# UNITED STATES DEPARTMENT OF LABOR
## OFFICE OF ADMINISTRATIVE LAW JUDGES
## Washington, DC

**Issue Date: 09 February 2024**

BALCA Case No.: 2024-TLC-00017
ETA Case No.: H-300-23336-539449

*In the Matter of:*

**MITCHELL FARMS PARTNERSHIP,**
*Employer.*

**DECISION AND ORDER**
**REVERSING DENIAL OF CERTIFICATION**
**AND REMANDING FOR CONTINUED PROCESSING**

This matter arises under the temporary agricultural labor or service provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1011(a)(15)(H)(ii)(a), 1188, (the "Act"), 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.

On January 16, 2024, Mitchell Farms Partnership ("Employer") requested a *de novo* hearing for an administrative law judge ("ALJ") to review the Certifying Officer's ("CO") January 12, 2024 denial of the Employer's H-2A application. AF 1–26.[1] This case was docketed on January 23, 2024. The Board of Alien Certification Appeals ("BALCA" or "Board") received the Administrative File ("AF") in this matter on the same day. On January 24, 2024, I issued a Notice of Docketing and Pre-Hearing Order, scheduling a conference call to set a hearing date in this matter. On January 30, 2024, I issued a Notice of Hearing, scheduling a video hearing in this matter for February 2, 2024. On February 2, 2024, a hearing in this matter was held.[2]

## BACKGROUND

The Employer is a 20,000-acre corn and soybean farm in Kentucky. On December 4, 2023, the Employer filed an *H-2A Application for Temporary Employment Certification* ("Application") and supporting documentation for 4 Farmworkers. AF 86–109. In Section A of the ETA Form 9142A, the Employer listed its need type as "seasonal." *Id*. at 86.

[1] References to the Administrative File are abbreviated as "AF."

[2] Under 20 C.F.R. § 655.171(e)(1)(ii), "[t]he ALJ will ensure that the hearing is scheduled to take place within 14 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests."

On December 7, 2023, the CO issued a Notice of Deficiency ("NOD"), stating that the Employer's Application failed to show that the work identified in its Application is temporary or seasonal in nature in accordance with 20 CFR § 655.103(d). *Id*. at 73–77. The CO stated that "10 months is a permissible threshold at which to question the temporary nature of a stated period of need" and "the CO may look at the situation as a whole, including aggregating the requested dates of need in the employer's filing history," when determining whether work is temporary. *Id*. at 75 (citing *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008); *JBO Harvesting, Inc.*, 2020-TLC-00129 (Nov. 6, 2020); *Overlook Harvesting Company, LLC*, 2021-TLC-00050 (Jan. 21, 2021)). Thus, the CO considered the Employer's aggregate filing history as follows:

| Case Number | Status | Dates of Need | |
|---|---|---|---|
| | | First Date | Last Date |
| H-300-22004-807577 | Certified – Full | 3/18/2022 | 1/12/2023 |
| H-300-23012-699452 | Certified – Full | 3/18/2023 | 1/12/2024 |
| H-300-23336-539449 | Received | 2/15/2024 | 12/14/2024 |

AF 75. The CO stated that all the applications in the table above were filed under the same Standard Occupational Classification Code ("SOC"): 45-2092.00 Farmworkers and Laborers, and list the same activities and requirements. *Id*. at 75–77. The CO therefore concluded that the applications "do not appear to represent distinct job opportunities." *Id*. at 77.

The CO alleged that "[t]he employer's filing history coupled with its current filing demonstrate that it has a need for labor that spans nearly the entire calendar year." *Id*. at 77. As such, the CO concluded that it is unclear how the positions requested are seasonal or temporary in nature, and instead appear to be ongoing or permanent positions for which H-2A temporary labor certification cannot be issued. *Id*. The CO directed the Employer to submit an explanation and documentation to support its seasonal or temporary need. *Id*. at 77–78.

The Employer submitted a letter in response to the NOD. The Employer stated that in past years, its dates of need for temporary workers from March 18-January 12 allowed H-2A workers to perform harvest and post-harvest field work. *Id*. at 53. The letter states that the time to complete post-harvest duties has decreased, leading the Employer to send workers home before the Employer's listed last date of need. *Id*. at 55. The Employer alleged that the change in dates of need to February 15-December 14 reflects the Employer's decision to use workers for pre-planting work instead, specifically to install draining tiles and perform preemptive spraying. *Id*. at 53. The letter stated, "The farm needs their H-2A labor to begin handling their preemptive spraying to ensure that their crops can start their growth cycle successfully," citing to and attaching the Nebraska Institute of Agriculture and Natural Resources' Cropwatch website, an article published on the South Dakota State University Extension Website, and *Guidelines For Managing Winter Vegetation* published by the LSU Ag Center. *Id*. at 54. The Employer stated that in previous years, the permanent labor handled preemptive spraying and off-season duties, but as the farm has grown, the permanent labor cannot handle these duties alone and "needs their temporary, seasonal labor for these duties." *Id*. at 54–55. Finally, the Employer amended the description of job duties listed in section A of its Application and provided payroll reports from 2020-2022 and H-2A housing documentation. *Id*. at 44–51, 55.

On January 12, 2024, the CO issued a Denial Letter, informing the Employer that its Application for 4 H-2A workers was denied as its NOD response did not support the Employer's seasonal need change. *Id*. at 27–40. In relevant part, the Denial Letter stated,

> The employer asserts that its earlier start date is due to the farm needing to install drainage tile in its fields and perform preemptive spraying. . . . However, the spraying of crops is a seasonal job duty that needs to be done every year. This duty was also included in the previous two applications that requested workers from March to January. Therefore, the employer's need for workers does not appear to be tied to a certain time of year by an event or pattern. Further, the employer's response does not explain why it no longer needs workers in January.

*Id*. at 35. The Denial Letter further stated that it is unclear why the farm's growth would affect pre-harvest duties but not post-harvest duties, and the Employer's assertion that "they no longer need extra labor for post-harvest duties and are switching workers to pre-planting" while stating that "its permanent workers need help for both post-harvest and pre-planting duties . . . indicates that the employer's need can be adjusted throughout the year depending on the activity." *Id*. at 36.

Moreover, the CO found that "[w]hile the 2022 payroll supports the requested season of February to December, 2021 and 2020 do not." *Id*. at 39. The CO stated that the Employer's amended job duty description does not establish the current application as distinct from previous applications as the new duties still fall under SOC Code 45-2092. *Id*. at 35. Accordingly, the CO denied the Employer's Application for failure to meet the requirements of 20 CFR § 655.103(d). *Id*. at 40.

On January 16, 2024, the Employer filed its request for *de novo* review of the CO's denial under 20 C.F.R. § 655.171(b). At the February 2, 2024 hearing, the CO and the Employer's representative Shane Mitchell both testified. On February 7, 2024, the parties filed post-hearing briefs.[3]

## STANDARD OF REVIEW

My review of this matter is *de novo*. 20 C.F.R. § 655.171(e)(2). When an employer appeals a denial and requests a *de novo* hearing before an ALJ, the parties are permitted to present additional evidence on the matter. *Id*. Consequently, the presiding ALJ "must independently determine if the employer has established eligibility for temporary labor certification." *David Stock*, 2016-TLC-00040 (May 6, 2016). The standard of proof an employer must satisfy is to show by a preponderance of the evidence that its temporary labor certification is sufficient for acceptance under the criteria established by 20 C.F.R. § 655.161. *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014). The ALJ's decision must be rendered within 10 calendar days after the hearing. 20 C.F.R. § 655.171(e)(1)(iv).

[3] I note with appreciation that counsel for both parties demonstrated high-quality written and oral advocacy in this matter.

## DISCUSSION

The issue here is whether the Employer meets the burden of proving that it has a seasonal need as defined by 20 C.F.R. § 655.103(d). An employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. 20 C.F.R. § 655.161(a). To succeed on an H-2A temporary labor certification application, an employer must establish that "the need for the agricultural services or labor to be performed [is] on a temporary or seasonal basis." *Id*. The regulation at 20 C.F.R. § 655.103(d) defines employment as seasonal in 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," and temporary in 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."

A seasonal need has generally been interpreted to be 10 months or less. *Grand View Dairy Farm*, slip op. at 6–8. This interpretation has been rejected as a "bright-line" rule, however, and it has been held that 10 months should be used only "as 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." *Grassland Consultants, LLC*, 2016-TLC-00012, slip op. at 5 (Jan. 27, 2016).

The issue is whether the employer's needs are seasonal, not whether the particular job duties are seasonal. *Mejia Produce LLC*, 2020-TLC-00030, slip op at 8 (Jan. 8, 2020) (citing *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)). Furthermore, the Board has established that it is "the nature of the need for the duties to be performed which determines the temporariness of the position." *Overlook Harvesting Co., LLC*, 2021-TLC-00105, slip op. at 3 (Mar. 30, 2021) (quoting *Matter of Artee Corp*., 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982)). To determine whether an employer's need is seasonal, "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." *Mejia Produce LLC*, slip op at 8 (quoting *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015)). Thus, denial of certification is appropriate where an employer fails to provide any evidence that it needs more workers in certain months than other months of the year. *See Rosalba Gonzalez*, 2017-TLC-00028, slip op. at 4 (Oct. 11, 2017); *Mejia Produce LLC*, slip op. at 8. Additionally, "it is well established that a CO may look at the situation as a whole, including an employer's filing history, in assessing whether an employer has met the regulator criteria for certification, including whether its need for labor is seasonal." *Overlook Harvesting Co., LLC*, slip op. at 4.

Because a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates for a seasonal need to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. *Mid-State Farms LLC*, 2021-TLC-00115 (Apr. 16, 2021) (citing *Thorn Custom Harvesting*, 2011-TLC-00196, slip op. at 3 (Feb. 8, 2011)).

Here, based on the aggregation of past applications with the present Application, the CO argues that the Employer is seeking to employ H-2A workers nearly year-round. Specifically, the Employer's Fiscal Year ("FY") 2023 application for H-2A workers listed dates of need from March 18, 2023, until January 12, 2024, and the Employer's FY 2024 application listed dates of need from

February 15, 2024, until December 14, 2024. The CO concluded that the Employer failed to establish a temporary or seasonal need.

The Employer contends that it is not seeking to employ H-2A workers year-round, but is rather adjusting its dates of need to reflect the Employer's seasonal need for temporary labor. The Employer included its annual schedule with its NOD response and Mr. Mitchell testified about the farm's season. The Employer's NOD response indicates that drainage tile installation begins in mid-February, planting and associated groundwork occurs between March and June, harvest preparation occurs between July and August, crops are removed from the fields between September and October, and post-harvest cleaning and other duties occur from November to December. AF 53. According to the Employer's NOD response, the farm typically begins planting its first crop in mid to late March. *Id*. at 54; *see also* Tr. 79:17–20. Mr. Mitchell's testimony was consistent with this schedule, which he testified is tied to the weather patterns. Mr. Mitchell testified that pre-planting work, including installing drainage tile and performing preemptive spraying, begins in mid-February. Tr. 90:3–5, 19–25. Mr. Mitchell stated that pre-planting work requires the ground to thaw and weeds to begin sprouting, and therefore, it cannot start earlier than mid-February. Tr. 79:9–16; 91:1–8. It follows that pre-planting duties must be completed before the first crop is planted in mid to late March. Mr. Mitchell testified that the growing season then lasts from April to October, and the harvest ends in late October or early November, at which point post-harvest duties are performed. Tr. 80; 95. Mr. Mitchell testified that December and January are slow months because the cold weather precludes extensive outdoor work. Tr. 91:1–8; 94:9–11; 96:12–16; 101:1–2, 12. Thus, Mr. Mitchell stated that the Employer does not need H-2A workers during December and January. Tr. 105:20–22; *see also id*.

According to the Employer, its seasonal dates of need have changed with the utilization of the H-2A program and growth of the farm. In previous years, the Employer used temporary labor for post-harvest duties while permanent labor alone handled pre-planting duties. AF 53–54. The Employer explained that the farm has been able to complete post-harvest work more quickly over the past couple of years. *Id*. at 54–55. In contrast, the Employer alleges that since the farm has grown and has extensive acreage that needs drainage tiles and spraying, the permanent labor can no longer handle pre-planting duties on their own. *Id*. Thus, the Employer claims its new dates of seasonal need begin in mid-February so H-2A workers can help with pre-planting duties.

Further, the Employer established a two-month break in its requested temporary labor certification between 2023 and 2024 that is consistent with the requested dates of need. The Employer submitted documentation showing that two of its three H-2A workers during FY 2023 were sent home in September 2023 and the remaining worker was sent home by December 15, 2023, though the last date of need was listed as January 12, 2024. AF 20–26. Thus, the Employer employed H-2A workers for nine months from March 18, 2023, until December 15, 2023, and is requesting to employ H-2A workers for ten months from February 15, 2024, until December 14, 2024, with a two-month gap in between FY 2023 and FY 2024 temporary labor employment. It follows that the Employer has a need for temporary labor of 10 months or less, which is generally interpreted as a seasonal need. *See Grand View Dairy Farm*, slip op. at 6–8; *see also Rainbrook Farms, LLC, 2017-TLC-00013*, slip. op. at 7 (Mar. 21, 2017) (ALJ considered a break in the chain of employer's continuously certified H-2A workers in reversing the CO's denial of certification).

I find that the Employer has established a seasonal need from February 15 to November 30. The growing season for corn and soybeans is late March through late October or early November, and pre-planting and post-harvest work is necessarily tied to the growing season. The Employer further established that it does not need H-2A workers during December and January when it is too cold to do the necessary outdoor fieldwork.

The Employer justified the change in its seasonal need dates by explaining that temporary labor can be best utilized during the pre-planting season instead of the post-harvest. The CO admitted that the Employer's 2022 payroll supports the requested season of February to December. AF 39. Further, the early termination of the Employer's 2023 H-2A workers supports the requested earlier dates of need. Though the CO stated that the 2021 and 2020 payrolls do not support the requested season, the two most recent years are consistent with a February to November season to reflect a change from use of temporary labor during pre-planting instead of post-harvest. When asked why the Employer requested an end date in December, when the Employer apparently does not need temporary labor, Mr. Mitchell testified that he understood that the dates of need were required to equal 10 months. Tr. 97:4–6; 107–09. He stated that the Employer is primarily concerned with the start date, not the end date, and the Employer typically sends workers home before the last date of need on an application. Tr. 81:8–11; 105–107.

In conclusion, the Employer has shown that it needs more workers during certain months of the year (*i.e.*, during pre-planting and harvest from mid-February to November) than in others.[4] Specifically, Mr. Mitchell testified that the Employer does not need temporary laborers in December or January, and therefore, the Employer's need is not permanent or year-round. The Employer's change in seasonal dates of need based on the need for temporary labor during pre-planting instead of the post-harvest period is reasonable and consistent with the record. Accordingly, I find that the Employer has established by a preponderance of the evidence that the relevant work is seasonal in nature.[5, 6]

## ORDER

It is hereby **ORDERED** that:

1. The Certifying Officer's denial of Employer's Application for temporary labor certification in this matter is **REVERSED**.

[4] The Employer employs 12 American workers at maximum and is requesting 4 H-2A workers. *See* Tr. 80–81. A one-third increase in labor is sufficiently more than the Employer's regular labor to constitute "labor levels far above those necessary for ongoing operations."

[5] Because I find that the Employer has established that its need is non-continuous and seasonal, and there is a two-month gap between the last date of 2023 H-2A employment and the first date of 2024 H-2A employment, I do not address the parties' arguments regarding whether the Employer's current and previous applications are for the same need.

[6] My decision in this matter should not be construed as a criticism of the CO's denial of certification. Given the information available to her at the time she made her decision, the CO's denial of certification was reasonable. My decision reversing hers is simply the result of my having more information available to me than she did at the time she made her determination.

2. This matter is **REMANDED** to the Certifying Officer for further consideration in accordance with this Decision and Order. The Certifying Officer is directed to modify the dates of need on the Employer's Application to February 15, 2024, through November 30, 2024, consistent with the seasonal need established above.

**SO ORDERED.**

**PAUL R. ALMANZA**
Associate Chief Administrative Law Judge