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U.S. Department of Labor

Employment and Training Administration

OFFICE OF FOREIGN LABOR CERTIFICATION

2010 H-2A Final Rule FAQs

Round 17: Temporary or Seasonal Need Assessments; Relevant Information or Factors Related to H-2A Labor Contractors (H-2ALCs) Operating in an Area of Intended Employment (AIE) Where Agricultural Production May Occur Year-Round

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Background

On December 3, 2021, the Secretary of Labor, United States Department of Labor (Department or DOL), issued a notice explaining the complexities involved in an administrative appeal of an *Application for Temporary Employment Certification* that was denied labor certification by the Office of Foreign Labor Certification (OFLC).[1] In that notice, the Secretary determined that his concerns with the underlying decision issued by the Administrative Law Judge (ALJ) would be better addressed through interpretive guidance, rather than issuing a precedential decision pursuant to 29 CFR 18.95(b)(2), 18.95(c)(2)(i). Accordingly, the Secretary directed ETA to issue interpretive guidance clarifying how OFLC assesses an H-2A employer's temporary or seasonal need for agricultural labor or services when reviewing the corresponding *Application for Temporary Employment Certification.* The Secretary specifically requested ETA provide guidance "in the context of H-2A Labor Contractors (H-2ALCs) who operate in localities that can support agricultural activities year-round." *Id.* The Secretary requested the guidance include how OFLC evaluates factors that frequently "arise when determining whether an employer has met its burden to establish a temporary or seasonal need for agricultural labor or services…the types of evidence relevant to making this determination" and how this evidence is assessed, "including the impact and relevance of an employer's previous history of filing *Applications for Temporary Employment Certification*." *Id*. These Frequently Asked Questions (FAQs) address the topics noted in the Secretary's December 2021 notice and other related topics.

Reference documents:

[1] *Overlook Harvesting Company, LLC*, 2021-TLC-00205 (Sept. 9, 2021), ***Sec'y assumed juris***. (Sept. 30, 2021), ***Sec'y juris. withdrawn*** (Dec. 3, 2021); *see* https://www.oalj.dol.gov/DECISIONS/ALJ/TLC/2021/In_re_Overlook_Harvesting__2021TLC00205_(DEC_09_2021)_124914_ORDER_PD.PDF.

- Statutory provisions: 8 U.S.C. 1101(a)(15)(H)(ii)(a); 8 U.S.C. 1184(c)(1), 1188
- Regulatory definition "of a temporary or seasonal nature": 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A).
- United States Citizenship and Immigration Services (USCIS) interpretive guidance: Policy Memorandum 602-0176.1, *Updated Guidance on Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production*, dated February 28, 2020 (USCIS PM-602-0176.1).[2]
- *Temporary Workers Under § 301 of the Immigration and Reform Act*, 11 Op. O.L.C. 39, 40 (1987) (*Temporary Workers*).
- Board of Alien Labor Certification decisions: *Overlook Harvesting Company, LLC*, 2021-TLC-00205 (Sept. 9, 2021), ***Sec'y assumed juris.*** (Sept. 30, 2021), ***Sec'y juris. withdrawn*** (Dec. 9, 2021); *William Staley*, 2009-TLC-00060 (Aug. 28, 2009); *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008); and *Matter of Artee*, 18 I. & N. Dec. 366 (BIA 1982).

Assessment of Whether a Labor Need is of a Seasonal or Temporary Nature

1. Is the OFLC Certifying Officer (CO) required to assess whether an employer has established that its need for the agricultural labor or services presented in its *Application for Temporary Employment Certification* is "of a temporary or seasonal nature"?

Yes. An H-2A temporary agricultural labor certification is limited by statute to agricultural labor or services *of a temporary or seasonal nature*. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1), 1188. Accordingly, the CO may certify an *Application for Temporary Employment Certification* only if the employer's need for the agricultural labor or services presented in the application (*i.e.*, the work for which the employer seeks to hire H-2A workers) is of a temporary or seasonal nature and all other criteria for certification are met. *See* 20 CFR 655.161(a).

Note: The employer bears the burden of establishing that its current need to fill a position is, in fact, of a temporary or seasonal nature. *See, e.g.*, *Garrison Bay*

[2] USCIS PM-602-0176.1 addresses how USCIS will apply its normal standard of review with regard to "of a temporary or seasonal need" to range occupation petitions and, in doing so, provides guidance about "of a temporary or seasonal need" adjudication generally (e.g., preponderance of the evidence standard; material break between an employer's asserted seasonal need). *See*, *e.g.,* page 1, where USCIS PM-602-0176.1 states, "[This policy memorandum] is not intended to alter current policy for the adjudication of H-2A petitions, but to ensure that [USCIS] adjudicates all H-2A sheep/goatherder petitions on a case-by-case basis, taking into consideration the totality of the facts presented, and in the same manner as all other H-2A petitions."

Honey, LLC, 2011-TLC-00054, at 4 (Dec. 2, 2011); *J and V Farms, LLC*, 2016-TLC-00022, at 3 n.2 (Mar. 7, 2016). Consistent with USCIS policy guidance, the CO's review of the *Application for Temporary Employment Certification* and assessment of the employer's temporary need is inherently fact driven and can only be determined on a case-by-case basis, considering the totality of the circumstances. The existence of a labor shortage in a particular area or occupation does not establish a need of a temporary or seasonal nature for the agricultural work to be performed under an *Application for Temporary Employment Certification*.

2. To be eligible for H-2A temporary agricultural labor certification, must an employer's labor need be <u>both</u> temporary <u>and</u> seasonal in nature?

No. An employer's need to fill the job presented in the *Application for Temporary Employment Certification* on a temporary basis must be <u>either</u> seasonal in nature <u>or</u> temporary in nature, as those terms are defined under DOL and DHS's H-2A program regulations. *See* 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A); *Temporary* Workers, 40 ("'temporary' means something other than seasonal"); *William Staley*, 2009-TLC-00060, at 6 (Aug. 28, 2009) ("That the Employer has established a seasonal need does not preclude him from establishing a truly temporary need for a worker in the same occupation during a different … period of the year.").

Note: Form ETA-9142A, Section A.3 requires employers to indicate whether their need is "seasonal" or "other temporary need." In all cases, the employer's need for the agricultural labor or services presented in the *Application for Temporary Employment Certification* (*i.e.*, the work for which the employer seeks to hire H-2A workers) cannot be permanent in nature.

3. How is a labor need of a *seasonal nature* defined for purposes of the H-2A program?

Both the DOL and DHS H-2A regulations specify that, for purposes of the H-2A program, an employer's labor need 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." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A).

Example: A farmer in Maine employs a few workers to maintain their agricultural operation year-round but needs a large number of additional workers to harvest the blueberries the employer cultivates between late July and early September. This need for additional workers occurs annually in the employer's agricultural operation during a particular time of year (*i.e.*, mid-summer to early fall) due to

the event or pattern of blueberry harvesting, which is a specific aspect of the longer cycle of cultivating blueberries. This employer has a need for workers for this harvesting at a level far above those required for their ongoing agricultural operations to cover the short annual blueberry harvest, which is tied to a certain time of the year. Accordingly, the employer's blueberry harvest labor need is of a seasonal nature.

4. How is a labor need of a *temporary nature* defined for purposes of the H-2A program?

Both DOL and DHS H-2A regulations specify that, for purposes of the H-2A program, a labor need 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." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A). *See* USCIS PM-602-0176.1; *see also Temporary Workers,* 40.

Example: A farmer in Maine needs workers for a six-month period to construct a new greenhouse on the employer's farm for expansion of its blueberry cultivation operation. This employer has a need for workers to perform a specific aspect of or activity within the agricultural operation, is of a relatively short duration, and is not expected to recur annually or without a material break.[3] When considered alone, the employer's six-month period of need is less than one year. In addition, when considered within the employer's larger, ongoing operations, the employer is likely to demonstrate that such a need (*i.e.*, tied to operational expansion involving newly acquired land) would not be expected to recur on a regular frequency, without material breaks between each need. As an irregular occurrence, with material breaks anticipated between recurrence, the nature of the employer's need is temporary and does not last longer than one year.

5. Are certain occupations, positions, or job opportunities in a particular geographic area, etc. *always* or *never* seasonal or temporary in nature?

No. It is the nature of the employer's need for the agricultural labor or services to be performed, not the occupation, location of the job opportunity (*e.g.*, in the northern or southern region of the United States), or job opportunity itself, that determines whether the need is temporary or seasonal for purposes of the H-2A program and,

[3] *See* USCIS PM-602-0176.1 (USCIS looks for a "material break," also referred to as "meaningful break," when evaluating whether an employer has demonstrated whether its need is temporary or seasonal in nature); *see also Temporary Workers*, 40 (1987) ("'temporary' means something other than seasonal").

therefore, eligible for certification. Different employers or the same employer in different locations may have different needs for the same type of work.

The focus of OFLC's assessment is on the employer's need for the labor, not on the temporary or seasonal nature of the job. *Temporary Workers,* 41, available at https://www.justice.gov/file/23936/download (citing *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (BIA 1982)) ("If an employer makes a *bona fide* application showing that he needs to fill a job on a temporary basis, the work is 'of a temporary or seasonal nature.' It is irrelevant whether the job is for three weeks to harvest a crop or for six months to replace a sick worker or for a year to help handle an unusually large lumber contract. ***The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.***") (emphasis added.)

Example of contrasting needs of neighboring farmers: Farmer A cultivates specific field crops and needs additional workers only in certain months during the farm's annual fall harvest period. As defined for the H-2A program, an employer's labor need 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." 20 CFR 655.103(d); 8 CFR 214.2(h)(5)(iv)(A). Farmer A may be able to demonstrate a need of a seasonal nature for those additional harvest workers identified on their *Application for Temporary Employment Certification* above their existing year-round workforce need. However, Farmer B, whose farm is adjacent to Farmer A's, cultivates diversified crops or uses greenhouses in their agricultural operation. Due to the crops grown and/or use of greenhouses, Farmer B employs a relatively constant number of farmworkers year-round in their agricultural operations. Farmer B may not be able to establish a need of a seasonal nature for some, or all, of the workers identified on the *Application for Temporary Employment Certification* as their operation may not require labor levels far above those necessary for ongoing operations, during a certain time of year due to an event or pattern within their agricultural operation.

Example of contrasting needs of farmers and labor contractors: Farmer C, Farmer D, and Farmer E each have distinct agricultural operations within a particular regional area of the United States that supports year-round agriculture. Like Farmer A, in the example above, Farmer C, Farmer D, and Farmer E each cultivate specific field crops and need additional workers only in certain months—tied to each farm's annual harvest period. Farmer C requires labor levels far above those necessary for ongoing operations from May through September, while Farmer D requires labor levels far above those necessary for ongoing operations from October through January, and Farmer E requires labor levels far

above those necessary for ongoing operations from January through April. If each of these individual farmers were to file an *Application for Temporary Employment Certification* for the additional farmworkers needed for each of their harvest periods, each farmer may be able to demonstrate a need of a seasonal nature for the workers requested on their *Application for Temporary Employment Certification* to supplement their existing year-round workforce related to annual harvesting activities. However, if Farmer C, Farmer D, and Farmer E engaged an H-2A Labor Contractor (H-2ALC) to fulfill their combined additional labor needs, the H-2ALC may not be able to establish that *its own need* to supply labor to these farmers is of a seasonal or temporary nature for some, or all, of the workers requested on its *Application for Temporary Employment Certification*. Essentially, the nature of the H-2ALC's need for labor would span May through the following April covering all seasons and all months of the year, thus indicating that the H-2ALC's need for labor is likely permanent rather than temporary.

In addition, an employer's need may change from one *Application for Temporary Employment Certification* to the next based on changes to the employer's agricultural operations.

Example: Farmer A, from the example above, whose *Application for Temporary Employment Certification* for workers to harvest crops in the past was certified may have made subsequent operational changes (*e.g.*, to diversify crops or introduce greenhouses) such that this need for labor is no longer "of a seasonal nature," in whole or in part, for purposes of the H-2A program.

An unusually large contract consistent with an employer's existing agricultural operations generally would not change the nature of the employer's labor need within its ongoing operations. Where such a contract requires the employer to produce a significantly higher crop volume than in prior years, the contract may increase the level of the employer's labor needs during its established period of seasonal need. However, the increase in crop volume may not establish a need of a temporary nature.

Examples:

Farmer A, from the example above, whose *Application for Temporary Employment Certification* for workers to harvest crops, enters into a contract requiring significantly higher crop production within Farmer A's existing operation. While the contract may increase Farmer A's labor level needs during harvest

further above normal operations than in other years, the timing and seasonal nature of Farmer A's higher labor level need would remain consistent.

Similarly, if Farmer F's agricultural operation involves a crop grown year-round in a climate-controlled environment, as is the case typically with the production of mushrooms, a large contract would result in increased ongoing operations, rather than creation of a need of a seasonal or temporary nature. However, to the extent such a large contract required labor (e.g., construction labor) to expand the infrastructure of Farmer F's existing operation, Farmer F may be able to establish a need of a temporary nature for the labor required for the employer's expansion activities, rather than the general increase in labor required for the employer's ongoing operations.

6. How does the CO assess whether an employer's need for the agricultural labor or services presented in an *Application for Temporary Employment Certification* is employment of a *temporary* or *seasonal* nature?

The CO evaluates the totality of circumstances and facts presented by the employer to determine whether the employer's need is seasonal or temporary in nature, as required, using the regulatory definition at 20 CFR 655.103(d) and other authorities and interpretive guidance.[4] In addition to information the employer submits with the current *Application for Temporary Employment Certification*, the CO may consider additional information, for example, information the employer has submitted with prior applications as well as information from the SWA or public sources (*e.g.*, the employer's website).

A variety of factors, alone or in combination, may raise questions about whether an employer's need for the labor or services presented in the *Application for Temporary Employment Certification* (*i.e.*, the work for which the employer seeks to hire H-2A workers) is seasonal or temporary in nature, as defined for H-2A visa program purposes. A non-exhaustive list of relevant factual scenarios that generally raise questions regarding the nature of an employer's need for the labor or services presented in the *Application for Temporary Employment Certification* appear below:

[4] *See*, *e.g.*, U.S. Citizenship and Immigration Services Policy Memorandum 602-0176.1, *Updated Guidance on Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production*, dated February 28, 2020; *see also*, *e.g.*, administrative and judicial decisions, including *Matter of Artee*, 18 I. & N. Dec. 366 (BIA 1982) (evaluate the nature of the employer's need, rather than the nature of the occupation) and *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008) (10 months is a reasonable threshold to question the nature of an employer's need).

- The employer asserts a need of a seasonal nature that is not clearly tied to a particular time of the year by an event or pattern;
- The employer seeks to employ H-2A workers for what appears to be, in whole or in part, the employer's ongoing operations (*e.g.*, employer's pending application(s) or filing history reflect consistent labor levels year-round);
- The employer seeks to employ H-2A workers for a lengthy period during the calendar year *with no material break in the labor or services to be performed* (*e.g.*, recurring need lasts longer than 10 months);
- The employer identified its need as being of a temporary nature and the need is longer than one year, but the employer has not demonstrated extraordinary circumstances; and/or
- The employer identified its need as being of a temporary nature and, due to likely recurrence of the need, the need extends beyond one year despite breaks (*e.g.*, employer's operation requires more labor during the 11-month period that recurs annually from livestock purchase to livestock sale), but the employer has not demonstrated, by a preponderance of the evidence,[5] that an extraordinary circumstance exists. The CO considers recurring or consecutive periods, without material break(s), in the aggregate.

Similarly, if the CO has questions with the nature of an employer's need for the labor or services presented in the *Application for Temporary Employment Certification*, the CO evaluates the information presented by the employer within the broader context of the employer's H-2A application filing history in the area of intended employment (AIE). The CO evaluates the employer's previous filings in the AIE, including those that the employer withdrew or were certified or denied by the CO, as the employer attested under penalty of perjury to the truth and accuracy of the information in each *Application for Temporary Employment Certification* submitted, including the employer's asserted need for the services or labor to be performed. A non-exhaustive list of relevant factual scenarios that generally raise concerns with the nature of an employer's need for the labor or services presented across its *Application for Temporary Employment Certification* filing history in the AIE appear below:

- The employer's pending application(s), filing history, or explanation(s) conflict with the time of year to which the employer's need allegedly is tied;
- There are change(s) in the timing of the employer's need from prior year(s) that conflict with the purported period of need in the employer's current or pending application;

[5] *See* USCIS PM-602-0176.1 (USCIS uses a preponderance of the evidence standard when evaluating whether an employer has demonstrated that its need is temporary or seasonal in nature).

- The employer's pending application(s) or filing history suggest the current application reflects a need, in whole or in part, for labor to maintain the employer's ongoing operations (*i.e.*, not for labor levels far above those necessary for ongoing operations);
- The employer asserted a need for H-2A workers to perform the same or similar labor or services[6] for a period longer than 10 consecutive months or repeatedly without material breaks (*e.g.*, for 10 or more nearly consecutive months within a 12-month period); and/or
- The employer asserts the same or similar need "of a temporary nature," or frequently asserts the same or similar "extraordinary circumstances" in multiple applications.

Where the CO is unable to determine whether the employer has demonstrated a need that is seasonal or temporary in nature, the CO will issue a Notice of Deficiency (NOD) that informs the employer of the concern(s) and offers the employer an opportunity to provide additional information to demonstrate that its need satisfies the required criteria for certification. This topic is addressed further in a separate question ("When would an employer receive a NOD asserting that the employer appears to have a permanent need for the labor or services in the AIE?") and answer.

Reminder: The CO evaluates the nature of the employer's *own need*, as opposed to the nature of the occupation, position, or job, generally. *See Matter of Artee*, 18 I. & N. Dec. 366 (BIA 1982). This does not mean, however, that the CO, in making this determination, will disregard the nature of the employer's agricultural operation or the types of duties involved; rather, in determining the employer's own need, it is necessary to understand and take into consideration all of the facts presented. An H-2ALC must demonstrate that its own need, independent of its client-grower, satisfies the criteria for certification.

7. How does the CO assess whether the jobs offered in an employer's *H-2A Applications for Temporary Employment Certification* filings in the AIE constitute the same or similar labor or services?

[6] Whether two *Applications for Temporary Employment Certification* seek H-2A workers to perform the same or similar labor or services is a separate complex factual analysis, which involves the CO comparing job offer information presented on each application, such as tools, tasks, duties, wage offer, qualifications and requirements, etc. This topic is addressed further in a separate question ("How does the CO assess whether the jobs offered in an employer's *H-2A Applications for Temporary Employment Certification* filings in the AIE constitute the same or similar labor or services?") and answer.

Whether multiple *Applications for Temporary Employment Certification* in an employer's filing history seek H-2A workers to perform the same or similar labor or services is a complex factual analysis, which involves the CO comparing the totality of circumstances of each job opportunity. The CO considers the Standard Occupational Classification (SOC) title and code assigned to the job offers in each *Application for Temporary Employment Certification*; however, the SOC assignments alone may not be determinative. The CO also considers the similarities and differences in the totality of job offer details, such as duties, tasks, tools, wages, qualifications, and requirements.

The SOC titles and codes most commonly assigned to H-2A program job offers include: 45-2092, Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers; 45-2093, Farmworkers, Farm, Ranch, and Aquacultural Animals; 45-2091, Agricultural Equipment Operators; 53-7064, Packers and Packagers, Hand; 45-2041, Graders and Sorters, Agricultural Products; and 45-2099, All Other Agricultural Workers. Each SOC code encompasses a broad variety of job titles and duties with areas of overlap between the SOC code descriptions. Due to the areas of overlap, the same SOC may have been assigned to job offers in different *H-2A Applications for Temporary Employment Certification* despite substantial differences in the duties listed on the *Application for Temporary Employment Certification*.

> *Example*: SOC 45-2092, Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers, includes manually cultivating and harvesting vegetables, fruits, nuts, horticultural specialties, and field crops. The cultivation and harvest of vegetable crops, whether in fields or greenhouses, typically involve substantially similar duties, tasks, tools, etc., regardless of the particular crop or commodity. However, the cultivation and harvest of vegetable crops typically involve substantially different duties, tasks, tools, etc., as compared to the cultivation and harvest of vineyard crops (*i.e.*, grapes), both of which may be coded as 45-2092.

Conversely, different SOCs may have been assigned to job offers in different *Applications for Temporary Employment Certification* despite similarities in the duties listed on the *Application for Temporary Employment Certification*.

> *Example*: In addition to cultivation and harvest activities, SOC 45-2092, Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers, encompasses cleaning, grading, sorting, packing, and loading harvested products, which overlap with two other SOC codes: SOC 53-7064, Packers and Packagers; and SOC 45-2041, Graders and Sorters, Agricultural Products. Depending on the specific facts of each job offer, when closely comparing two job offers involving packing, sorting, and grading, the CO may determine that two job offers are substantially similar, whether in their entirety or due to significant

overlap between the job offers (*i.e.*, significant aspects or duties of the job offered are substantially similar), even when the two job offers were assigned different SOC codes.

8. When would an employer receive a NOD asserting that the employer appears to have a permanent need for the labor or services in the AIE?

When reviewing an *Application for Temporary Employment Certification*, the CO evaluates the nature of the employer's need for the agricultural labor or services presented in that application both as presented in the *Application for Temporary Employment Certification*, and in the context of the employer's broader, historical need within the AIE, as evidenced by the employer's filing history. The CO may evaluate the combined historical need of different entities in the event those different entities share key operational similarities (*e.g.*, employer point of contact; referral and hiring instructions; signatory), which may indicate the different entities, in fact, operate as the same employer or joint employers.

Generally, the CO uses 10 months as the threshold to question whether an employer's need for the labor or services in the AIE is temporary or seasonal in nature and to provide the employer with an opportunity to submit evidence to establish the temporary or seasonal nature of its need. *See Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008).

Whether multiple *Applications for Temporary Employment Certification* in an employer's filing history—including those certified, withdrawn, or denied—seek H-2A workers to perform labor or services that is part of the employer's ongoing operations—rather than a need of a seasonal or temporary nature—is a complex factual analysis. The CO compares the totality of circumstances of each job opportunity, including the occupational classification, duties, tasks, tools, wages, qualifications, and requirements. The CO may determine that the jobs offered in different *Applications for Temporary Employment Certification* are the same or similar or, despite differences, overlap significantly (*i.e.*, are substantially similar with regard to significant aspects of the job offered). This analysis becomes more complex where the same or similar work is involved and the asserted periods of need overlap.

Example: If an employer seeks H-2A workers to perform a specific type of work for several months in one *Application for Temporary Employment Certification* (*e.g.*, harvest field crops), and under a subsequent *Application*, to perform the same or substantially similar work in addition to other duties (*e.g.*, harvest and pack field crops) for the rest of the year, the CO may determine that this need for

labor is part of the employer's ongoing operations—rather than a need of a seasonal or temporary nature.

Example: If an employer seeks H-2A workers to perform a certain type of work (*e.g.*, tend sheep) from March to October in one *Application for Temporary Employment Certification* and, under a subsequent *Application*, to perform a combination of the same or substantially similar work and other duties (*e.g.*, tend sheep and cattle) from October to May, the CO may determine that the employer's need is related to ongoing operations—rather than a need of a seasonal or temporary nature.

In addition, while an employer may have a need for labor levels far above normal operations to perform a particularly labor-intensive activity that must occur during a short time period (e.g., calving, lambing, or field packing lettuce), the employer's operation may otherwise require a relatively steady level of labor. In such cases, the CO will generally issue a NOD to request additional information regarding the employer's labor levels in all months of the year to further assess whether the employer's *Application for Temporary Employment Certification* reflects a need of a temporary or seasonal nature.

Taken together, the CO will generally question whether an employer's need for labor or services is temporary or seasonal in nature and provide the employer with an opportunity to submit evidence to establish the temporary or seasonal nature of its need where the CO identifies significant similarities between job offers in *Applications for Temporary Employment Certification* in the AIE that exceed the 10-month period threshold to question the temporary or seasonal nature of an employer's need.

9. What information or documentation should an employer provide in response to such a NOD?

In the event the CO determines that an employer has not demonstrated that the employer has a need of a temporary or seasonal nature[7] in the applicable AIE,[8] the

[7] Whether two *Applications for Temporary Employment Certification* seek H-2A workers to perform the same or similar labor or services is a separate complex factual analysis, which involves the CO comparing job offer information presented on each application, such as tools, tasks, duties, wage offer, qualifications and requirements, etc. This topic is addressed further in separate FAQs.
[8] The applicable AIE is the AIE for the job opportunity for which the employer currently seeks certification. The CO's method of determining the AIE for an *Application for Temporary Employment Certification* is addressed in separate FAQs.

CO will issue a NOD. The NOD will explain the basis for the CO's determination and will request additional information or documentation.

The employer bears the burden of establishing a seasonal or temporary need for the labor or services in the AIE for the current *Application for Temporary Employment Certification*. An employer may respond to the NOD with additional information, documentation, and/or explanation to address the CO's concerns regarding whether the employer's need for the labor or services is of a seasonal or temporary nature, as defined at 20 CFR 655.103(d). The employer is particularly encouraged to submit an explanation, as appropriate, providing context for the information and documentation submitted where the documentation could be misleading or misunderstood absent explanation. For example, if the NOD requests payroll information for a year in which the employer's operation experienced an unusual situation (*e.g.*, a natural disaster) that impacted production, the employer should include an explanation of the situation and how it altered production in that particular year. In this example, the employer is further encouraged to provide alternative information or documentation to demonstrate its normal operational patterns, as normal operational patterns could not be demonstrated through the unusual year's payroll.

In addition, if the NOD is based on the employer's filing history, the employer may, if applicable, address why it believes that some or all of the applications identified in the NOD are located outside the AIE for the current *Application for Temporary Employment Certification*. Note that before issuing the NOD, the CO will have completed the AIE review discussed in a separate question ("How does the CO determine the AIE applicable to the job opportunity presented in an *Application for Temporary Employment Certification*?") and answer; therefore, helpful additional information will focus on local factors, such as a mountain or lake that acts as a barrier to commuting in a certain direction.

Alternatively, or in addition, as applicable, the employer may address why it believes that some or all of the applications identified in the NOD present needs for distinct labor or services than the current *Application for Temporary Employment Certification.* Note that before issuing the NOD, the CO will have completed the job offer comparison discussed in a separate question ("How does the CO assess whether the jobs offered in an employer's H-2A Applications for Temporary Employment Certification filings in the AIE constitute the same or similar labor or services?") and answer; therefore, helpful additional information will focus on significant, substantive differences between jobs, as opposed to minor or superficial differences.

To establish that its need for labor or services is of a seasonal nature, the employer may also address the time of year to which its need is tied and how its labor need at that time of year is far above the level needed for ongoing operations.

When issuing the NOD, the CO identifies the types of evidence and documentation that may be helpful to the CO's assessment. For example, to demonstrate the high labor level needed during the asserted seasonal period compared with the labor levels of the employer's ongoing operations, the NOD may ask the employer to provide summarized monthly payroll reports, compiled from the employer's actual accounting records and that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. In addition, as evidence of the time of year and event or pattern to which the asserted seasonal period is tied, the NOD may request the employer provide a detailed description of their schedule of operations throughout the entire year and a monthly breakdown of duties. The employer may provide other evidence and documentation that similarly serves to justify the timing of, and labor level required for, the employer's asserted seasonal need. The CO will review all evidence submitted in assessing if the employer has met its burden of proof.

10. How far back does the CO look in an employer's case history when assessing temporary or seasonal need in the AIE?

The CO assesses each *Application for Temporary Employment Certification* on a case-by-case basis and considers the totality of the facts presented to determine whether the employer has established a need of a temporary or seasonal nature for the agricultural work to be performed under an *Application for Temporary Employment Certification*. The scope of an employer's case history (*i.e.*, prior filings, including those certified, withdrawn, and denied) relevant to the CO's review will depend on the facts of any specific case. However, as a general matter, an employer's more recent filing history (*e.g.*, within the prior two years) is often more relevant and accorded greater weight in the CO's assessment of whether the employer has established a temporary or seasonal need for the labor or services.

Note: The CO's assessment of an employer's need is addressed further in a separate question ("How does the CO assess whether an employer's need for the agricultural labor or services presented in an *Application for Temporary Employment Certification* is employment of a *temporary or seasonal* nature?") and answer.

11. Is an H-2ALC's *Application for Temporary Employment Certification* eligible for certification based solely on whether its client-growers' need for agricultural services or labor is of a temporary or seasonal nature?

No. All *Applications for Temporary Employment Certification* are subject to the same statutory and regulatory standards requiring an employer of the workers, in this case the H-2ALC, to establish that the nature of its need for the services or labor to be performed is temporary or seasonal independent of the client-growers' need. An H-2ALC is an employer who is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, *see* 20 CFR 655.103(b), and generally has an ongoing business of supplying workers to fixed-site client-growers, even if the individual client-grower(s) need for the services or labor to be performed is temporary or seasonal. Thus, the H-2ALC bears the burden of demonstrating that its *own* need for workers, not that of their client-growers, to perform the agricultural labor or services presented in the application (*i.e.*, the work for which the H-2ALC seeks to hire H-2A workers) is seasonal or temporary in nature, as defined for H-2A visa program purposes. *See Matter of Artee*, 18 I. & N. Dec. 366 (BIA 1982).

Note: The CO assesses each *Application for Temporary Employment Certification* on a case-by-case basis and considers the totality of the facts presented to determine whether the employer has established a need of a temporary or seasonal nature for the agricultural work to be performed under an *Application for Temporary Employment Certification*. The CO may note that an *Application for Temporary Employment Certification* reveals conflict(s) between the H-2ALC's client-grower's need (*e.g.*, contract for services from March through September) and the H-2ALC's asserted need (*e.g.*, H-2A workers requested from January through October) that raise questions on the nature and accuracy of the H-2ALC's asserted need. Alternatively, the CO may note that the H-2ALC provides labor for producing a crop (e.g., peppers) for several fixed-site growers within the AIE, each with a different growing cycle, which together, span more than 10 months. In such cases, the CO will issue a NOD to provide the H-2ALC with an opportunity to establish how its need is temporary or seasonal in nature, as defined for H-2A visa program purposes at 20 CFR 655.103(d).

12. Is an employer permitted to satisfy a year-round need for agricultural labor through separate *Applications for Temporary Employment Certification*, provided that each *Application for Temporary Employment Certification* offers employment for less than 10 months?

No. The CO will not certify an *Application for Temporary Employment Certification* where the CO becomes aware that work contracts or scheduled work have been manipulated and/or one or more employers have filed separate H-2A applications in a manner that creates the illusion of a temporary or seasonal need in order to secure H-2A temporary agricultural labor certification(s) to fill a need that is permanent in nature. Such filings conflict with the Department's obligations with regard to the integrity of H-2A temporary employment certifications.[9] Consistent with USCIS policy, the Department notes that in instances where employers' needs are permanent, rather than temporary or seasonal in nature, Congress intended employers to utilize the employment-based immigrant petition process, which includes options for skilled workers, professionals, and other workers under 8 U.S.C 1153(b)(3).[10]

Area of Intended Employment (AIE)

13. What is an AIE for purposes of the H-2A program?

AIE is a geographic area determination related to the Department's ability to determine whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary or seasonal agricultural labor or services offered, and whether the employment of H-2A workers will adversely affect the wages and working conditions of similarly employed workers in the United States. It is the geographic area where recruitment of U.S. workers is essential and where similarly employed workers would be most affected by the employment of H-2A workers.

As defined in the Department's regulations at 20 CFR 655.103(b), AIE is "[t]he geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought." Further, the definition acknowledges that determining the AIE for a job opportunity presented in an *Application for Temporary Employment Certification* involves a fact-specific evaluation of factors

[9] The Department addressed similar issues in *Hispanic Affairs Project, et al. v. Perez et al.*, No. 15-cv-1562 (D.D.C.) and rescinded 20 CFR 655.215(b)(2), which permitted H-2A applications for range sheep and goat herding occupations to span 364 days. The rescission was made in response to the court finding that H-2A certifications of 364 days violated the statutory definition of temporary. The assessment of temporary or seasonal need for range occupations currently is conducted in the same manner as all other H-2A applications. 86 FR 71373 (Dec. 16, 2021).

[10] *See* U.S. Citizenship and Immigration Services Policy Memorandum 602-0176.1, *Updated Guidance on Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production*, dated February 28, 2020 ("where employers' needs are permanent, rather than temporary or seasonal in nature, Congress intended employers to utilize the employment-based immigrant petition process").

that indicate the normal commuting area for that particular job opportunity. The definition states:

- There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network).

- If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

14. How does the CO determine the AIE applicable to the job opportunity presented in an *Application for Temporary Employment Certification*?

The CO reviews each H-2A application on a case-by-case basis, including a case-specific evaluation of the geographic area within normal commuting distance of the place of the job opportunity for which the certification is sought (*i.e.*, AIE). First, the CO identifies the place of employment in Section C of the Form ETA-790A, *H-2A Agricultural Clearance Order* or, if designated, the centralized ‘‘pick-up’’ point (*e.g.*, worker housing) to which workers would commute to begin the workday, which the form instructions indicate will be used to determine the applicable AIE. That location serves as the “starting point” for evaluating the AIE applicable to the job opportunity. Then, the CO applies the factors included in the regulatory definition of AIE that guide evaluation of normal commuting distance from or normal commuting area for that starting point, such as MSA, average commuting times, barriers to reaching the worksite, and quality of the regional transportation network.

As in separate Frequently Asked Questions (above), the CO will likely issue a NOD if an employer’s H-2A filing history suggests an on-going, permanent need for the same or similar labor or services in the applicable AIE. The NOD will apprise the employer of the CO's analysis and concerns regarding the employer’s documentation and/or filing history and afford the employer the opportunity to clarify its position and submit any supporting evidence.

Scenario 1: Starting point located within an MSA

If the starting point is located within an MSA, the CO considers all locations within the MSA and, absent local factors indicating otherwise, all locations outside but near the border of the MSA to be within the same AIE.

> Example A: An employer's application identifies an address in Hillsborough County, Florida as the first work location and lists additional addresses in Pasco, Pinellas, and Polk Counties as additional work locations. The first work location—in Hillsborough County—is located in the Tampa-St. Petersburg-Clearwater MSA. As the additional addresses in Pasco and Pinellas Counties are also located in the same MSA (*i.e.*, Tampa-St. Petersburg-Clearwater MSA), all of those work locations identified on the application are deemed within the AIE of the job opportunity offered. In addition, work locations that are near the border of the Tampa-St. Petersburg-Clearwater MSA, including those outside the MSA's border in Polk County, are considered within the AIE of the job opportunity offered.

To evaluate normal commute beyond those locations, the CO uses the estimated maximum commute for the MSA as a proxy. Put another way, in the absence of information about local area circumstances indicating otherwise, the CO assumes that the commute distance—measured in time—deemed normal for workers inside the MSA applies outward from the place of employment (*i.e.*, starting point), beyond the MSA's boundaries, too. Local circumstances (*e.g.,* a lake or mountains rendering a commute between locations, whether over or through the geographic barrier, impractical) may reduce normal commute distance beyond the MSA's boundaries in certain directions.

> Example B: An employer's application identifies an address in Hillsborough County, Florida as the first work location and lists additional addresses in Pasco, Pinellas, and Collier Counties as additional work locations. As in Example A, above, the first work location—in Hillsborough County—is located in the Tampa-St. Petersburg-Clearwater MSA and Pasco and Pinellas Counties are also located in the Tampa-St. Petersburg-Clearwater MSA; all work locations located in the Tampa-St. Petersburg-Clearwater MSA are deemed within the AIE for the job opportunity.
>
> However, Collier County is not in the Tampa-St. Petersburg-Clearwater MSA and additional evaluation is required. The CO uses locations near the borders of the Tampa-St. Petersburg-Clearwater MSA (*i.e.*, the MSA for the job offered) that reflect the longest distance within that MSA (*e.g.*,

Brooksville, FL and Fort Lonesome, FL) and online mapping tools to assess the estimated maximum potential commute within the MSA. If, for example, the CO's mapping and driving time calculations resulted in a maximum estimated potential commute within the MSA's borders of 1 hour and 56 minutes of driving time, the CO would consider the additional addresses listed in the application that are within a 1 hour and 56 minute radius of the first worksite in Hillsborough County to be within the AIE for the job opportunity offered if they were. Assuming the additional work locations in Collier County are further than 1 hour and 56 minutes driving time from the first work location in Hillsborough County, the CO would consider the work locations in Collier County to be located within a different AIE than the job opportunity offered.

AIE for the *Application for Temporary Employment Certification* includes: All locations within the MSA and, absent local factors indicating otherwise, all locations near the border of the MSA and all locations within a radius from the starting point equivalent to an estimated maximum commute for the MSA, adjusted for local factors.

Scenario 2: Starting point not located within any MSA

If the starting point is not located within any MSA, the CO evaluates the estimated maximum commute for the MSA(s) closest to any worksite on the application. The CO uses the longest estimated maximum commute as a proxy for normal commute in the area, unless information about local area circumstances indicates otherwise.

Example C: An employer's application identifies work locations in Glades County, which is not included in any MSA. The CO would use a nearby MSA as a proxy to estimate the maximum commute driving time to use to evaluate whether the work locations listed on the employer's application are all located within a single AIE, as required.

AIE for the *Application for Temporary Employment Certification* includes: All locations within a radius from the starting point that is equivalent to the estimated maximum commute, adjusted for local factors.

Note: Although the CO applies the same analysis and factors for all *Applications for Temporary Employment Certification*, the AIE determinations for each may vary, even in the same general part of a State, as the particular geographic location of each job opportunity's place of employment (*i.e.,* the place of employment in Section

C of the Form ETA-790A or, if designated, centralized "pick-up" point) may relate differently to MSAs and other local factors.

Example D: An employer files two applications—the first application identifies a first work location or designated pick-up point in Hillsborough County and additional work locations in Glades County; the second application identifies a first work location or designated pick-up point in Collier County and additional work locations in Glades County. The CO would use the Tampa-St. Petersburg-Clearwater MSA (*i.e.*, the MSA in which Hillsborough County is located) to assess the AIE for the first application and the Naples-Immokalee-Marco Island MSA (*i.e.*, the MSA in which Collier County is located) to assess the AIE for the second application, as described above. For each application, using the applicable MSA and other available local information, the CO would evaluate whether the additional worksites in Glades County are within or beyond the estimated maximum commute driving time from the first location for that job opportunity.

15. Can an H-2ALC include worksites in multiple AIEs on one *Application for Temporary Employment Certification*?

Generally, no. An H-2ALC's *Application for Temporary Employment Certification*, must be limited to one AIE, absent an explicit regulatory exception (*e.g.*, animal shearing occupations). *See* 20 CFR 655.132(a). In other words, all places where the H-2ALC's employees will perform the labor or services described in the *Application for Temporary Employment Certification* must be located within a single normal commuting area.

16. What will happen if the CO determines an H-2ALC's *Application for Temporary Employment Certification* includes worksites that appear to be outside the AIE for the job opportunity?

Where the CO determines an H-2ALC's application includes work in more than one AIE, in conflict with the regulatory requirement at 20 CFR 655.132(a), the CO will issue a Notice of Deficiency (NOD) notifying the employer that its application cannot be accepted and identifying the worksite(s) listed on the Form ETA-790A, *H-2A Agricultural Clearance Order*, that appear to be outside the normal commuting area or AIE for the job opportunity.

An employer may respond to the NOD with a request to have the worksite(s) outside the AIE removed from its H-2A application or with additional information or documentation to establish that the worksite(s) are within normal commuting distance of the first place of employment identified in the Form ETA-790A or, if

designated, the centralized ‘‘pick-up’’ point (*e.g.*, worker housing). For example, an employer may provide a topographical map showing mountains to one side of the place of employment along with a clear explanation about how those mountains create a physical barrier that impedes and reduces commuting in that direction. The CO has the discretion to determine whether the information or documentation presented is sufficiently detailed to conclude that the employer has met its burden of establishing that all worksites listed on that application are within the same AIE.

Note: As the NOD raises issues of normal commute for workers, across all industries, who reside in the geographic area, employer responses should address local factors related to commuting in the area. Responses that address climate, crops, or employer-provided housing are not responsive, as they do not provide information related to normal commute in the area.

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Important Note: *The examples provided are for illustrative purposes only. The Department evaluates each application on its merits and based on the information available during processing.*