



Issue Date: 03 February 2014

OALJ Case No.: 2014-TLC-00025
ETA Case No.: H-300-13337-320612

In the Matter of

DEVIN KIESCHNICK,
Employer

Certifying Officer: Chicago Processing Center

ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“the Department”) at 20 C.F.R. Part 655.

The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department. 8 U.S.C. 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On December 3, 2013 Devin Kieschnick (“the Employer”) applied for H-2A certification for one “Farm Worker.” Appeal File (“AF”) 30. The application stated the following about the Employer’s temporary need and the job duties:

Crops: Wheat, Peanuts, Cotton and Alfalfa. Will repair and do fence, maintain farm equipment, drive a 8830, 9700 Ford Tractor, 986 International tractor. Will drive 1987 Chevy Pick-up, plow on farm to irrigate, daily hoeing or weeding activities, and will do some basic welding. Education for welding is not necessary.

AF at 30, 32. The Employer indicated that the period of intended employment would begin on February 1, 2014 and end on December 1, 2014. *Id.* The nature of temporary need was “seasonal.” *Id.*

The Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) on December 9, 2013 in response to the Employer’s application. AF at 14. The CO noted that, although the application indicates the employer’s dates of need are from February 1, 2014 through December 1, 2013, the Employer’s previous certification was for March 4, 2013 through January 1, 2014. *Id.* at 16. The CO required the Employer to explain why its job opportunity is seasonal or temporary and to provide in detail as to why its dates of need have significantly changed from its

established season of March through January to its current request of February through December. *Id.*

The Employer submitted a response to the NOD on December 13, 2013. AF at 12. The Employer stated:

Modification to meet the requirements on regulation 20 CFR 655.104(d):
Our season here in Wilbarger County starts in March and it ends until about November, and by the 1st week or the middle of the December the worker goes back to his country. The reason why the date of need changed is because by the time I have meet with all the requirements and regulations required by the Workforce Commission and CNPC, and the approval from the Department of Homeland Security (INS), and the date given by The American Consulate to interview the worker, usually the worker don't get here until a month later of the date is said in the application, and the worker always leaves by the 1st or middle of December.

The seasonal or temporally need for the job is explained has follow:

Winter wheat is planted from mid-August through October, and the harvest of the winter wheat is from mid-May to mid-July. There are also other crops that need to be taken care of like: peanuts, cotton and alfalfa.

Id.

The CO issued a denial letter on December 20, 2013. AF at 8. The CO concluded that the Employer did not sufficiently address the deficiency noted in the NOD. *Id.* The CO noted that the Employer's previous certification was for March 13, 2013 through January 01, 2014 and the Employer's 2012 and 2013 filings indicated dates of need from the middle of March to middle of January. *Id.* According to the CO, this pattern indicates that the Employer has a year-round need for this job opportunity. *Id.* Acknowledging the Employer's response, the CO further explained its decision:

If the employer's season starts in March and ends in the end of November as stated by the employer, the employer has failed to establish a constant period of need in that the employer's current and previous applications show changes in the start and end dated of need which range from 2 weeks to one month. The employer has not adequately explained the reason for changes in its dates of need, therefore has not established how its need is seasonal.

Moreover, Departmental regulations set forth at 20 CFR sec, 655.103(d) indicate that a job opportunity is "of a seasonal nature where it is tied to a certain time of year by an event or pattern...and requires labor levels far above those necessary for ongoing operations." Because the employer's requested dated of need are premised not on the seasonal changes to its business needs, but rather reflect

anticipated procedural delays, they are incompatible with the requirements of the H-2A program.

AF at 11. The Employer requested expedited review of the decision on January 14, 2012. AF at 1. According to the Employer:

I can I sure you that the job opportunity is seasonal, attached is the letter of denial and the enclosure for denial letter. According to the pattern listed in the enclosure letter of denial, the dates of need are in March, that's when the job opportunity begins around this county of Wilbarger, on the year of April 2010 that year I applied 60 days to date of need but it came back because it have change to 75 days, so the date of need change too.

Please accept my apologies, but I did not intent to reflect the time of need on the application from 02-01-2014 to 12-01-2014 because of the delays or even complaint, thinking in the past dates, thinking in the past dates, if the date of need set in the application in on March but the worker don't get to the job a month later and leaves on December, that's why this time I requested the time of need from 02-01-2014 to 12-01-2014. I just want to have the worker by the time of need that is on March-December.

Id. at 2.

On January 27, 2014, I issued an order establishing a briefing schedule, setting the deadline for submitting briefs as January 29, 2014. The Solicitor submitted a brief on January 29, 2014. The Employer has not submitted a brief.

DISCUSSION

In order to be eligible for H-2A temporary labor certification, an employer must establish that it has a need for agricultural services or labor to be performed on a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The only issue before me is whether the Employer has established a temporary or seasonal need for the position requested in its application. 20 C.F.R. § 655.103(d) defines "temporary or seasonal nature" as:

For the purposes of this subpart, 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. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

"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." *Rolling Meadows Farm, LLC*, 2012-TLC-00007, slip op. at 4-5 (December 6, 2011). In order to determine if the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this

time of the year differs from other times of the year. *Trader's Rest Farm, Inc.*, 2012-TLC-00045 (February 29, 2012). Employers seeking temporary labor certification should explain how seasonal differences lead to a differing seasonal need for labor. *Vermillion Ranch Limited Partnership*, 2014-TLC-00002, slip op. at 8 (December 5, 2013).

The Solicitor argues that the Employer has failed to establish the period of temporary seasonal need asserted in the application and in the NOD response. Consequently, the CO demonstrated that her processing of the Employer's application conformed to the requirements of the H-2A program and that there is a reasonable basis for her decision to deny H-2A certification.

According to the Solicitor, the Employer has articulated a rationale for seasonal need that is inconsistent with its "specified season" because "rather than focusing on when the employer needed to have work performed, [the Employer] has explicitly based its requested date of need on completely unrelated concerns about the time the Department of Homeland Security and the American Consulate take to complete their functions." As a result, the CO could not conclude that the Employer's need during the season differs from its need during other times of the year.

The Solicitor points out that the Employer requested a period of need starting on February 1, 2014 even though the Employer declined to specify seasonal duties that it needs to have performed in that month. Rather, the Employer specified that the duties would begin in March 2014 and that the requested February start date was selected because March was "when the job opportunity begins..." and while the requested period of need ends on December 1, 2014, the NOD response and the Appeal state that the job opportunity extends into mid-December. According to the Solicitor, these discrepancies, taken together with the Employer's filing pattern, reinforce the CO's concern that the Employer has not established a temporary seasonal period of need for the job opportunity.

I find that the CO erred in denying the Employer's application on the grounds that it articulated a rationale for seasonal need that is inconsistent with its specified season. It is true that the period of intended employment identified in the Employer's application (02/01/2014 to 12/01/2014) does not correspond to the period of temporary need identified in the Employer's response to the NOD and the Employer's appeal (03/01/2014 to 12/01/2014). *See* AF 2, 12. However, the Employer candidly explained in its response to the NOD that it specified a start date of February rather than March because it anticipated procedural delays resulting in the worker actually starting a month after the start date in the application.¹ While the Employer's application and response to the NOD do not support a seasonal need beginning in February, the Employer in its response to the NOD did offer an explanation for a seasonal need beginning in March and ending on December 1.² The CO could have issued a partial certification pursuant to

¹ Although not addressed by the Solicitor in its brief, the CO also noted that the Employer's current and previous applications show changes in the start and end dates of need which range from 2 weeks to one month, and found that the Employer did not adequately explain the reason for changes in its dates of need, therefore not establishing how its need is seasonal. AF at 10-11. The Employer did not assert that its seasonal period has changed from past years; it only explained that it requested an earlier start date than usual for the worker to anticipate procedural delays. It is unclear if the Employer's explanation also applies to its decision to request an earlier end date than usual.

² The Solicitor mischaracterizes the Employer's response to the NOD in stating that "while the requested period of need ends on December 1, 2014, the NOD response and the Appeal state that the job opportunity extends into "mid-

§ 655.165, reducing the period of need to March 1, 2014 to December 1, 2014 based upon the new information it received from the Employer. The CO could also have interpreted the Employer's response to its NOD as a modified application with revised dates for the period of seasonal temporary need (a start date of March 1, 2014 rather than February 1, 2014), since the Employer did indicate that its response should be construed as a "Modification to meet the requirements on regulation 20 CFR § 655.104(d)." AF at 12.

ORDER

In light of the foregoing discussion, it is hereby **ORDERED** that this matter is remanded to the Certifying Officer for consideration of whether the Employer has established a temporary seasonal need for the period of March 1, 2014 to December 1, 2014.
SO ORDERED

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

December," reinforcing the CO's concern that the Employer has not established a temporary seasonal period of need for the job opportunity. AF 2 and 12. The Employer, in its response to the NOD, clearly stated that the period of seasonal need "ends until about November." AF 12. "Mid-December" (or first week of December) is mentioned only as the time when "the worker goes back to his country," not when the season ends. *Id.*