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Issue Date: 01 February 2010

OALJ Case Nos.: 2010-TLC-00016

ETA Case Nos.: C-09334-221161

In the Matter of

SEAWAY TIMBER HARVESTING, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

DECISION AND ORDER

On January 20, 2010, Seaway Timber Harvesting, Inc., (“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).¹ On January 25, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative

¹ 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.

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 November 30, 2009, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Seaway Timber Harvesting, Inc., (“the Employer”), for temporary labor certification. AF 43-63.² In particular, the Employer requested certification for one “Logging Equipment Operator” between March 1, 2010, and February 1, 2010. AF 43. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.* In its statement of temporary need, the Employer wrote, “[t]imber harvesting typically is done throughout the year, but chipping operations are shut down during the month of February so that maintenance can be performed on the chipper in the shop.” AF 53.

On December 7, 2009, the CO found that the application did not meet the requirements of the regulations, and thus, it would not be accepted for consideration unless the Employer submitted a modified application. AF 20. The CO identified several deficiencies, only one of which is applicable to this appeal. AF 22-25. Citing to 20 C.F.R. § 655.100(d)(3), the CO stated that the Employer had failed to establish that its need was temporary. AF 22. Specifically, the CO asserted:

The employer’s explanation [of temporary need] is not sufficient because it implies that the Chipper Operators are employed on a year-round basis. While chipping activities cease in February to allow for maintenance on machinery, the employer states that the crews in the woods continue cutting, skidding, and decking timber so that chip production can continue throughout the spring.

Id.

On December 11, 2009, the Employer submitted its response. AF 7-19. The Employer stated:

Our need for a temporary whole-tree chipper operator is such that chipping is done from March to February. Our company employs skidder operators, fellerbuncher operators all of whom are skilled in their own fields, but do not have the necessary skill and experience to operat[e] the whole-tree chipper. So, while our company employ[s] people on a year-round basis, the chipper operator position is not a year-round position. . . . [T]he chipper is taken down for

² Citations to the 63-page Administrative File will be abbreviated “AF” followed by the page number.

maintenance in February and therefore, we have no need [for]the chipper operator during that period.

AF 13.

On January 11, 2010, the CO denied the Employer's application. Again citing to 20 C.F.R. § 655.100(d)(3), the CO asserted that:

DOL regulations . . . define a temporary job opportunity as a job opportunity where the employer needs a worker for a position for a limited period of time, including but not limited to a peak load, which is generally less than one (1) year. . . . The employer does not state who will be performing maintenance on the chipper or why the chipper operator does not or cannot perform maintenance on the chipper. Thus, it appears the employer[s'] logging operation has a need for a full-time chipper operator who can perform the required maintenance on the whole tree chipper for the month that chipping is not being performed.

AF 5. 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 its need for a wood-chip operator was temporary because the operator was not capable of performing the required maintenance during the month of February. AF 1. Instead, the Employer stated that the maintenance must be completed by "mechanics and welders." *Id.* Therefore, the Employer argued that it has no need for a chipper operator in the month of February. *Id.*

On January 28, 2010, the CO filed its brief. In response to the Employer's request for review, the CO wrote:

The Employer failed to offer an explanation why only the chipper operator position, and not the skidder operators, fellerbuncher operators and log loader operators, are not seasonal or temporary positions. Presumably, these other pieces of heavy equipment require comprehensive maintenance as well. Do the operators of these other pieces of heavy equipment perform the kind of maintenance of their equipment that the chipper operator is not expected to perform? The answer to these questions cannot be answered based on the record in this matter because of the employer's brief response to the CO's request for a fuller explanation of the seasonal or temporary nature of the job opportunity.

CO's Brief 3.

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.

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). The Employer bears the burden of proving its need is temporary. *Cal Farms, LLC, and Washington Farm Labor Source, LLC*, 2009-TLC-00049, slip op. at 8, (May 29, 2009).

The Employer bears the burden in demonstrating that it only needs a wood-chip operator on a temporary basis. Moreover, since the Employer asserts that its need is temporary because the wood-chip operator cannot work in February due to routine maintenance, then the Employer must establish that routine maintenance once a year for an entire month is necessary and that the wood-chip operator cannot perform the maintenance. Although the Employer briefly discussed in its request for review that the wood-chip operator cannot perform the maintenance because

welders and mechanics are required, the Employer did not include this information in the record before the CO. Likewise, in an administrative review, I am bound by the information contained in the record before the CO. *See* 20 C.F.R. § 655.115(a). Moreover, the Employer failed to adequately address why the maintenance could not be performed over the course of the year, nor does it explain how the other crews continue to cut, skid and deck timber year round without the same type of required maintenance and without the chipper. In both its application and subsequent response to the CO, the Employer's explanation for temporary need was lacking in sufficient detail in order for the CO to determine if the Employer had a temporary need. 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