



Issue Date: 18 January 2011

OALJ Case No.: 2011-TLC-00120

ETA Case No.: C-10347-25792

In the Matter of

MISSOURI RIVER FEEDERS,
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 January 3, 2011, Missouri River Feeders, 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 January 10, 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. § 655.171(a).

STATEMENT OF THE CASE

On December 13, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for eight (8) “Farmworker General Crop.” AF 64-75.¹ The Employer stated that it

¹ Citations to the 84-page Administrative File will be abbreviated “AF” followed by the page number.

had a seasonal temporary need for the farm workers from February 1, 2011 to November 1, 2011. AF 64. The Employer stated the job duties as follows:

Drives trucks and tractors and performs variety of crop raising duties as directed on general farm. Plows, harrows and fertilizes soil and cultivates, sprays and harvest crops using a variety of tractor drawn machinery. Operates, repairs and maintains farm implements and mechanical equipment. Trucking will be only for farming purposes.

AF 66. The Employer expanded on its need in a letter, submitted with its application:

We farm and need these men from the first of February to the end of November, to help with getting the equipment ready for the planting season and to plow, harrow and fertilize the fields to make ready for planting 8000 acres that consist of corn, soybeans, wheat and alfalfa. Then as the crops come up, we will cultivate them and put up the hay and then harvest the crops. Then get the fields ready to plant next year. Also, [the workers] will have to help with maintaining and repairing equipment.

AF 63. On December 17, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer’s previously established dates of need were from July 27, 2009 through May 27, 2010, and therefore, the Employer did not establish how this job was temporary and seasonal in nature under 20 C.F.R. § 655.103(d). AF 38-42. The CO requested that the Employer provide a detailed explanation of why the Employer’s dates of need have significantly changed from its established season of July through May to its current request of February to November, and required the Employer to explain why its job opportunity is seasonal or temporary. AF 40. Additionally, the CO required the Employer to amend page 5 of the Attachments to ETA Form 790 under “Other,” to reference the correct assurances and obligations of the H-2A employers under the 2010 regulations, found at 20 C.F.R. § 655.135.²

The Employer responded to the NOD on December 22, 2010. 24-37. The Employer submitted a statement of temporary and seasonal need, asserting that:

With today’s farming and ranching economics and the changing weather over the past few years, we have had to make timing adjustments to our farming and ranching cycles to coincide better with the cattle and crop markets and bring better prices for our products. One of the changes that we have had to make has been our calving season. Our calving season runs from the end of January through the end [of] May. We are going to be starting earlier this year to try and have more of the calving done before the farming season starts. During this time

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

period, there is a lot of very labor intensive work that has to be done to ensure that the calving operations are performed successfully. There has to be someone watching the cattle 24 hours a day, 7 days a week to make sure all of the calving goes smoothly. There are many things that they have to watch during this time such as: making sure calves born outside are brought inside quickly, making sure the calves get the colostrums and continue feeding, making sure the cows don't have trouble birthing and helping them if they do have trouble, tagging, vaccinating, and some of the sick calves have to be hand fed until they are healthy enough to return to their mother.

In late March we begin our farming operations. Due to the change in commodity prices, we have changed our planting times to get better prices for our wheat and corn. We also recently purchased an additional 2000 acres of farmland. This is also a 24 hour a day, 7 day a week operation as we need to get all of this done as quickly as possible as we have many variables that can put a stop to the process quickly. The main challenges are the weather cooperating and the equipment running smoothly. We plant mainly corn and wheat. In March we start chiseling the fields and laying down fertilizer. We then have to get everything planted and after that is done there is still spraying, fertilizing, and cultivating that has to be done. Also, we didn't get all of our fall tillage done due to weather conditions last fall, so that much more will have to be done this spring.

Another operating that we do that takes labor is irrigating. We have pivot irrigation and flood irrigation. The flood irrigation has to be checked every few hours and when the section of the field being irrigated is finished, the next section has to be started. This has to be watched at all hours of the day and switched on time as too much water on the field will cause damage to the crops. The pivots also need to be check[ed] regularly to ensure that they are operating correctly.

AF 36. On December 30, 2010, the CO denied temporary labor certification, finding that the Employer had not justified changing its previously established dates of need. AF 20-23. Specifically, the CO found the Employer's justification for its dates of need inconsistent with the job duties listed on the Employer's application, because while the job duties did not mention calving, the Employer's response to the NOD stated that its season was beginning earlier due to the calving season. AF 23. Secondly, the CO found that the Employer failed to amend page 5 of the Attachments to ETA Form 790 under "Other," to reference the correct assurances and obligations of the H-2A employers under the 2010 regulations. AF 23. 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).

The Employer’s statement of temporary and seasonal need relied heavily on the fact that the Employer had to move up its calving season from the end of January through the end of May. However, the Employer did not include any job duties related to calving in its application. Moreover, the Employer’s statement of temporary and seasonal need stated that its farming operations begin in March. As the job duties in this application relate to farming operations, I find that the Employer has failed to demonstrate a seasonal and temporary need for 8 farmworkers from February 1 to November 1, 2011.

Based on the foregoing, the Employer has failed to demonstrate that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d), 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