

U.S. Department of Labor

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Issue Date: 15 October 2010

OALJ Case No.: 2011-TLC-00002

ETA Case No.: C-10260-25077

In the Matter of

AMVC MANAGEMENT SERVICES, LLC/NDSC, LLP,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On October 4, 2010, AMVC Management Services, LLC/NDSC, LLP, (“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 September 17, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from AMVC Management Services,

LLC, (“the Employer”) for temporary labor certification. AF 44-53.¹ In particular, the Employer requested certification for seven “Feedlot” workers between November 13, 2010 and September 13, 2011. AF 44. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.* The Employer did not provide a statement of temporary need on its application. *Id.*

On September 22, 2009, the CO sent a Notice of Deficiency (“NOD”), which identified four deficiencies, only one of which is relevant to the Employer’s appeal. AF 24-33. Specifically, the CO found that the Employer failed to establish a seasonal temporary need pursuant to 20 C.F.R. § 655.103(d). AF 26. Specifically, the CO stated that the “care and feeding of livestock is presumed to occur on a year-round basis as is vaccinating and related activities.” *Id.* Therefore, the CO required the Employer to provide a “detailed, written explanation documenting the temporary need for seven Feedlot workers for only ten months of the year. The employer must explain who takes care of the livestock during the two months in which temporary workers are not needed.” *Id.*

On September 24, 2010, the Employer responded to the NOD. AF 12-23. The Employer wrote regarding its temporary need:

The position would require the workers to assist in caring and breeding of swine, examine and treat hogs for diseases and injuries. . . . We have 7 full time workers that would normally take care of the animals that will be assisting with manure hauling, snow removal and additional winter maintenance including cleaning and repair of feed lines and troughs and upkeep of the farm buildings to ensure proper ventilations for the survival of the animals and piglets during these 10 months. Once the winter months are over, the full time employees will resume all aspect of the normal off season livestock duties.

AF 23.

On September 27, 2010, the CO denied the Employer’s application for temporary labor certification. AF 6-8. Citing to 20 C.F.R. 655.103(d), the CO found that the Employer failed to establish a temporary seasonal need. AF 8. In its denial letter, the CO wrote: “Since the full

¹ Citations to the 63-page Administrative File will be abbreviated “AF” followed by the page number.

time workers will be performing the same duties as the H-2A workers, the employer has not justified a need for seven temporary H-2A workers for only ten months. Furthermore, it has been determined by the CNPC that the employer has a year-round need for workers.” *Id.* 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 its seasonal need on the winter season, and the farms need to remove snow and complete winter maintenance. While this work might qualify as a seasonal need given that it is tied to a particular season, the Employer requested double its workforce for ten months. Winter, while no doubt long in North Dakota, by itself does not justify a ten month need without additional information. Likewise, the Employer failed to justify why it would take double the workforce to complete the maintenance and care for the animals, especially given that some of the job duties, such as manure hauling, must occur all year. The Employer bears the burden of demonstrating that it is entitled to labor certification, and in the present case, the Employer failed to meet this burden. 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