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Issue Date: 07 January 2011

OALJ Case No.: 2011-TLC-00109

ETA Case No.: C-10330-25620

In the Matter of

LODOEN CATTLE COMPANY,
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 27, 2010, Lodoen Cattle Company (“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. § 655.171. On December 30, 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 business days after receiving the file to issue a decision on the basis of the written record. § 655.171(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 for two (2) workers for the position of “Crop Farming – Farm Worker General.” AF

64-81.¹ The Employer stated that it had a seasonal temporary need for the workers from January 10, 2011 to April 30, 2011. AF 64, 23. On its application, the Employer stated that the job duties include maintaining and repairing farm machinery, hauling large grain crop to market, hauling fertilizer for spring planting, cleaning seed for spring planting, maintaining farm buildings and structures, assisting in hauling new farm equipment from dealerships or factories to the farm, and setting up, assembling, and calibrating new farm equipment for spring planting. AF 66.

Additionally, the Employer submitted a statement of temporary need with its application.

In a statement *signed by the Employer*, the Employer stated:

This is a year round livestock operation, but the need for a foreign worker is only for the winter and spring of the year, as you will see by my explanation.

The need for foreign labor in my operation continues to increase due to the changing US workforce becoming more of a white-collar service industry. The result is that American farm workers are so difficult to find. I have recruited and continue to recruit local workers to fill this position with no success. I try to recruit US workers through the Local Job Service agency, word of mouth, and the local media to no avail.

Our Livestock operation of Farm/Ranch unit requires additional workforce in the winter and early spring months of the year. During this time of year we are required to feed the cattle with hay and feed supplement. Just this process requires 6 or more hours per day. The feed lots and holding pens require daily cleaning as well as the water tanks. While the cattle are confined in this area they also require close inspection for diseases or injuries. Many days we are required to plow snow before we can begin to feed and take care of the livestock.

During the spring of the year we begin to calve and at this time of the year the livestock are under 24 hour supervision so that if they have trouble during the birth process, someone is there to assist. After the cows calve we separate them from the herd so that the calves are not lost or injured by the remaining herd. We also vaccinate the calves and keep them under watch for any diseases.

This is a highly labor intensive period in our livestock operation. It requires extra people as it really is the 24 hours per day/7 days per week. In April given the weather conditions, we take the livestock to our late spring and summer grazing feeding areas.

¹ Citations to the 84 page Administrative File will be abbreviated "AF" followed by the page number.

AF 62-63.² On December 3, 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.³ AF 39. In determining that the Employer had not established a temporary need, the CO noted that the job duties listed in the Employer’s application contradict the job duties in the Employer’s statement of temporary need. AF 39. The CO found that because the Employer failed to provide a statement of temporary need that lists job duties that are consistent with the duties in the Employer’s application, the Employer failed to establish a temporary need. AF 39. Therefore, the CO required the Employer to submit a written explanation documenting the temporary need for H-2A workers based upon supporting evidence. AF 39.

On December 13, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 17-35. In responding to the deficiency listed above, the Employer stated that:

We have to again apologize and admit that our agents had admitted that they accidentally included the wrong justification or explanation of need letter with our application.

[...]

This winter season is the first season where two of my children are not anymore able to help us. My eldest son is off to college and my second oldest had a knee operation and is not able to help.

Every year we have an annual recurrent pattern of farm work during the winter and early spring season since it is our peak preparation period to start planting in the late spring. As a family operation with 4 children – we have been able to handle the workload in the past, but it seems impossible for this winter and we have realized it.

We have been advertising our need by word of mouth and now also through job service with no success. Due to the fact that the Midwest around North Dakota is an area with the lowest unemployment in the country we have a tremendous struggle to find workers to help with any and all of our farm work.

² This Employer’s statement of temporary need is identical to the statement of temporary need submitted by a different employer in North Dakota also seeking H-2A workers. Both employers are represented by the same agent, Manuel Flick, of Pluto, Inc. See *Tim Ames*, 2011-TLC-103 (Jan. 4, 2011).

³ The CO also identified six other deficiencies, not at issue on appeal. AF 38-41, 14-16.

To add to our challenge – the discovery of the oil slate fields are the biggest magnet we have to fight. All employers in our area complain how they just can't afford or keep their workers since the oil industry offers them now \$40 per hour with another \$100 cash per day just for showing up. If we as farmers have to pay a \$40 per hour wage rate, it will drive us farmers bankrupt.

We use the winter months to accomplish a range of tasks which is always done during these winter season period and is essential to get accomplished to set the stage for our summer operations.

Due to the specialty of the tasks, as well as the fact that this is only a seasonal activity[,] we can't offer people a full time job doing this. As already stated, we have a major challenge finding people who have the appropriate knowledge and [are] willing to be employed for only a season.

AF 29-31. On December 21, 2010, the CO denied temporary labor certification because the Employer failed to establish a seasonal need for a foreign worker, as required by 20 C.F.R. § 655.103(d). AF 11-13. The CO found the Employer's response to the NOD did not overcome the deficiency. AF 13. The CO noted that the Employer submitted two different statements of temporary need and failed to amend the job duties in its application, and therefore, the application contained inconsistencies regarding the nature of the temporary need. The Employer's appeal followed the CO's denial.

DISCUSSION

The H-2A regulations provide, in relevant part, that “[t]he criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a). 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).

Even if I accept the statement of temporary need that the Employer submitted with its NOD response, rather than the Employer's signed statement of temporary need submitted with its application, the Employer still has not established a temporary seasonal need. The Employer states that the farmwork has always been done by himself, his wife, and his four children. AF 30, 35. However, this winter, two of his children are unavailable – one because of school and the other because of an injury. AF 30. The Employer has not put forth any evidence that the winter

months are his “season,” *i.e.*, that during this time of year he requires more workers than he does during the rest of the year. Instead, it appears that the Employer has a year-round need for six employees and is seeking to hire two temporary workers in order to maintain his usual labor level. There is no evidence that the winter months, during which the Employer prepares for spring planting and harvesting, require more workers than the other months of the year. *See generally Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof).

Based on the foregoing, I find that the CO properly denied certification because the Employer did not demonstrate that the employment is seasonal in nature as required under 20 C.F.R. § 655.103(d) and therefore failed to meet its burden of establishing that it is entitled to labor certification. *See Garrison Bay Honey Co., LLC*, 2009-TLC-49 (May 29, 2009).

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.