



**Issue Date: 10 November 2010**

**OALJ Case No.: 2011-TLC-00024**

**ETA Case No.: C-10285-25215**

*In the Matter of*

**SCHOTTLER DAIRY, INC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: WILLIAM S. COLWELL  
Associate Chief Administrative Law Judge

### **DECISION AND ORDER**

On October 25, 2010, Schottler Dairy, 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 November 3, 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 12, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for four (4) farm workers. AF 38-48.<sup>1</sup> The Employer indicated that its temporary need for workers was seasonal in nature. AF 38. On October 19, 2010, the CO issued a Notice of Deficiency (“NOD”), citing eight separate deficiencies with the Employer’s application. AF 22-27. Among the eight deficiencies, the CO determined that the Employer failed to establish a

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<sup>1</sup> Citations to the 57 page Administrative File will be abbreviated as “AF” followed by the page number.

temporary need as required by 20 C.F.R. § 655.103(d), and therefore required the Employer to submit a written explanation documenting the temporary need of H-2A workers and provide summarized payroll reports from 2009 to substantiate that need. The CO notified the Employer that pursuant to the regulations, the Employer had five business days to submit a modified application to address the eight deficiencies listed in the NOF. AF 22-23. On October 21, 2010, the Employer filed a modified application and documentation. AF 7-21. Regarding its temporary need, the Employer wrote:

Our dairy operation includes many additional jobs for this time of the year. There is feeding, watering (because ponds freeze over), herding, manure hauling, dehorning and sometimes helping with artificial breeding along with loading of animals. We have struggled to be able to hire qualified local help this time of year because it does get cold in this part of the country and this type of work does not seem to be appealing to them. Once ponds thaw and it warms up and school is out there seems to be more employees available for employment. This time of year is more demanding because of the weather and creates more work and need for seasonal employees.

AF 14.<sup>2</sup>

On October 25, 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 4-6. Specifically, the CO found that the Employer's temporary need statement was insufficient and found that the Employer failed to provide the payroll reports required by the Notice of Deficiency. AF 6. 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). The Employer states that it needs more workers during the winter because it is hard to find domestic workers when it gets cold and because the cold weather creates more work, and therefore need, for seasonal employees. However, the Employer failed to submit the 2009 payroll records in response to the Notice of Deficiency as requested by the

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<sup>2</sup> While the copy of this statement of need in the Administrative File was illegible, the Employer submitted a copy with its request for administrative review that is legible.

CO that would support its argument that it consistently has a need for more workers in the winter months. Although the Employer has submitted this documentation with its request for administrative review,<sup>3</sup> administrative review must be made on the basis of the written record, which may not include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). As the Employer did not provide the requested documentation to support its assertion, the Employer has not met its burden of establishing that it has a seasonal need for temporary workers, and 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

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<sup>3</sup> I note that the Employer's request for review asserts that it did in fact submit the requested payroll records in response to the Notice of Deficiency. Assuming *arguendo* that the administrative file is incomplete and the Employer did submit its 2009 payroll records, the 2009 payroll records do not support the Employer's argument that it needs more workers in the winter months. The Employer employed 29 workers in November, 28 workers in December, 30 workers in January, 31 workers in February, and 31 workers in March. In contrast, the Employer employed 34 workers in April, 32 workers in May and June, 30 workers in July, and 29 workers in August. The payroll records show a consistent need for roughly 30 workers, and any variation in that amount indicates that more workers are needed in the spring and summer months than in the winter.