U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 23 October 2009

OALJ Case No.: 2010-TLC-00002

ETA Case No.: C-09258-20486

In the Matter of

MATTHEW PHILIP STOCKMAN d/b/a STOCKMAN FARM,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

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

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

On October 6, 2009, Matthew Philip Stockman d/b/a Stockman Farm ("the Employer") filed a request for expedited administrative review of the Certifying Officer's ("the CO") 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).[1] On October 16, 2009, 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. 20 C.F.R. § 655.115(a).

[1] On December 18, 2008, the Department of Labor ("DOL") published new rules governing this process that became effective January 17, 2009. 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued a proposal to suspend these rules for nine months and reinstate the rules that were in effect on January 16, 2009. 74 Fed. Reg. 11,408 (Mar. 17, 2009). On May 29, 2009, DOL adopted the proposal as a Final Rule, which would have taken effect on June 29, 2009. 74 Fed. Reg. 25,972 (May 29, 2009). On July 1, 2009, the United States District Court for the Middle District of North Carolina preliminarily enjoined DOL from temporarily suspending the new rules. *N.C. Growers' Ass'n v. Solis*, No. 1:09CV411 (M.D.N.C. July 1, 2009). As a result, I will apply the rules that became effective January 17, 2009, which were codified in Title 20 of the Code of Federal Regulations.

Statement of the Case

On September 11, 2009, the United States Department of Labor's Employment and Training Administration ("ETA") received the Employer's application for temporary labor certification. AF 56-66.[2] In particular, the Employer requested certification for two "Farm Workers, General I." AF 56. The Employer listed the job duties as cultivating corn, peanut, and hay; fertilizing and watering crops; and tending to cattle. AF 58.

On September 22, 2009, ETA issued a *Notice of Deficiency* informing the Employer that his application had not been "accepted for consideration." AF 31. The notice identified several deficiencies requiring corrective action, only one of which is relevant to this appeal. AF 33-35. In particular, the notice read:

> DOL regulations at 20 CFR 655.100(d)(3) require that the job opportunity be on a seasonal or other temporary basis. The job opportunity described in Section B Items 5 & 6 of ETA Form 9142 and Item 6 of ETA Form 790 indicates the employer's dates of need are from 12/01/2009 to 09/30/2010. Based on the employer's requested dates of need and the employer's previously established dates of need, the employer has established their need to be permanent full-time in nature. Based on the court decision in the matter of *Grandview Dairy*, 2009-TLC-00002(2008) [sic], the court found ten (10) months to be the threshold for a temporary period requested by an employer.
>
> The employer has requested workers at the same work location for the same job duties from 04/01/2008 to 09/30/2010.

AF 33. The notice directed the Employer to "provide a detailed explanation of why this job opportunity is seasonal or temporary rather than permanent in nature, given the fact that the employer is requesting certification for a span of over thirty (30 months)." *Id.*[3]

On September 25, ETA received the Employer's response to the deficiency notice. AF 23-30. Regarding the temporary nature of his need, the Employer wrote:

> I am mostly a farmer although I also raise some cattle as most of the farmers do in Texas. Most of the works in my farm are seasonal work. We are busy in the spring, summer, and fall. Winter is slow in the farm. During these seasons, the farm workers will plant seeds, cultivate corn, water crops, apply fertilizer, and harvest crops and hays. The farm workers have to hoe weeds, move irrigation pipes, pick up the rocks, … [sic] Besides, the workers also tend the cattle. **I declare that the job opportunity is seasonal in my farm.**

AF 23.

---

[2] Citations to the 75-page Administrative File will be abbreviated "AF" followed by the page number.

[3] The Employer had previously applied and received certification for workers from April 1, 2008, through January 30, 2009, and from February 1, 2009, through November 30, 2009. AF 33.

On October 1, 2009, the CO issued a letter denying certification. AF 8-10. In the letter, the CO noted that 20 C.F.R. § 655.100(d)(3) required "that the job opportunity be on a seasonal or other temporary basis." AF 10. The CO observed that the Employer's history involved three different applications for a total combined period of 30 months. AF 10. Further, the CO noted that "all three applications involve the exact same job duties which are performed year-round." AF 10. After noting that the Employer stated that production is slow during the winter months, the CO wrote, "However, the previously certified cases, as well as the current application, have workers performing the same duties through the entire year, including the winter months." *Id.* Having found that the Employer failed to demonstrate how these job opportunities are either temporary or seasonal, the CO denied certification. *Id.* The Employer's appeal followed.

Discussion

The only issue on appeal is whether the Employer established a temporary or seasonal need for two farm workers from December 1, 2009, through September 30, 2010, as required under the H-2A program. *See* 20 C.F.R. § 655.100(a)(1)(i) (2009).

Regulatory Framework

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. § 655.100(d)(3)(iii) further explains that a temporary opportunity is:

> . . . any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, including, but not limited to, a peakload need, which is generally less than 1 year, unless the original temporary agricultural labor certification is extended pursuant to § 655.110.

In 1987, the Secretary of Labor revised the regulations governing temporary alien agricultural labor certification. *See* 52 Fed. Reg. 16,770 (1987) (proposed rule, May 5, 1987); 52 Fed. Reg. 20,496 (1987) (interim final rule, June 1, 1987). The rulemaking reveals that the Department's interpretation of the word "temporary" under the H-2 provision is intended to be consistent with the common meaning of the word "temporary" and to have the same meaning for both H-2A and H-2B purposes. 52 Fed. Reg. 20,497. In stating this, the Department accepted the interpretations set forth in the leading case *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *Artee* held that what is relevant in determining whether an employer has made a *bona fide* H-2 application is "whether the need of the petitioner for the duties to be performed is temporary." *Id*. Thus, the regulatory history of the Department's temporary labor certification rules provides that:

> [i]t is irrelevant whether the job is for three weeks to harvest berries or for six months to replace a sick worker or for a year to help handle an unusually large agricultural contract. What is relevant to the temporary alien agricultural labor certification determination is the employer's assessment . . . of its need for a short-term (as opposed to permanent) employee. The issue to be decided is whether the employer has demonstrated a temporary need for a worker in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is <u>whether the employer's need is truly temporary</u>.

52 Fed. Reg. 20,497-20,498 (emphasis added); *see also* 73 Fed. Reg. 77,119 ("The controlling factor is the employer's temporary need, generally less than 1 year, and not the nature of the job duties.").

The regulatory history does not closely examine the meaning of the word "seasonal." It indicates, however, that the meaning ascribed to the word "temporary" "will not be a problem for much of agriculture, which uses workers on a seasonal basis." 52 Fed. Reg. 20,497. The regulatory history further explains, "Of course, with respect to truly 'seasonal' employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation." *Id*. at 20,498.

Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either: (1) that an employer's need to have the job duties performed is "temporary"—of a set duration and not anticipated to be recurring in nature; or (2) that the

employment is seasonal in nature—that is, employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year. *See* 20 C.F.R. § 655.100(d)(3)(ii) (*citing* 29 C.F.R. § 500.20).

Nature of the Employer's Need

In his request for review, the Employer conceded that he has applied for 30 consecutive months of temporary agricultural labor certification and acknowledged that he requires these workers to perform duties throughout the year. *See* AF 6. While some of the workers' duties are only performed during certain seasons, the Employer's filing history and admissions establish that he requires these workers throughout the calendar year. As discussed above, a need for agricultural labor that is continuous or carried on throughout the year does not qualify as "seasonal" under the H-2B program. *See* 20 C.F.R. § 655.100(d)(3)(ii). Thus, these opportunities are not "seasonal" as defined by the regulations. The Employer also has not established that his need for these workers qualifies as "temporary." Specifically, given the filing history, his need has no set duration; rather, it appears that he anticipates employing these workers for as long as he can obtain consecutive ten-month labor certifications.

Based on the record, I find that the Employer's need for these farmworkers is permanent, which disqualifies him from filling these positions through the H-2A program. While ETA granted his two previous applications for the same positions, that fact does not estop the Department from fulfilling its responsibility to assess the Employer's eligibility when processing the instant application. *See Camp Rio Vista*, 2009-TLC-32, slip op. at 3 (ALJ Mar. 9, 2009). Accordingly, I find that the CO properly found that the Employer did not demonstrate that his need is either seasonal or otherwise temporary, and affirm his denial of certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge