UNITED STATES DEPARTMENT OF LABOR

BOARD OF ALIEN LABOR CERTIFICATION APPEALS

Washington, DC

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Issue Date: 19 January 2024

BALCA Case No.: 2024-TLC-00012
ETA Case No.: H-300-23311-485076

In the Matter of

MARIA I ROMERO,

Employer.

Certifying Officer: Marcella Campbell,
Chicago National Processing Center

Appearances:

Maria A. Restrepo, Lay Representative
Farm Labor Services, LLC,
Piedmont, South Carolina
For the Employer

Edward Waldman, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF TEMPORARY LABOR CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States ("U.S.") on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor ("Department").[1] A Certifying Officer ("CO") in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek

[1] 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

administrative review or a de novo hearing before the Office of Administrative Law Judges.[2]

I. STATEMENT OF THE CASE

On November 21, 2023, Maria I Romero ("Employer") filed (1) ETA Form 9142A, "H-2A Application for Temporary Employment Certification" ("Application"); (2) Appendix A to Form ETA 9142; (3) ETA Form 790, "Agricultural Clearance Order", 790A, and Addendums, (4) Workers Compensation Insurance Documentation, (5) Work Contract, (6) Housing Documentation, (7) FLC Documentation, (8) MSPA FLC/E Certification Letter, (9) Surety Bond, and (10) Agent Agreement.[3] Employer requested certification for six farm labor workers,[4] from January 6, 2024 until June 6, 2024, based on an alleged seasonal need during that period.[5]

The CO issued a Notice of Deficiency ("NOD") dated November 27, 2023, stating that Employer had failed to establish temporary or seasonal need under 20 C.F.R. § 655.103(d) based on a finding that Employer's requested dates of need in its current H-2A application and its previously requested dates of need in its filing history for the same area of intended employment showed an ongoing need for more than ten months of the year, and that the Court has "found that 10 months is a permissible threshold at which to question the temporary nature of a stated period of need." The CO noted that area of intended employment included "a normal commuting distance or normal commuting area[.]" Based on this, it determined that Employer's previous applications were for the same area of intended employment because they were within a normal, seven minute commute time of each other. The CO found that the applications showed the same or similar labor need since they requested workers with the same occupational code, with a number of the same job activities and requirements listed for each of them.[6] The CO concluded that although the crops may differ depending on the time of year, there appeared to be a year round need for labor:

> Therefore, based on the employer's currently requested dates of need and its previously requested dates of need for the same or similar labor in the AIE [area of intended employment] for its current application, it is unclear how all of the positions presented in this application for H-2A workers are seasonal or temporary in nature. The need for labor does not appear to be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle. Nor does the employer's

[2] 20 C.F.R. § 655.171.
[3] AF 77-117. In this Decision and Order, "AF" refers to the Administrative File.
[4] SOC (O*Net/OES) occupation title "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" and occupation code 45-2092.00. AF 83-84.
[5] AF 77, 84.
[6] AF 54-57.

> need for this labor or services appear to be temporary, as defined at 20 CFR § 655.103(d).[7]

The CO required that Employer explain how its need for the same or similar labor should be viewed as seasonal or temporary, including:

> 1. A statement describing the employer's (a) business history, (b) activities…and (c) schedule of operations throughout the entire year. If applicable, address recent changes in the employer's business operations that relate to its requested dates of need;
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> 2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation outside the requested period of need;
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> 3. A statement indicating the employer's monthly staffing levels and identifying periods of normal operations and periods where labor levels are far higher than normal;
>
> 4. 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 parent occupation… the total number of workers or staff employed, total hours worked, and total earnings received….
>
> 5. Additional information or documentation establishing that the employer's need for the labor or services…is distinct from application(s) in the filing history, such that prior filing history is not reflective of employer's current and subsequent utilization of the H-2A program…. and
>
> 6. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification.[8]

The CO also noted that Employer's response may include "information or documentation establishing that the employer's need for the labor or services" in its current application is distinct from its previous applications or information or documentation "demonstrating that some or all of the applications in the case history" are located outside the area of intended employment.[9]

[7] AF 56-57.
[8] AF 57-58.
[9] AF 58-59.

The CO also included two additional deficiencies, namely a failure to describe how it would provide workers with inbound and outbound transportation and a failure to "provide a complete, executed Form ETA-9142A - Appendix B, with valid documentation of power of attorney attached, in the bond amount required for this application[,]" which are not at issue in this appeal.[10]

On December 6, 2023, Employer submitted a response to the NOD, stating that its current application and the previously denied application were for a tree farm as opposed to the citrus nursery staffed by its other applications, and that it "gives CNPC written permission to amend Section I of the ETA Form 790 with the NAICS Code: 561730-Ornamental tree and shrub services to reflect Case Number H-300-23311-485076." It stated that it does not have any permanent workers in Florida. In response to the request for a "statement indicating the employer's monthly staffing levels and identifying periods of normal operations and periods where labor levels are far higher than normal[,]" Employer replied simply that "[n]ormal operations and periods where labor levels are the same as normal season."[11] Employer attached payroll records for its H-2A workers and printouts of pictures from its website on its tree farm and citrus growers.[12]

In a Denial Letter dated December 8, 2023, the CO found that although Employer had stated that it attached an explanation for why the jobs at the tree farm and "Citrus" were "sufficiently different….the documents provided contain only pictures with no explanation as to how the job opportunities are distinct."[13] The CO found that despite Employer's attempt to distinguish between its current application and its previously denied application:

> both cases have the same SOC in which the job duties of both applications fall under. Additionally, both applications share similar requirements: no experience, three months training, no licensing, no education and no driving required. Case H-300-23230-278139 lists a 30-pound lifting requirement while the current case does not list any lifting. However, the job duties listed in the current case lists apparent lifting duties. The employer did not demonstrate that the applications represent distinct occupations, which require different experience or special skills and knowledge that are not required for the position sought in the prior application. Given the absence of special skills or requirements present in this filing, and the overlapping duties, the employer failed to explain why this filing should

[10] AF 59-62.
[11] AF 13-14.
[12] AF 16-47.
[13] AF 11.

> be viewed as a separate occupation and representative of a distinct need.[14]

The CO also found that it is the nature of the need which is important and that although the type of crops harvested changes throughout the year, the Employer has a year-round need for the same type of labor. "In effect, the employer's need is not limited by a growing season or specific aspect of a longer cycle as the regulation requires, but only by the length and quantity of contracts that it chooses to enter." The CO also found that the payroll records did not support a seasonal need for the period requested because there were no workers from January to March in 2022 and no records were provided for January 2023. As Employer did not explain this, the CO found that it failed to meet its burden to show that its need was seasonal as asserted on its application.[15]

On December 15, 2023, Employer appealed the CO's denial to the Office of Administrative Law Judges ("OALJ") and requested a de novo hearing, arguing that the applications were for different worksites with different crops, with open planting of trees as opposed to planting citrus in a greenhouse, each having "functions specific to this type of plantation," and that the "dates on which each request was made is the date that the employer needs to cycle the trees in this case, as well as to grow the citrus plants in the other case."[16]

The case was assigned to me on January 2, 2024. On January 4, 2024, the CO filed an uncontested motion to cancel the hearing and convert the case into an administrative review, which I granted, allowing the CO until January 9 to submit briefs. The CO submitted a brief on January 9, 2024.

II. DISCUSSION AND APPLICABLE LAW

Employer bears the burden to establish eligibility for temporary labor certification.[17] In this case, the Employer has appealed the CO's decision to deny its application. When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only render a decision based on "documents in the OFLC administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence." Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO even if it is in the administrative file.

Under 20 C.F.R. § 655.103(d):

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[14] AF 11.
[15] AF 11-12.
[16] AF 1-2.
[17] *See e.g. Altendorf Transport, Inc*., 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *see also Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

> 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 1 year."

In assessing the existence of a temporary need, the CO can look at the situation as a whole and need not confine the analysis to the existing application. [18] When the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the changes.[19]

The CO's "ten month rule," which presumes that if an employer's need lasts more than ten months, it is not "temporary," is not actually a rule, but rather a threshold at which the CO will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature.[20] If it is applied as a threshold and the employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, it is not an arbitrary rule.[21]

In this case, between its H-300-22333-609095, H-300-23230-278139, and H-300-23311-485073 applications and its current application, Employer has requested farm laborers for Lake County in Florida from February 12-October 12, 2023, and November 2, 2023-October 2,2024.[22] This demonstrates that Employer had a need for farm laborers in the same county for more than ten months out of the year. Area of intended employment refers to "[t]he geographic area within normal commuting distance from the workplace opportunity for which certification is requested."[23] Employer has not contested the CO's finding that these worksites were within commuting distance of each other. I therefore find that these applications covered the same area of intended employment.

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[18] *Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011 (April 14, 2000); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016).

[19] *Thorn Custom Harvesting,* 2011-TLC-00196 (Feb. 8, 2011) (employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor); *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010) (finding that a seasonal need is tied to the weather or a certain event, and a change in the dates from a previous application for a seasonal need must be justified).

[20] *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008).

[21] *Id.* at 7. *See also Grasslands Consultants, LLC*, 2016-TLC-00012 (Jan. 27, 2016) (finding that the employer established its cow milking season was more than ten months).

[22] AF 77-94, 118-213, 214-268, 351-430.

[23] 20 CFR § 655.103(b).

The CO gave Employer the opportunity to submit proof to establish the temporary nature of its employment needs. Despite Employer's attempt to distinguish between the job duties at its different locations, as pointed out by the CO, the application all requested workers under the same Standard Occupational Classification Code ("SOC"): 45-2092.00, and title: "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" and they all required similar duties, including spacing plants, taking out plants, pulling weeds, and fertilizing plants.[24] The fact that some of the work is in greenhouses and some of it is outdoors is immaterial given the fact that Employer requires the same type of work for each location, which are each within the same area of intended employment.

Employer failed to adequately explain why its need should be considered temporary and seasonal despite the fact that its requests for farm laborers spanned approximately eleven months of the year and the workers had most of the same duties throughout this time.[25] It was unaided by the payroll records which do not demonstrate additional workers or work hours during the months of January through March in 2022, given that no workers were reported, or January through February 2023, given that no workers were reported in January and February showed around half the workers that were reported in the following months.[26]

Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than in other months of the year. A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.[27] The CO thus accurately concluded that Employer failed to sufficiently establish that Employer has a temporary or seasonal need for workers under 20 C.F.R. § 655.103(d).

Because Employer has failed to establish that its need for labor was temporary or seasonal under 20 C.F.R. § 655.103(d), it has not met its burden of establishing it is entitled to labor certification.[28] Accordingly, the CO's denial of certification is hereby affirmed.

[24] AF 8, 84, 180, 253, 413.
[25] AF 1-2, 84, 180, 253, 413.
[26] AF 17-19,30-39.
[27] *Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999) (en banc)).
[28] *See Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (Dec. 2, 2010).

ORDER

It is hereby **ORDERED** that the CO's decision denying temporary labor certification be, and hereby is, **AFFIRMED**.

Steven D. Bell
Administrative Law Judge