



Issue Date: 08 February 2011

OALJ Case No.: 2011-TLC-00196

ETA Case No.: C-11007-26397

In the Matter of

THORN CUSTOM HARVESTING, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

On January 8, 2011, Thorn Custom Harvesting, 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 January 7, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for ten (10) “Farmworker Laborer Crop.” AF 25-33.¹ The Employer stated that it

¹ Citations to the 45-page Administrative File will be abbreviated “AF” followed by the page number.

had a temporary seasonal need for the farm workers from March 1, 2011 to November 15, 2011. AF 25. In its statement of temporary need, the Employer stated that it was, “[u]nable to hire enough local workers during the season[.] There are a large number of farms in the county and not enough workers to fill the need.” AF 25. In describing the job duties, the Employer stated that “Workers will plant and cultivate sweet potato plants in rows as directed daily[,] harvest and sort using 4/5 bushel buck, and carry to trailers.” AF 27.

On January 13, 2011, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer requested new dates of need, thereby indicating that the Employer’s previously established seasonal need is not 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. AF 14-17.² The CO noted that the Employer’s previous dates of need were April 25, 2010 through November 1, 2010 and required the Employer to provide a detailed explanation of the reason that the Employer’s dates of need have changed from its established season of April through November to its current request of March to November. AF 16. Additionally, the CO required the Employer to explain why its job opportunity is seasonal or temporary. AF 16.

The Employer responded to the NOD on January 19, 2011. 7-13. The Employer submitted a statement of temporary and seasonal need, asserting that:

[The Employer] is a sweet potato grower in the rural community of Houston, [Mississippi]. We grow about 1000 acres of sweet potato and our request for workers beginning i[n] March is mainly due to the lack of workers in the area, [because] the new Toyota plant in Tupelo [Mississippi] has pulled a lot of the available work force from our area. Our growing season begins in March with the planting of the seed potatoes[.] This is labor intensive and begins with the preparation and building of the beds[.] [T]he potatoes are then spread on the beds in an even layer, fertilizer is applied and the seed potatoes are covered with soil then plastic, [and] the sides of the plastic must be covered with soil to prevent the wind from blowing it off and to hold the heat in the soil to promote the growth of the plants. We plant approximately 60 acres of seed beds using 40,000 bushels of seed potatoes. We have approximately 45 to 60 days to complete the seed beds before the planting season begins[,] which is when we historically in the past have brought in workers to plant the 1000 acres using the plants for the 60 acres of seed beds. Our growing season truly begins in March and ends in November from planting to harvest. There are approximately 102 sweet potato farmers in a three (3) county area and the competition for local workers is fierce and we respectfully request that you consider our application.

² The CO also found two other deficiencies, not at issue on appeal.

AF 11. On January 21, 2011, the CO denied temporary labor certification, finding that the Employer had not justified changing its previously established dates of need. AF 2-6. The CO found that the Employer's explanation that its change of its dates of need was due to the lack of workers in the area was an insufficient explanation of its changed dates of need. AF 5-6. 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. § 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).

Based on the Employer's past filing history, the Employer has needed laborers from roughly April until November. This year, however, the Employer has requested workers from March until November. Although the Employer's explanation of its change of need was rather cryptic, it indicated that there are not enough workers in the area available to assist with the planting process. Additionally, the Employer reiterated that its season actually starts in March, when the Employer begins to plant the seed beds. It appears that in years past, the Employer has not used H-2A workers to assist in planting the beds, but always needs ten workers to assist in planting the seed beds. I find that the Employer has explained that it needs ten workers to begin a month earlier this year in order to assist in planting the seed beds.

Employers are required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor. Here, however, the Employer still clearly has a temporary seasonal need for workers related to its sweet potato farming operation. The Employer is not attempting to manipulate the months of its "season;" rather, it is requesting that ten workers begin a month earlier to help plant the seed

beds. The Employer's response to the NOD indicates that its growing season always begins in March with the planting of the seed potatoes. Just because the Employer has not used H-2A workers for the preliminary planting phase of its sweet potato season in years past does not mean that it does not have a seasonal need for the workers. Its need for workers is tied to a time of the year, and therefore, it is seasonal in nature.

Based on the foregoing, I find that the Employer has demonstrated that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d), and therefore, the CO's determination is vacated and remanded for further processing consistent with this decision.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **VACATED** and remanded for further processing.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge