



**Issue Date: 23 December 2010**

**OALJ Case No.: 2011-TLC-00087**

**ETA Case No.: C-10321-25504**

*In the Matter of*

**STEVEN COX ASSOCIATES,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

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

**DECISION AND ORDER**  
**REVERSING DENIAL OF CERTIFICATION**

On December 11, 2010, Steven Cox Associates (“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 17, 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 17, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for five (5) “Agricultural Equipment Operators.” AF 30-40.<sup>1</sup> The Employer stated

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<sup>1</sup> Citations to the 44 page Administrative File will be abbreviated “AF” followed by the page number.

that it had a seasonal temporary need for the workers from January 10, 2011 to June 30, 2011.

The Employer described the job duties as follows:

Drive trucks and tractors to perform animal and crop raising duties. Harvest, cultivate, plant crops. Monitor irrigation, repair equipment. Mow around barns/yards, maintain rock barriers around barns, remove liquid residue from drainage pits and haul to liquid spreaders, repair/prepare barn curtains for winter. Feed/observe livestock.

AF 30, 32. On November 22, 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. AF 20-22. The CO found that the Employer’s previous certification was for November 10, 2009 through June 30, 2010. AF 22. The CO required the Employer to provide a detailed explanation of why the Employer’s dates of need have significantly changed from its established season of November through June to its current request of January through June. AF 22. Additionally, the CO required the Employer to explain why its job opportunity is seasonal or temporary. AF 22.

On November 30, 2010, the Employer responded to the NOD. AF 15-18. The Employer’s statement of temporary need provided the following:

Rainfall basically ceased, and the employer experienced an extreme drought in August, September, and October which drastically affected the fall crops with less harvest. Due to the lack of moisture, the employer was unsure of what work they would be able to do, if anything on the farm; therefore, the employer delayed filing for H2A laborers.

Its not the Employer’s liking that he experienced a drought and did not file for H2A labor at the normal time; however, the weather precluded him from doing so. When ¼ of an agricultural employer’s year is an extreme drought, the employer must make necessary adjustments for economic purposes. Many of the duties that normally take place in November and December were considerably reduced, allowing the employer to accomplish the tasks that take place regardless of moisture conditions himself.

In a normal year, the seasonal need is as follows:

Mow around barns and prepare yard and rock barriers for winter. Monitor barn curtains to assure warmth in animal barns (Nov – Feb). Transport liquid residue from drainage pits to storage areas (Dec – Jan). Transport liquid residue to

spreaders (Feb/May). Repair tillage equipment prior to spring cultivation (Dec-Feb). Repair/maintain equipment in heated barns. Till the soil to make a seed bed (Mar/April), planting corn (April/May) and soybeans (May/June). Apply liquid residue as fertilizer to field (Feb/May). Irrigation is also turned on and monitored and moved from field-to-field from (Feb/May).

AF 18. On December 9, 2010, the CO denied temporary labor certification because the Employer failed to establish temporary need. AF 8-11. The CO determined that the duties referenced in the Employer's response are performed on a year-round basis. AF 11. Additionally, the CO found that the majority of duties described would not appear to be affected by drought conditions, and therefore, the Employer had not demonstrated that the position was seasonal in nature. AF 11. 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)). 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).

In this case, the CO found that the Employer's application was deficient because while the last year the Employer's season lasted from November 10 through June 30, this year the Employer only sought workers from January 10 through June 30. Therefore, the CO required the Employer to justify the changing dates of need. The Employer responded that its season had not changed, rather, there had been a severe drought in August, September and October. The Employer explained that because of the drought, the Employer was unsure of the extent of the year's crops and whether it would need temporary workers. The Employer is not seeking to change its season, it is simply explaining why its dates of need were reduced this year.

Additionally, the CO found that the job duties referenced by the Employer are performed on a year-round basis. I disagree. The Employer has specifically stated which job duties are

performed during which months. With the exception of feeding livestock, all of the job duties listed on the Employer's application and included on the Employer's statement of temporary need are tied to weather patterns. Based on the foregoing, I find that the Employer has met its burden to establish that it has a seasonal need for H-2A workers, and therefore, the CO's denial is not appropriate.

**Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED** and **REMANDED** for further processing consistent with this decision.

For the Board:

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