

**U.S. Department of Labor**

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**Issue Date: 04 January 2011**

**OALJ Case No.: 2011-TLC-00103**

**ETA Case No.: C-10330-25621**

*In the Matter of*

**TIM AMES,**  
*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 22, 2010, Tim Ames (“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 December 27, 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 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 26, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for one (1) “Farmworkers, Farm and Ranch Animal.” AF 47-70.<sup>1</sup> The Employer stated that it had a seasonal temporary need for the workers from January 1, 2011 to April 30, 2011. AF 50. The Employer also submitted a statement of temporary need with its application. In its statement, the Employer stated:

This is a year round livestock operation, but the need for a foreign worker is only for the winter and spring of the year, as you will see by my explanation.

The need for foreign labor in my operation continues to increase due to the changing US workforce becoming more of a white-collar service industry. The result is that American farm workers are so difficult to find. I have recruited and continue to recruit local workers to fill this position with no success. I try to recruit US workers through the Local Job Service agency, word of mouth, and the local media to no avail.

Our Livestock operation of Farm/Ranch unit requires additional workforce in the winter and early spring months of the year. During this time of year we are required to feed the cattle with hay and feed supplement. Just this process requires 6 or more hours per day. The feed lots and holding pens require daily cleaning as well as the water tanks. While the cattle are confined in this area they also require close inspection for diseases or injuries. Many days we are required to plow snow before we can begin to feed and take care of the livestock.

During the spring of the year we begin to calve and at this time of the year the livestock are under 24 hour supervision so that if they have trouble during the birth process, someone is there to assist. After the cows calve we separate them from the herd so that the calves are not lost or injured by the remaining herd. We also vaccinate the calves and keep them under watch for any diseases.

This is a highly labor intensive period in our livestock operation. It requires extra people as it really is the 24 hours per day/7 days per week. In April given the weather conditions, we take the livestock to our late spring and summer grazing feeding areas.

AF 48. On December 3, 2010, 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.<sup>2</sup> AF 29-37.

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<sup>1</sup> Citations to the 70-page Administrative File will be abbreviated “AF” followed by the page number.

<sup>2</sup> The CO also identified five other deficiencies, which are not at issue on appeal. AF 31-34, 11-12.

The CO found that the job duties provided in the Employer's application include the care and feeding of livestock, including cattle, which are presumed to occur on a year-round basis. AF 32. 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 "Farmworkers, Farm and Ranch Animals." 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.

On December 13, 2010, the Employer responded to the NOD and submitted the requested documentation. AF 13-28. The Employer submitted a payroll summary for the period from December 2008 through November 2010. AF 22-23. The payroll records show that the Employer hired two workers from May 2009 to November 2009 and May 2010 to November 2010 and did not hire any workers from December 2008 to April 2009 and December 2009 to April 2010. AF 23. In its statement of temporary need, the Employer stated that it is applying for winter help for the first time because it has become too much for him to do on his own, and his two summer employees are not available during the winter months. AF 26.

On December 17, 2010, the CO denied temporary labor certification because the Employer failed to establish a seasonal need for a foreign worker, as required by 20 C.F.R. § 655.103(d). AF 11-12. The CO found the job duties for the farmworker position include the care and feeding of livestock, which are presumed to occur on a year-round basis, and that the Employer failed to explain why in previous years the Employer did not have work from January to April. AF 12. The Employer's appeal followed the CO's denial.

### **Discussion**

The H-2A regulations provide, in relevant part, that "[t]he criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis." 20 C.F.R. § 655.161(a). 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 explaining the meaning of temporary need under the H-2 program, "[i]t 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).

Therefore, the inquiry of whether an employer has established eligibility for a seasonal worker under the H-2A program is whether employer’s need for the services to be performed is seasonal, *i.e.*, tied to a certain time of year. While the Employer in this case has demonstrated that it needs a worker during winter months because its two summer workers are unavailable, and because the work load is too much for the Employer to handle alone, the Employer has a year-round need for the duties to be performed. The Employer’s records show that it hires other temporary workers to do perform substantially the same services from May to December. Therefore, because the Employer has a year-round need for services to be performed related to its livestock operation, it does not have a temporary seasonal need. 20 C.F.R. § 655.103(d).

Accordingly, the CO properly denied certification because the Employer failed to demonstrate that the employment is seasonal in nature.

### **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.