



Issue Date: 03 September 2009

OALJ Case No.: 2009-TLC-00065

ETA Case No.: C-09215-20285

In the Matter of

GREAT SOUTHERN FARMS, LLC,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On August 24, 2009, Great Southern Farms, LLC, (“the Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“the CO”) determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009).¹ On August 25, 2009, the CO submitted the Administrative File. In expedited administrative review cases, the administrative law judge must review the CO’s determination for legal sufficiency. 20 C.F.R. § 655.115(a).

Statement of the Case

On August 3, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. *See* AF 19.² The Employer requested certification for eight “Farmworkers and Laborers, Crop,” from November 3, 2009, through September 1, 2010. AF 35-43. The job duties were in described, in part, as:

¹ On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued notice of proposed rule making, proposing to suspend the 2008 Rule for nine months and reinstate the 1987 rule. On May 29, 2009, DOL issued the new H-2A rule, scheduled to take effect on June 29, 2009. *See* 74 Fed. Reg. 25,972 (May 29, 2009). However, on July 1, 2009, in *North Carolina Grower’s Assoc., Inc., et al v. U.S. Dept. of Labor*, the United States District Court for the Middle District of North Carolina granted a preliminary injunction to enjoin the Department from temporarily substituting the new regulation. As a result of this injunction, I will apply the 2008 rule, 73 Fed. Reg. 77,110 (Dec. 18, 2008), as opposed to the substitution rule.

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

Workers will propagate blueberry plants by: using hand cutters to take cuttings from established plants; filling filler flats with potting material using a hand shovel and wetting flats with water; placing cuttings in prepared flats by punching a hole in soil and inserting cutting into soil: moving prepared filler flats to rooting area under water mist...

AF 37. The Employer did not require any education, training, or experience. AF 38.

On August 7, 2009, ETA issued a notice informing the Employer that its application had not been accepted for consideration. AF 19. The notice identified two deficiencies requiring corrective action, one of which is relevant to this appeal. AF 19-21. The notice described this deficiency as follows:

DOL regulations at 20 CFR 655.100(d)(3) require that the job opportunity be on a seasonal or other temporary basis. Great Southern Farms, LLC is currently certified (C-09022-17394) for forty (40) Farmworkers and Laborers, Crop from 04/01/2009 to 11/01/2009. The current application is requesting eight (8) Farmworkers and Laborers, Crop from 11/03/2009 to 09/01/2010. The overlapping dates of need span seventeen (17) months. Both job opportunities involve harvesting, field maintenance, field preparation, and maintenance of blueberry plants. The employer has not provided an explanation as to how the job opportunity is temporary or how the job opportunities are different.

AF 22. The notice directed the Employer to “provide a clear statement explaining how this job opportunity is either seasonal or temporary and explain how the job opportunities are different.” AF 21.

On August 13, 2009, ETA received the Employer’s response to the deficiency notice. AF 8-18. In its response, the Employer explained that it employed two different groups of temporary employees whose jobs were very different. AF 11-13. For Group 1, the Employer stated, “Beginning in November, Great Southern Farms needs workers to plant new fields, propagate plants to supply new plant stock and perform plant maintenance in existing blueberry fields.” AF 11. For Group 2, it noted, “Beginning in April, Great Southern Farms needs workers in addition to present staff to prepare for harvesting blueberries.” *Id.* The Employer further contended:

Group 1 workers do not participate in harvesting activities. Group 2 workers do not participate in propagation activities, field preparation, irrigation or planting.

As the jobs are so different so are the needs for the workers in question. Harvest equipment must be ready when the berries begin to ripen. Depending on the variety, blueberries begin to ripen in May, one variety that ripens and is ready for harvest in June and one variety that ripens and is ready for Harvest through July. All the blueberries on a particular bush are not ready for harvest at the same time and may take a week or longer to complete the harvest on a particular variety. Harvesting is extremely “time” sensitive, the berries must be picked at their peak

to ensure freshness and marketability-overripe berries deteriorate and are lost to the producer. . . .

When the picking season is finished, only then does the harvest workers [sic] participate in pruning plants. From November [3, 2009 to September 1, 2010], Great Southern Farms needs workers to plant new fields, propagate plants to supply new plant stock and perform maintenance in existing blueberry fields.

AF 12-13.

On August 17, 2009, the CO issued a denial letter. AF 5-7. In the letter, the CO noted that 20 C.F.R. § 655.100(d)(3) requires “that the job opportunity be on a seasonal or other temporary basis.” AF 7. Based on the Employer’s submissions, the CO determined that “the need for workers is continuous and year round.” He found, “The fact that the job duties overlap, from 04/01/2009 to 09/01/2010, provides further evidence that the job duties are permanent in nature.” *Id.* The CO explained that ETA therefore could not accept the application for further processing, and denied certification for the eight job opportunities. *Id.* The Employer’s appeal followed.

Discussion

The only issue on appeal is whether the Employer established a temporary or seasonal need for eight “Farmworkers and Laborers, Crop,” from November 3, 2009, through September 1, 2010, as required under the H-2A program. *See* 20 C.F.R. § 655.100(a)(1)(i) (2009).

Regulatory Framework

In defining a need “of a temporary or seasonal nature,” the H-2A 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(d)(3)(i). The WHD defines the phrase as follows:

(1) 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.

(2) 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.

(3) On a seasonal or other temporary basis does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(4) 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.

29 C.F.R. § 500.20(s) (2009). 20 C.F.R. § 655.100(d)(3)(iii) further explains that a temporary opportunity is:

. . . any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, including, but not limited to, a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to § 655.110.

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). 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. 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 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. 20,497-20,498 (emphasis added); *see also* 73 Fed. Reg. 77,119 ("The controlling factor is the employer's temporary need, generally less than 1 year, and not the nature of the job duties.").

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." 52 Fed. Reg. 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* 20 C.F.R. § 655.100(d)(3)(ii) (*citing* 29 C.F.R. § 500.20).

Nature of the Employer's Need

The CO denied the application because he found that the Employer's need for workers is continuous and therefore permanent. As the CO noted, the Employer is currently certified for 40 workers with the same job title from April 1, 2009, to November 1, 2009. The instant application requests eight workers from November 3, 2009, to September 1, 2010. Thus, with the exception of one day, these two applications create overlapping dates of need that combined span seventeen months.

The Employer has persuasively explained in great detail how Group 1's duties are exclusive to the period requested: November 3, 2009, to September 1, 2010. Viewed in isolation, the Employer's need would qualify as seasonal. That the Employer has received certification for 40 seasonal workers with the same job title for a seven-month period concluding November 1 complicates matters. While I recognize that there are some distinctions between the two groups' duties, the Employer conceded that some of their duties are the same. AF 12 ("The only similarity is in pruning of plants and in weeding and grass control."); *see* AF 11-12 (listing the two groups' duties).

For all intent and purposes, the Employer claims it has two distinct "seasons" in which it needs two groups of farmworkers to perform some—but not all—of the same duties. When combined, these "seasons" essentially cover the entire year and overlap during five months: April, May, June, July, and August. Viewing the Employer's two applications together, I find that the Employer actually has a permanent need for eight farmworkers. It appears that the Employer could employ these eight farmworkers year-round and assign them to some of Group 2's tasks during September and October.³ Since the Employer does not have a seasonal need but rather a constant need for eight farmworkers, the job opportunities in the instant applications are "consistently filled" permanent positions. *See Bracy's Nursery*, 2000-TLC-11, slip op. at 3 (Apr. 14, 2000). Accordingly, I find that the Certifying Officer's denial of labor certification was proper.

³ The Employer listed no experience, education, or training requirements in the instant application. While the record does not contain the Employer's application for certification of the Group 2 positions, nothing in the record suggests that the September and October tasks would require experience, training, or education.

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