

**U.S. Department of Labor**

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 31 March 2014**

OALJ Case No.: **2014-TLC-00077**

ETA Case No.: **H-300-14022-500127**

*In the Matter of:*

**ADVANCED AGRICULTURE, INC.,**  
Employer.

Appearances:

Ashley Foret Dees, Lake Charles, LA  
For the Employer

Stephen R. Jones, Esq., Office of the Solicitor, Washington, D.C.  
For the Certifying Officer, U.S. Department of Labor, Chicago, IL

Before: Pamela J. Lakes  
Administrative Law Judge

**DECISION AND ORDER**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c)(1), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On March 14, 2014, Advanced Agriculture, Inc. (“Employer”) filed a request for an expedited administrative review of the Certifying Officer’s denial of its H-2A application pursuant to 20 C.F.R. §655.171.

**STATEMENT OF THE CASE**

On January 29, 2014, Employer filed an application for temporary labor certification for five (5) farmworkers, for the soybean and sugarcane seasons, to the Department of Labor’s Employment and Training Administration (“ETA”). (AF 75-104)<sup>1</sup>. Employer indicated that it has a temporary seasonal need for workers from March 15, 2014 to October 1, 2014. (AF 75). The Employer’s statement of temporary need provided:

---

<sup>1</sup> Citations to the Administrative File will appear as “AF” followed by the pertinent page number.

Seasonal temporary workers needed for soybean and sugarcane seasons. Different from previous years, employer will begin in March, doubling its soybean farming to over 1000 acres; job duties include fertilizing and cultivating soybeans and sugarcane through June followed by planting sugarcane through September. Employer will no longer harvest the sugarcane and therefore does not need the employees after October.

*Id.* On February 5, 2014, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), by e-mail, finding three<sup>2</sup> deficiencies or groups of deficiencies. (AF 54-62). Employer responded to the NOD on February 13, 2014. (AF 50-53).

The NOD advised the Employer that the application was deficient, because Employer had failed to establish that its need for seasonal workers was temporary in nature. (AF 57-58). The CO specified that Associate Chief Judge William Colwell, Office of Administrative Law Judges (“OALJ”) determined, on two prior occasions, that Employer does not have a temporary or seasonal need.<sup>3</sup> *Id.* The CO indicated that it was still unclear how the job opportunity was temporary or seasonal in nature. *Id.* Additionally the CO requested Employer explain who would be harvesting its sugarcane and its source of workers. *Id.* In its response, Employer explained:

[E]mployer will lease its worksites/land to another employer during the sugarcane harvest during October through January and for that reason no longer requires H2A workers to harvest sugarcane during October through January. A letter regarding this transfer of workers to another employer, as permitted under H2A program, is attached.

(AF 50-52). In support, Employer attached a letter from Lance Weber of M.A. Patout & Son Limited, L.L.C., to “Dear Grower” which stated:

In reviewing our application, it has come to our attention that we can “Roll-Over” labor from our growers to Patout Equipment Company. . . . We also will modify our dates of need for these applications. The application dates of need for P.E.C. will be September 1st to January 31st. . . . Growers must also keep in mind that the H2-A employee will have to return to his native country for two months after the P.E.C. application expires before he is allowed to return to the United States. Employees that roll-over will not have to leave the United States as long as the roll-over application process is started within fifteen days of the employees end

---

<sup>2</sup> The CO listed three groups of deficiencies, with the subparts (A) through (E) included in the third deficiency. (AF 54-62).

<sup>3</sup> In Judge Colwell’s decision dated May 8, 2012, he found Employer did not present its evidence of a temporary nature before the CO; accordingly, Judge Colwell found he was not permitted to consider the newly submitted evidence on appeal, and affirmed the denial of certification. *Agricultural Advancements, LLC.*, 2012-TLC-00065 (ALJ, May 8 2012). In his March 19, 2012 decision, Judge Colwell found that sugarcane does not have a distinct season, and that it is possible to harvest sugarcane a few times a year. Judge Colwell also found that if Employer’s request was granted it would have “temporary” workers for nineteen consecutive months, finding Employer has a year-round need, and therefore affirming the denial of certification. *Advanced Agricultural, Inc.*, 2012-TLC-00058 (ALJ, March 19, 2012).

date. . . . If you are interested in participating in this roll-over program please let us know. . . .

(AF 29, 52). Employer did not identify the other employer that would be leasing the land for the purpose of harvesting the sugar cane.

The second deficiency involved the ownership of the listed work locations, and whether Employer meets the definition of a “fixed-site employer.” (AF 58). In that regard, the Employer’s identified business address and worksite addresses are at different locations. *Id.* The CO requested that Employer provide all required documentation and written assurances to abide by 20 C.F.R. § 655.132(b), if acting as an H-2A Labor Contractor, and the CO specified what documentation was required to be submitted. *Id.* Employer asked that the forms be amended, and specifically to state “employer owns or operates all the worksite locations” and to reference an attachment to the original application. (AF 50, 97).

In the third deficiency, the CO found Employer’s application to be incomplete for five different reasons (subparts A through E), all of which are technical or clerical in nature. (AF 60-62). In its response to the NOD, Employer requested its application be amended to correct the deficiencies. (AF 50).

On March 7, 2014, the CO denied Employer’s application for temporary labor certification. (AF 44-49). Although accepting the Employer’s corrections to the second and third deficiencies, the CO found that Employer failed to submit sufficient information to establish that its need was either seasonal or temporary and therefore denied the application. (AF 47).

Employer filed a request for expedited review of the denial of a certification, on March 14, 2014. (AF 1-43). The undersigned administrative law judge received the Administrative File on March 24, 2014. Pursuant to the undersigned’s Notice of Assignment and Order, the parties were given three (3) business days from the date of receipt of the AF, to submit any briefing in the matter, with a decision to be issued within five (5) business days; thus, the briefing was due on or before March 27, 2014. Both Employer and the CO timely submitted letter briefs on March 27, 2014.

## **DISCUSSION**

In order to bring non-immigrant workers to the United States to perform agricultural work, an employer must demonstrate that: 1) there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed, and 2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.103(a). The H-2 visa program was created to relieve shortages of U.S. workers in agricultural (H-2A) and non-agricultural (H-2B) industries by enabling employers to hire aliens to perform labor or services of a temporary or seasonal manner. *See, e.g., Florida Fruit and Vegetable Assoc., 1991-TLC-4 (ALJ, Sept. 6, 1991).*

In the February 5, 2014 NOD, the Certifying Officer named three groups of deficiencies in need of correction, in order to process Employer's application, two of which were successfully corrected in Employer's response to the NOD. (AF 54-62; 50-53). The CO indicated in the denial of certification that Employer failed to submit sufficient information to establish that its need was either seasonal or temporary. (AF 47). Accordingly, the only remaining issue in this case is whether Employer failed to establish its need for soybean and sugarcane workers was temporary or seasonal in nature.

The H-2A 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). The same regulation provides that "[e]mployment 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." 20 C.F.R. § 655.103(d). It is well-established that "[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, e.g., William Staley*, 2009-TLC-9, slip op. at 4 (ALJ, Aug. 28, 2009).

As a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates for a seasonal need in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. *See, e.g., Southside Nursery*, 2010-TLC-157, slip op. at 4 (ALJ, Oct. 15, 2010); *Thorn Custom Harvesting*, 2011-TLC-196, slip op. at 3 (ALJ, Feb. 8, 2011). Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected. *See, e.g., Salt Wells Cattle Co.*, 2010-TLC-134 (ALJ, Sept. 29, 2010). As Judge Colwell has explained:

An employer's ability to manipulate its "season" in order to fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).

*Salt Wells Cattle Co., LLC*, 2011-TLC-185 (ALJ, Feb. 8, 2011).

In the application form, Employer explained that its need was seasonal, and that its need for the workers would begin in March, and the temporary workers would fertilize and cultivate soybeans and sugarcane through June, followed by planting sugarcane through September. (AF 75). It explained that its dates of need have changed from previous dates to this year's need from March 15, 2014 through October 1, 2014 because it was increasing its acreage for soybean farming, and therefore would start earlier, and it would no longer be harvesting the sugarcane,

and therefore did not need the employees after October.<sup>4</sup> *Id.* Employer obtained certification most recently for dates of need from July 15, 2013 through January 15, 2014; however, the Denial Letter indicated that this application, H-3000-13134-980626, was certified in error. (AF 48). Employer has also previously submitted a request under a different name.<sup>5</sup> In the NOD, the CO asked for a further explanation as to why its dates of need had significantly changed from its previous season of July to January and specifically asked who would be harvesting the sugarcane and the source of the workers. (AF 58).

Employer's response to the NOD contains a discussion of "roll-over labor" and Employer contends that the nature of the use of the land and not the fact that the land will be used year-round determines the temporary nature.<sup>6</sup> (AF 500-52; *Employer's Brief* at p.2). In support, Employer explained that the same field could be used for planting and harvesting rice, and then flooded to be used for growing crawfish, which would constitute two separate needs.<sup>7</sup> (*Employer's Brief* at p.2.) However, the need in the instant case does not reflect two separate seasonal needs, as both uses of the land relate to the growing and harvesting of sugarcane; it is therefore distinguishable from the above example. Rather, Employer has acknowledged that it will be planting both soybeans and sugarcane and, even though it only plans to harvest soybeans, it is implicit that the sugarcane will need to be harvested, in contrast to its example, in which the uses of the same land are not dependent upon each other. Employer has likewise acknowledged its intention to have the same H-2A workers roll over to another employer that will lease its land in order to harvest the same sugarcane the workers planted. Thus, the H-2A workers would essentially work permanently in the United States on a year-round basis.

I find that the filing history of Employer does not reflect either a temporary or a seasonal need, but a permanent year round need. Additionally, the evidence in the record suggests that its need is not tied to any particular time of year by an event or pattern. Employer's "roll-over labor" explanation demonstrates that the need for H-2A workers does not end in October; rather the continued need is transferred to another employer, who leases Employer's land for said purposes. If Employer's need was truly temporary, the "roll-over" of H-2A workers to complete the work would not be necessary. Under these circumstances, the CO properly denied certification.

Employer also argues, in the alternative, that the case should be remanded, and it should be given the opportunity to present evidence to rebut the "assumption" that its property will be taken over by H-2A contractors. (*Employer's Brief* at p.2.) However, in the NOD, the CO requested this information, and Employer submitted a letter demonstrating plans to "roll-over" H-2A workers but did not identify the employer that would be leasing its land for that purpose. (AF 57-58; 50-53). The Employer should have provided this information in response to the CO

---

<sup>4</sup> Employer's previous requests include dates of need from July 1, 2011 through April 30, 2012; April 1, 2012 through January 31, 2013; June 1, 2012 through January 31, 2013; and July 27, 2012 through October 27, 2012. (AF 48). *See also Advanced Agricultural, Inc.*, 2012-TLC-00058, slip op. at 3 (ALJ, March 19, 2012).

<sup>5</sup> Employer has filed under the name, Agricultural Advancement, LLC, the sister company of Advanced Agricultural, Inc. (AF 48); *Agricultural Advancement, LLC*, 2012-TLC-00065 (ALJ, May 8, 2012).

<sup>6</sup> A "roll-over" is a transfer of labor from one contractor or employer to another. *See Accord v. Alyseka Pipeline Service Co.*, 1995-TSC-4 (ALJ, Oct. 18, 1996).

<sup>7</sup> Employer has provided no citation to support its assertion that such a use of the same workers would be permissible under the regulations. It is unnecessary to resolve that issue, however, for purposes of the instant case.

but failed to do so. Moreover, whether the Employer hired a contractor to perform the harvesting function or arranged for another employer to lease the land for that purpose is not determinative on the issue of seasonal need. For the same reason, it is not relevant whether Employer still possesses the equipment necessary to harvest sugarcane. There is no need for a remand.

### **CONCLUSION**

Based on the foregoing, I find that the Employer has not demonstrated that it has a temporary or seasonal need for H-2A workers under 20 C.F.R. § 655.103(d) and the CO properly denied certification. Accordingly, I find that the CO's denial should be affirmed.

### **ORDER**

**IT IS HEREBY ORDERED** that the Certifying Officer's denial of temporary alien labor certification be, and hereby is, **AFFIRMED**.

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.