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Issue Date: 26 November 2013

CASE NO.: 2014-TLC-00004

OALJ NO.: 13269-843401

IN THE MATTER OF

LANCASTER TRUCK LINE,
Employer

Certifying Officer: Chicago National Processing Center

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

This matter involves a request for certification of non-immigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended,¹ and the implementing regulations promulgated by the Department of Labor.² This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration, and the written arguments submitted by the parties. Pursuant to federal regulations at 20 C.F.R. Section 655.171(a), evidence considered was limited to that which was before the Certifying Officer (“CO”), with no new evidence submitted on appeal. In expedited administrative review cases, the administrative law judge has five working days after receiving the AF to issue a decision on the basis of the written record.³ The AF for this case was received on Tuesday, November 19, 2013. Employer chose to submit its request for administrative review as its brief, and the CO submitted his brief on November 21, 2013.

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

² 20 C.F.R. Part 655, Subpart B.

³ 20 C.F.R. § 655.171(a).

BACKGROUND

On September 13, 2013, Employer requested temporary labor certification for three “agricultural equipment operators” during the winter period, December 1, 2013, through April 30, 2014, under the name “Lancaster Truck Line.”⁴ On October 21, 2013, an email was sent from the Chicago National Processing Center to Employer, detailing five deficiencies in its application.⁵ One of these was that the job opportunity did not seem to be temporary or seasonal in nature, based on Employer’s requested dates of need and previously established dates of need. The Notice of Deficiency (NOD) stated that Employer must provide in detail why its dates of need had significantly changed from an established season of July through December (for an application certified to Lancaster Truck Line, LLC in 2011) to its current request of December through April.⁶

Employer responded to the NOD on October 23, 2013.⁷ In it, Employer stated that the 2011 application (certified for July 2011 through December 2011) was for a separate business operated in conjunction with his father under the name Lancaster Truck Line LLC. Employer averred that in 2013, an H-2A application was certified for Lancaster Farms, but was not included in the history of applications in the NOD. This filing allegedly represented Employer’s decision to separate from his father’s harvesting operation. Employer stated that the application at issue, filed under “Lancaster Truck Line,” represents a different legal entity that operates during the winter season and focuses on transporting grain, while the “Lancaster Farms” application represents the summer crop farming operation.

The Certifying Officer (“CO”) denied Employer’s application on November 1, 2013, stating that Employer had failed, in his response to the NOD, to establish that its need is seasonal or temporary in nature. Employer’s applications were all for agricultural equipment operators in the same areas of intended employment. “Although the employer filed each application with a different employer name: Lancaster Harvesting, Lancaster Truck Line LLC and Lancaster Truck Line, they all share the same Federal Employer Identification Numbers, the same business address and are both [*sic*] owned by Jeff Lancaster.”⁸ Additionally, the CO found that the current and previous applications

⁴ AF 68.

⁵ AF 28-35.

⁶ AF 31.

⁷ AF 22-24.

⁸ AF 17.

included similar job duties, all containing “a mixture of harvest work and machine operation/maintenance.” The CO concluded that Employer has a full-time need for agricultural equipment operators.

On November 6, 2013, Employer requested administrative review of the CO’s denial. In its petition, Employer argued that the explanations provided to the CO in response to the NOD were sufficient. Employer restated the circumstances of the several previous applications, and explained that he submitted two separate applications under two different legal entities to cover his summer and winter farming operations, which he claims have two different focuses: generating a crop (summer), and transporting the crop to market (winter). Employer was frank about separating the legal entities of his operation in order to comply with the H-2A program’s seasonal permitting restrictions, but argues it is his right to change his dates and repurpose his legal entities to meet his needs, and that the two separate seasons with their independent work requirements support multiple yearly H-2A applications.

Law

An employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program.⁹ To be eligible for H-2A labor certification, the employer must demonstrate a need for agricultural services or labor on a temporary or seasonal basis, and thus the relevant inquiry is not whether the job is temporary, but if the employer has shown that the need is temporary.¹⁰ That is, it is appropriate to determine “if the employer’s needs are seasonal, not whether the duties are seasonal.”¹¹

[E]mployment 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.¹²

⁹ 20 C.F.R. § 655.161(a).

¹⁰ See *Cressler Ranch Trucking, LLC*, 2013-TLC-00007 (Nov. 26, 2012).

¹¹ *D&G Frey Crawfish, LLC*, 2012-TLC-99 (Oct. 19, 2012), quoting *Sneed Farm*, 1999-TLC-7 (Sept. 27, 1999).

¹² 20 C.F.R. § 655.103(d).

In *the Matter of Katie Heger*, the ALJ affirmed the CO's denial based on the employer's failure to demonstrate that its need was temporary or seasonal.¹³ There, the ETA received an application from the employer seeking temporary labor certification for December 1, 2013 through February 15, 2014. The CO noted that an H-2A application had been filed by the business entity "Steven Heger" for the period of February 15, 2013 to December 15, 2014, with the same job title, duties, requirements, and worksite as that listed for the employer Katie Heger. The CO found it was not clear that Steven and Katie Heger were separate business entities, and their needs for H-2A workers were so similar that they appeared to represent a single, non-seasonal need, operating the same business at the same work site, with overlapping dates of need. The ALJ found that the employer and Steven Heger needed the same number of workers with the same qualifications to operate agricultural equipment at the same location, which was enough for the CO to reasonably conclude that the labor needs identified exceeded those considered temporary or seasonal.

In *Altendorf Transport, Inc.*, the ALJ found that an employer did not establish it was a separate business entity, even where it had its own name, FEIN, and address.¹⁴ In *the Matter of DS Farms GP*, the CO discovered that the employer's owner operated another entity at the same address, Five S Farms, which had applied for and received H-2A temporary labor certification for ten workers from February 1, 2012 through December 1, 2012.¹⁵ The employer was seeking certification for ten workers for nearly identical positions for the period from December 10, 2012 to October 10, 2013. Believing that the employer was seeking to fill the same need year-round, the CO found the employer failed to establish how its job opportunity was seasonal rather than permanent and denied the application.

Discussion

While Employer tries to distinguish its need for agricultural equipment operators in the winter and summer season by applying with separate legal entities for each season, its applications contain the same area of intended employment, Federal Employer Identification Number, and job title. The winter equipment operator job description included: repair of farm machinery, maintenance of farm machinery, hauling grain crop to market, hauling fertilizer for spring planting, cleaning seed for spring planting, maintenance of farm buildings and structures, assisting in hauling farm equipment from dealerships and factories to farm, and setup, assembly, and calibration of new farm

¹³ 2014-TLC-1 (Nov. 12, 2013).

¹⁴ 2013-TLC-00026 (Mar. 28, 2013).

¹⁵ 2013-TLC-00005 (Nov. 14, 2012).

equipment for spring planting.¹⁶ The record does not contain a copy of Employer's application for temporary workers for the summer season, but Employer states that the agricultural equipment operators during the summer focus on ploughing, planting, spraying, and harvesting.¹⁷ The distinction between the seasonal duties, however, does not make Employer's need seasonal. The record demonstrates that Employer has consistent need for workers whose job duties change according to the farming requirements of the season, but whose work is required year-round. Employer's attempt to divide the work between separate legal entities does not demonstrate a temporary need.¹⁸ The temporary labor certification program is inappropriate for Employer's requirements, and the record supports the CO's denial of Employer's certification.

ORDER

Accordingly, it is **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

PATRICK M. ROSENOW
Administrative Law Judge

¹⁶ AF 23-24.

¹⁷ AF 12.

¹⁸ See *Katie Heger*, 2014-TLC-1.