



DATE: December 16, 1997

CASE NO.: 98-TLC-1

In the Matter of:

KENTUCKY TENNESSEE GROWERS ASSOCIATION, INC.,
Employer.

CASE NO.: 98-TLC-2

In the Matter of:

GREEN VALLEY FARMS, INC.,
Employer.

Appearances:

C. Stan Eury, President - Kentucky Tennessee Growers Association, Inc.,
for Employers

Elizabeth Hopkins, Esq.,
for the U.S. Department of Labor

BEFORE: JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

These matters arise 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). The Kentucky Tennessee Growers Association, Inc. ("KTGA") has requested expedited review of the decisions by a U.S. Department of Labor Regional Administrator ("RA") denying applications for temporary alien agricultural labor certification for Harvest Laborers at Glover Enterprises and for Nursery Laborers at Green Valley Farms, Inc., based on the finding that the job opportunities are not

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

seasonal or temporary. Because of the similarities of the issues in these cases, they have been consolidated for decision.

STATEMENT OF THE CASE

Kentucky Tennessee Growers Association

KTGA, a joint employer, filed an application on November 13, 1997, for temporary alien agricultural labor certification that was received by the United States Department of Labor, Employment and Training Administration in Atlanta, Georgia. The application was for the employment of ten unknown alien harvest laborers to work 40 hours per week, Monday through Saturday from January 12, 1998 until November 20, 1998. The RA notified KTGA by letter dated November 20, 1997, that the application was unacceptable because the anticipated period of employment exceeded nine months.² The RA wrote:

Modification Required: The job offered must be of a seasonal or temporary nature. Our national office has determined that the intended period of employment should not exceed nine months unless the employer can substantiate the employment is not intended to continue indefinitely, nor is it essentially on a year-round basis.

Modify the order to cover a period not to exceed nine months, or provide evidence that the employment is not intended to continue indefinitely, or on a year-round basis.

The RA instructed KTGA that it could modify the application or request administrative-judicial review or a *de novo* hearing. KTGA requested review pursuant to §655.104(c).³

KTGA argues that the jobs offered are temporary as they are for a period of less than one year. (Glover - Request at 1 *citing* §655.100(c)(2)(iii)). In its request for review, KTGA explains that Glover Farms engages in double crop tobacco (Glover- Request at 2). Thus, the first crop is harvested and put in the barn to cure. Until that crop is cured, the second crop cannot be placed in the barn for curing, and "[t]here is not any work during the month of December and the first few weeks of January until the second crop is ready to strip." KTGA also stated that the job offer involves "work on the farm in burley tobacco as farm worker, diversified crop which has always been an seasonal/temporary need." *Id.* at 2.

² The RA also found the application was unacceptable because KTGA failed to provide the occupational title and code at item 3 on ETA Form 790. In its brief, however, counsel for the RA states that KTGA corrected this deficiency by providing the occupational title in its request for expedited administrative review. (RA's Brief at 1).

³ Although KTGA's request was mailed via express mail within the 7 day period provided for such requests at §655.104(c)(4), the Office of Administrative Law Judges (OALJ) did not receive KTGA's request for review until December 3, 1997 because the RA's notification incorrectly provided an old address. OALJ received a copy of the administrative file on December 10, 1997.

Green Valley Farms, Inc.

Green Valley Farms, Inc. filed an application for temporary alien agricultural labor certification with the United States Department of Labor, Employment and Training Administration in Atlanta, Georgia on November 20, 1997. The application was for the employment of five unknown alien nursery laborers to work 40 hours per week, Monday through Saturday from January 26, 1997⁴ until December 15, 1998. By letter dated November 26, 1997, the RA found that the application was unacceptable based on the same rationale quoted above in regard to the KTGA application. Employer was instructed that it could modify the application⁵ or request administrative-judicial review or a *de novo* hearing. KTGA, on behalf of Green Valley Farms, requested review pursuant to §655.104(c).⁶

KTGA argues that the jobs offered are temporary as they are for a period of less than one year. (Green - Request for Review at 1 *citing* §655.100(c)(2)(iii)). KTGA also argues that the job offer "has always been a seasonal/temporary need." *Id.* at 2.

DISCUSSION

An "H-2A" worker is 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) (*emphasis added*). Pursuant to §655.101(g), "[t]he employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a *temporary or seasonal nature*", as defined at §655.100(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature." §655.101(g) (*emphasis added*). The issue herein is whether Employers set forth on their applications that the job opportunities are for agricultural labor or services of a *temporary or seasonal nature*.

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

⁴ Presumably, 1997 is a typographical error and Employer actually intends employment to begin January 26, 1998.

⁵ The RA's instructions for modification were identical to those required of KTGA recited above.

⁶ See footnote 3.

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). The regulations go on to define “temporary” as

. . . 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, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances pursuant to §655.106(c)(3) of this part.

§ 655.100(c)(2)(iii).

In these matters, the RA found that the job opportunities were not “of a temporary or seasonal nature” because the job opportunities exceeded nine months. Thus, Employers were instructed to amend the applications to reduce the period of employment to nine months⁷ or put forth evidence to “substantiate the employment is not intended to continue indefinitely, nor is it essentially on a year-round basis.” I find that ETA’s establishment of a “nine month rule” is not arbitrary, insofar as the RA’s letters of denial permitted Employers the opportunity to rebut its findings. Thus, I find that this “nine month rule” is not actually a rule, rather it is a red flag,

⁷ This statement suggests that the RA would have accepted an application that was identical to these with the exception that the period of employment was for less than nine months.

and when that red flag is raised, the RA requests employers to establish that its needs are truly temporary or seasonal.⁸

Although I find that the RA's statement of what was required of these Employers to perfect their applications was less than clear, after a thorough review of the applications I agree that Employers did not satisfy their burden as imposed by §655.101(g). In these cases, the applications did not contain specific statements of the temporary or seasonal nature of the employment. Rather, Employers stand on the fact that their applications stated a time period of "less than one year," and the argument that such jobs are typically certified as seasonal and temporary under these regulations.

In 1987, the Secretary of Labor revised the regulations governing temporary alien agricultural labor certification, and a review of the history of the rulemaking adds insight into the application of the regulatory definition of "temporary or seasonal". 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). The rulemaking indicates 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 Corporation*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982).⁹ *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.*¹⁰ Thus, the regulatory history of DOL's temporary labor certification rules provides that:

⁸ The use of this "red flag" will help address a concern raised in *Volt Technical Services Corporation v. INS*, 648 F. Supp. 578, 581 (S.D.N.Y. 1986), and in the rulemaking history that agricultural employers may abuse the H-2A temporary visa program, and use it to avoid the more rigorous standards for permanent alien labor certification found at 8 U.S.C.A. §1182(a)(5)(A). 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).

⁹ Prior to the INS decision in *Artee*, the INS determined temporariness by looking to the nature of the duties performed, not to the intent of the petitioner employer and the alien beneficiary concerning the time that the alien beneficiary would be employed in that position. *Matter of Contopoulos*, 10 I. & N. Dec. 654 (1964).

¹⁰ The position in *Artee* that the burden is on employer to establish that the need for the H-2 worker is only temporary has been affirmed by several courts. *Wilson v. Smith*, 587 F. Supp. 470 (D.D.C. 1984); *Volt Technical Services Corporation v. INS*, 648 F. Supp. 578 (S.D.N.Y. 1986); *North American Industries, Inc. v. Feldman*, 722 F. 2d 893 (1st Cir. 1983); *Sussex Engineering, Ltd. v. Montgomery*, 825 F. 2d 1084 (6th Cir. 1987).

[i]t is irrelevant whether the job is for three weeks to harvest berries or for six months to replace a sick worker or for a year to help handle an unusually large agricultural contract. What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment . . . of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a temporary need for a worker in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.

52 Fed. Reg. 20,497 - 20, 298 (1987) (interim final rule June 1, 1987) (emphasis added).

The regulatory history does not closely examine the meaning of the word "seasonal". It is indicated, however, that the meaning ascribed to the word "temporary" "will not be a problem for much of agriculture, which uses workers on a seasonal basis." *Id.* at 20, 497. The regulatory history also indicates that: "Of course, with respect to truly 'seasonal' employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation." *Id.* at 20,498.

Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either: (1) that an employer's need to have the job duties performed is "temporary" -- of a set duration and not anticipated to be recurring in nature; or (2) that the employment is seasonal in nature -- that is, employment which ordinarily 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. *See* §655.100 (c)(2)(ii) (*citing* 29 C.F.R. §500.20).

Employers' applications in these matters fail to establish that the work is either "temporary" or "seasonal", and rather suggest an artificial termination of employment in an attempt to qualify the work as temporary rather than permanent. First, a mere citation of a time period of employment less than twelve months does not address the question of whether the employer's need for performance of the job duties will continue. Neither does it reveal whether the nature of the job duties are seasonal.

Second, KTGA's position that the job offers are for work which has always been a seasonal and temporary need carries little persuasive weight in the absence of supporting reasoning or evidence.¹¹ A close review of the record, and in particular, the ETA 790 with attachments, does not clearly reveal employment that is inherently temporary or seasonal in

¹¹ The Board of Alien Labor Certification Appeals has held that although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Rajwinder Kaur Mann*, 95-INA-328 (Feb. 6, 1997).

nature. Rather, in both applications it appears that the work could be performed in any and all of the twelve months of the year, and that it is only Employers' choice to terminate the employment for brief periods that causes these positions to last less than a full year.

In sum, while it is possible that Employers' in fact could establish that these applications are for employment of a temporary or seasonal nature, the record before me is insufficient to carry Employers' burden under § 655.101(g).

Accordingly, the RA's denials of temporary alien labor certification must be affirmed and the following Order shall enter.

ORDER

The determinations of the Regional Administrator in the above cases is hereby **AFFIRMED**.

SO ORDERED.

JOHN M. VITTONI
CHIEF ADMINISTRATIVE LAW JUDGE

JMV/trs/jlh