



**Issue Date: 15 December 2010**

**OALJ Case No.: 2011-TLC-00073**

**ETA Case No.: C-10312-25429**

*In the Matter of*

**SUNSHINE GREENHOUSE INC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

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

### **DECISION AND ORDER**

On December 3, 2010, Sunshine Greenhouse 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). On December 8, 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 8, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for fifteen (15) “Greenhouse Laborers.” AF 64-72.<sup>1</sup> The Employer stated that it had a seasonal temporary need for the workers from January 3, 2011 to October 30, 2011

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<sup>1</sup> Citations to the 85-page Administrative File will be abbreviated “AF” followed by the page number.

because it was “unable to hire enough local workers.” AF 64. The Employer described the job duties as follows:

Plant and grow[,] bedding plants[,] control weeds[,] move plants from greenhouse to carts[,] water & cultivate plants[.] Requires bending and lifting.

AF 82. On November 12, 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.<sup>2</sup> AF 44-48. The CO found that the job duties provided in the Employer’s application include planting and growing bedding plants, controlling weeds, moving plants from greenhouses to carts and cultivating plants, which are presumed to occur on a year-round basis. AF 46. The CO required the Employer to submit a written explanation documenting the temporary need for H-2A workers as required by 20 C.F.R. § 655.103(d) and a summarized payroll report from 2009 for nursery workers. AF 46. The summarized payroll report was to identify the total number of workers, total hours worked, and total earnings received, separated by month and by permanent and temporary employment. AF 59.

On November 19, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 11-43. The Employer did not submit a written explanation documenting its temporary need, but did submit copies of summarized payroll reports from 2009 and 2010. (AF 40-41). Although these summaries were separated by temporary and permanent laborers, the reports did not include the total number of hours worked. AF 40-41. The payroll report for 2009 is summarized as follows:

<b>Month</b>	<b>Number of Permanent Workers</b>	<b>Number of Temporary Workers</b>	<b>Total Number of Workers</b>
January	24	7	31
February	25	11	36
March	27	11	38
April	27	13	40
May	32	13	45
June	30	12	42

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<sup>2</sup> Additionally, the CO found four other deficiencies, not at issue on appeal. AF 46-48.

July	24	0	24
August	25	0	25
September	22	0	22
October	26	0	26
November	29	0	29
December	26	0	26

The payroll report for 2010 is summarized as follows:

<b>Month</b>	<b>Number of Permanent Workers</b>	<b>Number of Temporary Workers</b>	<b>Total Number of Workers</b>
January	27	0	27
February	27	7	34
March	30	10	40
April	33	10	43
May	32	10	42
June	32	10	42
July	26	3	29
August	25	1	26
September	25	1	26
October	26	1	27
November	24	0	24
December		0	

AF 40. On November 26, 2010, the CO denied temporary labor certification because the Employer failed to establish temporary need. AF 7-9. The CO found that the job duties listed in the application are presumed to occur on a year-round basis, and the Employer failed to provide a written explanation as to why it had a temporary seasonal need for nursery workers. AF 9. Based on the Employer's payroll reports, the CO found that the Employer needs workers on a permanent, rather than temporary, basis. AF 9. On December 3, 2010, the Employer requested review and submitted a statement of seasonal need. AF 5-6.

### Discussion

The applicable H-2A 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)).

The Employer’s request for review included a statement of temporary seasonal need, which the Employer did not previously submit with its response to the NOD. The H-2A regulations restrict administrative review to the basis of the written record, and review cannot include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Therefore, I am unable to consider the evidence included in the Employer’s statement of temporary need.

Based on the record before me, the Employer has not met its burden of establishing eligibility for the H-2A temporary labor certification program. The job duties listed in the Employer’s application appear to occur on a year-round basis, and there is no indication that nursery laborers are only needed during part of the year. Indeed, the Employer’s 2009 and 2010 payroll records demonstrate that it hires no fewer than 24 nursery laborers on a year-round basis. While the Employer’s need for nursery laborers may fluctuate, and the need seems to be higher between March and June, it is readily apparent that the Employer needs nursery laborers all year. Moreover, the Employer’s generalized statement of temporary need that it is “unable to hire enough local workers,” is not probative of whether or not the Employer’s need is seasonal in nature. AF 64.

The Employer has not met its burden to establish that it has a ten month seasonal need for fifteen nursery laborers, and therefore, the CO properly denied temporary labor certification.

**Order**

Accordingly, 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