



**Issue Date: 08 February 2011**

**OALJ Case No.: 2011-TLC-00185**

**ETA Case No.: C-10361-26073**

*In the Matter of*

**SALT WELLS CATTLE COMPANY, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

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

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

On January 31, 2011, Salt Wells Cattle Company, 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. § 655.171. On February 1, 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 27, 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 ranch workers. AF 58-66.<sup>1</sup> The Employer stated that it had a seasonal temporary need for the workers from February 20, 2011 to August 31, 2011. AF 58. In its statement of temporary need, the Employer stated that “[b]eginning in February through March, workers will maintain snow fencing and fencing on ranch; April – June, workers will maintain ranch equipment and assist with calving, and movement of cattle to summer pastures; July-August, workers will prepare to store equipment for the upcoming winter.” AF 58. Additionally, the Employer described the job duties as follows:

1. Build and repair fencing.
2. Building and [re]place snow fencing;
3. Prepare ranch and ranch equipment for winter season;
4. Maintain ranch equipment;
5. Assist with vaccination of cattle;
6. Assist with calving;
7. Assist with transport of cattle to range sites and to market.
8. Clean corrals and holding pens
9. Maintain corrals.

AF 60. On January 3, 2011, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer’s previous filing history establishes that its need for ranch workers is permanent in nature. AF 29-38. The CO noted that the Employer had received labor certification for temporary workers from November 13, 2006 to September 13, 2007; from October 5, 2007 to July 4, 2008; from July 5, 2008 until April 4, 2009; and from April 5, 2009 until January 4, 2010. The CO also noted that the Employer had filed applications for temporary workers from January 5, 2010 to October 30, 2010 and September 23, 2010 to July 22, 2011, but that both of these applications were denied. AF 31. The CO required the Employer to provide a detailed explanation of why this job opportunity is seasonal or temporary rather than permanent in nature and why the dates of need have changed. AF 31.

The Employer responded to the NOD on January 1, 2011. 7-13. The Employer submitted a statement of temporary and seasonal need, asserting that:

This position is temporary in nature. The job description specifically outlines the duties to be performed during specific seasons of the year. This position is only for a period of six months. The fencing is in need of repair. Because of the timing of obtaining workers so late in the winter months, the fencing will need to be done in the summer months after the cattle [have] been moved to summer

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<sup>1</sup> Citations to the 74-page Administrative File will be abbreviated “AF” followed by the page number.

pastures. The equipment to be maintained by these two workers is basically farm equipment used in the winter months such as plows, etc. The assistance need[ed] in the spring and summer pertains to calving and moving cattle to summer pastures.

[...]

The dates of need have changed only because of the denial of our application in late 2010. We needed to see if we could find local workers to fulfill our needs, and when none were found the decision was made to try to obtain your approval to employ two H-2A workers for the period as noted.

This is a temporary position and we are unable to find workers to fill our position through the end of August 2011. We will need workers until the end of August as the work that should [be] completed to date is awaiting workers. It will take six months for the work to be completed.

AF 9-10. On January 21, 2011, the CO denied temporary labor certification, finding that the Employer failed to provide a sufficient explanation of how this job opportunity is tied to a specific time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and why it requires labor levels far above those necessary for ongoing operations. AF 5. Additionally, the CO denied the Employer's application because it was incomplete. AF 6. The Employer's appeal followed the CO's denial. In its brief, the Employer argues that January through May are its most important and laborious months of its operation. The Employer added that October and November are also very busy, and that its peak season is October through May. Emp. Br. at 1. The Employer added that usually the H-2A workers maintain the equipment and fencing in December, but that "[m]ost of this work will have to be done in July and August to accommodate the filing at hand." *Id.*

## **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). "It is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*,

2009-TLC-9, slip op. at 4 (Aug. 28, 2009). BALCA has held that a seasonal need is tied to the weather or 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).

Although the Employer argues that its need for workers is tied to a particular time of the year, the Employer's filing history proves otherwise. Likewise, the Employer's filing history also undermines the Employer's assertion that it only has a temporary need for this position to be filled. Over the past several years, the Employer has needed ranch workers on a year-round basis to do the type of labor that the Employer now asserts is only seasonal and temporary. Although the Employer's application is for February through August, in its brief, the Employer states that October and November are very busy months and described October through May as its "peak season." Emp. Br. at 1. The Employer's dates of need and its purported season do not match the months that the Employer describes as its busiest months on the ranch, revealing that the Employer's need is not temporary or tied to any particular season. Further, the Employer states that most of the work to repair the fences is usually done in December, but it will be done in July and August to accommodate this application. An employer's ability to manipulate its "season" in order fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d). It is the Employer's burden to establish eligibility for the H-2A program, and here, the Employer has not established how its need for workers is seasonal, *i.e.*, tied to a certain time of year by an event or pattern.

Based on the foregoing, I find that the Employer has not demonstrated that it has a seasonal need for H-2A workers from February 20, 2011 to August 31, 2011, and therefore, find that the CO properly denied certification.<sup>2</sup>

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<sup>2</sup> Because I affirm on this ground, I need not address the other two grounds for denial.

**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