

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 18 November 2008

OALJ Case No.: 2009-TLC-00011
ETA Case No.: C-08247-14675

In the Matter of

CLAYTON WILLIAMS FARMS, INC.,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

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 On November 5, 2008, Clayton Williams Farms, Inc., (“Employer”) requested expedited administrative review of the Certifying Officer’s October 29, 2008, denial of its application for temporary alien labor certification. *See* §§ 655.104(c), 655.112(a). A brief explanation of the Employer’s basis for appeal accompanied the Employer’s request for review. On the evening of November 10, 2008, the Office of Administrative Law Judges received the administrative file from the United States Department of Labor’s Employment and Training Administration (“ETA”). On November 12, 2008, I issued an *Order Setting Briefing Schedule* permitting the parties to file supplemental or reply briefs no later than 4:30 pm EST on Friday, November 14, 2008. On November 14, 2008, both the CO and the Employer timely filed briefs. The order also required that the parties discuss resolving the matter and provide a status report at the time either filed any additional brief. The CO’s November 14, 2008, filing contained no such report. The Employer’s filing indicated that the CO’s counsel failed to return counsel for the Employer’s phone call when she attempted to contact him to discuss resolving the matter.

The regulations relating to administrative review of H-2A determinations direct the administrative law judge to review the record “for legal sufficiency” and render a decision within five working days after receipt of the case file. § 655.112(a)(2). Under § 655.112(a)(1), the administrative law judge may not receive additional evidence or remand the matter in the course of this review. On the basis of the written record and after due consideration of any written

¹ Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.

submissions, the administrative law judge is required to “either affirm, reverse, or modify the OFLC Administrator’s denial by written decision.” 20 C.F.R. §655.112(a)(2).

Statement of the Case

The Employer is a Texas farming operation that employs eighteen full-time workers and grows hay and pecans. AF 91, 10.² The Employer states that its operation requires an additional 8 workers. AF 91. However, the Employer reports that a local shortage of agricultural workers has prevented it from filling these vacancies. AF 91. Accordingly, on September 3, 2008, the Employer filed its application for temporary labor certification. AF 93. Specifically, the Employer requested certification for eight temporary workers who would assist with planting, harvesting, weed control, irrigation, and other farm-maintenance tasks from October 15, 2008, until June 6, 2009. AF 82, 83. The Employer stressed that these workers “will not become a part of [its] regular operation.” AF 91.

On September 9, 2008, Marie Gonzalez, the certifying officer who reviewed the Employer’s initial application, informed the Employer that its application was “not being accepted for consideration” and requested certain modifications. TR 78-81. First, Ms. Gonzalez requested that the Employer adjust the temporary workers’ start date to no earlier than October 18, 2008, in order to comply with § 655.101(c)(1). AF 80. Second, she requested that the Employer modify its ETA 750 and 790 forms to include consistent end dates for its stated period of need. AF 80. Third, Ms. Gonzalez requested that the Employer modify its ETA 750 and 790 forms to include consistent work hours for the vacant positions. AF 80. She also noted that the Employer needed “to provide a plausible explanation to support its request” that the temporary workers work more than 50 hours per week. AF 80. Fourth, Ms. Gonzalez requested that the Employer amend its ETA 790 form and attachments to reflect that it will reimburse certain transportation costs at rates required by § 655.102(b)(5). AF 81.³

On September 19, 2008, the Employer filed its modified ETA 750, ETA 790, and ETA 790 attachments. AF 59-72. In its cover letter, the Employer also informed ETA of its desire to increase the number of requested temporary workers to fourteen. AF 59. On the forms, the Employer also increased its period of need by three months. AF 66, 68. On September 25, 2008, the CO informed the Employer that its application was “not being accepted for consideration” and requested two additional modifications. AF 51-54. First, noting that the Employer had “failed to establish a temporary need” the CO requested that the Employer “provide supporting evidence that a temporary need exists.” AF 53. Specifically, the CO requested a written explanation based upon supporting evidence establishing its temporary need. The CO specifically requested supporting evidence in the form of “summarized payroll reports . . . to substantiate the employer[’]s temporary need” and attached an example. AF 53. Second, the CO requested that the Employer explain why it increased the number of temporary workers sought to 14. AF 54. Third, the CO requested that the Employer modify its ETA 790 form to include only 50-hour workweeks consistent with its ETA 750 form. AF 54.

² Citations to the 113-page Administrative File will be abbreviated as “AF” followed by the page number.

³ In the letter, Ms. Gonzalez mistakenly cited to “20 CFR 655.102(b)(i)(ii).” AF 81.

On October 3, 2008, the Employer sought clarification of some of the CO's modification requests in an e-mail sent to ETA. AF 30-31. In this e-mail, the Employer explained that it pushed back the start date in its modification filings to avoid violating § 655.101(c)(1)'s 45-day rule. AF 32. On or around October 7, 2008, ETA responded.⁴ In its response, ETA explained that requesting a start date at least 45 days after the Employer's initial September 9, 2008, filing would have complied with the rule regardless of the date the Employer filed its modifications. AF 31. ETA's response also included, inter alia, the following:

Since Clayton Williams Farms pushed back the start date in their modification response, they also pushed back the end date, which is not typically acceptable. The employer must have a peak or seasonal need to be considered temporary. Clayton Williams Farms first requested the dates of 10/15/2008 to 6/16/2009 and now the employer is requesting the dates of 11/17/2008 to 09/17/2009. The employer moved the end date back an additional three months. This cannot be considered a temporary need if the employer's dates of need change due to a modification letter. The employer's need must be tied to a season or peak in the employer's work.

AF 31.

On October 9, 2008, the Employer filed its modified ETA 750, ETA 790, and ETA 790 attachments. AF 31, 33-49. In its cover letter, the Employer noted that it had changed the length of its period of need and number of requested workers back to those it initially requested, seven months (November 17, 2008, through June 17, 2009) and eight workers, respectively. AF 33, 41, 42. The Employer noted that it was "unaware that changing the end date (adding three months) in a modification would change our need from temporary to permanent." AF 33. Finally, the Employer explained that "[a]lthough the peak season is from April to September, the enterprise is so far behind because of lack of employees that the farm is seeking immediate workers to help catch up to its normal work load." AF 33.

On October 10, 2008, the CO informed the Employer that its application was "not being accepted for consideration" and requested two additional modifications. TR 27-29. First, the CO requested that the Employer amend the overtime wage rate listed in its ETA 750 and 790 forms to comply with § 655.102(b)(9). AF 29-30. Second, noting that the Employer "still has not provided a temporary need statement that coincides with the requested dates of need," the CO again requested a statement explaining its temporary need and supporting evidence in the form of summarized payroll reports. AF 29. Notably, the CO emphasized that the Employer's peak season—April to September—differed from its requested period of need, November 17, 2008, to June 17, 2009. AF 29.

On October 27, 2008, the Employer filed its modified ETA 750, ETA 790, and ETA 790 attachments, a summarized payroll report for temporary workers employed during 2007, a summarized payroll report for permanent workers employed from January 2007 through

⁴ The administrative file does not contain a copy of the message ETA actually sent to the Employer. Rather, it contains correspondence between ETA staff members that includes a draft of the message to be sent to the Employer and instructions to transmit the exact message to the same. AF 31.

September 2008, and a letter explaining the Employer's need. AF 9-25. In the letter, the Employer's manager, Jeff Williams, explained that his labor needs peak from the beginning of the growing season in the spring through harvest time in the early fall and that the Employer therefore requires temporary workers during that period. AF 10-11. He also attempted to explain why the Employer's stated period of need includes periods outside its growing season. Mr. Williams wrote that the Employer seeks temporary workers "to help catch up on some of the routine maintenance that was neglected due to having limited workers last growing season" in order to "enter the growing season in a good position." AF 10-11. However, Mr. Williams then explained that the Employer's need for workers during the growing season is direr than its need for workers during the period of need listed in its most recently modified application. AF 11; *see* AF 21. Finally, the Employer wrote:

Even though the need for workers is temporary due to the seasonal nature of our business, the need for workers during growing season is not temporary in nature. We suspect each year we will face this same crisis when attempting to find field labor for the growing season until the unemployment rate in our area rises.

AF 11. The Employer's payroll reports indicate that the Employer had between one and five temporary employees throughout 2007. AF 12.

On October 29, 2008, the CO determined that "the employer failed to provide a temporary need statement and payroll reports that support the dates of need as requested [by] the employer" and therefore denied the Employer's application. AF 5. The CO explained that the number of temporary workers the Employer requested "is inconsistent with the payroll records" supplied by the Employer. AF 5-6. He also noted that the Employer's number of temporary workers steadily decreased between October and April. AF 6. The CO quoted language from Mr. Williams's need statement, emphasizing his assessment that "[t]he need for work is temporary in that the farm can manage with its permanent staff during of season (November through March)." AF 6. The CO concluded that the temporary need statement and payroll reports "clearly failed to establish a temporary need for the dates requested as part of their peak season." AF 6. The Employer's appeal followed.

Discussion

The only issue on appeal is whether the Employer established a temporary or seasonal need for H-2A workers, as required by §§ 655.100(c)(2) and 656.101(a).

Regulatory Framework

In defining a need "of a temporary or seasonal nature," the regulations adopt the meaning of "on a seasonal or other temporary basis" as used by the Employment Standards Administration's Wage and Hour Division ("WHD") under the Migrant and Seasonal Agricultural Worker Protection Act. § 655.100(c)(2)(i). The WHD defines the phrase 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). 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 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.* Thus, the regulatory history of the Department’s temporary labor certification rules provides that:

[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 indicates, 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 notes, "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 that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, 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).

Nature of Need

The CO had no legally sufficient basis for denying the Employer's application. The Employer established a temporary need between November 17, 2008, and June 17, 2009. The Employer consistently explained its desire to employ temporary workers outside of its peak season to help it catch up on tasks that the operation has neglected due to its worker shortage over the last two growing seasons. *See, e.g.*, AF 10-11, 33. The Employer's need to compensate for previous labor shortages during this offseason presumably will not recur once the Employer has H-2A workers during the growing season or, in Mr. Williams's words, "the unemployment rate in our area rises." AF 11. Thus, its need is temporary.

The CO placed far too much importance on the Employer's 2007 payroll reports. That the Employer did not employ the number of requested temporary workers during the same months in previous years does not preclude a finding of temporary need. By regulatory definition, temporary needs do not recur. Accordingly, the number of temporary workers employed during previous years will not be consistent with the number of temporary workers sought to meet a truly temporary need. In this case, the Employer has consistently explained that its temporary need arose because it could not employ a sufficient number of temporary workers

to complete necessary tasks during previous years. That the Employer now seeks more temporary workers than it previously employed is entirely consistent with its need theory. Likewise, that the Employer's stated period of temporary need did not coincide with its peak season has no bearing whatsoever on the temporary-need analysis; the CO can grant certification upon a showing of either a temporary or a seasonal need.

Confusion appears to have arisen because the Employer tried to amend its application to request that the temporary workers remain as seasonal workers during the operation's peak season. In reliance on ETA's misstatement of law in the October 7, 2008, e-mail, the Employer renewed its original request for temporary workers during its offseason only.⁵ Statements contained in Mr. Williams's letter suggest that he may not have been aware of the fact that the Employer's requested period of need no longer included the upcoming growing season. Furthermore, it appears that, as farm manager, Mr. Williams felt that the operation required additional workers during the growing season more than it needed temporary workers to assist in catching up on previously neglected tasks during this offseason. Indeed, Mr. Williams explained that offseason tasks can be postponed and performed by permanent workers if the CO denies certification but that his need for seasonal workers is dire. AF 11. The CO appears to have read this language to mean the Employer's temporary need is not legitimate. However, the regulations do not forbid certification for the less pressing of two demonstrated needs. Ultimately, the CO lacked a legally sufficient basis for denying the application.

IT IS ORDERED that the Certifying Officer's decision is **REVERSED**.

A

JOHN M. VITTON
Chief Administrative Law Judge

⁵ ETA wrote that the Employer "must have a peak or seasonal need to be considered *temporary*." AF 31. (emphasis added). The e-mail contains several similar statements containing this fundamental error.