



Issue Date: 18 January 2011

OALJ Case No.: 2011-TLC-00121

ETA Case No.: C-10322-25524

In the Matter of

MICHAEL W. DICKINSON, INC.,
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 4, 2011, Michael W. Dickinson, Inc. (“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 November 18, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for six (6) “Farm Workers, Farm & Ranch Animals.” AF 51-59.¹ The Employer

¹ Citations to the 68 page Administrative File will be abbreviated “AF” followed by the page number.

stated that it had a seasonal temporary need for the farm workers from February 1, 2011 to December 1, 2011. AF 51. In its statement of temporary need, the Employer stated, “Employer seeks approval to hire workers on a temporary seasonal basis to provide services for employers, horse racing, breeding, and training operation. Temporary need is based on weather conditions and other temporary work on a horse farm.” AF 51. The Employer stated the job duties as follows:

Handling purebred equine stock, catch, halter and tie horses, groom horses, including bathing, brushing hoof care and clipping, clean stalls, sweep barns, water and feed, mow and stack hay. Job requires knowledge of safe handling of equine stock, lift and handle 50 pounds. Hay will need to be loaded, stocked and checked for mold.

On November 24, 2010, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer failed to establish temporary need as required by 20 C.F.R. § 655.103(d) and failed to establish that the job opportunity consisted of agricultural labor or services as required by 20 C.F.R. § 655.103(c).² AF 23-28. In order to demonstrate that the Employer’s need is temporary, the CO required the Employer to submit a written explanation documenting the temporary need and summarized payroll reports that identify the total number of permanent and temporary workers, separated by month and total hours worked. AF 25. Additionally, the CO found that because the job opportunity involves racing horses, it does not meet the definition of agricultural labor or services, and therefore, the CO required the Employer to remove all non-agricultural activities from the job description, provide a written statement describing how the activities are agricultural labor or services, or withdraw the application and file under the H-2B program. AF 25-26.

On December 7, 2010, the Employer responded to the NOD. 6-22. In its statement of temporary need, the Employer asserted that:

Michael Dickinson’s company maintains a horse farm for 50-60 horses. The temporary need arises from the fact that our main season runs from April 1 through November 30. Horses are then turned out in paddocks or returned to their owners’ farms to “vacation” for 6 to 8 weeks. They typically return to Tapeta Farm no earlier than the beginning of February. We have enclosed a Summarized Payroll Report, as requested, for Calendar Year 2009 that demonstrates this temporary need.

² Additionally, the CO found four other deficiencies, not at issue on appeal. AF 4-5, 25-27.

AF 13. The Employer also submitted a summarized payroll report for the position of “Feeder/Scraper,” showing that the Employer had no permanent employees for that position in 2009 but that it had four temporary employees from May to November and three temporary employees in December. AF 15. Further, the Employer stated that all non-agricultural job requirements had been removed from the Employer’s application. AF 13.

On December 23, 2010, the CO denied temporary labor certification, finding that the Employer had not established a temporary need because the job duties occur on a year-round basis and the Employer did not demonstrated why it needs workers to begin in February. AF 2-6. Secondly, the CO found that the Employer failed to explain why the new activities meet the definition of agricultural labor or services under 20 C.F.R. § 655.103(c). AF 4. 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).

The statement of temporary need that the Employer submitted with its response to the NOD indicated that its “main season” runs from April 1 through November 30. AF 13. The Employer’s 2009 payroll records show that it employed four temporary workers from May to November and three workers in December. AF 15. Although the Employer has presented new evidence on appeal why it did not hire workers until April last year, this new evidence is beyond my scope of review and I cannot consider it. 20 C.F.R. § 655.171(a). The Employer clearly stated in its statement of temporary need that its season runs from April 1 through November 30,

and therefore, I find that the Employer has not demonstrated a temporary need for six workers beginning February 1.³

Based on the foregoing, I find that the CO properly denied certification under 20 C.F.R. § 655.103(d).

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

³ Because I find that the Employer has not demonstrated a temporary need beginning February 1, I need not reach the issue of whether the job opportunity consists of agricultural labor or services as required by 20 C.F.R. § 655.103(c).