



Issue Date: 02 December 2010

OALJ Case No.: 2011-TLC-00054

ETA Case No.: C-10306-25374

In the Matter of

GARRISON BAY HONEY CO., LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On November 22, 2010, Garrison Bay Honey Co., 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 24, 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 2, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Garrison Bay Honey Co., LLC (“the Employer”) for temporary labor certification for ten (10) “Farmworkers.” AF 56-64.¹ The Employer stated that it has a seasonal temporary need for the farm workers from December 31,

¹ Citations to the 72-page Administrative File will be abbreviated “AF” followed by the page number.

2010 to October 31, 2011. AF 56. In a letter attached to its application, the Employer stated that the beekeeping season begins with the preparation and repair of beehives, servicing of equipment in preparation of the arrival of bees from California, and feeding, medicating, and placing bees in appropriate locations. AF 55. During the season, the workers monitor the bees, and then the hives are brought into the plant, where honey is extracted. AF 55. The season concludes when the bees are shipped to California by the end of October, and the Employer stated that it has a dramatic decrease in operations by late October. AF 55.

On November 8, 2010, the CO issued a Notice of Deficiency (“NOD”), stating that the Employer’s application failed to demonstrate that the job opportunity was of a seasonal nature as required by 20 C.F.R. § 655.103(d).² AF 36-38. Specifically, the CO pointed to the Employer’s previous applications for seasonal workers from 2006-2009, which reflected seasonal needs from April through the end of November. AF 39. The CO noted that while it granted certification for dates of need from December 31, 2009 to October 31, 2010 last year, it did so because of the Employer’s special need for beehive maintenance, which was to occur once every three to four years. AF 38. Additionally, the CO reminded the Employer that in its response to the CO’s Notice of Deficiency from the previous year, the Employer indicated that its dates of need would return to its normal season of April through the end of November in the 2011 season. AF 38. Therefore, the CO required the Employer to provide a detailed explanation of why the Employer’s dates of need have significantly changed from its established season of April through the end of November to its current request of December 31 through October 31. AF 38. Alternatively, the CO permitted the Employer to amend the dates of need to its established season of April through the end of November. AF 38.

The Employer responded to the NOD on November 15, 2010. AF 28-35. The Employer included a letter from the Employer’s agent describing why the Employer’s dates of need have changed from its established season. AF 32-34. In its letter, the Employer stated that while the Employer intended to revert back to its established season, it could not because of its efforts to combat “Colony Collapse Disorder,” (“CCD”) a crisis that has affected the beekeeping industry since 2006. AF 32. The Employer stated that in order to combat CCD, it must hire a temporary work crew to conduct increased hive checks, medication and feeding, and overall hive

² Additionally, the CO found one other deficiency that is not at issue on appeal.

maintenance. AF 33. The Employer explained that because the temporary workers' responsibilities increased last year due to CCD, they were not able to complete maintenance on the Employer's wooden beehives, as the Employer had intended during the previous year. AF 33.

Secondly, the Employer asserts that it needs workers from December 31, 2010 through October 31, 2011 because it has approximately 25% more beehives this year than it did last year in an effort to combat "the mysterious colony disappearing concerns that CCD create[s]." AF 33. The Employer states that because of this, it now requires additional preparation and longer shipping periods, and therefore, it now has a longer season. AF 33.

On November 17, 2010, the CO denied temporary labor certification because the Employer could not establish seasonal need pursuant to 20 C.F.R. § 655.103(d). AF 24-27. The CO found that the Employer's new dates of need indicate that the Employer's need is not tied to a certain time of year by an event or pattern. AF 26. Further, the CO determined that the Employer's need is not tied to any season, because it is based upon economic considerations, namely, efforts to combat CCD and the 25% increase in the size of the Employer's operations. AF 27. The Employer's appeal followed the CO's denial.³

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).⁴ BALCA has held that a seasonal need is tied to the weather or

³ The Employer's appeal contains a more detailed explanation of the duties of workers during each particular month of the Employer's stated season, the dates that the bees are shipped from California, the dates that the bees are shipped back to California, and the dates when there are no bees at the Employer's place of business in North Dakota. (AF 22-23). However, 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). Therefore, I am unable to consider any of the additional evidence submitted with the Employer's request for administrative review.

⁴ While the CO's argument relies in part on the definition of "temporary or seasonal nature" under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), the Employment and Training Administration ("ETA") has explained that it removed this definition from the H-2A regulations because it is not compatible with the H-2A program. *See Proposed Rule, Temporary Employment of H-2A Aliens in the United States*, 74 Fed. Reg. 45905, 45911 (Sept. 4, 2009) (noting that while the 1987 Rule and 2008 Final Rule used the MSPA definition, "[u]pon further consideration, the Department has concluded that the MSPA definition, which is driven by the circumstances of individual workers, is not compatible with the needs of the H-2A program, which relates to the temporary/seasonal needs of employers. This has led to confusion under the previous rules, which the Department

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).

The Employer has presented no evidence that its “season” is tied to weather patterns. Instead, the Employer argues that it now has a longer season due to its efforts to combat CCD, which includes increased preparation, care, and an increase in the size of the Employer’s operations. Therefore, the Employer states that its season is now four months longer, running from December 31 to October 31, rather than April to November. The fact that the size of the Employer’s operation has increased due to CCD does not explain why the season is longer. If operations are 25% bigger, it would make sense that the Employer would need more workers during its season, not that the season itself would change. Secondly, while the Employer asserts that CCD has caused a need for increased preparation for the arrival of the bees and extraction of honey, the Employer also states that CCD has affected the beekeeping industry since 2006. The Employer has not explained why this crisis, which is the purported reason behind the extended season, is only now – four years after the CCD crisis began – requiring the Employer to increase its preparation and extend its season by four months.

The Employer bears the burden of demonstrating that it is entitled to labor certification, and in the present case, the Employer has failed to meet its burden of showing that its need for temporary workers is tied to a certain time of year by an event or pattern. 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

now seeks to rectify.”); Final Rule, *Temporary Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6883, 6890 (Feb. 12, 2010) (deciding to retain the language in the NPRM regarding the new definition of seasonal employment).

