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Issue Date: 12 November 2013

OALJ Case No: 2014-TLC-00001

ETA Case No: H-300-13263-805129

In the Matter of:

KATIE HEGER,
Employer.

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **ALAN L. BERGSTROM**
Administrative Law Judge

**DECISION AND ORDER – AFFIRMING CERTIFYING OFFICER’S
DENIAL OF TEMPORARY LABOR CERTIFICATION**

The above-captioned case involves a request for certification of nonimmigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. In this case, Katie Heger (“the Employer”) has filed a timely request for expedited administrative review of the Certifying Officer’s October 23, 2013 denial of temporary labor certification. The Decision and Order that follows is based on review of the entire administrative file, including the Employer’s request for review and written argument. Pursuant to federal regulations at 20 CFR §655.171(a) evidence that may be considered is that which was before the Certifying Officer, no new evidence submitted on appeal may be considered.

STATEMENT OF THE CASE

On September 20, 2013, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer seeking temporary labor certification for two farm workers to serve as “Agricultural Equipment Operators” from

December 1, 2013 through February 15, 2014. (AF¹ 40-49). The application listed the following job duties: “Drive truck to transport and deliver farm stored commodities to elevators or other locations. Load/unload truck. Inspect trucks for proper function, i.e. brakes, oil, lights, water, tires. Snow removal.” (AF 42, Item F.a.5). No education or training requirements were listed, but job applicants were expected to have at least three months of experience driving a truck; a clean driving record; an employment reference; and a valid driver’s license. (AF 43, Item F.b). The worksite address was listed as 2896 3rd Street Northwest in Underwood, North Dakota. (AF 43, Item F.c).

On September 26, 2013, the ETA Certifying Officer (“CO”) issued a Notice of Deficiency finding that the Employer’s application failed to meet the criteria for acceptance for several reasons. (AF 26-30). First, the Employer had failed to provide a valid FEIN (Federal Employment Identification Number). Second, the job order filed with the ETA (AF 50-57) omitted the anticipated hours of work for the job opportunity. Third, the Employer had failed to establish the job opportunity was seasonal and temporary in nature, as required under 20 C.F.R. § 655.103(b). Specifically, the CO noted that an H-2A application filed by the business entity “Steven Heger” had previously been approved for a position that lasted from February 15, 2013 to December 15, 2014 and that had the same job title, job duties, job requirements, and worksite address as the job offered by the Employer. Considering the apparent interlocking nature of the two business entities and the fact that they sought certification for nearly identical job opportunities with sequential dates of need, the CO inferred that Steven Heger and the Employer were, in fact, a single business entity with a year-round rather than temporary or seasonal need for workers.

On September 30, 2013, the Employer filed a response to the Notice of Deficiency that corrected the first two deficiencies identified by the CO. (AF 23-25). Addressing the CO’s claim that the Employer had failed to demonstrate its need was temporary or seasonal, the Employer asserted, “Though Katie and Steven Heger share the same address, Katie owns and operates her half of the farming operation herself. Contrary to your assumption in the NOD, the two entities are not operating to fill the same need.” (AF 23). The Employer further provided the following description of its seasonal need:

The corn crop for this year is projected to be 16% larger than last year’s record crop. In a normal year, Katie has 1500 acres of corn with a proven yield of 90 bu/acre for a total of 135,000 bu. This equates to about 150 truckloads of corn. Also in a normal production year, Katie can move trucks at a pace of 2.5 hours/load and dump three loads/day.

With the projected increase this year, Katie expects to yield 1500 acres at 130 bu/acre, or 195,000 bu to haul. Harvest is also later than normal this year, pushing the hauling period back to December. Longer lines at the ethanol plant will reduce the number of truckloads/day that can be hauled. In addition to corn, wheat must also be hauled during this time frame. With the significant increase in truckloads this year in a shortened hauling period, Katie cannot accomplish the

¹ Citations to the Appeal File in this case will be abbreviated “AF” followed by the page number(s).

hauling herself. Additional labor is absolutely necessary in order to get the crops hauled to market prior to spring.

(AF 23). The Employer also requested that the job order for the position be changed to reflect a crop of corn rather than beans.

On October 23, 2013, the CO denied temporary labor certification on grounds that the Employer had failed to establish its need for workers was temporary or seasonal. (AF 17-22). The CO found that it was still not clear that the Employer and Steven Heger were separate business entities, and their respective needs for H-2A workers were so similar they appeared to represent a single, non-seasonal need. The CO also refused the Employer's request to change its job order to reflect a crop of corn rather than beans, which the CO characterized as an attempt by the Employer to differentiate itself from Steven Heger.

On October 29, 2013, the Employer requested expedited administrative review of the CO's denial. In expedited administrative review cases, the administrative law judge has five working days after receiving the Appeal File to issue a decision on the basis of the written record after due consideration of any written submissions not including new evidence. 20 C.F.R. § 655.171(a). The Appeal File for this case was received by this Administrative Law Judge on Monday, November 4, 2013. The Parties were directed to file any additional argument/briefs by Thursday, November 7, 2013. The Employer timely submitted a brief, along with evidentiary attachments. The Solicitor did not submit a brief on behalf of the CO. The Employer's request for administrative review, the Appeal File, and the Employer's written argument constituted the entire administrative file and were considered in deliberation. The new evidence submitted on November 7, 2013 was not considered.

EMPLOYER'S POSITION

In its request for expedited administrative review filed October 29, 2013, the Employer argued that it had already explained it was a separate entity from Steven Heger with a separate FEIN and separate seasonal need for workers. The Employer further asserted that denial of its application would be discriminatory, considering that the CO had previously approved applications for the same job opportunity in the same area of employment with very similar dates of need. The Employer also refuted the CO's suggestion that it was acting improperly in its attempts to amend the job order to reflect a crop of corn instead of beans. (AF 1-15).

In its brief filed November 7, 2013, the Employer reiterated that it was a separate entity from Steven Heger. The Employer contended it had already provided all the information the CO requested. The Employer also argued that its job opportunity differed from the job that had been certified for Steven Heger. The Employer asserted that their respective job offerings shared only one similar job duty, and that even though their job requirements (a driver's license, a clean driving record, and three months of experience driving a truck) were identical, this was not cause for suspicion, as most farm positions would be expected to share these same requirements.

ISSUE

The issue in this case is whether the Employer's application for two H-2A nonimmigrant workers is for a period of time exceeding the limited period of "temporary or seasonal" work for which certification is permitted under the INA.

DISCUSSION

The Employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. *See* 20 C.F.R. § 655.161(a). To be eligible for H-2A labor certification, the Employer must establish that it has a need for agricultural services or labor to be performed on a temporary or seasonal basis. *Id.* The applicable regulations promulgated by the ETA define "temporary or seasonal" employment as follows:

[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.

20 C.F.R. § 655.103(d). The relevant inquiry is not whether the job itself is temporary, but whether the Employer has established that its *need* for labor is of a temporary or seasonal nature. *Cressler Ranch Trucking LLC*, 2013-TLC-00007 (Nov. 26, 2012).

- I. The record does not establish that the Employer and Steven Heger are separate business entities with distinct labor needs.

In the Notice of Deficiency, the CO found that the Employer's business appeared to interlock with Steven Heger's business. The CO determined that the interlocking nature of the Employer's and Steven Heger's businesses raised an inference that the two named employers were, in fact, a single business entity operating the same farming business at the same fixed work site.

First, the CO noted that both businesses used the same worksite at the same address. (AF 29-30). The Employer does not dispute that the worksites are the same, nor has the Employer offered any explanation as to why the two farming operations take place at the same fixed site address if they are distinct from one another.

The CO also noted that the two businesses have separately sought to certify the same number of workers for the same occupation², where their respective H-2A applications indicate the workers must have the same qualifications and will perform very similar job duties within sequential time periods that together span the whole year. (AF 29-30). The Employer argues that the job opportunity for which it seeks certification is not the same as Steven Heger's because some of the job duties listed on their respective H-2A applications differ. However, regardless of how

² O*NET occupational code: 45-2091; occupational title: Agricultural Equipment Operator.

the Employer chooses to phrase its description of job duties on the H-2A application, differences in wording do not change the fact that the Employer and Steven Heger need the same number of workers with the same qualifications to operate agricultural equipment at the same location. This is enough for the CO to reasonably conclude that the labor needs identified by the Employer and Steven Heger are for the same agricultural equipment operator work, at the same fixed site farm location, and for over a period of time exceeding that considered temporary or seasonal in nature.

The Employer points out that it uses a separate FEIN from Steven Heger. (AF 23). However, the fact that the Employer has obtained its own FEIN and goes by the name “Katie Heger” instead of “Steven Heger” does not establish that the two businesses are not so interlocking that they essentially function as the same farming operation. *See, e.g., Altendorf Transport Inc.*, 2013-TLC-00026 (Mar. 28, 2013) (finding that the employer had not established it was a separate business entity even though it had its own name, FEIN, and address). The Employer further contends that “[t]hrough Katie and Steven Heger share the same address, Katie owns and operates her half of the farming operation herself.” (AF 23). This contention actually contradicts the Employer’s position that it is a separate entity from Steven Heger, because it reflects a conceptualization of her farming operation as “half” of a single unit.

After requesting administrative review, the Employer attempted to submit new evidence in the form of a lease agreement and two tax forms to show that it is a separate business entity from Steven Heger. However, as noted above, federal regulations bar an Administrative Law Judge from considering newly submitted evidence in an administrative review case. Additionally, the Employer’s argument that it is treated differently from Steven Heger for contractual and tax purposes does not establish that it is a separate fixed site farming operation with distinct labor needs. *See Altendorf Transport.*

After considering the entire administrative record and the Employer’s arguments, this Administrative Law Judge finds that it was reasonable for the CO to infer on the basis of the available facts that the Employer’s and Steven Heger’s businesses are interlocking. It was also reasonable for the CO to require the Employer to submit more information in order to confirm its status as a separate business entity. The Employer did not submit sufficient information to distinguish its farming operation and labor needs from those of Steven Heger. Accordingly, the Employer has failed to establish by a preponderance of the evidence that it is a separate business entity with separate seasonal/temporary needs for agricultural equipment operators to work at a separate fixed farm site.

II. The Employer has failed to establish its need for H-2A workers was temporary or seasonal in nature.

As discussed above, the Employer does not dispute that both it and Steven Heger sought H-2A certification for the same number of workers (two) with the same qualifications (a valid driver’s license, a clean driving record, and three months of experience driving a truck) to perform the same occupation (“Agricultural Equipment Operator”) at the same location (2896 3rd Street Northwest in Underwood, North Dakota). Steven Heger’s H-2A application was certified for the period from February 15, 2013 to December 15, 2013 (AF 29), and the Employer now seeks to

fulfill the same labor need for the sequential period from December 1, 2013 to February 15, 2014 (AF 40). Considering that the Employer and Steven Heger appear to function as a single business entity and have identified sequential dates of need for the same work, their “temporary” needs merge into a single year-round need for equipment operators. Therefore, this Administrative Law Judge finds that the CO reasonably concluded that the Employer has not established its need for workers is temporary or seasonal in nature.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s denial determination is **AFFIRMED**.

ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia