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**Issue Date: 29 March 2011**

**OALJ Case No.: 2011-TLC-00335**

**ETA Case No.: C-11053-27977**

*In the Matter of*

**WINROCK FARMS,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **LINDA S. CHAPMAN**  
Administrative Law Judge

**DECISION AND ORDER**  
**VACATING DENIAL OF CERTIFICATION**

On March 18, 2011, Winrock Farms (Winrock) filed a request for review of the Certifying Officer's determination in the above-captioned temporary alien labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On March 22, 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 February 22, 2011, the United States Department of Labor's Employment and Training Administration received Winrock's H-2A temporary labor certification application for twelve "Farm Workers, Farm and Ranch Animals." Administrative File (AF) 90. Winrock stated that it had a seasonal temporary need for the workers from April 2, 2011 to December 31, 2011, because "this is a busier time of the year for our farm and more employees are required to operate properly." Winrock further explained: "the work is seasonal because harvest seasons occurs [*sic*] during the period requested. Cows are calving during this period, also." AF 90. In describing the job duties, Winrock stated:

The job offer includes the activities of cutting and bailing hay, fixing fences, maintaining farm equipment, checking and changing oil on tractors, cleaning tractors and other farm equipment, spreading chicken and barn manure on fields, cleaning fertilizer equipment, working cow herd. This job requires heavy lifting and working outside in hot weather and /or other inclement weather, if safe. Farm and shed sanitation work is required. Picking up rocks and piling brush in fields.

AF 92.

On March 1, 2011 the CO issued a Notice of Deficiency (“NOD”) letter notifying Winrock that it had not established a seasonal temporary need as required by 20 C.F.R. § 655.103(d).<sup>1</sup> Specifically, the CO noted that the job duties described by Winrock in its application included the care and feeding of livestock, which are duties presumed to occur on a year-round basis. AF 70. In order to remedy this deficiency, the CO instructed Winrock to submit a written explanation documenting its temporary need for H-2A workers based on supporting evidence—specifically, summarized payroll reports for the previous calendar year. AF 71.

On March 7, 2011, Winrock responded to the CO’s NOD letter stating that it needed temporary H-2A workers “for additional help during spring and fall calving season, fertilizing pastures during the growing season, hay season and clean up of trees and limbs and repairs to buildings due to storm damage.” AF 65. Winrock included the following table summarizing its payroll for Calendar Year (CY) 2010:

MONTH	PERMANENT EMPLOYMENT			TEMPORARY EMPLOYMENT		
	TOTAL WORKERS	TOTAL HOURS WORKED	TOTAL EARNINGS RECEIVED	TOTAL WORKERS	TOTAL HOURS WORKED	TOTAL EARNINGS RECEIVED
JANUARY	1	279	3692.32	2	122.50	1211.00
FEBRUARY	1	252	3692.32	2	67	681.00
MARCH	1	279	3692.32	4	238.5	3005.06
APRIL	1	270	3692.32	8	534.5	4688.26
MAY	1	279	3692.32	8	489	4097.44
JUNE	1	270	3692.32	8	1195.25	6734.69
JULY	1	279	3692.32	8	606.75	5272.15
AUGUST	1	279	3692.32	8	672.5	6011.44
SEPTEMBER	1	270	3692.32	7	645.5	5373.58
OCTOBER	1	279	3692.32	6	568	5019.89
NOVEMBER	1	270	3692.32	6	410.5	4541.38
DECEMBER	1	279	3692.32	6	721.25	8076.27

AF 65.

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<sup>1</sup>The NOD contained a number of other deficiencies that are not at issue on appeal.

On March 9, 2011, the CO issued a second NOD letter after determining that Winrock's CY 2010 payroll records indicated it employed temporary workers year-round, and thus the payroll records did not aid Winrock in establishing a need for temporary workers during the months of April through December.<sup>2</sup> AF 43-46. In order to remedy this deficiency, the CO instructed Winrock to "submit a statement explaining why temporary workers are employed year-round, as well as explain what the workers are doing during the months of January through March." AF 45.

On March 11, 2011, Winrock responded to the CO's second NOD letter, stating:

We need temporary workers from April through December due to our calving seasons which start in April and go through May and start again in September and go through December, the growing season for fertilizing pastures and cutting hay also fall in this time period, and the need to clean up trees and limbs that have fallen due to weather during the winter months. Our employees primarily feed and doctor sick cattle during the winter months of January through March. The cattle have to be fed a feed mix as well as hay daily due to the unavailability of grass in these months.

AF 39.

On March 14, 2011, the CO denied Winrock's application for temporary labor certification. AF 28-30. The attached enclosure lists only one deficiency: failure to establish temporary need pursuant to 20 C.F.R. § 655.103(d). AF 30. After reviewing Winrock's payroll records and March 11, 2011 response to the second NOD letter, the CO determined that Winrock "indicated in its statement, and by its payroll records that temporary workers are needed for 12 months, and has not justified the need for temporary H-2A workers." AF 30.

On March 18, 2010, Winrock appealed the CO's denial and sought expedited administrative review.<sup>3</sup>

## DISCUSSION

Under to 20 C.F.R. § 655.103(d), Winrock is required to demonstrate that the positions it seeks to fill are of a "temporary or seasonal nature." Specifically, the regulations provide that:

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<sup>2</sup> Again, the NOD contained other deficiencies that are not at issue on appeal.

<sup>3</sup> In its appeal, Winrock explained that its operation needs four full time employees, but because it could not fill three of those full-time positions, it resorted to employing local college students part time during the winter months. AF 21. However, administrative review must be made on the basis of the written record, which may not include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Therefore, I am unable to consider any of the additional evidence submitted with Winrock's request for administrative review.

[E]mployment 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. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. § 655.103(d). In determining whether an employer's need is truly temporary, "it is the nature of the need, not the nature of the duties, that is controlling." *William Staley*, 2009-TLC-9, 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). Thus, even though duties involving the care and feeding of livestock are presumed to occur on a year-round basis (and therefore reflect a year-round need for workers), *Cowboy Chemical, Inc.*, 2011-TLC-211 (Feb. 10, 2011), this presumption can be overcome if an employer sufficiently explains why it does not need workers on a year-round basis. See *Gisi Pheasant Farm*, 2011-TLC-139 (Jan. 25, 2011) (employer overcame presumption by explaining that although it needed temporary workers from March to December to hatch, maintain, and raise the poultry, it did not need workers in January and February because by December, it had slaughtered or sold its poultry and shut down production during the winter).

In the instant case, Winrock contends that it requires additional help from April to December in order to: (1) get through the spring and fall calving seasons, which run from April to May, and September to December respectively; (2) fertilize pastures and cut hay during the growing season, which follows the calving season; and (3) clean up trees and limbs that have fallen due to weather during the winter months. AF 39. Winrock maintains that it does not require this additional labor from January to March, because its employees "primarily feed and doctor sick cattle." AF 39.

Winrock's CY 2010 payroll records do, in fact, reveal a sharp increase in temporary workers from April through December. But the CO's denial overlooked this increase, simply stating that Winrock's CY 2010 payroll records indicated a need for temporary workers year round. AF 30. Although Winrock did hire several temporary workers throughout all twelve months, the sharp increase in temporary workers from April through December is consistent with Winrock's claim that its operation requires increased seasonal labor during this period.

Indeed, in its brief, the CO does not dispute that Winrock has a need for *some* temporary workers beginning in April 2011. The CO concedes that Winrock's CY 2010 payroll records indicate a peak load need of four additional temporary workers beginning in April, bringing Winrock's total peak employment to nine workers—one permanent and eight temporary. Yet, because Winrock's application failed to explain why the operation now needs *twelve* temporary workers (an increase of at least four temporary workers from CY 2010), the CO argues that its denial of Winrock's labor certification should be affirmed. Even though this may be an adequate basis for the CO to base its denial, the CO never provided Winrock an opportunity to supplement the record in response to this particular line of reasoning, in other words, to explain why it now needs four more temporary workers than it needed last year. Consequently, fundamental fairness dictates that this matter be remanded to the CO to allow Winrock an opportunity to respond.

**ORDER**

Based on the foregoing, IT IS ORDERED that the Certifying Officer's denial of labor certification in the above-captioned matter is VACATED and that this matter is returned to the CO for additional proceedings consistent with the above.

For the Board:

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LINDA S. CHAPMAN  
Administrative Law Judge