



Date: **October 12, 2000**

Case No.: **2000-TLC-15**

ETA Case: **T2000-IL-054385940**

In the Matter of:

HAAG FARMS, INC.

Respondent

BEFORE: Thomas M. Burke
Associate 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 its implementing regulations, found at 20 C.F.R. Part 655.¹ This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file (“AF”), and the written submissions from the parties. § 655.112(a)(2).

Statement of the Case

On August 22, 2000, the Region V Regional Administrator (“RA”) of the U.S. Department of Labor, Employment and Training Administration received an application for alien labor certification from Haag Farms, Inc. (“Employer”). (AF 15-29). In this application, Employer sought to employ four aliens to work in its “pork production” as livestock workers from October 5, 2000 to September 5, 2001. (AF 16-17).

The RA informed Employer that it was not accepting the application and that it was returning the application for modification on August 28, 2000. (AF 12-14). The RA found that the job duties, as described by Employer, constituted permanent work as the duties could be carried on throughout the year. Employer was informed that it could either change the application to file for permanent workers in these

¹Unless otherwise noted, all regulations cited in this decision are in Title 20.

positions, or it could provide the RA “with documentation as to why his need is temporary (not to exceed 10 months). (AF 14).

On September 11, 2000, Employer filed its modification of the application, attempting to demonstrate that the position was temporary. (AF 9-11). Employer stated that its “employment is seasonal as we use two employees from our swine facility to work our grain farming enterprise spring, summer and fall.” (AF 11). Employer’s agent argued that:

This position is temporary as Mr. Haag has two permanent positions which go year around [*sic*]. During the [*sic*] March through December they are moved from the swine operation to the farming operation. So, Mr. Haag needs temporary help in his swine operation during those months for which he has been unable to get qualified US workers.

(AF 10).

The RA rejected Employer’s application on September 15, 2000. (AF 5-8). Specifically, the RA rejected Employer’s contention that the moving of employees from the swine operation to the farming operation created a temporary need, as “the job duties at the swine operation still continue to exist while the 2 workers are working at the grain farming operation.” (AF 8). However, the RA indicated that Employer may wish to consider filing an application for H-2A workers for its farming operation for the following year. *Id.*

Employer appealed the RA’s rejection of its application on September 22, 2000. (AF 2-4). On October 4, 2000, this Office received the file from the RA. The parties were afforded until October 10, 2000 to file any briefs in this matter. Briefs were received from both parties.

Discussion

The issue presented in this matter is whether the employment is “on a seasonal or temporary basis” and thus eligible for certification to employ H-2A workers.² § 655.101(a). According to the regulations, “on a seasonal or other temporary basis” is the same as defined in the regulations at 29 CFR § 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). § 655.100(c)(2)(i). This regulation provides:

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

²Employer also argues that the RA delayed in sending out the rejection until September 19, 2000, which it argues was 5 days past the date allowed under § 655.104(c), as its modification was dated September 8, 2000. Employer, however, ignores the fact that its modification was not sent to the RA until September 11, 2000. (AF 9). While the RA still delayed sending the rejection by a day, this delay was *de minimis* as Employer was afforded the extra day to file its appeal.

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.

29 C.F.R. § 500.20. Further, the regulations governing H-2A regulations indicate that temporary, as used above, “refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year[.]” § 655.100(c)(2)(iii).

The RA was correct in determining that this employment is not seasonal, as the duties will continue throughout the year. However, Employer argues that, as it shifts people away from the swine operation, it creates a temporary need for employees. These summaries of the respective positions illustrate the ultimate issue in this matter: when looking at the temporary nature of the job, is it the entire operation that should be considered, or just the position for which certification is sought?

According to case law, an employer must establish that it has a temporary need for the workers. *W.A. Maltsberger*, 1998-TLC-5 (ALJ Feb. 20, 1998). Specifically, the history to the regulations indicate that the Department of Labor accepted the administrative and judicial interpretation as set forth in the leading case, *Matter of Artee Corporation*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). See 52 Fed. Reg. 16,770 (1987) (proposed 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).

In *Artee*, the Board of Immigration Appeals held that “[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position.” The Board later held that this proposition “precludes certification for temporary alien employment of positions which comprise services or labor for which a petitioner has a permanent or indefinite rather than temporary need.” *Matter of Golden Dragon Chinese Restaurant*, Interim Decision 2987, 1984 WL 48604 (BIA Oct. 5, 1984).

The most important factor in determining whether a position is temporary is thus the petitioner’s own need. To determine a petitioner’s need, the fact finder must look at the situation as a whole and not narrowly focus on the instant position. See *Bracy’s Nursery*, 2000-TLC-11 (ALJ April 14, 2000) (proper to look at all H-2A applications to determine the true nature of employer’s “seasonal” business). Without taking into consideration all of the circumstances, it is impossible to accurately determine an employer’s actual needs. For example, in the present case, looking at just the position, the RA concludes that the duties are permanent, and thus denies certification. The RA goes further to say that Employer should apply for temporary help for the grain farming positions. However, Employer already has permanent U.S. employees that work these grain farming positions during the season and work the swine operation positions during the off-season. Employer does not need more permanent employees; instead, it needs employees nine months of the year during the grain season to work in the swine operation.

Only by looking at Employer's entire operation does the full extent of the need become apparent. By narrowly focusing on the fact that Employer needs workers in the swine operation year round, the RA is requiring Employer to fill its positions, in which U.S. workers are already employed, with temporary alien employees and to place the U.S. workers in the positions that they are unwilling to work, thereby driving them away from this Employer. Such a result runs contrary to the purposes of this Act.

Looking at Employer's total need, it is clear that it needs temporary help to work in its swine operation during the grain farming season.

Accordingly, the following order shall enter:

ORDER

The Regional Administrators' denial of temporary alien agricultural labor certifications is hereby **REVERSED**.

at Washington, DC

THOMAS M. BURKE
Associate Chief Administrative Law Judge

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