

U.S. Department of Labor

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Issue Date: 04 January 2011

OALJ Case No.: 2011-TLC-00096

ETA Case No.: C-10328-25581

In the Matter of

BEDNER FARM AND GREENHOUSE, INC.
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On December 17, 2010, Bedner Farm and Greenhouse, Inc. (“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 December 27, 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 November 24, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification. AF 33-52.¹ On November 30, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer failed to establish a temporary need as required by 20 C.F.R. § 655.103(d), and therefore was required to provide supporting evidence that a temporary need exists.² AF 20-24.

The CO found that the job duties provided in the Employer’s application include planting, potting, transplanting, watering and covering greenhouses with plastic and planting seedlings in greenhouses, which are presumed to occur on a year-round basis. AF 22. To remedy this deficiency, the CO required the Employer to submit a written explanation documenting the temporary need for H-2A workers and a summarized payroll report from 2009 for the Nursery worker. The summarized payroll report was to identify the total number of workers, total hours worked, and total earnings, separated by month and by permanent and temporary employment. AF 22.

On December 7, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 10-18. The Employer submitted a payroll summary for the period from May 2009 to October 2010. AF 16. It shows that the Employer employed four temporary workers from May through July 2009 and February through June 2010 and lists their total hours worked and earnings received during these months.

On December 15, 2010, the CO denied temporary labor certification because the Employer failed to establish how this job is temporary or seasonal in nature or that the Employer has a temporary need. AF 6-9. The CO found that the Employer did not provide documentation to establish and support its temporary need, as required by 20 C.F.R. § 655.103(d), and again requested by the NOD. AF 8. The CO stated:

In its response to the NOD, the employer only provided summarized payroll documents but failed to explain how the planting operations are going to occur during the months of February through October in a greenhouse which is presumed to occur on a year-round basis.

AF 8.

¹ Citations to the 52-page Administrative File will be abbreviated “AF” followed by the page number.

² The CO also identified four other deficiencies, which are not at issue on appeal. AF 22-24.

The CO further explained that the payroll records show that during the 2009 season, only four temporary workers were needed from May through July and none from August through December. Additionally, in 2010 the Employer was certified for four H-2A workers for January through October, however, its payroll records only show it employed four temporary workers for February through June and none for July through October. For 2011, the Employer has requested seven H-2A workers but failed to provide sufficient evidence that a need for temporary H-2A workers exists. *Id.* The Employer's appeal followed the CO's denial.

Discussion

The applicable regulations provide that "employment is of a seasonal nature where it 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." 20 C.F.R. § 655.103(d). In 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 (Aug. 28, 2009) (citing *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982)).

With the Employer's request for review, it submitted a statement of temporary need and revised summarized payroll records. AF 1-3. However, the H-2A regulations provide that administrative review must be made on the basis of the written record, and cannot include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Thus, I am unable to consider any additional evidence the Employer submits with its request for review.

The CO properly found that the Employer does not have a temporary seasonal need for workers. The Employer has failed to meet its burden to establish that it has a seasonal need for H-2A workers, 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

Washington, D.C.
WSC: ECB