

U.S. Department of Labor

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Issue Date: 21 October 2010

OALJ Case No.: 2011-TLC-00001

ETA Case No.: C-10263-25092

In the Matter of

RIVER SEEDS, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On October 1, 2010, River Seeds, 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. § 655.115(a) (2009). On October 12, 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 September 20, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from River Seeds, Inc., (“the

Employer”) for temporary labor certification. AF 41-50.¹ In particular, the Employer requested certification for two “Feedlot” workers between November 14, 2010 and September 16, 2011. AF 41. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.* The Employer did not provide a statement of temporary need on its application. *Id.*

On September 24, 2009, the CO sent a Notice of Deficiency (“NOD”), which identified three deficiencies, only one of which is relevant to the Employer’s appeal. AF 20-29. Specifically, the CO found that the Employer failed to establish a seasonal temporary need pursuant to 20 C.F.R. § 655.103(d). AF 22. Specifically, the CO stated that the “care and feeding of livestock is presumed to occur on a year-round basis as is vaccinating and related activities.” *Id.* Therefore, the CO required the Employer to provide a “detailed, written explanation documenting the temporary need for two H-2A Feedlot workers for only ten months of the year. The employer must explain who takes care of the livestock during the two months in which temporary workers are not needed.” *Id.*

On September 28, 2010, the Employer responded to the NOD. AF 9-19. The Employer described the H-2A workers potential job duties as an explanation of its temporary need. AF 14. Specifically, the Employer wrote that the workers would need to:

clean manure from barns daily and spread on fields. Mix cattle feed and feed to cattle and make sure they have water. Keep close watch for injuries and diseases on livestock. Vaccinate and spray insecticide on cattle. Notch ear and brand livestock. Keep building and equipment clean and spray the with disinfectant.

AF 14. Additionally, the Employer wrote that “through the summer months the livestock was out on pasture and did not need to be hand fed. We now have to bring them in as the pastures are dormant for winter. . . . Livestock do not need much attention during summer months as they are put out to graze on pasture.” AF 19.

On September 29, 2010, the CO denied the Employer’s application for temporary labor certification. AF 6-8. Citing to 20 C.F.R. 655.103(d), the CO found that the Employer failed to

¹ Citations to the 50-page Administrative File will be abbreviated “AF” followed by the page number.

establish a temporary seasonal need. AF 8. In its denial letter, the CO wrote: “the temporary need statement submitted to the CNPC indicates that temporary workers are not needed during the summer months. However, the employer’s dates of need are from November 14, 2010 through September 6, 2011, which include the summer months.” *Id.* The Employer’s appeal followed.

In its request for review, the Employer noted that it would be willing to change the end date of the contract to May 31, 2011. AF 2. Moreover, the Employer indicated that the cattle could be put to pasture sometime in May or early June. *Id.*

Discussion

In defining a need “of a temporary or seasonal nature,” the H-2A regulations adopt the meaning of “on a seasonal or other temporary basis” as used by the Employment Standards Administration’s Wage and Hour Division (“WHD”) under the Migrant and Seasonal Agricultural Worker Protection Act. § 655.100(d)(3)(i). The WHD defines the phrase as follows:

(1) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(2) A worker is employed on other temporary basis where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

(3) On a seasonal or other temporary basis does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(4) On a seasonal or other temporary basis does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on

essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

29 C.F.R. § 500.20(s) (2009). 20 C.F.R. § 655.103(d) further explains that a temporary seasonal opportunity 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.

Accordingly, when 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, (August 28, 2009).

The Employer based its seasonal need on the winter season, yet its initial request lasted through September, well beyond the winter months.² Moreover, the Employer failed to explain how the workers' duties, such as keeping watch on livestock and animals, would not occur year round. 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

² Whether the Employer would change his dates of need is irrelevant to this proceeding. The Board may only view the evidence as it appeared before the CO, and likewise, allowing the Employer to change its application at this stage is beyond the parameters of this review.

Associate Chief Administrative Law Judge