

**U.S. Department of Labor**

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**Issue Date: 27 November 2006**

CASE NO. 2006-TLC-00015

In the Matter of:

VEENSTRA DAIRY,  
Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR  
Respondent.

**Decision And Order Denying Temporary Alien  
Agricultural Labor Certification**

This matter arises under the temporary alien agricultural labor certification provisions found in Section 218 of the Immigration and Nationality Act (the "Immigration Act"),<sup>1</sup> codified at 8 U.S.C. §1188, and its implementing regulations published at 20 C.F.R. Part 655. I find that the certification should not be granted.

Veenstra Dairy ("Petitioner") applied on August 22, 2006 for the certification from the United States Department of Labor that is required for it to obtain H-2A visas from the Department of Homeland Security. Those visas would admit 10 alien farm workers to the United States, under Section 218 of the Immigration Act, which permits the temporary admission of nonimmigrants to perform seasonal agricultural work. The application explained that from October 13, 2006 to August 13, 2007, the dairy temporarily needed additional agricultural labor due to the breeding of the dairy's cows. The Department of Labor's Employment and Training Administration ("Respondent") replied with a request that the Petitioner submit payroll records to demonstrate that the dairy historically needs additional labor for 10 months per year to care for pregnant dairy cows and their neonate calves.

Petitioner supplied payroll records showing that it had 113 employees in 2004 but only 98 in 2005, as proof that it is understaffed. On September 18, 2006, the Respondent denied Petitioner's certification application, finding this information incongruent with the purpose of the H-2A program because it showed year-to-year trends rather than a need for temporary

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<sup>1</sup> See also 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

employment.<sup>2</sup> Petitioner appealed on September 22, 2006, alleging that temporary foreign workers were necessary because it could not locate domestic employees. Petitioner later reiterated its original assertion that employees were necessary due to the birth cycles of its calves.

### *Procedural Background*

Under the regulations for the H-2A program, a trial is convened within five days after the matter is assigned to an Administrative Law Judge if a petitioner requests it. 20 C.F.R. § 655.112(b)(1)(ii). On September 26, 2006, I held a telephonic pretrial conference, during which the Petitioner waived this right to an expedited trial. The parties agreed no testimony need be taken in a trial-type setting, so this Decision and Order is based on the written record consisting of the Employment and Training Administration appeal file and the parties' written submissions. 20 C.F.R. § 655.112(a)(2). On October 2, 2006, I issued an Order memorializing the briefing schedule and narrowing the issue to whether Petitioner's practice of rotating different H-2A visa holders indefinitely for ten-month shifts runs counter to the regulation's requirement that each job be for "a limited period of time" of "less than one year." 20 C.F.R. § 655.100(c)(2)(iii).

### *De Novo Review*

A threshold issue is whether Petitioner's second basis for certification – that temporary foreign workers are necessary because domestic workers cannot be located – is properly raised for the first time in this forum. A *de novo* hearing allows for new evidence, but only rarely for new issues. *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1063-64 (9th Cir.1996) (allowing review of new issues at the time of appeal under three narrow circumstances: prevention of miscarriage of justice; when a change in law raises a new issue while an appeal is pending; and when the issue is purely one of law that does not require a developed factual record). The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party. *See Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir.1996); *McMillan v. Weathersby*, 31 Fed.Appx. 371, 375 (9th Cir. 2002). There is no injustice in excluding Petitioner's new argument because it was free to amend its initial application to raise it within five days of receiving the Department's notice that its application was deficient. *See* 20 C.F.R. § 655.100(a). No statute or regulation has changed in a way that affects the Petitioner's initial application, and this is not a pure issue of law. Consequently, the only issue appropriate on appeal is whether the Department properly denied Petitioner's request for temporary workers based on a cyclical need.

### *Temporary Employment*

The Immigration Act defines an H-2A worker as an individual "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). An employer seeking H-2A visas for nonimmigrant aliens must

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<sup>2</sup> Job opportunities of twelve months or more are presumed permanent. 20 C.F.R. § 655.101(g).

establish that it has a temporary need for these workers, not that the job is temporary. *See* 52 Fed. Reg. 16,770 (1987) (proposed May 5, 1987); 52 Fed. Reg. 20,497 – 20,298 (1987)(interim final rule June 1, 1987); 52 Fed. Reg 20,507 (1987) (codified at 20 C.F.R. pt. 655); *W.A. Maltsberger, d.b.a. Maltsberger Ranch*, 1998-TLC-6 (ALJ)(Feb. 20, 1998) (accepting that it is the nature of the temporary need, not the nature of the duties, that is controlling). To establish temporary employment, the employer must show that the job duties are “of a set duration and not anticipated to be recurring in nature.” *See Kentucky Tennessee Growers Assoc., Inc.*, 1998-TLC-1 and 2 (ALJ) (Dec. 16, 1997); 20 C.F.R. § 655.100(c)(2)(ii) (*citing* 29 C.F.R. § 500.20). A good example is the temporary need for additional labor to harvest a crop. When the harvest is complete, the need for the labor is gone too. The H-2A program is not meant to allow agricultural employers who need additional labor permanently to rotate different alien laborers through its business for periods of less than one year.

Petitioner explained that it applied for temporary workers to fill jobs based on the fertility cycles of the herd. To meet milk production goals, each of its cows must give birth to one calf per year. These cows do not produce milk for sixty days before the birth of a calf. Most of the Petitioner’s cows give birth around October, so there is decreased demand for workers during August and September, when the cows are not producing milk. Petitioner contends that the months from October through July are a temporary peak in employment needs; during August and September the farm can be run by permanent staff.<sup>3</sup>

Petitioner concedes it did not supply proof, either with its application or in its answer to Respondent’s request for payroll records, showing that it maintains newborn calves for bull and heifer replacement herds for a period of ten months or that calves require intensive care for a ten month period. This evidence, it claims, is available only in its private and confidential spreadsheets and computer programs detailing its breeding information. Petitioner argues that giving Respondent access to such information goes beyond the scope of requirements that Congress intended.

It is not necessary to consult the legislative history of the H-2A program to determine what (if anything) Congress intended about the submission of privileged information to support labor certification applications. The central problem is that Petitioner did not supply any evidence to support its assertion that it has a temporary, ten-month need for non-immigrant farm workers. An employer must show that the job duties are of a set duration, and not of an ongoing nature. The IRS W-3 forms that Petitioner provided to answer to the Respondent’s request for proof establish only the number of employees on Petitioner’s payroll during a year. This simply is not enough.

Therefore, I find that Petitioner’s application for temporary workers has not met the requirements of the H-2A program and was properly denied.

## ORDER

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<sup>3</sup> Petitioner’s request for workers for ten months does not, by itself, preclude a finding of temporary need. *See Kentucky Growers Association*, 98-TLC-1 (Dec. 16, 1997) (explaining that nine months is a red flag for further inquiry rather than contrary to the regulatory definition of temporary).

It is hereby ORDERED:

The Respondent's denial of Petitioner's application for certification of temporary alien agricultural labor is affirmed.

A

William Dorsey  
Administrative Law Judge

**Notice:** This Decision and Order constitutes the final order of the Secretary of Labor. 20 C.F.R. § 655.112(b)(2) (2006).