



Issue Date: 14 April 2011

OALJ Case No.: 2011-TLC-00388

ETA Case No.: C-11069-28452

In the Matter of

SCOTT FARMS,
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 March 10, 2011, Scott Farms (“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 April 6, 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 March 10, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for 5 farm laborers. AF 74-95.¹ The Employer stated that it had a temporary

¹ Citations to the 95-page Administrative File will be abbreviated “AF” followed by the page number.

seasonal need for the farm workers from April 25, 2011 to February 15, 2012. AF 74. In its statement of temporary need, the Employer stated, in relevant part:

This letter is to advise you of the requirement for temporary help for our produce farm. The sales and production of vegetables and fruit [are] directly related to the weather, [and] our growing season is determined by the weather (growing season). Please see attached Production letter for a detail of each phase in our production. What you will see is that our most labor intense months are mid April through mid February.

AF 74, 91. With its application, the Employer submitted a chart showing which months each of its different farming duties are performed. AF 92. The Employer's chart shows that its only year-round duties are maintenance duties. *Id.* From mid-April through mid-February, the Employer irrigates and fertilizes, and from mid-April through mid June, it plants spring crops. *Id.* From mid-April through the end of November, the Employer uses herbicides, harvests, boxes, and sorts crops. *Id.* The Employer cleans the greenhouse for the new crop from July through September and plants the fall crops from September through November. *Id.* From November through mid-February, the Employer cleans the harvested fields for the next season. *Id.*

On March 17, 2011, the CO issued a Notice of Deficiency ("NOD"), determining that there were two deficiencies with the Employer's application. AF 59-62. The CO found that the Employer's dates of need in its previous temporary labor certification were March 25, 2010 through November 15, 2010, while its current dates of need are April 25, 2011 through February 15, 2012. AF 61. Based on the Employer's current requested dates of need, compared to its previously established dates of need, the CO found that the Employer had not established how the job opportunity is temporary or seasonal in nature. *Id.* The CO required the Employer to provide a detailed explanation of why its dates of need have significantly changed from its established season of March through November to its current request of April through February. *Id.* Additionally, the CO required the Employer to submit supporting evidence of its temporary need in the form of payroll reports, summarizing the Employer's individual payroll records by month and identifying the total number of workers, total hours worked, and total earnings received, separated for permanent and temporary employees. AF 62.

The Employer responded to the NOD on March 28, 2011. 49-57. Regarding the change of its dates of need, the Employer stated the following, in relevant part:

Our timing has changed this year compared to last year. We struggled at the beginning of the year in deciding whether we wanted to stay in production or not. The decision that we came to was to continue business however to add greenhouses to grow tomatoes through the winter and cut back on some of our spring crops that are less profitable. The change in our business plan has caused a change in our dates of need. Since we will not be doing as many spring crops, we will not [need] workers until 4/15/11 (however this year we filed late and the start date is 4/25/11) and will be needing workers through 2/15/12. With the visas ending in February instead of November, the workers will be caring for the tomatoes as well as cleaning the fields of rubber mulch for the next season. During the end of February through mid April [is] when we typically catch up on maintenance and other non-production related issues.

The change of our business plan to scale down on less profitable spring crops and go forward with winter greenhouse tomato crops has resulted in the change in our seasonal need to mid April through mid February. We will no longer be using the start and end dates of March 25 through November 15 because of this change and will instead be requesting workers from April 15 through February 15. Our business is seasonal based on the weather, planting schedules and growing cycles, however, with the change in production and crops, our season has been adjusted.

AF 54. The Employer also noted that the 2010 payroll records show that temporary workers were not used until June 2010, and explained that he had encountered delays with getting workers approved at the Consulate in Nuevo Laredo. *Id.* The Employer submitted the following summarization of its 2010 payroll records:

Month	Number of Permanent Workers	Total Number of Hours worked by Permanent workers	Total Earnings Received	Number of Temporary Workers	Total Number of Hours worked by Temporary workers	Total Earnings Received
January	4			0		
February	4			0		
March	4			0		
April	4			0		
May	4			0		
June	4			2	180	\$1,620
July	4			2	308	\$2,952
August	4			2	336	\$3,024
September	4			2	320	\$2,880

October	4			2	330	\$2,970
November	4			1	82	\$738
December	4			0		

AF 56. The Employer stated that it is a family farm and does not pay a salary or hourly wage or keep track of how many hours its permanent workers work. *Id.* The Employer stated that, “[d]uring production, myself, my wife, my son and his wife can work 8-10 hours a day 6 days a week and also require the help of additional temporary workers. When we are not in production work scales down enough that we can manage the maintenance on our own without the extra help of temporary workers.” *Id.*

On March 29, 2011, the CO denied temporary labor certification, finding that the Employer failed to establish a temporary need, as required by 20 C.F.R. § 655.103(d). AF 45-48. The CO explained that by converting its business to cultivation of greenhouse crops, the Employer’s dates of need are not temporary or tied to any particular season. AF 48. The CO noted that the Employer can manipulate its season to fit the criteria of the temporary labor certification program because greenhouse crops may be grown year-round, and therefore, its need for labor is not tied to the weather or any particular annual pattern. *Id.* Therefore, the CO found that the Employer’s need is not seasonal according to the definition established at 20 C.F.R. § 655.103(d). *Id.*

The Employer appealed the CO’s denial, arguing that the Employer did not convert his entire farming operation to greenhouse crops, and submitted additional documentation regarding which crops are produced in which months. AF 1-44.

DISCUSSION

The applicable regulation provides 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). A seasonal need is tied to the weather or a particular annual pattern, and an employer's need for labor is not seasonal if an employer is able to manipulate its season to fit the criteria of the temporary labor certification program. *See Salt Wells Cattle Company, LLC*, 2011-TLC-185 (Feb. 8, 2011). An employer is required to justify a change in the dates of its established season. *See Thorn Custom Harvesting*, 2011-TLC-196, slip op. at 3 (Feb. 8, 2011); *Southside Nursery*, 2010-TLC-157, slip op. at 4 (Oct. 15, 2010).

The Employer in this case received temporary labor certification for three prior years. AF 61. In all of those years, the Employer's date of need ended on November 15. *Id.* This year, however, the Employer seeks labor certification for farm laborers from April 25, 2011 to February 15, 2012. In justification of its change of seasonal need, the Employer explained that this year, it is scaling back on its spring crops and adding winter greenhouse tomato crops. The CO found that the Employer's need was not seasonal or temporary, as required by 20 C.F.R. § 655.103(d), because it converted its business operations to growth of greenhouse crops. Because greenhouse crops can be grown year-round, the CO determined that the Employer's business is not tied to a certain time of year.

I find that the CO's denial is well supported by the evidence in the record.² According to the Employer, the addition of greenhouse crops to the Employer's farm has created a need for the workers from mid November – mid February. AF 54. But given that the greenhouse crops can be grown year-round, why does the need for workers to tend to the greenhouse tomatoes cease in mid-February? The Employer's chart, separating the farm duties by the months in which they are performed, does not provide any insight into this issue. AF 92. While the chart shows that the Employer cleans the greenhouse for a new crop between July and September, and plants fall crops (presumably the tomatoes in the greenhouse) from September through November, it is not clear when the greenhouse tomatoes are harvested. As this information is not provided, the February 15, 2012 end date of need appears to have been arbitrarily selected. Rather than corresponding to the weather or an event or pattern, it seems that the Employer is manipulating its "season" in order to ensure that it lasts fewer than ten months so as to qualify for temporary labor certification. *See generally Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008)

² While the Employer has submitted additional evidence on appeal regarding the nature of its farming operations and its need for temporary labor, the H-2A regulations prevent me from considering any evidence that was not part of the record upon which the CO based his denial. 20 C.F.R. § 655.171(a). Accordingly, I cannot consider this evidence in determining if the CO's denial of certification was proper.

(upholding the “ten month rule” presumption). The Employer’s suggestion that it does not need additional workers from mid-February to mid-April is not persuasive given that the Employer has provided no explanation of what happens to the greenhouse tomatoes during this time.

It is the employer’s burden to establish eligibility for the temporary labor certification program. *See Garrison Bay Honey Co., LLC*, 2009-TLC-49 (May 29, 2009). Because the Employer has not demonstrated why it does not need workers during from mid-February to mid-April, I find that the Employer has not met its burden of establishing that it has a temporary seasonal need for five farm laborers from April 25, 2011 to February 15, 2012.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge