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Issue Date: 15 October 2010

OALJ Case No.: 2010-TLC-00157

ETA Case No.: C-10242-24971

In the Matter of

SOUTH SIDE NURSERY,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On September 28, 2010, Southside Nursery (“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 October 6, 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 30, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Southside Nursery (“the Employer”) for

temporary labor certification. AF 66.¹ In particular, the Employer requested certification for seven “Farmers Workers & Laborers Crop” between October 29, 2010 and August 20, 2011. AF 22. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.* In explanation of its need, the Employer provided the following:

Sept.-Nov.—Care of plants, loading wholesalers’ trucks.

Oct.-January—Re-planting and re-stocking.

Jan.-March—Preparation for Spring Festival and starting of the heaviest sales season.

Mar.-Jul.—Watering, care of plants, grounds general maintenance, loading trucks, etc.

The months of September through November are crucial months because of the hurricane season. . . . From November through January our business enters the cleaning and preparing conditions for planting for the Spring season. . . . February through May (Spring) is the heaviest season of all because for the planting and harvesting. During this time we also have the Spring Festival which opens the Heavy Sales Season that is between the months of June—July.

AF 66, 20.

On September 3, 2010, the CO sent a Notice of Deficiency (“NOD”), which identified twenty deficiencies, only one of which will be addressed on appeal. AF 48-57. Specifically, the CO found that the Employer failed to establish a seasonal temporary need pursuant to 20 C.F.R. § 655.103(d). AF 51. The CO noted that the Employer had filed and been granted certification for three previous temporary labor certifications. AF 52. Previously, the Employer had received labor certification for temporary works from April 1, 2007 until February 1, 2008; from April 15, 2008 until February 15, 2009; and from May 21, 2009 until March 21, 2010. Given the Employer’s shift in its date of need, 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 September 15, 2010, the Employer responded to the NOD. AF 20-21. The Employer wrote regarding its temporary need:

¹ Citations to the 82-page Administrative File will be abbreviated “AF” followed by the page number.

In previous years, we have requested temporary foreign labor due to the shortage of labor. . . . The reason we have waited to request [workers] for [the current year] is because of the national economic shortage, and the demand for our type of product, flower and landscaping shrubs, has been almost completely flat during the first half of the year. . . . Now we are preparing for the inclement weather season, during which we definitely need help to move and protect our production.

AF 21.

On September 21, 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 establish a temporary need. AF 9. Therefore, 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).

The Employer, based on its past filing history, needs workers from roughly April until February of the following year. However, this year, the Employer has requested a change of need from September until July. A seasonal need is tied to the weather or a certain event, and a change in the dates for a seasonal need must be justified. When the CO properly required the Employer to justify its changed dates, it appears that the Employer based its new date of need on economic concerns. While this is a valid concern, it cannot justify a shift in temporary need. Moreover, a need that can shift based on mere economics cannot properly be classified as a seasonal nature. For example, a grower who only plants and harvests crops six months a year due to weather concerns might not need workers during those six months for economic reasons, but it likewise would not need workers during the other six months because the employer would not have crops to harvest because the harvest is tied directly to the planting season. The Employer's need, on the other hand, can be amended based on its economic needs, and even in its "off" season months, now claims to need workers. Therefore, the Employer's need cannot possibly be tied to a season or specific time of year, and therefore, 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