



Issue Date: 23 December 2010

OALJ Case No.: 2011-TLC-00088

ETA Case No.: C-10312-25431

In the Matter of

TRADERS REST FARM, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On December 13, 2010, Traders Rest Farm, 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 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 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 five (5) “Farmworkers, Farm and Ranch Animal.” AF 69-80.¹ The Employer stated that it had a seasonal temporary need for the workers from January 3, 2011 to November

¹ Citations to the 108 page Administrative File will be abbreviated “AF” followed by the page number.

3, 2011. AF 69. In describing the job duties, the Employer stated, “General farmhands needed for agricultural use. Work includes: planting of rye grass, fertilizing, harvesting, and bailing of hay. Duties also include grooming horses, cleaning stables, repairing and building fences and maintaining farm land.” AF 71.

On November 15, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer had not established a seasonal temporary need for workers as required by 20 C.F.R. § 655.103(d).² AF 48-51. The CO found that the job duties include the grooming of horses and cleaning of stables, which is presumed to occur on a year-round basis. AF 50. The CO required the Employer to provide supporting evidence that a temporary need exists by submitting a written explanation documenting the temporary need for H-2A workers based upon supporting evidence. AF 51. The CO also required the Employer to submit summarized payroll reports from 2009, identifying the total number of workers, total hours worked, and total earnings, separated by month and by permanent and temporary employment. AF 51.

The Employer responded to the NOD on November 23, 2010. AF 13-46. In describing its temporary need, the Employer asserting that:

We have a desperate need for additional temporary workers, which include dates January through October for the duties of: planting of rye grass, fertilizing, harvesting, and bailing of hay.

We have a few permanent workers for the job duties of: grooming horses, cleaning stables, repairing and building fences and maintaining farm land. However, the temporary workers may assist in some of these duties.

AF 20. The Employer also submitted payroll records from 2009. AF 22-46. The 2009 payroll records are summarized as follows:

Month	Number of Permanent Workers	Number of Hours worked by Permanent Workers	Number of Temporary Workers	Total Number of Hours worked by Temporary workers	Total Number of Hours
January	3	489	4	284.5	773.5
February	3	514	3	305.5	820
March	3	507	2	296.25	803.25

² Additionally, the CO found one other deficiency, not at issue on appeal. AF50.

April	3	513	2	275.75	788.75
May	3	523	2	237.5	760.5
June	3	480	2	184.5	664.5
July	3	462	1	26	488
August	3	437	1	27	464
September	3	449	1	27	476
October	3	423	1	26	449
November	3	419	0	0	419
December	3	915	0	0	915 (465) ³

On December 2, 2010, the CO denied temporary labor certification because the Employer had not established a temporary need. AF 7-9. The CO found that the Employer’s statement of temporary need did not provide adequate evidence of a temporary need, and found that the job duties are performed on a year-round basis. AF 9. The Employer’s appeal followed the CO’s denial.⁴

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)).

The Employer’s payroll records demonstrate that it did employ temporary workers from January to November last year, but at far lower levels than it seeks this year. During its January

³ It appears that of 450 of these hours were given to the workers as a holiday bonus, so in reality, it appears that the three permanent workers worked a total of 465 hours in December 2009. AF 45.

⁴ In its request for review, the Employer submitted another summarization of its 2009 payroll reports, not separated by year, showing 5 temporary workers that have the job duties of planting rye grass, fertilizing, harvesting, and bailing hay, and 3 permanent workers that handle horse grooming, cleaning stables, repairing and building fences, and maintaining the farmland. AF 5. Because administrative review must be made on the basis of the written record, which may not include new evidence submitted on appeal, I am unable to consider any of this additional evidence. *See* 20 C.F.R. § 655.171(a).

to November season last year, the Employer had no more than seven employees, and during eight of these ten months, the Employer had either four or five *total* employees. During July, August, September, and October of 2009, the Employer's temporary worker only worked an average of 26.5 hours *each month*. The Employer has not offered any explanation why it now needs five temporary employees for its season, nor has it demonstrated that its season lasts until November. Rather, it seems that the Employer's season lasts from January until June. Based on the foregoing, the Employer has failed to demonstrate that it has a seasonal need for H-2A workers from January through November, 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:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge