



Issue Date: 19 November 2010

OALJ Case No.: 2011-TLC-00031

ETA Case No.: C-10277-25162

In the Matter of

BELLA INIZIO FARM, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On November 4, 2010, Bella Inizio Farm, LLC (“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 November 12, 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 October 4, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Bella Inizio Farm (“the Employer”) for temporary labor certification for six (6) “Stable/Horse Attendants.” AF 87-96.¹ The Employer

¹ Citations to the 109-page Administrative File will be abbreviated “AF” followed by the page number.

stated that it had a seasonal temporary need for the workers from November 25, 2010 to September 25, 2011. AF 87. In explaining the temporary need, the Employer stated:

The Stable/Horse Attendant position at Bella Inizio Farm is directly tied to our horse breeding cycle. Our mares are seasonal breeders and enter into their natural breeding season in late Winter/Early Spring. The length of pregnancy lasts between 335 to 342 days. The H-2A program will be instrumental in providing workers needed to ensure that the horse breeding season, our substantial investment, and the safety of the horses are not compromised or put at risk.

AF. 87. On October 7, 2010, the CO issued a Notice of Deficiency (“NOD”), stating that the Employer failed to establish temporary need as required by 20 C.F.R. § 655.103(d).² AF 68-71. Specifically, the CO stated that the requested position involves the care, feeding, cleaning and treatment of horses, which is presumed to occur on a year round basis. AF 70. The CO noted that while the Employer included breeding related duties as part of the job requirement, these specific activities do not normally occur on a 10 month basis. AF 70. Therefore, 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 stable/horse attendants. AF 70. 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 70. On October 19, 2010, the Employer filed an explanation of temporary need, which stated:

Bella Inizio Farm already employs sufficient year-round workers to feed and care for horses under normal conditions. However, Bella Inizio requires additional help during the horse breeding season because, due to the extensive amount of work required to breed horses and care for the pregnant mares and foals, the year-round workers are unable to perform even regular maintenance duties without additional help, much less the breeding activities.

[...]

In the case of horses bred for competitive purposes[,] especially horse racing, such as the ones bred at Bella Inizio, it is desirable that the horses be born as close to January 1st as possible so that they are at an advantage in size and maturity when competing against other horses in the same age group. [...] Since a mare’s gestation period is approximately 11 months, the breeder normally chooses to breed in late November to early December. Bella Inizio is requesting a start-date for their H-2A Stable/Horse Attendants of November 25, 2010 precisely so that the H-2A employees can help with the breeding activities.

² Additionally, the CO found three other deficiencies not at issue on appeal. AF 70-71.

[...]

Most foals will have been born by the beginning of February. After assisting with the birthing of the foals, Bella Inizio needs H-2A employees to help with foal care and mare after-care. [...] Because of the special attention needed by the young foals, Bella Inizio requires extra help, in the form of H-2A workers, during these months which are critical to the health and development of the foals.

After the foals are weaned, the farm workload is considerably lessened. The weaning process will generally be completed in late August to mid-September, when the foals reach 8 months of age. After this time, the foals do not need any extra care beyond the care already given to more mature horses. For this reason, Bella Inizio is asking for an end-date of September 25, 2011 for its H-2A workers' employment. After weaning is completed, the work required on the farm can be performed by Bella Inizio's year round workers.

AF 10-12. Additionally, the Employer submitted payroll reports from 2009. In 2009, the Employer only employed permanent workers, and had six permanent workers during every month of the year except August, September, and October, when it only had three workers each month. AF 26. The Employer stated that it "has not previously utilized the H-2A program, however, there is an increase in need for the months of November through September, based on the farm's breeding season." AF 26.

On October 26, 2010, the CO denied temporary labor certification because the Employer did not submit documentation to establish that Employer has a temporary need for employees. AF 6-9. The CO found that the payroll records demonstrate that the Employer requires Stable Attendants on a year-round basis. Additionally, the CO noted that while the Employer stated that the year-round workers are unable to perform the breeding duties without additional help, the Employer's application listed duties that are required on a year-round basis, like feeding and watering the horses and cleaning and re-bedding the stalls. AF 8. The CO found that the duties required of the requested temporary workers are the same as the employer's permanent workers, and therefore, the Employer did not have a temporary seasonal need. 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. § 103(d).

Here, the Employer asserts that it has a seasonal need based for temporary workers based on its horses’ breeding cycle, which it states is the end of November to the end of September. Additionally, the Employer states that it has an increased need because of the extensive amount of work required to care for the pregnant mares and the foals up until they are weaned at eight months. The Employer states that it needs H-2A temporary workers to begin in late November in order to start the breeding process. As, the Employer wants the foals to be born as close to January 1st as possible, and states that most are born by the beginning of February, and with an eleven month gestation period, that means that the mares actually become pregnant at the end of January, in February, or possibly even in March. Therefore, the Employer needs workers for what appears to be a three month “breeding season” in late November, December, January, and February, to provide assistance with the breeding. However, it also states that it has an increased need during the mares’ pregnancies, which will continue from February 2010 until January, 2011. Therefore, the need is actually year-round, because the Employer has an increased need for the three months breeding season before pregnancy, *plus* during the eleven month gestation period.

Further, the Employer’s 2009 payroll report does not support its contention that it needs six additional workers from the end of November to the end of September. In 2009, the Employer only had permanent workers, and had six permanent workers from November to July, and then had three permanent workers during August, September, and October. The Employer has not submitted any evidence or documentation to show that its need is greater this year than last year.

The employer bears the burden of proving that it is entitled to labor certification, and here, the Employer has not demonstrated that it has a temporary seasonal need for workers. *Cal Farms LLC and Washington Farm Labor Source LLC*, 2009-TLC-49 (May 29, 2009). 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:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge