

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 11 August 2010**

**OALJ Case No.: 2010-TLC-00095**

**ETA Case No.: C-10183-24606**

*In the Matter of*

**BGR DAIRY, LLP,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **ROBERT RAE**  
Administrative Law Judge

**DECISION AND ORDER**

On July 23, 2010, BGR Dairy, LLP, (“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. § 655.164(B) (2010). On August 4, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). 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. § 655.171.

**Statement of the Case**

On July 2, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from BGR Dairy, LLP, (“the Employer”), for

temporary labor certification. AF 24-33.<sup>1</sup> In particular, the Employer requested certification for fifteen “Farmworkers, General Crop” between August 29, 2010, and June 29, 2011. AF 24. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.* The Employer gave the following job description: “drive trucks and tractors and perform [a] variety of crop raising duties as directed on general farm. Plows, harrows and fertilizes soil and cultivates sprays and harvest crops using a variety of tractor drawn machinery.” AF 26.

On July 8, 2010, the CO issued a Notice of Deficiency (“NOD”). AF 15-17. Specifically, the CO found that the Employer failed to establish a seasonal temporary need pursuant to 20 C.F.R. § 655.103(d). The CO noted that the Employer had previously filed and been granted certification for temporary workers from April 7, 2008, until January 30, 2009. AF 17. As a result of the Employer’s labor certification history, the CO required the Employer to “provide a detailed business related explanation” discussing the change in the Employer’s dates of need. *Id.*

On July 14, 2010, the Employer responded to the NOD. AF 10-14. The Employer wrote regarding its temporary need:

This job opportunity is temporary, within the change of dates, along the terms of:

- Feasibility within the operation: Due to the current facilities, we are currently rotating the calving schedule from the spring to the fall months.
- Weather Elements: Spring months tend to include snow and/or rain, cold weather, and less lighting available. Although fall be just as bad as the spring, it is generally dry and warm[,] which is adequate for the herd and their offspring.
- Change of management within the operation: Through careful consideration, along with the best interest of the herd, calving within the fall months provides health benefits, smoother transition, and superior quality of the product.

AF 22.

On July 19, 2010, the CO denied the Employer’s application for temporary labor certification. AF 7-9. Citing to 20 C.F.R. 655.103(d), the CO found that the Employer failed to

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<sup>1</sup> Citations to the 44-page Administrative File will be abbreviated “AF” followed by the page number.

establish a temporary need. Noting the Employer's previous dates of need, the CO asserted that the Employer's present application combined with its past applications indicated that the Employer had a permanent and full-time need rather than a temporary need. AF 9. The CO also stated that the Employers response to the NOD was deficient because "the Employer provides reasons for changing the dates within its cattle operation. However, in its current application, the employer is requesting [workers] with job duties specifically related to the growing of crops." AF 9. As a result, the CO found that the Employer had not adequately explained why the previously established dates of need for workers changed. *Id.* Having found that the Employer did not establish a temporary need, the CO denied certification. The Employer's appeal followed.

In its request for an expedited administrative review, the Employer stated that it filed the application as a "crop farm" because the workers would be farming the straw, hay and alfalfa for during the fall. AF 4. The Employer further asserted that during the winter, the workers would help with the cattle. *Id.*

### **Discussion**

Under the H-2A regulations, a seasonal temporary need is defined as "employment . . . tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations." 20 C.F.R. § 655.103(d).

In order to establish a seasonal temporary need under the H-2A program, the Employer must show that its temporary need is tied to an event or pattern. In its request for review and in its NOD, the Employer indicated that it changed its date of need due to a shift in the cattle operation. However, the Department explicitly stated in the preamble to the H-2A program that "the majority of activities encompassed by the dairy industry, and milk production, in particular, are year-round activities and therefore cannot be classified as temporary." 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010). Moreover, given the Employer's last application, it would appear that the Employer has a year-round need for workers between the caring of the cattle and the harvesting

of the Employer's crops. Ultimately, the Employer bears the burden to prove that labor certification is appropriate. The Employer failed to prove its seasonal 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:

**A**

**ROBERT RAE**  
Administrative Law Judge