

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: 29 December 2010

OALJ Case No.: 2011-TLC-00094

ETA Case No.: C-10330-25613

In the Matter of

BOULDER DEVELOPMENT

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

On December 17, 2010, Boulder Development (“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 21, 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 26, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification. AF 35-63.¹ On December 1, 2010, the CO issued a Notice of Deficiency (“NOF”), finding that the Employer’s job offer does not offer the same benefits, wages and working conditions that the Employer is offering to H2-A workers, as is required by 20 C.F.R. § 655.122(a), and that the Employer failed to establish a temporary need as required by 20 C.F.R. § 655.103(d).² AF 21-24.

The CO required the Employer to amend its application and to provide supporting evidence that a temporary need exists. AF 23. Specifically, the CO required the Employer to amend Item 16 of ETA Form 790 and Item 11 and 3 of the Attachments to Form 790 and to submit the latest version of Appendix A.2 under the current Regulations. AF 23. For the issue of temporary need, the CO required the Employer to provide a detailed explanation why its job opportunity is seasonal or temporary in nature.

On December 8, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 9-20. The Employer stated:

Although some time in the requested occupation is spent tending cattle and irrigating alfafa, the primary component of the job (comprising about 85% of the total time worked) is raising and tending turkeys. The duties related to the alfafa crop and cattle are only performed when there are rare and limited breaks in the turkey-raising process. We typically raise four (4) turkey broods a season, from February 1st to November 30th.

AF 14. The Employer continues, explaining that the brooding stages are the most sensitive, which is why they need someone with experience tending the broods. The Employer asserts: “Raising turkeys is a specialized field and there simply is not enough time in the course of a single season to train an individual to perform the required tasks.” The Employer notes that it was an error on their part to not include an experience requirement on its application last year. AF 15.

On December 10, 2010, the CO denied temporary labor certification, finding that the job duties listed in the temporary statement of need were not consistent with the job duties listed in ETA Form 9142, ETA Form 790 and the Attachment to ETA Form 790. AF 6-8. Upon review of the Employer’s explanation of the job duties, the CO determined that the Employer’s business

¹ Citations to the 65-page Administrative File will be abbreviated “AF” followed by the page number.

² The CO also identified a deficiency regarding the job qualifications and requirements, which is not an issue on appeal. AF 3-5.

functions primarily as a turkey farm and the job duties primarily relate to raising and tending turkeys. AF 8. In comparison, the CO stated that the job duties listed in Section F(a) Item 5 of ETA Form 9142, Item 15 of ETA Form 790 and Item 10 of the Attachment to ETA Form 790, relate to tending and feeding cattle and irrigating alfalfa crop. Thus, the CO found that the Employer failed to provide consistent job duties in both its ETA Form and in its explanation of its temporary need, received on December 8, 2010. The Employer's appeal followed the CO's denial.

Discussion

The Employer's request for review asserts that the job duties in its H-2A application and statements in its Response to Notice of Deficiency are consistent. I agree. While the job descriptions are not identical, I find that the additional explanation the Employer provided in response to the CO's NOD provides more specific information about the job duties and gives additional detail as to what the job opportunity specifically entails in response to the CO's request; it does not add additional duties or change the nature of the job opportunity. The job duties on the ETA Form 9142 list the job duties as "Herd, calve, tend and feed cattle; irrigate alfalfa crops; tend, feed turkeys." The Employer has added more detailed information about the work with turkeys.

On December 27, 2010, the CO submitted a brief arguing that the farm is open year round and the job duties have no obvious seasonal or temporary component. The CO does not address the issue of whether the job duties in the Employer's application and in its statement of temporary need are consistent.

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)).

Based upon my review of the Employer's application, it appears that the Employer's job opportunity is of a seasonal nature and tied to a certain time of year. As the Employer explained

in its submission on December 8, 2010, the turkey-raising process has seasons and it raises four broods of turkeys from February through November.

Based on the foregoing, I am reversing the CO's denial, and granting certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's determination is **REVERSED** and **REMANDED** for further processing consistent with this decision.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.
WSC: ECB