



Date: **April 14, 2000**

Case No.: **2000-TLC-11**

ETA Case: **2358**

In the Matter of:

BRACY'S NURSERY

Respondent

BEFORE: John M. Vittone
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 March 13, 2000, Bracy's Nursery ("Respondent") submitted an application for alien labor certification with the Region VI Regional Administrator ("RA") of the U.S. Department of Labor, Employment and Training Administration. (AF 25-39). In this application, Respondent sought eight nursery workers, whose duties would include "potting, shipping, pruning, fertilization, staking, weeding, tagging and capital improvement. Low prolonged bending required." (AF 26). The time period for these temporary positions was listed as May 5, 2000 through January 31, 2001. (AF 25).

On March 27, 2000, the RA informed Respondent that its application was deficient (AF 22-24). Specifically, the RA determined that the positions offered by Respondent were actually permanent in nature. The RA cited two previous applications from Respondent where it had requested certification for

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

temporary employees for the periods of May 1, 1999 through January 31, 2000 and January 15, 2000 through May 15, 2000. Due to the overlapping dates, it was the RA's opinion that these positions must be permanent and advised Respondent "to submit an application under the permanent process." (AF 24).

On March 31, 2000, Respondent requested an expedited administrative review of the denial. (AF 3-21). The case file was received from the RA on April 7, 2000, with the RA's brief and response to the request for review received on April 10, 2000.

The case file contains information regarding the two previous applications as cited by the RA. The first application, Case No. 2121, covers the period of January 15, 2000 through May 15, 2000. It seeks 14 temporary employees for the job of nursery worker. (AF 77-78). The duties for these positions were described as "shipping, potting of plants and order filling work during this season. Other activities are freeze protection, tagging and capital improvement. Low prolonged bending required." (AF 77).

The second application, Case No. 1835, covers the period of May 1, 1999 through January 31, 2000, and seeks eight nursery workers. These workers had the duties of "potting, shipping pruning, fertilization, staking, weeding, tagging & capital improvement. Low prolonged bending required." (AF 94).

Discussion

The only issue in this case is whether the employment listed above is "temporary or seasonal" in nature. According to the regulations, the definition of "temporary or seasonal employment" is the same as that contained in the regulations implementing the *Migrant and Seasonal Workers Protection Act*. § 655.100. Specifically,

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 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.

29 C. F. R. § 500.20.

The regulations go on to state:

Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H-2A worker for a cumulative period, including temporary alien agricultural labor certifications and extension, of 12 months or more, except in extraordinary circumstances.

§ 655.101(g).

In the case at bar, the RA argues that the “seasonal” nature alleged by Employer is a contrivance, as the applications all seek nursery workers, whose duties remain more or less the same, and the periods sought for these employees encompasses an entire calendar year. Respondent argues that there are two distinct seasons with completely different responsibilities. One season lasting for four months, and the other lasting for eight months. Respondent argues that the four month season is its “shipping and planting season” and that the other eight months make up its “growing season.”

Respondent’s argument, however, does not account for the fact that these two seasons encompass an entire year. In fact, as the RA correctly pointed out, the time periods indicated in the applications overlap. Further, a majority of the duties remain the same during these “seasons,” and these positions are consistently identified as nursery workers. The only real distinction between the seasons is the need more help during the so-called “shipping and planting season.”

Over the past year and a half, Respondent has consistently employed a minimum of eight such nursery workers. These numbers have spiked during the shipping season to 15 employees. As was held in the seminal immigration case regarding temporary employment, it is not so much the duties of the employees, as it is the need for those duties that determines the temporariness of the position. *Matter of Artee Corporation*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). Under the present facts, the positions sought to be filled are ones that are consistently filled, *i.e.*, these are the eight positions that still remain during the slower time of the year. Under *Artee*, these positions are not temporary.²

Nor are these positions seasonal. Although some of the duties are different throughout the year, the majority remain the same. The only significant distinction is the need for extra help in the first quarter of the year. By Respondent’s own admission, these duties are ordinarily conducted throughout the course of the year. (AF 15-16). As such, these positions do not meet the regulatory definition of seasonal. § 655.100.

Respondent argues that its situation is covered by the regulatory language allowing such employees to move between such seasonal employment and be employed for a major portion of the year and still be eligible for the H-2A program. *See* § 655.100. As I have found above, however, these positions do not involve seasonal employment. Further, these positions are filled year round, not just for a “major portion” of the year. The regulations specifically require that where, as here, the claimed “seasonal” employments add up to 12 months or more, use of the H-2A program to fill these positions is inappropriate unless “extraordinary circumstances” exist.

I find that, under the evidence submitted, the eight positions sought to be filled under the current application are in fact permanent, and affirm the RA’s denial. I note that Respondent may refile and attempt to prove extraordinary circumstances that would justify the use of the H-2A program for these positions. § 655.101(g).

²If this matter involved an application for the expanded work force during the busier time of year, the result may be different, as the need for these positions is temporary.

Accordingly, the following order shall enter:

ORDER

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

at Washington, DC

JOHN M. VITTON
Chief Administrative Law Judge

JMV/jcg