

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 December 2010

OALJ Case No.: 2011-TLC-00091

ETA Case No.: C-10319-25497

In the Matter of

LOUISIANA CENTER FOR EQUINE REPRODUCTION, LLC
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On December 15, 2010, Louisiana Center for Equine Reproduction, 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. § 655.115(a) (2009). On December 21, 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 15, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification. AF 35-57.¹ On November 15, 2010, the CO issued a Notice of Deficiency (“NOF”), 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.² AF 21-25.

The CO found two deficiencies in the Employer’s application regarding its temporary need. First, the CO found that the Employer’s dates of need changed from its previous certification for December 28, 2009 to July 31, 2010. The CO required the Employer to provide a detailed explanation of why its dates of need have significantly changed. AF 23. The CO also found that the job duties provided in the Employer’s application include the care and feeding of horses, which is presumed to occur on a year-round basis. AF 23. To remedy this deficiency, the CO required the Employer to submit a written explanation documenting the temporary need for H-2A workers and a summarized payroll report from 2009 for farm workers and laborers. AF 24. The summarized payroll report was to identify the total number of workers, total hours worked, and total earnings, separated by month and by permanent and temporary employment. AF 24.

On November 22, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 13-20. In its statement of temporary need, the Employer stated that they “do not board or perform artificial insemination procedures as a year around activity within [their] horse breeding operation.” AF 18. The Employer asserted, “this is common within the horse breeding industry as mare[s] only cycle for a portion of the year.” It further stated, “horse owners choose to avoid the months of November and December for breeding purposes as the gestation period is roughly one year and it is deemed best not to have her fowl born in these winter months.” *Id.* The Employer asserted that last season the anticipated dates of need were requested through July 31, but that due to new innovative technology, they have been able to extend the breeding cycle through the late fall. The Employer attached a payroll summary for 2009 and 2010, which shows that no employees were hired until 2010. AF 19. It shows that the Employer employed three workers from February through June and lists the total hours worked and earnings received during these months.

¹ Citations to the 57-page Administrative File will be abbreviated “AF” followed by the page number.

² The CO also identified a deficiency in the contents of the job order, which is not at issue on appeal. AF 9-12.

On December 6, 2010, the CO denied temporary labor certification because the Employer failed to establish how this job is temporary or seasonal in nature or that the Employer has a temporary need. AF 9-12. The CO found that the Employer did not justify why its dates of need changed from its established season of December through July to its current request of January through October by providing evidence that the need is tied to a certain time of year or an event or pattern. AF 11. The CO also noted that the Employer's explanation that new reproductive technology allows it to be more flexible with the breeding season goes against its argument that temporary workers are tied to a certain time of year. Regarding the payroll records, the CO noted that the submitted payroll records do not show either permanent or temporary workers beyond the established dates of need and they do not reflect that Dr. Eddie worked after business hours as the Employer explained. AF 12. 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). 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 asserted that the only difference in its dates of need from last year is that they desire to extend their application. The Employer asserted that breeding for ten months is a "widely known industry standard" and explained that it was attaching print-outs from the DOL website which show two other breeding farms that use the H2-A program for a ten-month duration. AF 4. The Employer failed to attach these documents to its request for review. However, even if the Employer had attached these documents, the regulations provide that administrative review must be made on the basis of the written record, and cannot include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Thus, I am unable to consider any additional evidence the Employer submits with its request for review.³

³ Even if this documentation were to be considered, the CO determines temporary need based on supporting information provided by the individual employer, not the "widely known industry norm."

The CO properly found that the Employer does not have a temporary seasonal need for workers. The Employer's explanation that modern reproductive technology enabled it to extend the breeding cycles of mares throughout the fall did not justify changing its dates of need from the previous year. Further, given the flexibility this technology provides and the fact that January and February are also winter months, the Employer has failed to prove that its need is tied to a certain time of year or by an event or pattern. Additionally, the Employer's payroll summary report did not show either temporary or permanent workers beyond the dates of need and it did not reflect the work the Employer attributed to Dr. Eddie. Thus, the Employer's payroll records do not support its requested dates of temporary need.⁴

Based on the foregoing, the Employer has failed to meet its burden to establish that it has a seasonal need for H-2A workers from January 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

Washington, D.C.
WSC: ECB

⁴ The CO also noted the discrepancy between the Employer's request for certification of five H2-A workers this year and the payroll records that showed only three temporary farm workers the previous year.