

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 September 2010

OALJ Case No.: 2010-TLC-00126

ETA Case No.: C-10208-24807

In the Matter of

COLORSTAR GROWERS,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Harry Sheinfeld, esq.
Office of the Solicitor
U.S. Dept. of Labor
Washington, D.C.
On behalf of the Certifying Officer

Ms. Laurie Whitten
Action Visa Assistance
Wylie, TX
On behalf of the Respondent

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

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

On August 26, 2010, Colorstar Growers (“the Employer”) filed a request for a de novo hearing 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). On September 3, 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 ten calendar days after the hearing to issue a decision. § 655.115(b).

Statement of the Case

The facts of the case are undisputed. On July 27, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Colorstar Growers (“the Employer”) for temporary labor certification for 60 “Plant Nursery Laborers” from September 17, 2010 until June 30, 2011. AF 41.¹ The Employer explained in its statement of temporary need that it “shift[ed] . . . [its] timing from the years past [because the Employer] has been awarded business by accounts in different territories. [The Employer has] lost a lot of [its] North Texas business and ha[s] gained a lot of South Texas business which has cause[d] a shift in our dates of need.” *Id.*

On August 3, 2010, the CO issued a Notice of Deficiency (“NOD”). AF 25-28. Citing to 20 C.F.R. § 655.103(d), the CO stated that ten months is the threshold for a temporary period requested by an employer. AF 27. According to the CO’s records, the Employer had the following labor certifications:

Case Number	Employer	Status	Beginning Date of Need	Ending Date of Need
C-09341-21254	Colorstar Growers	Certified—Full	01/28/2010	11/28/2010
C-09341-21255	Colorstar Growers	Certified—Full	01/28/2010	07/01/2010
C-10208-24807	Colorstar Growers	Received	09/17/2010	06/30/2011

The CO required the Employer to provide an explanation of why this job opportunity [was] seasonal and/or temporary rather than permanent in nature. AF 28.

¹ Citations to the 57-page Administrative File will be abbreviated “AF” followed by the page number.

On August 17, 2010, the Employer responded to the NOD. AF 11-24. The Employer wrote:

In past years, we have serviced the Wal-Mart stores in Dallas/Ft. Worth, and for 2011 we do not have this business. We have gained, however, Lowes business extending from the Valley (South Texas) through San Antonio and Austin. We did not previously have this Lowes business, and the seasonality of the southern areas greatly impacts our production schedule and timing. Whereas we had to be prepared for the start of a spring peak season in early April for Dallas, this timing is early February in South Texas. . . . The change in the loss of North Texas business with the gaining of the South Texas business causes the change in our seasonal need to September through June. We will no longer need workers for the dates of January through November as stated before since our season has changed.

AF 17.

On August 20, 2010, the CO denied the Employer's application for temporary labor certification. AF 7-10. Again citing to 20 C.F.R. § 655.103(d), the CO wrote:

The employer's statement for temporary need does not correspond to the dates [of] need on the current application. The statement "we will no longer need workers for the dates of January through November" contradicts the employer's dates of need and therefore the CNPC cannot determine if a temporary need exist[s]."

AF 10. The CO denied the application because the Employer failed to establish a temporary need. The Employer's appeal followed.

In its request for a de novo hearing, the Employer wrote that its statement that it would no longer need workers from January to November "was merely to state that [the Employer] will no longer be requesting petitions for need dates of January through November, but will now be requesting need dates of September through June." AF 1. As clarification, the Employer wrote that it still has a seasonal need, but the need has "shifted." *Id.*

A hearing was held via conference call on September 10, 2010. Transcript ("Tr") 4. The appeal file was entered as Administrative Law Judge Exhibit ("ALJx") 1. Tr 5. Both parties declined to call witnesses, and instead, agreed to make statements on the record. Tr 6-7.

The CO, in his statement through counsel, reiterated that the Employer had received prior labor certifications from January 28, 2010 until July 1, 2010. Tr 7. As a result, the CO stated that the Employer's previous application combined with the present application essentially extended their period of need for more than a year. *Id.* The CO also pointed out that since the Claimant is located in a warm climate, its seasonal need is not apparently obvious. Tr 7-8. Ultimately, the CO stated that the question was whether next year the Employer will file "another overlapping application." Tr 8.

The Employer's representative responded to the CO by stating that the Employer had "a complete shift in how [the Employer] is going to be handling their clientele and where their clientele is now and in the future." Tr 9. Further, the Employer represented that it understood that their "need was not something that was easily changeable." Tr 10.

Discussion

In its denial letter, the CO found that the Employer's statement in its response to the NOD contradicted the Employer's requested dates of need, and therefore denied the application. Specifically, the Employer wrote that "We will no longer need workers for the dates of January through November as stated before since our season has changed." The application requested workers from September 2010 through June 2011. Taken literally as the CO interpreted the statement, the Employer's application contradicts its statement of need. A more reasonable interpretation, however, is that the Employer has two periods of need: January to November and September to June. According to its statement, it will no longer request workers for the first period of need from January to November but will use the second period of need exclusively. This interpretation is supported by not only the record before the CO but also the request for review and the brief filed by the Employer in anticipation of the hearing. Therefore, the Employer's statement should not preclude its application from being processed.

A more immediate concern, however, is the length of time the Employer will use temporary workers given its past certification history and its present application. Altogether, the

time is well over a year. In its denial letter, the CO cited to *Grandview Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008) for the proposition that temporary employment under the H-2A program is limited to ten months. In *Grandview*, an organic dairy farmer sought to use the H-2A program to employ a temporary worker for approximately 11 months per year from January 15th until December 12th. *Id.* at 2. The CO in *Grandview* denied the Employer's application, citing to the "longstanding rule" that temporary labor certifications should be ten months or less. *Id.* at 3. Ultimately, the Board found that the ten month rule was a threshold for H-2A certifications, but the Employer had the opportunity to prove that its need was temporary despite the longer duration. *Id.* at 7. In denying the *Grandview* appeal, the Board focused not on the length of the period of need but the nature of the Employer's need. *Id.*

In following *Grandview's* lead, the Employer must establish that its need is temporary, regardless of the duration. Accordingly, the Employer has sufficiently proven that a business model shift caused the Employer to change its dates of need to meet its consumer contract demands, but its underlying need is temporary in nature. Therefore, the CO improperly denied the application. Should the Employer, however, as the CO suggested, "shift" their business model again so that the dates of need continue to merge together to form a longer overlapping period of need, it would be much harder for the Employer to prove that its need was temporary rather than permanent. If, for example, the nature of the Employer's business requires the Employer's dates of need to shift consistently rather than this one-time necessity, then the Employer would have a permanent need for workers based on its consistently shifting growing season. Because the Employer established a temporary need, the CO's denial is reversed and remanded for further processing consistent with this opinion.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED** and **REMANDED** for further processing consistent with this opinion.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.
WSC:ARH