



Issue Date: 09 December 2010

OALJ Case No.: 2011-TLC-00068

ETA Case No.: C-10316-25462

In the Matter of

GEORGE BROWN,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On December 2, 2010, George Brown (“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 2, 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 12, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from George Brown (“the Employer”) for temporary labor certification for two (2) “Farm Worker Farm & Ranch.” AF 76-90.¹ The Employer stated that it had a seasonal temporary need for the farm workers from January 1, 2010

¹ Citations to the 90-page Administrative File will be abbreviated “AF” followed by the page number.

to October 15, 2010² to feed cattle, calve the cattle, and care for the cattle in the spring. AF 76.

The Employer also indicated that the employees:

will help with the cleaning of the barns and regular maintenance of the machinery and buildings. Employees will help move cattle out to the pastures in June and move them back home in September for the winter months. During the time that the cattle are at the pastures a weekly routine is set up to check each pasture for minerals, water conditions and health of the animals. Repairs of the fencing will have to be done. This activity demonstrates the temporary need workers.

AF 76. In its application, the Employer listed the job duties are listed as:

The employees will operate tractors with loaders to feed cattle & grind hay. They will assist with the calving of the cattle and care for the newborns. Calving starts February and ends in May. Employees will administer vaccines & pour ons for routine care of the animals. They will operate vehicle[s] designated for towing equipment such as feed carts, trailers, and flatbeds. The Employees will be responsible for minor repairs and routine maintenance of machinery. Repairs of corrals and fencing will have to be done along with daily cleaning of the barns. They will drive trucks (2 ton) to deliver feed, supplies to designated locations. Moving cattle to the pasture is done the first part of June (weather permitting). All fencing & repairs will have to be done. Each pasture will have to be checked for minerals, water conditions, health of the animals on a weekly basis. Employees will plant, cut & bale forge for the cattle along with hauling bales to certain locations. Planting will be done in May & June. Harvesting of the forge will be done in August through September.

AF 78. On November 16, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the job opportunity was not seasonal as defined by 20 C.F.R. § 655.103(d) because the job duties include the care and feeding of livestock, including cattle, which is presumed to occur on a year-round basis.³ AF 59-63. Therefore, the CO required the Employer to submit a written explanation documenting the temporary need, as well as submit summarized payroll reports from 2009. AF 62. The CO required that the payroll reports summarize the Employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment, and be signed and certified by the Employer. AF 62.

² It appears that the CO understood this to be a typographical error, and that the Employer intends to hire two workers from January 1, 2011 to October 15, 2011.

³ Additionally, the CO found four other deficiencies, not at issue on appeal.

On November 23, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 6-23, 27-56. In its statement of seasonal need, the Employer stated that:

I, George Brown and my wife Connie feed [and] breed cows over the winter months. I am looking for extra workers for this up coming winter because [my] wife Connie is 63 years old and is experienc[ing] health issues. We have had local help in the past and it is extremely hard to find workers at this time. The workers will feed cattle on a daily basis and calve out 400 head of cattle.

AF 39. Additionally, the Employer provided its 2009 payroll, which showed that it had two workers in 2009, one worker that worked from May until August, and the other that worked from August to October. AF 40-41.

On November 26, 2010, the CO denied temporary labor certification because the Employer had not established that it had a seasonal need as required by 20 C.F.R. § 655.103(d). AF 1-3, 24-26. Specifically, the CO found that the Employer's dates of need cover all four seasons, although the Employer indicated only a need for winter months. AF 3. Additionally, the CO noted that the Employer's payroll reports demonstrate that the Employer did not hire any workers during the winter months in 2009. AF 3. 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)).

Based on the job duties listed on the Employer's application, it appears that the Employer has a mix of both seasonal and year-round work for which it needs additional workers. While the Employer's need for workers in order to assist with calving is tied to an event or pattern and

⁴ In its appellate brief, the Employer explains that it needs additional workers this year because Ms. Connie Brown, the Employer's wife, cannot do the physical labor because she had a forearm fracture and related surgery in June, 2010. Because administrative review must be made on the basis of the written record and cannot include new evidence submitted on appeal, I am unable to consider this new evidence in making a determination in this case. 20 C.F.R. § 655.171(a).

lasts from February to May, the Employer also needs workers for year-round work, including cleaning, feeding the cattle, and repairing corrals and fencing. Given that the Employer's need for these duties is year-round, it is not properly classified as seasonal. *See e.g. North Star Dairy*, 2010-TLC-86 (Aug. 10, 2010).

Accordingly, the Employer has failed to demonstrate that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d) from May to October, and therefore, 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:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge