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Issue Date: 15 March 2011

OALJ Case No.: 2011-TLC-00325

ETA Case No.: C-11045-27687

In the Matter of

SOUTHALL FARMS,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **STEPHEN L. PURCELL**
Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On March 7, 2011, Southall Farms (“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 March 8, 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 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 February 14, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification. AF 25-46.¹ On February 18, 2011, the CO issued a Notice of Deficiency ("NOD"), 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 20-24.

The CO found that the Employer's period of intended need of employment is from April 1, 2011 through February 28, 2012, which is 27 days over the 10 month maximum amount of days for H-2A labor unless under special provisions. The CO also found that the job duties provided in the Employer's application include the care of cattle and farm maintenance, all of which may occur on a year-round basis. AF 22. To remedy this deficiency, the CO required the Employer to submit a written explanation documenting the temporary need for H-2A workers and summarized payroll reports for a minimum of one (1) previous calendar year (2010) for Farmworkers, Farm and Ranch Animals. The CO specified that the reports must be a summarization of the employer's individual payroll records by month, and, at minimum, identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment. AF 22.

On February 23, 2011, the Employer responded to the NOD and submitted the requested documentation. AF 13-19. Regarding its explanation of temporary need, the Employer stated:

Working cow herd refers to a broad list of activities including feeding, tagging for ID organizing and separating, preventative medication, weaning, birth management and assistance, pasture rotation, vaccinating, parasite control, water quality and quantity maintenance. During the winter months due to stress of colder weather, inclement conditions, and cows in later stages of pregnancy, activities are primarily limited to feeding and basic maintenance. Starting with calving season in early spring, the activities aforementioned continue until fall with a requirement of more people. In addition the

¹ Citations to the 46-page Administrative File will be abbreviated "AF" followed by the page number.

² The CO also identified four other deficiencies, which are not at issue on appeal. AF 22-24.

associated hay harvest is seasonal from April to December. Spreading of manure is done in the summer months due to requirement for drier conditions. Farm storage and building maintenance must be done in summer months when buildings are not full of winter feed supplies. Fencing repair and maintenance is done in summer months when weather is more suitable. Brush hogging, pasture maintenance, planting, and other improvements can only be done in growing season, from April to November.

AF 14. The Employer also submitted a payroll summary for the period from January 2010 to December 2010. AF 14. This summary shows that the Employer employed 0-2 permanent workers each month and 2-3 temporary workers in March through May and 7-10 temporary workers in January-February and June-December. The summary also lists the total hours worked and earnings of each worker during these months, showing a significant increase in the months where more workers were employed.

On March 1, 2011, 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 10-12. In analyzing the summarized payroll records the Employer submitted, the CO found that there was no apparent difference between the duties assigned to temporary versus permanent workers. He further asserted that the duties referencing livestock are performed on a year-round basis. 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 payroll summary the Employer submitted in response to the NOD shows that the Employer hires from 2 to 10 temporary employees throughout the year, depending on the month. As the CO asserted in his appellate brief, the farm indisputably operates year round and nothing

in the application supports the size or scope of the requested need for 15 workers. According to the payroll summary, the Employer never employs more than 12 workers and it employs this many workers only two months of the year. Further, the Employer does not explain how it operates with only 2-3 workers in February and March.³

The CO properly found that the Employer does not have a temporary seasonal need for workers. The Employer has failed to meet its burden to establish that it has a seasonal need for H-2A workers, 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**.

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Stephen L. Purcell
Chief Administrative Law Judge

³ Although the Employer further explains its temporary need in its request for review, the H-2A 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 submitted with its request for review.