

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 August 2010

OALJ Case No.: 2010-TLC-00086

ETA Case No.: C-10182-24590

In the Matter of

NORTH STAR DAIRY,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On July 22, 2010, North Star Dairy (“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 July 30, 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 1, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from North Star Dairy (“the Employer”), for

temporary labor certification. AF 85-93.¹ In particular, the Employer requested certification for ten “Farmworkers” between August 28, 2010, and July 11, 2011. AF 85. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.*

On July 8, 2010, the CO issued a Notice of Deficiency (“NOD”). AF 49-78. 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 November 27, 2008, until September 27, 2009. AF 51. 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 13, 2010, the Employer responded to the NOD. AF 17-48. The Employer wrote regarding its temporary need:

Due to diversification in our hay/silage and crop production[,] which means the number of acres in production, we are needing additional labor for the haying production[,] which involves swathing, raking, baling and transporting hay, harvesting grain and silage and transporting from fields to storage facilities from August-December; assisting moving of dry cows, vaccinating, feeding, watering, calving, testing antibiotics, feed baby calves colostrums three times daily, bed and water in January and February; operating tillage machinery for tilling, fertilizing, planting of grain and silage crops March-June.

AF 22.

On July 16, 2010, the CO denied the Employer’s application for temporary labor certification. AF 14-16. Citing to 20 C.F.R. 655.103(d), the CO found that the Employer failed to establish a temporary need. Citing to the Employer’s previous dates of need, the CO asserted that “the employer has not established how its job opportunity is tied to a certain time of year by an event or pattern.” AF 16. The CO further stated that the Employer’s explanation of diversification of the hay/silage and crop production failed to cure the deficiency. Having found

¹ Citations to the 112-page Administrative File will be abbreviated “AF” followed by the page number.

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 "diversification in agriculture is based on variables such as [what the] commodity market prices are at the time, projection on production costs, weather conditions, etc." AF 2. Further, the Employer wrote that it had "additional hay, grain and silage work that will need to be done beginning late August." *Id.* The Employer's agent noted that "[the Employer] need[ed] additional labor beginning late August and continuing with harvesting and transporting grain from field to storage thru December." AF 1.

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. The Employer asserts that it needs additional work to help with hay/crop production, but by its own admission, this work will end in December. Assuming that the Employer adequately established its need for workers from August 2010 until December 2010, the Employer failed to explain its need for ten workers from December 2010 until June 2011.² Moreover, the Employer also failed to establish that its need for "labor was far above those necessary for its normal business." While the Employer stated that it was diversifying its hay/silage and crop production, the Employer did not offer evidence that its needs had changed enough to justify an increase in workers. Ultimately, the Employer

² The Employer also stated that he needed help in the spring working with its cattle, but 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). The Employer failed to distinguish how his need for workers to care for his cattle is a temporary need rather than a year-round permanent need.

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:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:ARH