

**U.S. Department of Labor**

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**Issue Date: 29 September 2010**

**OALJ Case No.: 2010-TLC-00134**

**ETA Case No.: C-10219-24859**

*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 September 3, 2010, 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). On September 20, 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. § 655.115(a).

**Statement of the Case**

On August 6, 2010, 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 49-57.<sup>1</sup> In particular, the Employer requested certification for two “Farmworkers, Livestock” between September 23, 2010, and July 22, 2010. AF 49. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.*

On August 12, 2009, the CO sent a Notice of Deficiency (“NOD”), which identified eight deficiencies, only one of which is applicable to this appeal. AF 19-42. 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 filed and been granted certification for four previous temporary labor certifications. AF 21. Previously, the Employer had received labor certification for temporary works from November 13, 2006 until September 13, 2007; from October 5, 2007 until July 4, 2008; from July 5, 2008 until April 4, 2009; and from April 5, 2009 until January 4, 2010. The Employer had also filed for workers from January 5, 2010 until October 30, 2010, but the certification was denied. *Id.* As a result, the CO required the Employer to provide a detailed explanation of why this job opportunity was seasonal or temporary rather than permanent in nature. *Id.*

On August 23, 2010, the Employer responded to the NOD. AF 10-18. The Employer wrote regarding its temporary need:

This position is temporary in nature. . . .This position is only for a period of ten months. . . .No assistance is needed in the summer months.

In past years we have received an annual renewal of our application for alien certification. . . .We were never asked for additional information for any of the applications pertaining to temporary/seasonal need. Our workers did not stay for a full 12 months at their own request. They returned to Peru and applied to the U.S. Embassy in Lima for H-2A status to return to work on the following work authorization.

AF 10.

On August 26, 2010, the CO denied the Employer’s application for temporary labor certification. AF 6-9. 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 57-page Administrative File will be abbreviated “AF” followed by the page number.

establish a temporary need. Citing to the Employer's past filing history, the CO stated that the previous dates of need established a year round permanent need for workers. AF 8. The CO also noted that while the Employer claimed that it did not need assistance in the summer months, the current dates of need include both June and July. AF 9. The CO further wrote:

In its request for administrative review for its previous application . . . the Employer asserted "it has taken three years to determine when its actual season need occurs . . . the seasonal needs of the ranch this year, 2010, are to tend to the cattle and fences from January to October." However in the current application . . . the Employer is requesting dates of need [from] September 23, 2010 to July 22, 2011[,] which is a contradiction of the determined dates of need stated during administrative review. Furthermore, the [E]mployer has been filing under the H-2A program since 2006, but has requested sporadic dates of need for the same job opportunity in the same area of intended employment.

*Id.* Having found that the Employer failed to establish a temporary need, the CO denied certification. The Employer's appeal followed.

### **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. § 655.103(d) further explains that a temporary seasonal opportunity is:

    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. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

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, the Employer has used or attempted to use a temporary worker to fulfill the same position on the ranch. Further, had the CO granted certification for all of the Employer's requests, the Employer would have used a temporary worker for 56 months. The Employer has presented nothing that would indicate that the present circumstances are "extraordinary" enough to require 56 months of continuous temporary workers. Moreover, 56 months is not a temporary need; it is a permanent one.

    Secondly, in the Employer's last appeal, it argued that the reason for the elongated period of need was that it was attempting to determine its "seasonal need." According to the last appeal, the Employer's final "seasonal need" was from January until October. Yet in the present appeal, the Employer has changed its seasonal need yet again, so that it runs from September until July. Rather than finding its true seasonal need, it appears from the Employer's filing history that its "seasonal need" changes so that the Employer needs a worker year-round. Again,

nothing in the record indicates that the Employer has a permanent 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