



**Issue Date: 28 August 2009**

**OALJ Case No.: 2009-TLC-00060**

**ETA Case No.: C-09173-19992**

*In the Matter of*

**WILLIAM STALEY,**  
*Employer*

Certifying Officer: Robert E. Myers  
Chicago Processing Center

### **DECISION AND ORDER**

On August 7, 2009, William Staley (“the Employer”) filed a request for 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).<sup>1</sup> On August 20, 2009, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). During an August 24, 2009, telephone call, the Employer requested expedited administrative review rather than a de novo hearing. *See* § 655.115. In administrative review cases, the administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.115(a).

#### **Statement of the Case**

On June 29, 2009, the United States Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. AF 31.<sup>2</sup> In particular, the Employer requested certification for a ranch worker and described the position’s duties, “[T]end and feed cattle, help with birthing of calves, if necessary. Repair farm equipment and small engines, fence repair, weld, pasture and pond maintenance, mow and bail

---

<sup>1</sup> On December 18, 2008, the Department of Labor (“DOL”) published new rules governing this process that became effective January 17, 2009. 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued a proposal to suspend these rules for nine months and reinstate the rules that were in effect on January 16, 2009. 74 Fed. Reg. 11,408 (Mar. 17, 2009). On May 29, 2009, DOL adopted the proposal as a Final Rule, which would have taken effect on June 29, 2009. 74 Fed. Reg. 25,972 (May 29, 2009). On July 1, 2009, the United States District Court for the Middle District of North Carolina preliminarily enjoined DOL from temporarily suspending the new rules. *N.C. Growers’ Ass’n v. Solis*, No. 1:09CV411 (M.D.N.C. July 1, 2009). As a result, I will apply the rules that became effective January 17, 2009, which were codified in Title 20 of the Code of Federal Regulations.

<sup>2</sup> Citations to the 42-page Administrative File will be abbreviated “AF” followed by the page number.

hay.” *Id.* The Employer sought certification from October 15, 2009, to August 15, 2010. AF 32.

On July 2, 2009, ETA issued a notice informing the Employer that his application had not been “accepted for consideration.” AF 20. The notice identified several deficiencies requiring corrective action, only one of which is relevant to this appeal. AF 22-23. The notice described that deficiency as follows:

DOL regulations at 20 CFR 655.100(c)(2) require that the job opportunity be on a seasonal or other temporary basis. The employer was previously granted certification for the same position of 2 Ranch Workers for the period of February 01, 2009 to December 01, 2009 (C-08287-15064). Therefore, the employer established your temporary need as occurring between the months of February to December. However, on June 29, 2009 the employer requested 1 worker from October 15, 2009 to August 15, 2010.

AF 22. The notice directed the Employer to “provide supporting evidence that a temporary need exists.” *Id.* Specifically, the Employer was to explain why its previously established dates of need have changed from the period of February 1, 2009, through December 1, 2009, to the period requested in the instant application. *Id.*

On July 15, 2009, ETA received the Employer’s response to the deficiency notice. AF 11. Regarding the temporary nature of his need, the Employer wrote:

I am responding to your letter requiring modifications on my request for 1 ranch worker, in addition to the 2 that I have currently in my employment. In the past, I have run a cow and calf operation at my ranch that was based on spring birthing of calves. I have recently bought more cows and more land to run cattle on. These cows are birthing in the fall and winter. Since I am unable to keep my 2 workers longer than 10 months on the H2A visa program, I am in need of another worker to help during the period that my other workers cannot be here. I have checked into getting my workers permanent papers, but the process is beyond my ability to accomplish. I am trying to work with the government and within the law. I am asking you to work with me.

*Id.* On July 17, 2009, an ETA analyst e-mailed the Employer “to informally resolve” the temporary need issue. AF 10. The analyst wrote that the Employer’s response to the deficiency notice “established a permanent need” in that the Employer stated “that he needs workers during the whole year since he has bought more cows and more land to run the cattle on.” *Id.* The analyst noted that the CO had previously granted certification for the same position from February 1, 2009, through December 1, 2009. *Id.* To accommodate the Employer’s need for an additional worker during the balance of the current certification period, she offered to accept the application with an amended end date of December 1, 2009. *Id.* Otherwise, ETA could “not accept this application for processing” as filed. *Id.*

On July 20, 2009, the Employer responded to the analyst’s e-mail with the following:

Thank you for your response to my request for a H2A worker. As I have stated in my recent correspondence, I am in need of another worker from October 15, 2009 to August 15, 2010 because of a greater work load for my ranch. Because of the current economic conditions I have been able to increase the size of my ranch and herd at a favorable price to me. I need a great deal of fencing done and preparation for taking care of the cows that I will soon have. I have in the past bred all of my cows to have their calves in the spring when my workers can be here. With this new herd, I will be having calves all fall and winter. After this first year, I will be able to get back to my normal plan of having spring calves. I can control this with my own breeding process. It would greatly help me to have another worker here for this winter to help with the extra work load that I will be having. I know that there are many illegal workers in the area that I could hire to help me. I am choosing to go through the government system to run my ranch legally. Since the system allows for an H2A worker to be here and work for 10 months on the workers [sic] visa, I would like to keep this worker for the 10 months. There will be an increased work load with new pastures and hay bailing for the new herd. If you could allow this one extra worker for this winter, I believe I will be able to get back onto my original schedule for having workers here from February 1 thru December 1 for the future. I would greatly appreciate your consideration in this matter.

AF 8.

On July 31, 2009, the CO issued a denial letter. AF 2-4. In the letter, the CO noted that 20 C.F.R. § 655.100(c)(2) (2008) requires “that the job opportunity be on a seasonal or other temporary basis.” AF 4. Based on the Employer’s submissions, the CO determined that “a year round permanent need for workers exists.” *Id.* The CO explained that ETA therefore could not accept the application for processing, and denied certification. *Id.* The Employer’s appeal followed.

### **Discussion**

The only issue on appeal is whether the Employer established a temporary or seasonal need for a ranch worker from October 15, 2009, through August 15, 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), 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 the Employer's expansion created a year-round need for ranch worker services. In so doing, the CO relied on the fact that the Employer currently has two seasonal ranch hands under a certification set to expire on December 1, 2009. If the Administrative File contained only the Employer's original application and response to the deficiency notice, I would affirm the denial. However, the Employer's July 20, 2009, statements to the ETA analyst reveal that his need for a ranch worker from October 15, 2009, through August 15, 2010, qualifies as temporary.

In particular, the Employer explained that he requires an additional ranch worker to help prepare his expanded ranch for the newly purchased additions to his herd and to assist with fall and winter calving. AF 8.<sup>3</sup> The Employer implied that the fact that these new additions would calve in the fall and winter was beyond his control. *See id.* He also stated that, after this year, all of his cows would again calve in the spring. *Id.* The Employer presented this expansion as a unique event that will not recur each year. Since the Employer will not require a worker to

---

<sup>3</sup> In his request for review, the Employer asserted for the first time that he also requires the additional ranch worker because he has scheduled a knee surgery. AF 1. Since § 655.115(a)(1) precludes me from receiving evidence beyond "what the CO used to make the determination," I will not consider these statements in reviewing the denial.

prepare for ranch expansions on a recurring basis and will not require assistance with out-of-season calving after this year, his need for this ranch worker qualifies as temporary.<sup>4</sup>

The Employer's non-recurring need to have an additional worker during this fall and winter does not transform his seasonal need for two workers from February 1 through December 1 into a permanent need. *See Clayton Williams Farm, Inc.*, 2009-TLC-11, slip op. at 6-7 (ALJ Nov. 18, 2008).<sup>5</sup> That the Employer has established a seasonal need does not preclude him from establishing a truly temporary need for a worker in the same occupation during a different ten-month period of the year. The CO failed to distinguish between "temporary" and "seasonal." Accordingly, I find that he lacked a legally sufficient basis for refusing to process the Employer's application and reverse his decision. **SO ORDERED.**

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

---

<sup>4</sup> In his brief, the CO for the first time asserted that the Employer has sought to extend its current ten-month labor certification for two ranch hands—which will expire on December 1, 2009—and proceeded to analyze the facts under § 655.110(d)'s extension standard. The instant application is not an extension request. Rather, it is an application for a distinct temporary need for a period beginning a month and a half before the current certification will expire.

<sup>5</sup> Though not explicitly stated, it appears that the Employer intends to retain the temporary worker to fill as much of its seasonal need as possible during the balance of the ten-month certification.