

U.S. Department of Labor

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Issue Date: 13 December 2010

OALJ Case No.: 2011-TLC-00074

ETA Case No.: C-10309-25396

In the Matter of

MILL RIDGE FARM, LTD
D/B/A
THOROUGHbred BREEDING FARM,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On December 6, 2010, Mill Ridge Farm, Ltd d/b/a Thoroughbred Breeding 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. § 655.115(a). On December 6, 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 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 two (2) “Horse Stable Workers-Stallion Groom.” AF 80-97.¹ The Employer stated that it had a seasonal temporary need for the workers from January 22, 2011 to November 22, 2011. The Employer described the job duties as follows:

Workers will take care of horses which will include but not be limited to: daily chores, such as feeding, watering, daily grooming, and cleaning of stables. Daily grooming and bathing of horses several times each week. Grooming involves deep brushing, hoof cleaning and treatment, mane care and overall hair coat quality control. Daily exercise in the form of fast-walking twice a day for at least 30 minutes each time. Teaching young horses show related maneuvers. Examines horses to detect illness or injury and distribute vaccinations, treating of minor injuries and ailments. Careful observation of weight, diet, and management of nutrition in terms of feed, combined with hay and exercise. Maintain buildings and equipment.

AF 82. On November 12, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer failed to establish a temporary need as required by 20 C.F.R. § 655.103(d), and therefore was required to provide supporting evidence that a temporary need exists.² AF 57-61. The CO found that the job duties provided in the Employer’s application include the care and feeding of horses, which is presumed to occur on a year-round basis. AF 59. The CO required the Employer to submit a written explanation documenting the temporary need for H-2A workers and a summarized payroll report from 2009 for stable/horse attendants. AF 59. The summarized payroll report was to identify the total number of workers, total hours worked, and total earnings, separated by month and by permanent and temporary employment. AF 59.

On November 17, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 37-55. In its statement of temporary need, the Employer stated that its seasonal fluctuations were based on the breeding season from the end of January to June and its sale of horses, which runs from July through mid-November. AF 46. The Employer also stated that “[u]nfortunately, it has proven difficult to fill our labor requirements for the Horse Stable Workers – Stallion Groom positions...the work is very hard, the hours long, the pay relatively low and then the seasonality factor. We advertise for these positions, but without much success.” AF 46.

¹ Citations to the 100-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 59-61.

The Employer also provided summarized payroll records from 2009, showing that it employed one temporary worker in January, 2009, and two temporary workers from February through November, 2009.³ AF 47. The Employer's summarized payroll records also showed the following with respect to the Employer's permanent workers:

- January: the Employer had 32 permanent workers that worked a total of 2,263.5 hours
- February: the Employer had 34 permanent workers that worked a total of 2,789.25 hours
- March: the Employer had 39 permanent workers that worked a total of 7,456.5 hours
- April: the Employer had 37 permanent workers that worked a total of 9,174 hours⁴
- May: the Employer 37 permanent workers that worked a total of 7,664.75 hours
- June: the Employer had 37 permanent workers that worked a total of 7,475.25 hours
- July: the Employer had 37 permanent workers that worked a total of 9,281.75 hours⁵
- August: the Employer had 31 permanent workers that worked 6,821.25 hours
- September: the Employer had 29 permanent workers that worked 5,575.5 hours
- October: the Employer had 28 permanent workers that worked 6,512.2 hours
- November: the Employer had 26 permanent workers that worked 4,797.25 hours
- December: the Employer had 26 permanent workers that worked 5,870 hours

AF 48-55. On November 23, 2010, the CO denied temporary labor certification because the Employer failed to establish temporary need. AF 15-17. Based on the Employer's payroll report, the CO found that the Employer requires Horse Stable Workers/Stallion Groom on a

³ The Employer's temporary worker worked 20.5 hours in January. The temporary workers worked 357 hours in February, 394.5 hours in March, 490 hours in April, 397.75 hours in May, 362 hours in June, 545.45 hours in July, 437 hours in August, 430 hours in September, 471 hours in October, and 248.25 hours in November. AF 47.

⁴ Whether the Employer's records are accurate or not is difficult to determine. I note that the Employer's payroll record shows that Mr. Jose Castillo worked 529.75 hours in April 2009 (an average of 17 hours a day, seven days a week), and Mr. Juan Gonzalez-Palacio worked 460 hours in April 2009, for an average of nearly 15 hours a day.

⁵ In July, the Employer's records show that Mr. Jose Castillo worked 556 hours, nearly 18 hours a day (or almost 20 hours a day, if in fact workers work six days a week, as the Employer has indicated).

year-round basis, and that there is no apparent difference between the duties assigned to temporary versus permanent workers. AF 17. 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 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)).

The Employer's request for review asserts that its need for stable workers is directly related to its horse population, and introduced new evidence regarding the size of its horse population and manner in which it breeds horses. However, the regulations provide that administrative review must be made on the basis of the written record, and cannot include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Therefore, I am unable to consider any of the additional evidence that the Employer submitted with its request for review.

The CO properly found that the Employer does not have a temporary seasonal need for workers. 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, the work consists of daily chores, including feeding, watering, daily grooming, and cleaning. This is work that must be conducted on a year-round basis. Additionally, the Employer's payroll records are inconsistent with a temporary seasonal need from the end of January to late November. While the Employer's records show that it employed fewer workers in November and December 2009, its permanent employees worked more than twice as many hours in November and December than in January and February.⁶ Further, the Employer's statement of temporary seasonal need focuses on its inability to find domestic workers to do the

⁶ While I have no jurisdiction over any issue other than whether or not the Employer has established a temporary need for H-2A workers, I would be remiss if I did not note that the number of hours that several of the Employer's permanent employees worked during the past year is cause for serious concern.

work, and does not demonstrate that it has a temporary need that is tied to a certain time of the year.

Based on the foregoing, the Employer has failed to meet its burden to establish that it has a seasonal need for H-2A workers from January to November, 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