



Issue Date: 10 February 2011

OALJ Case No.: 2011-TLC-00211

ETA Case No.: C-10361-26054

In the Matter of

COWBOY CHEMICAL, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

On January 31, 2011, Cowboy Chemical, Inc. (“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 February 2, 2011, 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. 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On December 27, 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 horse groomers. AF 54-62.¹ The Employer stated that it had an intermittent

¹ Citations to the 77-page Administrative File will be abbreviated “AF” followed by the page number.

or other temporary need for the workers from February 16, 2011 to December 16, 2011. AF 54. In its statement of temporary need, the Employer stated that it “raises and trains horses for sale and racing. The process takes 10 months and is done one time per year.” AF 54. Additionally, the Employer described the job duties as follows:

Assist in morning & evening feeding of horses. Exercise performance horses. Conduct observation for foaling mares. Assist in general care & grooming of horses. Maintain safe & well-kept grounds for horses, including grounds, fences, water troughs, & stalls. Assist in maintaining equipment used to maintain horse pastures & facilities (tractors, shredders, manure spreaders, etc.) During foaling/expectancy, keep watch over mare.

AF 56. On January 3, 2011, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer’s application failed to meet the criteria for acceptance for four reasons. AF 39-43. Among the deficiencies, the CO determined that the job duties for the requested position include grooming and care for horses, which are presumed to occur on a year-round basis. AF 41. Therefore, the CO required the Employer to submit documentation to establish and support the Employer’s temporary need in the form of a detailed explanation of why the job opportunity is seasonal or temporary in nature. AF 41.

The Employer responded to the NOD on January 14, 2011. AF 22-38. The Employer submitted a statement of temporary and seasonal need, asserting that:

In connection with the company’s horse breeding activities, Cowboy Chemical, Inc. (CCI) has full-time permanent staff, who care for the horses year-round. The duties of the permanent staff include studying the rangelands to determine the best grazing seasons and the number of horses that can be most profitably bred; planning and directing the construction and maintenance of range improvements, including fencing, corrals, water reservoirs, and other needed structures, as well as developing improved practices for maintaining the range, determining the best grass varieties suited to particular horses, and developing methods for protecting the range from fire and other damage. In addition, the current permanent staff of Cowboy Chemical, Inc. (CCI) provides general day-to-day care of the horses. However, during the breeding, gestating, and foaling season of the mares, which is a period of approximately 10 months, additional care of, and attention to the mares and foals is needed. Our current permanent staff is unable to handle the additional duties required during the breeding, gestation and foaling season, in addition to all of the current ranch activities. Last year Cowboy Chemical increased the number of mares it is breeding to 20 mares, some of which will be exporting to its Brazilian clients. As such, additional assistance is needed during the breeding, gestation, and foaling season. In Tuscola, it is difficult to find

workers who are capable of working with horses and willing to take on a seasonal, temporary position, which requires hard ranch work. Accordingly, Cowboy Chemical is forced to utilize the H-2A program to fulfill its additional seasonal need of the care of its pregnant and foaling horses. That is because pregnant horses require more attention and care. The intensive part of the breeding/gestation/foaling season is about 10 months and usually begins when the mares begin foaling in either January or February and lasts through November or December. During that time, the mares require extra care and attention, as well as do the newborn foals. The foals must be attended to through the weaning process. After weaning, they usually require a lot of additional attention as well.

AF 37-38. On January 24, 2011, the CO denied temporary labor certification, finding that the Employer failed to establish that the job opportunity was on a seasonal or temporary basis as defined by 20 C.F.R. § 655.103(d). AF 19-21. Specifically, the CO referred to part of the Employer's statement of temporary need where it stated:

The duties for the permanent staff include studying the rangelands to determine the best grazing seasons and the number of horses that can be most profitably bred; planning and directing the construction and maintaining the range, determining the best grass varieties suited to particular horses, and developing methods for protecting the range from fire and other damage. In addition, the current permanent staff of Cowboy Chemical, Inc. (CCI) provides day-to day care of the horses.

AF 21. The CO found that these job duties occur on a year-round basis and that these were different than the job duties listed in the Employer's application. Therefore, the CO determined that the Employer failed to explain why the position was seasonal or temporary in nature. AF 21.

The Employer appealed the denial, arguing that horse breeding is a season and that its need for H-2A workers is seasonal. The CO submitted a brief arguing that the Employer has not demonstrated that it has an increase of agricultural work performed during its horse breeding season. AF 5-6.

DISCUSSION

An employer must have a temporary or seasonal need for agricultural labor or services in order to be eligible for temporary labor certification under the H-2A program. The applicable regulations provide, in relevant part:

[E]mployment 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. 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.

20 C.F.R. § 655.103(d). "It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009). Nevertheless, duties are relevant inasmuch as the care and feeding of animals are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis. *See Gisi Pheasant Farm*, 2011-TLC-139 (Jan. 25, 2011).

Both the CO and the Employer have submitted additional evidence on appeal related to the length of the horse breeding season. However, this is new evidence, and I am unable to consider any of this new evidence on appeal. 20 C.F.R. § 655.171(a). The CO's NOD requested that the Employer provide a detailed explanation why its job opportunity is seasonal or temporary. AF 41. In responding to the NOD, the Employer explained what the duties of its permanent workforce are and then explained why it needs two temporary workers from February through December. Specifically, the Employer stated that while its permanent staff provides day-to-day care of its horses, the permanent staff is unable to handle the additional duties required during the breeding, gestation, and foaling season. AF 37. Moreover, the Employer stated that the labor intensive part of the breeding, gestation, and foaling season is about ten months long and usually begins when the mares begin foaling in January or February and lasts through November or December. AF 37-38.

The CO either failed to thoroughly read the Employer's explanation or completely disregarded the Employer's response to the NOD as it pertains to its temporary need. The CO's denial letter selectively quoted the Employer's explanation and omitted the relevant portion of the Employer's response that actually relates to its temporary need for workers to provide seasonal care to its pregnant and foaling horses. Because the CO did not address the Employer's detailed explanation of its temporary need, I find that the CO's denial was arbitrary and

capricious. *See generally Blondin Enterprises, Inc.*, 2009-TLC-56, slip op. at 3-4 (July 31, 2009); *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (May 16, 2008). The Employer provided the information that the CO requested in its NOD and sufficiently explained why it does not need these two temporary workers on a year-round basis. If the CO needed more specific information to make a determination whether the Employer's need for labor is truly seasonal, the CO should have specifically requested that information. Here, the Employer complied with the CO's request, and the CO failed to even acknowledge the Employer's explanation in its denial letter. Based on the foregoing, I find that the Employer has demonstrated a temporary need for two horse groomers from February 16, 2011 to December 16, 2011. Accordingly, the CO's denial of temporary labor certification is vacated and this matter is remanded for further processing.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **VACATED** and **REMANDED** for further processing.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge