline, but the chart does not accurately depict a defined peak in business from May through September.

Employer's data does not support a peakload need. I agree with the CO and find Employer did not establish entitlement to certification under any definition of temporary need.

Based on the above, I cannot find the CO's denial to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, and will uphold the CO's denial.

ORDER AND DECISION

Based on the above, the Certifying Officer's denial of certification is AFFIRMED.

SO ORDERED.

For the Board:

PATRICK M. ROSENOW
District Chief Administrative Law Judge
Covington, Louisiana District Office