

U.S. Department of Labor

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Issue Date: 09 December 2010

OALJ Case No.: 2011-TLC-00064

ETA Case No.: C-10320-25501

In the Matter of

**BILL & EVON W. HUNSTMAN – HUNTSMAN RANCH CO.
D/B/A HUNTSMAN RANCH CO.,**
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On November 30, 2010, Bill & Evon W. Huntsman – Huntsman Ranch Co. d/b/a Huntsman Ranch Co. (“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). On December 2, 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 16, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Bill & Evon W. Huntsman – Huntsman Ranch Co. d/b/a Huntsman Ranch Co. (“the Employer”) for temporary labor

certification for two (2) “General Farmworkers.” AF 37-50.¹ The Employer stated that it had a seasonal temporary need for the farm workers from January 1, 2011 to November 1, 2011 to feed cattle when weather conditions prevent the cattle from being in the pastures, and assist in calving, vaccinations and pregnancy testing of the cattle. AF 36-37. The Employer stated that:

These job responsibilities are only performed during the winter months as calving begins in early February and the cattle are sent to pasture for the summer months. In conjunction with these early duties, and during the remainder of the season, the worker performs a variety of duties related to general farm work and irrigation.

AF 36. The full job duties are listed on the Employer’s application as follows:

Workers will perform a variety of duties related to caring for livestock and growing native hay & grass/alfalfa mix.

Worker may perform the following duties: observe general condition of livestock; mix feed and additives, fill feed troughs with feed, water livestock and monitor food and water supplies; herd livestock to and from pasture for grazing or to scales, trucks, or other enclosures; haul feed to livestock during grass shortage and winter months; sort and work livestock; build panels; move fencing panels; repair pens, panels & fencing; hang gates; corral work; repair sheds; clean calving barns; spread straw and bedding in sheds, remove & replace as necessary; assist with calving; brand livestock; haul manure; build and fill water gaps; burn trash in ditches; clean debris from ditches; cut growth that slows flow of water from ditches using weed eater; haul gravel; haul required materials, cut plastic dams & poles and place dams in ditches; repair plastic dams; assist in the installation of water troughs; stack bales of hay and buck them onto wagon or truck, using hand hook; drive and operate farm machines; attach farm implements, such as plow, seed drill, disc and manure spreader to tractor; drive tractor and operate implements in fields to till soil and plant, cultivate, and fertilize crops; add oil, gasoline, and water to appropriate tanks on machinery; mix chemical solutions, such as pesticides, herbicides, and fertilizers, and spray crops; gather and remove rocks from the field; make minor mechanical adjustments and repairs on farm machinery; paint farm structures, replace/repair fencing and perform general clean up of farm areas when weather and season preclude other activities; thin and weed crops or surrounding farm grounds using hand tools, such as hoes and shovels or power-drawn implements; load and drive truck to transport farm supplies, tools and harvested crops to and from specified locations; unload grain onto conveyors to storage bins or elevators; drive and operated self-propelled harvest machines to harvest crops; operate a motor bike or all-terrain vehicle; remove undesirable and excess growth, such as tassels, suckers, and weeds, by hand; load and unload trucks.

¹ Citations to the 55-page Administrative File will be abbreviated “AF” followed by the page number.

AF 25, 39. Additionally, the Employer notes that “[m]ost duties are performed out of doors, and entail exposure to heat, extreme cold, dust, rain and other environmental conditions common in fields, including mosquitoes during certain seasons.” AF 25.

On November 17, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer’s season was established as January through September, based on its previously submitted application, and therefore, the Employer did not establish how this job was seasonal in nature under 20 C.F.R. § 655.103(d). AF 20-23. The CO requested that the Employer provide a detailed explanation of why the Employer’s dates of need have significantly changed from its established season of January through September to its current request of January to November, and required the Employer to explain why its job opportunity is seasonal or temporary. AF 22. On November 22, 2010, the Employer responded to the NOD, asserting that:

Due to changes in their farming and calving operation (such as the distance between livestock locations, the owners’ changing physical ability to perform the work themselves and an increasing lack of local workers willing and/or available to do the work) this employer has determined that he will need his workers to arrive somewhat earlier and remain longer than in the past in order to insure that a full labor force will be in place throughout the temporary, seasonal 10-month period of time.

AF 12. Additionally, the Employer stated that the work was seasonal in nature because it could not be performed during November or December because cattle do not typically birth their offspring during that time and because general farming duties cannot be performed due to weather and cropping conditions. AF 12.

On November 24, 2010, the CO denied temporary labor certification because the Employer had not justified changing its previously established dates of need by providing evidence that the need is tied to a certain time of year by an event or pattern. AF 8-11. Additionally, the CO rejected the Employer’s argument that the distance between the livestock locations was a factor in requiring the workers to arrive earlier and leave later, noting that the Montana State Workforce Agency (“SWA”) informed the CO that the distance is no more than 23 miles, which is deemed to be a minimal traveling distance. AF10-11. The Employer’s appeal followed the CO’s denial.²

² In its request for review, the Employer asserts that it had two applications in 2010, one covering the need for one worker from January to September, and another covering the need for three workers from February to November. AF 2. Additionally, the Employer contends that it has filed applications for several years with ending dates consistently falling in mid- to late November. AF 2. On appeal, the Employer submitted a copy of its 2010 payroll

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)). BALCA has held that a seasonal need is tied to the weather or a certain event, and a change in the dates for a seasonal need must be justified. *Southside Nursery*, 2010-TLC-157, slip op. at 4 (Oct. 15, 2010).

While I certainly appreciate the Employer’s candor regarding the job duties that it plans to have its H-2A workers perform, the extensive and varied nature of the work reveals that the Employer’s need is not seasonal at all. The Employer seeks workers in connection with its seasonal calving operation and its seasonal operation of growing hay, grass, and alfalfa, in addition to general farming and repair work. The two H-2A workers will perform virtually every task imaginable on the Employer’s farms, from repair and infrastructure work, to clean-up and maintenance work, to agricultural work related to the Employer’s crops, to feeding, watering, and monitoring livestock. There is no indication that this work is in any way “seasonal” in nature; rather, it appears that the Employer requires workers for a longer period of time because the owners are no longer physically able to perform the day-to-day operations of their farms.

Further, while the Employer asserts that the general farming duties cannot be performed during November and December due to weather and cropping conditions, the Employer has not explained why the weather prevents the work in November and December but not January and February, and presumably, Januarys in Idaho and Montana are just as cold, if not colder, than Novembers and Decembers. Aside from the Employer’s unsupported statement that general farming duties cannot be performed in November and December, there is no indication that the Employer’s need for help working the farms will subside during these months.

records to support its argument that it has a temporary seasonal need. Administrative review must be made on the basis of the written record, which may not include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). As such, I am unable to consider any of this additional evidence that the Employer submitted.

The Employer's description of the job duties reveals that the work it needs is not tied to a certain time of the year, requiring labor levels above those necessary for ongoing operations. Rather, these H-2A workers will be responsible for tasks crucial to the ongoing operation of the farms because the Employer's owners are no longer physically able to do the work themselves. Such a need is not a seasonal need under 20 C.F.R. § 655.103(d).

Based on the foregoing, the Employer has failed to demonstrate that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d), 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