



Issue Date: 26 January 2010

OALJ Case No.: 2010-TLC-00015

ETA Case No.: C-09323-21049

*In the Matter of*

**SALT WELLS CATTLE CO.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge

### **DECISION AND ORDER**

On November 19, 2009, Salt Wells Cattle Co., (“the Employer”), filed a request for review of the Certifying Officer’s 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 January 19, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the

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<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.

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 November 19, 2009, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Salt Wells Cattle Co., (“the Employer”), for temporary labor certification. AF 33-52.<sup>2</sup> In particular, the Employer requested certification for two “Farmworkers, Livestock” between January 5, 2010, and October 30, 2010. AF 33. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.*

On November 25, 2009, the CO sent a Notice of Deficiency (“NOD”), which identified four deficiencies, only one of which is applicable to this appeal. AF 16-24. Specifically, the CO found that the Employer failed to establish a seasonal temporary need pursuant to 20 C.F.R. § 655.100(d). The CO noted that the Employer had filed and been granted certification for two previous temporary labor certifications. AF 19. Previously, the Employer had received labor certification for temporary works from April 5, 2009, until January 4, 2010, and in a subsequent application, from January 5, 2010, until October 30, 2010. The CO wrote: “it was established that the 10-month rule is a threshold at which the CO will require an employer to either modify its application or prove that its need, is in fact, of a temporary or seasonal nature. The Employer has [two] previous certification[s] in the same area of intended employment and with the similar job duties as the current application.” *Id.* Accordingly, the CO required the Employer to provide a detailed explanation of why this job opportunity is seasonal or temporary rather than permanent in nature.

On December 21, 2009, the Employer responded to the NOD. AF 9-14. The Employer wrote regarding its temporary need:

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<sup>2</sup> Citations to the 52-page Administrative File will be abbreviated “AF” followed by the page number.

We have allowed our H-2A workers to return to Peru at their request. We now need to have temporary H-2A workers from January to October 2010 at this time. The previous schedule of April to January has not worked as well to meet the temporary needs of our business.

The workload for the winter months is heavy in this part of Utah due to weather. The snow drifts badly and we are consistently needing temporary help to keep the fencing up and the storm fencing in place. With this additional work added to our regular workload[,] it is difficult to maintain our business without H-2A workers. We also need temporary help in the spring for the calving season, and in the summer months for the market season.

AF 14.

On January 7, 2010, the CO denied the Employer’s application for temporary labor certification. AF 3-6. Citing to 20 C.F.R. 655.100(d)(3), the CO found that the Employer failed to establish a temporary need. According to the CO, after receiving the Employer’s explanation of temporary need, “[the CO] further reviewed the Employe[r]’s filing history.” AF 5. According to the CO, the Employer has filed the following applications for temporary labor certification:

<u>Case Number</u>	<u>Case Received Date</u>	<u>Status</u>	<u>Beginning Date of Need</u>	<u>Ending Date of Need</u>
C-06229-02854	08/17/2006	Certified-Full	11/13/2006	09/13/2007
C-07270-06340	09/27/2007	Certified-Full	10/05/2007	07/04/2008
C-08119-09251	04/28/2008	Certified-Full	07/05/2008	04/04/2009
C-09012-16773	01/12/2009	Certified-Full	04/05/2009	01/04/2010
C-09323-21049	11/19/2009	Modification	01/05/2010	10/30/2010

AF 5. Accordingly, the CO wrote: “Based on the dates of need in the previous certification[s] . . . and the sporadic dates of need requested throughout the employer’s filing history[,] the employer has failed to justify the requested dates of need on the current application . . . [or] in response to the Notice of Deficiency.” AF 6. The CO denied the Employer’s application for failure to establish a temporary need. The Employer’s appeal followed.

In its request for an expedited administrative review, the Employer asserted that it has been applying for labor certification since 2006, and that the certification is always granted “without question.” AF 1. Further, the Employer argues that its ranch has “legally and properly employed H-2A workers on a seasonal and temporary basis since 2006” with the intent of “supplementing” its permanent employees. *Id.* According to the Employer, it has taken three years to determine when its actual seasonal need occurs. *Id.* Based on this determination, the Employer has found that “the seasonal needs of [the] ranch, this year, 2010, are to tend to the cattle and fences from January through October.” *Id.* The Employer further asserted that this need was based on difficult winter weather, the “branding and vaccination of new calves and their mothers” in the spring, “the preparation of cattle to ship out to Summer grass in late Spring/early summer,” and the need “to repair equipment and fencing” in the fall. AF 1-2.

On January 21, 2010, the CO filed its brief. In response to the Employer’s request for review, the CO wrote: “[The Employer] has not established that its job opportunity is seasonal or temporary. Rather the information available to the CO, in the current application and the four preceding applications, established that the employer has a year-round permanent need for workers.” Brief 4. Further, the CO noted the Employer’s claim that it has taken three years to determine its seasonal need and asserted that “the one thing that stands out about those start dates is that they have directly followed the end dates of the previous certifications. The present application fits the pattern, supporting the conclusion that the work in question is permanent.” *Id.* Further, the CO wrote that the Employer has failed to establish it does not have a need for workers during the two-month “break period” because the Employer has always had temporary workers during this time, and the Employer “has not established that the work required in November and December 2010 will differ from that performed in the previous four years. Rather, it appears that the designation of November and December as the down time is simply an expedient to achieve technical compliance with the requirements of the H-2A program.” *Id.*

### **Discussion**

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.

Accordingly, when determining whether an Employer's need is temporary, "it is the nature of the need, not the nature of the duties, that is controlling. *William Staley*, 2009-TLC-00009, slip op. at 4, (August 28, 2009).

Since its first application in August 2006, with the exception of approximately two weeks, the Employer has used a temporary worker to fulfill the same position on the ranch.

Further, the Employer does not dispute that it has used temporary workers for the last three years, without a break and for the entire duration of the year. Moreover, if the current application is granted, the Employer will have used temporary labor for 47 months.

In its statement of temporary need, the Employer has indicated that it has finally determined when its seasonal need begins and ends, yet it failed to justify how it will no longer need workers in November and December, despite the Employer's reliance on these workers for the past four winters. Nor has the Employer indicated how its need is different in November and December compared to the other winter months. In order to prove a temporary need, the Employer needs to evidence that the nature of its need is temporary. Unfortunately, the Employer has failed to meet its burden. Not only is the Employer's explanation remarkably absent of why it no longer needs workers in November and December despite its past need for workers during this time period for the last four years, but the Employer's history of temporary labor certification clearly indicates that the Employer needs a permanent worker. Therefore, the Employer cannot establish a temporary need, and the CO properly denied certification.

**Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge