

SECRETARY OF LABOR
WASHINGTON, D.C. 20210

Issue Date: December 3, 2021

BALCA Case No.: 2021-TLC-00205
ETA Case No.: H-300-21183-441761

In the Matter of:

OVERLOOK HARVESTING COMPANY, LLC,
Employer.

BEFORE: MARTIN J. WALSH
Secretary of Labor

NOTICE OF SECRETARY’S WITHDRAWAL OF JURISDICTION

On September 9, 2021, following a *de novo* hearing, an Administrative Law Judge (“ALJ”) on the Board of Alien Labor Certification Appeals (“BALCA”) issued a Decision and Order reversing the denial of H-2A temporary agricultural labor certification in the above-captioned matter. On September 29, 2021, I exercised my discretionary authority to review the ALJ’s decision and assumed jurisdiction pursuant to 29 C.F.R. §§ 18.95(b)(2), 18.95(c)(2)(i). BALCA thereafter promptly provided the record in accordance with 29 C.F.R. § 18.95(c)(2)(ii). For the reasons stated below, I hereby withdraw jurisdiction and decline to issue a final determination in this matter; however, given the complexities attendant to this matter and my concerns with the underlying decision, I hereby direct the Employment Training Administration (“ETA”) to engage stakeholders and issue interpretive guidance on the issues described below.

Overlook Harvesting Company, LLC (“the Employer”) is an H-2A labor contractor (“H-2ALC”) that contracts with fixed-site agricultural businesses (e.g., farms and nurseries) to provide agricultural workers, primarily foreign workers on H-2A nonimmigrant visas (“H-2A workers”). Agricultural employers seeking to employ H-2A workers must complete a multistep process before several Federal agencies. The first step is to apply to the Department of Labor, ETA, for a certification that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform the agricultural labor or services for which the employer seeks H-2A workers and that the employment of H-2A workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* 8 U.S.C. § 1188(a) (requiring an employer to apply for this certification from the Secretary of Labor); Secretary’s Order 06–2010 (Oct. 20, 2010) (delegating authority to make this certification to ETA). To apply for this certification—known as a “temporary agricultural labor certification”—an employer must submit an *Application for Temporary Employment Certification* to ETA’s Office of Foreign Labor Certification (“OFLC”).

The Immigration and Nationality Act, as amended, limits the type of work that H-2A workers may perform to “agricultural labor or services . . . of a temporary or seasonal nature.” 8 U.S.C. §

1101(a)(15)(H)(ii)(a). Accordingly, all employers seeking H-2A temporary agricultural labor certification must establish, *inter alia*, that their need for agricultural labor or services is temporary or seasonal in nature. 20 C.F.R. 655.161(a). In the *Application for Temporary Employment Certification* (“Application”) at issue here, the Employer indicated that it had a seasonal need for 50 farmworkers from September through June. To establish that its need for these farmworkers is seasonal in nature, the Employer needed to demonstrate that the agricultural labor or services these workers will perform 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 C.F.R. § 655.103(d).

The OFLC Certifying Officer who reviewed the Employer’s Application noted that the Employer’s and other related entities’ history of filing *Applications for Temporary Employment Certification* reflected that the Employer sought to employ H-2A workers on a year-round basis. See Administrative File (AF) at 16–18. Citing this history, the Certifying Officer found that the Employer appeared to have a permanent need for H-2A workers and denied the Employer’s Application on that basis. AF at 19–20. The Employer sought review before an ALJ, and following a *de novo* hearing, the ALJ reversed the Certifying Officer’s denial.

The ALJ agreed with the Certifying Officer that the *Applications for Temporary Employment Certification* filed by the Employer and related entities, taken together, indicated that the Employer sought to employ H-2A workers in similar positions in the same area on a year-round basis. See *In re Overlook Harvesting Company, LLC*, 2021-TLC-00205 (ALJ Sept. 9, 2021) (“*Overlook*”) at 16–19. The ALJ additionally found that the Employer had tried to obscure the true scope of its seasonal need, and that the Employer’s disavowals of future attempts to employ H-2A workers on a year-round basis were not credible. *Id.* at 16, 18.

But the ALJ found that the Employer’s H-2A filing history and its lack of credibility in and of themselves did not preclude the Employer from establishing a seasonal need for the 50 positions at issue in the Application before him. *Overlook* at 18. To assess the Employer’s seasonal need for these positions, the ALJ evaluated the combined number of farmworker positions for which the Employer and related entities sought H-2A certification from September 2020 through September 2021. *Id.* at 17–18. The ALJ used this data to analyze the total number of H-2A workers that the Employer sought to employ during each month of the 12 months during this period; based on this data, he found that the Employer had “a need for 60 to 73 permanent workers and a contingent of up to about 943 H-2A workers from September or October through May, June, or July.” *Id.* Citing this finding, the ALJ determined that the Employer established a seasonal need for farmworkers from September to June that “requires labor levels far above those necessary for ongoing operations.” *Id.* at 18–19.


I find several aspects of the ALJ’s analysis problematic, and two in particular. First, I am concerned that the ALJ based his conclusion about the Employer’s seasonal need solely on the number of H-2A workers the Employer sought to employ during various months of the year, without considering other evidence relevant to an employer’s need for agricultural labor or services, such as payroll records, staffing/workload data, or employment contracts. Second, I am troubled that the ALJ assumed the 50 farmworkers the Employer sought in this Application were among the larger contingent of “seasonal” workers that he found the Employer required for only

ten months of the year, and not part of the 60 to 73 workers that he found the Employer permanently required on a year-round basis, particularly in light of his findings concerning the Employer's credibility and the Employer's obfuscation of its true seasonal need.

Yet after careful consideration of the record on review, I have determined that a precedential decision in this case is not the best vehicle to resolve the complex factual and regulatory issues involved in assessing whether this, or any other, Employer has a temporary or seasonal need for agricultural labor or services. Accordingly, I will not issue a final precedential decision under 29 C.F.R. 18.95(c)(2)(iii), and I am hereby withdrawing the jurisdiction over this matter that I invoked on September 29, 2021. The ALJ's September 9, 2021 Decision and Order will therefore be the Department's final determination in this particular matter.

It is nevertheless apparent that both BALCA and the regulated community would benefit from clarification as to how the Department assesses an employer's temporary or seasonal need for agricultural labor or services, particularly in the context of H-2ALCs who operate in localities that can support agricultural activities year round. Accordingly, I am directing ETA to engage stakeholders on this topic and issue interpretive guidance. Such interpretive guidance should detail how the Department 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. It should also address the types of evidence relevant to making this determination and explain how this evidence will be assessed, including the impact and relevance of an employer's previous history of filing *Applications for Temporary Employment Certification*.

Signed in Washington, DC, this 3rd day of December, 2021,

A handwritten signature in black ink, appearing to read "Martin J. Walsh", written in a cursive style.

Martin J. Walsh
Secretary of Labor.