



Issue Date: 17 November 2010

OALJ Case No.: 2011-TLC-00029

ETA Case No.: C-10288-25258

In the Matter of

GOMEZ LIVESTOCK ETC, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

DECISION AND ORDER

On November 3, 2010, Gomez Livestock Etc, 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 8, 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. 20 C.F.R. § 655.115(a).

Statement of the Case

On October 15, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for one (1) farm worker. AF 51-59.¹ The Employer indicated that its temporary need for a worker was seasonal in nature and that the period of intended employment was from December 1, 2010 to September 1, 2011. AF 51. On October 22, 2010, the CO issued a Notice of Deficiency (“NOD”), stating that the Employer failed to establish temporary need as required

¹ Citations to the 68 page Administrative File will be abbreviated as “AF” followed by the page number.

by 20 C.F.R. § 655.103(d). AF 42-44. Specifically, the CO stated that the requested position involves feeding livestock, which is presumed to occur on a year-round basis. AF 44. Therefore, the CO required the Employer to submit a written explanation documenting the temporary need for an H-2A worker and a summarized payroll report from 2009. AF 44. On October 25, 2010, the Employer filed an explanation of temporary need, which stated:

We filed a H2A application for a worker as we are unable to find sufficient labor for our seasonal farming operation. In the job description it includes: *assisting with cattle grazing on hard winter wheat pasture with branding, vaccinating, ear tagging, castrating, feeding mineral supplements and watering December – March; transporting to market in March.* As stated, assistance is needed for the small Stocker Cattle that are usually purchased in the fall and grazed on winter wheat pasture until they reach a certain poundage, then they are pulled off the wheat pasture and **SOLD** at market in March.

AF 41. Regarding its 2009 payroll, the Employer's letter also indicated that "[d]ue to drought in 2009[,] we had no sufficient wheat pasture to graze Stocker cattle on so no records are available for our cattle operation." AF 41.

On October 28, 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 31-33. The CO found that the duties listed in the Employer's application and letter did not provide adequate evidence for the Employer's seasonal need. AF 33. Additionally, the CO found that the Employer failed to provide the payroll reports required by the Notice of Deficiency. AF 33. 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). 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). Further, BALCA has held that an employer cannot claim that its need is temporary and seasonal based on the "winter months" when its labor

certification request lasts through the summer months. *See River Seeds*, 2011-TLC-00001, slip. op. at 4 (Oct. 21, 2010).

Here, the Employer's statement of temporary need indicates that it needs a worker from December until March because it sells its cattle at the market in March. AF 41. However, this statement of need does not explain why its labor certification request is from December until September. Additionally, Employer failed to submit the 2009 payroll records in response to the Notice of Deficiency as requested by the CO, and its explanation of its inability to provide the 2009 payroll records is vague and insufficient. The Employer bears the burden of demonstrating that it is entitled to labor certification, and in the present case, the Employer failed to meet this burden. 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