



Issue Date: 25 January 2011

OALJ Case No.: 2011-TLC-00139

ETA Case No.: C-10343-25746

In the Matter of

GISI PHEASANT FARM,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
MODIFYING DENIAL OF CERTIFICATION

On January 12, 2011, Gisi Pheasant Farm (“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(a). On January 18, 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 9, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for twelve (12) “Farmworkers, Farm and Ranch Animal.” AF 83-91.¹ The Employer stated that it had a seasonal temporary need for the workers from February 1, 2011 to December 10, 2011. AF 69. In describing the job duties, the Employer stated, “Gathering, washing, racking and transferring eggs. Daily chores, cleaning barns, constructing pens, moving birds to pens. Catching roosters and delivering roosters. General upkeep and sanitation of operation.” AF 85.

On December 15, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer had not established a seasonal temporary need for workers as required by 20 C.F.R. § 655.103(d).² AF 48-51. The CO found that the job duties include the care and feeding of livestock, including roosters, which are presumed to occur on a year-round basis. AF 64. The CO required the Employer to provide supporting evidence that a temporary need exists by submitting a written explanation documenting the temporary need for H-2A workers based upon supporting evidence. AF 64. As supporting documentation, the CO requested that the Employer submit a summarized payroll report from 2009, identifying the total number of its workers, total hours worked, and total earnings, separated by month and by permanent and temporary employment. AF 64-65.

The Employer responded to the NOD on December 22, 2010. AF 48-61. In describing its temporary seasonal need, the Employer asserted that:

In the springtime Gisi Pheasant Farm starts the season by hatching eggs in preparation of the enormous demand that comes for full grown roosters in the fall. This demand is there because many roosters are being sold to hunting lodges, which lines up with the South Dakota pheasant hunting season in the fall, and because the consumption of pheasants is a seasonal occurrence with most people.

[...]

Because of this seasonal demand for our product, and the inevitable increase in sales in the fall months, we begin hatching on a major scale in the springtime, so that there are plenty of full grown roosters for the fall when sales are at their peak. This starts in February or March, depending upon how quickly the spring weather comes in. During this time frame additional temporary workers are hired to assist in this increase of workload.

¹ Citations to the 101 page Administrative File will be abbreviated “AF” followed by the page number.

² Additionally, the CO found three other deficiencies, not at issue on appeal. AF 64-67.

In the spring eggs are gathered several times a day by workers. Production can hit as high as the gathering of 12,000 eggs per day. Then from April through July the hatching of chicks increases in line with the increase of eggs gathered. Workers will count, box and deliver day old chicks during this period as well, as some consumers prefer to purchase eggs or day old chicks and raise them themselves instead of purchasing full grown roosters later in the fall.

As the birds begin to grow it takes much maintenance by temporary work crews to ensure their health and survival. The roosters are fully mature between September and late November or early December of each year, at which time the majority of our sales take place. Most sales are same day sales, and when an order comes in temporary workers have to catch roosters in our large outdoor facilities. During this period workers will catch anywhere from 100 to 6000 roosters a day for live sales. Also, many roosters are slaughtered for sales to restaurants, consumers, etc. during this period. By November/December the pheasant hunting season in South Dakota is winding down and therefore the seasonal sales spike that hits during this period levels off and all additional roosters who have not been sold are slaughtered, packaged and frozen for the light sales activity that take place in the winter months. The remaining hens are kept in winter pens until the following spring, when production begins once again the following year. We hold onto enough birds to ensure production next spring and they are not allowed to hatch until the following year. Temporary work crews are then disbanded, and will not come back until production goes back up once again the following spring.

Gisi Pheasant Farm is a strictly seasonal based agricultural employer. A total of 100% of production, and roughly 90% of all sales happen between February/March to November/December each calendar year, which can clearly be seen from the increase in workers shown on our 2009 payroll reports, which are attached. The demand for pheasant is only seasonal in North America, and therefore we simply do not have a need to produce in the winter months. We are never capable of securing enough local workers to fulfill our temporary demand, and therefore we have utilized the H-2A program for the past eight calendar years, which has proved quite successful. Without the utilization of the H-2A program we would have no way of operating our business to any similar capacity of what we do today, if at all.

AF 56-57. The Employer also submitted payroll records from 2009. AF 55. The 2009 payroll records for the position of “General Laborer” are summarized as follows:

Month	Number of Permanent Workers	Number of Temporary Workers	Total Number of Hours worked by Temporary workers	Total Earnings Received
January	0	0	0	0

February	0	0	0	0
March	0	11	835.43	\$7887.52
April	0	18	1991.10	\$20,438.19
May	0	21	2563.76	\$21,487.55
June	0	19	2522.91	\$26,350.81
July	0	20	3036.30	\$33,585.99
August	0	14	1952.61	\$19,603.27
September	0	7	1263.43	\$12,565.95
October	0	10	1664.37	\$16,520.16
November	0	9	1341.01	\$12,925.24
December	0	2	86.82	\$912.29

On January 6, 2011, the CO denied temporary labor certification because the Employer had not established a temporary need in violation of 20 C.F.R. § 655.103(d). AF 45-47. The CO found that while the Employer indicated that September through early December are the months when most pheasant sales take place, the Employer’s payroll reports indicate a significant drop in the use of temporary workers during that period in 2009. AF 47. The CO found that the majority of the employees’ agricultural duties end in September, directly proceeding the October hunting season. AF 47. In addition, the CO found that the Employer’s payroll records indicate that last year, the Employer did not use any temporary workers during February and only used two temporary workers in December, thereby contradicting the Employer’s stated dates of need for twelve agricultural workers from February to December. AF 47. 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. § 655.103(d). In determining whether an employer’s need is truly temporary, “it is the nature of the need, not the nature of the duties, that is controlling.” *William Staley*, 2009-TLC-9, 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)). Accordingly, when determining whether

an employer's need is seasonal, it is appropriate "to determine if the employer's needs are seasonal, not whether the duties are seasonal." *Sneed Farm*, 1999-TLC-7, slip. op at 4 (Sept. 27, 1999).

The CO's denial relied on the fact that the duties for the farm worker position involve the care and feeding of livestock, which are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. However, I find that the Employer has sufficiently rebutted the presumption that its need is year-round. The Employer thoroughly explained that it needs temporary workers to hatch, maintain, and raise the poultry beginning in March, and then catch the birds once they are mature, between September and December. The Employer explained that it does not have a need for workers during January and February because it is not raising any poultry during those months, and that by December, it has slaughtered or sold its poultry. The Employer clarified that it does not employ any temporary workers during the winter months because it shuts down production at this time. Moreover, while the Employer noted that it does keep some hens during the winter, it explained that it does not need workers to feed them because they are fed with automated feeders.

The Employer's explanation is consistent with its 2009 payroll report, which shows only two workers in December (working a total of only 86.82 hours) and no workers in January or February. However, the Employer's payroll report also demonstrates that the Employer does not require workers during the month of February, and therefore, the CO correctly found that the Employer failed to substantiate its need during the month of February. Based on the foregoing, I find that the CO's denial should be reversed and modified to accurately reflect the Employer's seasonal need, commencing March 1, 2011 through December 10, 2011. *See* 20 C.F.R. § 655.171(a); *Chantilly Farms, Inc.*, 2006-TLC-5 (March 2, 2006).

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of certification is **REVERSED** and the determination is **MODIFIED** to reflect the Employer's seasonal need for workers from March 1, 2011 through December 10, 2011.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge