

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 November 2008

OALJ No.: 2009-TLC-00004
ETA No.: C-08269-14870

In the Matter of

NORTHERN LIGHTS CATTLE,
Employer

Certifying Officer: Robert E. Myers
Chicago National Processing Center

Appearances: Roberta Holle
Office Manager
*Pro Se for the Employer*¹

Harry L. Sheinfeld, Esquire
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **JOHN M. VITTON**
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations at 20 C.F.R. Part 655, Subpart B.

¹ The Appeal File indicates that the Employer engaged Dennis R. Sutton of Placement Service International, LLC, as its representative in regard to its H-2A application. (AF24). The appeal, however, was filed by Ms. Holle, and Mr. Sutton has not made an entry of appearance before the Office of Administrative Law Judges in this matter.

BACKGROUND

On October 24, 2008, counsel for the Certifying Officer forwarded an Appeal File in the above-captioned matter. In the e-mail forwarding the Appeal File, counsel explained that the Certifying Officer (“CO”) had rejected the Employer’s application for H-2A workers on October 9, 2008. On October 15, 2008, the Employer e-mailed the CO an appeal letter. The letter was addressed to the Chief Administrative Law Judge. The CO took no action for several days on the assumption that the appeal letter had also been sent to the Chief ALJ. However, when it became apparent that the Chief ALJ had not been notified of an appeal, the CO prepared the Appeal File and forwarded to counsel for the CO. Counsel then submitted the Appeal File to the Chief ALJ for appropriate action.

The regulations provide that an employer has the right to request either a decision on the record or a de novo hearing. 20 C.F.R. § 655.112(a), (b). In an administrative review case, the judge's scope of review is limited to a check for legal sufficiency. The ALJ has five working days after receipt of the case file to issue a decision. In a de novo review case, the ALJ shall – if the employer so requests – set up a hearing within five working days after receipt of the case file, and shall render a decision within ten days after the hearing. The Employer’s appeal letter in this matter does not state which type of review is requested.

Accordingly, on October 27, 2008, the undersigned issued an Order Setting Briefing Schedule. This Order directed the Employer to provide, in time to reach the undersigned no later than close of business on Friday, October 31, 2008, a written statement specifying whether it is seeking a review on the existing record or a full hearing. The Order also directed that any briefs be filed by that time. The parties were granted permission to file the statement and briefs by next-day delivery, e-mail, or fax. The Order noted that the Office of Administrative Law Judges (“OALJ”) had no record of receipt of a hearing request from the Employer other than the copy of the e-mail sent to the CO.

The CO timely filed a brief on October 31, 2008, arguing that (1) OALJ does not have jurisdiction because the Employer did not file a timely appeal with OALJ, and (2) that the denial

should be affirmed on the merits. OALJ has no record of any filings by the Employer in response to the October 27, 2008 order.

DISCUSSION

Timeliness of Appeal

If an H-2A application is rejected by the CO, an employer has seven calendar days from the date of the rejection to request review by an administrative law judge. 20 C.F.R. § 655.104(c)(3) and (4). The CO is required to provide notice to the employer of this time limit, inform it that the request is made to the Chief ALJ, and provide the Chief ALJ's address. *Id.*

In the instant case, the CO gave proper notice to the Employer of its appeal rights and the address of the Chief ALJ. However, there is no evidence that the Employer filed such an appeal with the Chief ALJ. Moreover, to date the Employer has not filed any documents directly with OALJ. Thus, it did not perfect a timely appeal of the CO's denial determination.

The doctrine of equitable tolling, however, has been applied to hearing requests under the Department of Labor's immigration regulations. See, e.g., *Global Horizons, Inc.*, 2006-TLC-13 (Nov. 30, 2006); *Wakileh v. Western Kentucky University*, 2003-LCA-23 (ALJ Oct. 6, 2003); *Administrator, Wage And Hour Division, v. IEM Services*, 2005-LCA-34 (ALJ July 26, 2005). One ground for equitable tolling is the appellant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

In the instant case, it is beyond dispute that the Employer was appealing the CO's denial letter, and wrote the Chief ALJ name and address on the e-mail sent to the CO. Although the Employer did not file a brief to explain why it apparently only sent the appeal letter to the CO and not to the Chief ALJ, I find that the "wrong forum" ground for equitable tolling applies, and therefore proceed to the merits of the appeal.

The Issue on Appeal – Seasonal Employment

Since the Employer did not respond to my Order directing it to state whether it was seeking a review on the existing record or a full hearing, I will decide the case based on the existing record.

The CO received the Employer's ETA Form 750 application for nine unnamed H-2A workers on September 25, 2008. (AF 10-24). The application was filed under the name "Northern Lights Cattle." The positions were for "Farmworker Livestock" workers in North Dakota. (AF 10). The time period for employment was stated to be November 10, 2008 through August 29, 2009. (AF 112).² Attached to the application was a letter under the letterhead of "Northern Lights Dairy" dated August 7, 2008, explaining that it offers recurring seasonal jobs. During the spring and summer the focus is on crops – essentially preparing and storing feed for the severe winter months in North Dakota. As the winter months are approached, however, the focus changes from crops to the care and monitoring of cows and calves. (AF 23).

On October 2, 2008, the CO issued a letter in which he identified several deficiencies with the application and informed the Employer what modifications needed to be taken in order for the application to be accepted for further processing. (AF 6-9). First, the CO found that the application could not be filed less than 45 days prior to the first date of need. 20 C.F.R. § 655.101(c). Thus, the application needed to be modified to a date no earlier than November 10, 2008.

Second, the CO noted that the Employer appeared to have filed a previous H-2A application in the name of "Northern Lights Dairy" for nine "Farmworker, Dairy" positions. The CO noted that the Federal Employer Identification Numbers and work locations were the same, despite the slight difference in the name of the Employer on the two applications. The CO also found that the job descriptions were substantially similar. Therefore the CO directed the

² The application originally showed a start date of October 29, 2008, but that date was scratched out, and the November 10, 2007 substituted. (AF 12).

Employer to provide proof that there are two employers with different temporary or seasonal job opportunities at the same work location.

Third, the CO required some technical modifications to the Employer's Form 790 to show the number of hours required per week that the total dollar amount earned.

The Appeal File shows the Employer's entire response as follows:

Modification # 2; as you can see in the Letter of Need, the second paragraph deals with a totally different season, winter, and as this takes place in North Dakota where the winters are very rough the employer needs the workers to help take care of the cattle.

These are most definitely different job opportunities and are seasonal at the same work location with the same employer.

(AF 5).³

On October 9, 2008, the CO issued a letter denying the application. (AF 3-4). The CO found that the Employer's needs were for year-round activity in the care and feeding of livestock, and building and equipment maintenance. The Employer, therefore, was not offering work of a temporary or seasonal nature, and therefore was not eligible for H-2A program.

The Employer's appeal file of October 15, 2008, reiterated the Employer's argument that the first application was for job duties involving the seasonal cropping and harvesting of feed crops, and the second application was for job duties relating to the winter calving season. (AF 1-2). The Employer noted that North Dakota is a rural state, with very harsh winters, a declining population, and very low unemployment. Thus, it needs the H-2A program for the continuing success of its operations. The Employer admitted to errors in its filing, but asked that it only be given a reprimand, and be permitted to continue with its application for seasonal workers for the winter season of 2008-09.

³ The Appeal File does not show who wrote this modification response. The Form 750 shows that the start date was modified as directed, (AF 112), and the Form 790 also appears to have been modified as directed. (AF 13-20). The CO did not address these deficiencies in the denial letter. Accordingly, I find that they are no longer at issue.

Regulatory Framework

The regulations define “of a temporary or seasonal nature” as follows:

Labor is performed on a seasonal basis, where, ordinarily the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year

* * *

A worker is employed on “other temporary basis” where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

* * *

"On a seasonal or other temporary basis" does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

§655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20). In 1987, the Secretary of Labor revised the regulations governing temporary alien agricultural labor certification. *See* 52 Fed. Reg. 16,770 (1987) (proposed rule, May 5, 1987); 52 Fed. Reg. 20,496 (1987) (interim final rule, June 1, 1987); 52 Fed. Reg. 20, 507 (1987) (codified at 20 C.F.R. pt. 655). The rulemaking reveals that the Department’s interpretation of the word “temporary” under the H-2 provision is intended to be consistent with the common meaning of the word “temporary,” and to have the same meaning for both H-2A and H-2B purposes. 52 Fed. Reg. 20,497 (1987) (interim final rule June 1, 1987). In stating this, the Department accepted the administrative and judicial interpretation as set forth in the leading case *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA

Nov. 24, 1982). *Artee* held that what is relevant in determining whether an employer has made a *bona fide* H-2 application is “whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.” *Id.*

In *Seed Farm*, 1999-TLC-7 (ALJ Sept. 27, 1999), I applied the logic of *Artee* to analyze an employer’s contention that its work was seasonal in nature. Thus, the question is whether an employer’s needs are seasonal, not whether the duties are seasonal.

In the instant case, the Employer’s essential argument is that it employs H-2A workers during two different seasons, and that it only makes economic sense to use the same workers for both seasons where they have been trained and have proven to be reliable and motivated. (AF 2). The CO found that the Employer’s needs extended over the course of an entire year, even though the duties were different in different parts of the year.

Under the legal sufficiency level of review, I find that the CO’s finding was not arbitrary and capricious.⁴ I find that Northern Lights Dairy/Northern Lights Cattle is an operation that continues all year around. I also find that although the duties change during different seasons, its need for workers also continues all year around.⁵

It is unfortunate that the Employer is having a hard time finding reliable U.S. employees. The record established before the CO, however, supports his finding that that Employer does not have seasonal work within the meaning of the Department of Labor’s H-2A regulations, and therefore is not eligible to sponsor Aliens under the H-2A program.

⁴ I have found in prior cases that “legal sufficiency” standard of review is the same as the arbitrary and capricious standard of review. *Bolton Spring Farm*, 2008-TLC-28 and 31 (ALJ May 16, 2008); *85 Members of The Snake River Farmers' Association, Inc.*, 1988-TLC 2, 1988-TLC-3, 1988-TLC-4 (ALJ Feb. 8, 1988).

⁵ In its appeal letter, the Employer admitted that it would be using the same employees for both seasonal positions.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of temporary labor certification is **AFFIRMED**.

A

JOHN M. VITTON
Chief Administrative Law Judge