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Issue Date: 12 May 2015

OALJ Case No.: 2015-TLC-00048
ETA Case No.: H-300-15098-898223

In the Matter of

CARTER AHLERS,
Employer

DECISION AND ORDER

This matter involves a request for certification of non-immigrant foreign workers for temporary or seasonal agricultural employment under the Immigration and Nationality Act, as amended, and the implementing regulations promulgated by the United States Department of Labor. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B.

For the reasons set forth below, I affirm the Certifying Officer's denial of temporary labor certification.

STATEMENT OF THE CASE

Carter Ahlers ("Employer") submitted an *H-2A Application for Temporary Labor Certification* (ETA Form 9142A) on April 8, 2015. AF-84.¹ In particular, Employer requested certification for three full-time "farmworkers" from June 6 – December 5, 2015. AF-78. Employer indicated that the job was a "seasonal need." AF-78. Employees would be required to work for 40 hours per week at a rate of pay of \$13.59 per hour, with no possibility of overtime pay. AF-80-82. The required job duties were described as follows:

Drive tractors and operate large farm equipment to till soil, plant, cultivate apply fertilizer & harvest crops. Drives truck with double trailers to haul crop to storage area & elevator. Perform maintenance & must have mechanical abilities. Must have or be able to obtain driver's license within 30 days after hire. 3 mos. experience required.

AF-80.

Employer filed a job order with the applicable state workforce agency on April 8, 2015. AF-82. On April 10, 2015, Employer amended its application and now requested four farmworkers from June 6, 2015 – March 30, 2016. AF-61. The job was still described as a "seasonal need." AF-61.

¹For purposes of this opinion, "AF" stands for "Administrative File."

On April 15, 2015, the Certifying Officer (“CO”) issued a Notice of Deficiency to Employer. AF-54. In its Notice of Deficiency, the CO provided two reasons why Employer’s application was defective. AF-56-57. Specifically, the CO noted that Employer failed to provide a valid Federal Employment Identification Number, as required by 20 C.F.R. § 655.103(b). AF-56. To correct this error, the CO requested that Employer provide documentation that it actually possesses the identification number listed in its *H-2A Application for Temporary Labor Certification*. AF-56. Second, the CO stated that Employer provided different postal codes and telephone numbers throughout its application. AF-56-57. The CO thus requested permission from Employer to correct these inconsistencies. AF-56-57.

Employer responded to the CO’s Notice of Deficiency later that day and provided written documentation of its Federal Employment Identification Number. AF-50. Employer also gave the CO permission to amend its application so that its postal codes and telephone numbers would be consistent. AF-50.

On April 23, 2015, the CO notified Employer’s agent, Garold Dungy, that Employer’s application could not be certified because Employer had not complied with 20 C.F.R. § 655.103(d), which states that the job opportunity must be “temporary” or “seasonal” in nature. AF-33-35. The CO stated that Employer had not demonstrated that it had a temporary or seasonal need because a different business entity, “Ahler’s Farm,” had previously received two certifications for farmworkers to perform the same duties at the same location from September 15, 2013 – June 15, 2014 and September 15, 2014 – June 15, 2015, respectively.² AF-35.

The CO also noted that the dates of need on Employer’s application and the applications of “Ahler’s Farm” overlapped and that both parties listed the same point of contact in their applications. AF-35-36. The CO thus concluded that workers were needed to perform the same duties at the same location for roughly one year and six months (September 15, 2014 – March 30, 2016). AF-35-36. The CO therefore found that Employer had not shown that it had a temporary need because 20 C.F.R. § 655.103(d) states that employment is only “temporary” if it lasts one year or less. AF-35. To remedy this deficiency, the CO asked Employer to explain why its need for foreign workers was temporary or seasonal in nature. AF-36.

On April 27, 2015, Employer wrote a letter to the CO stating that he would begin managing his own farm on June 1, 2015. AF-31. Employer explained that he extended his date of need from December 2015 to March 2016 because he now planned to perform his own trucking and haul his own grain. AF-31. Employer also asserted that foreign workers were needed to prepare equipment for the wheat harvest, monitor the field for weeds, and prepare equipment for the fall harvest. AF-31. Once those activities had been completed, Employer stated that he would require foreign workers to store equipment for the winter and transport stored grain. AF-31.

On April 29, 2015, the CO denied Employer’s *H-2A Application for Temporary Labor Certification*. AF-20. The CO found that Employer’s response did not explain how the job opportunity was temporary or seasonal in nature. AF-23. Further, Employer did not clarify how its business operations differed from “Ahler’s Farm” or how its application for temporary workers differed from the previous applications submitted by “Ahler’s Farm.” AF-23. The CO

²The evidence indicates that “Ahler’s Farm” is owned and operated by Employer’s parents.

thus concluded that there was not a temporary or seasonal need for workers at the job site and denied Employer's application. AF-24.

On May 1, 2015, Employer appealed the CO's decision by requesting an expedited administrative review before the Office of Administrative Law Judges within the United States Department of Labor. AF-1. Employer's appeal was referred to the Pittsburgh division of the Office of Administrative Law Judges on May 4, 2015 and subsequently assigned to the undersigned. *See Notice of Assignment and Order Setting Briefing Schedule.* The undersigned received the Administrative File on May 5, 2015. *Id.* One day later, the undersigned issued a "Notice of Assignment and Order Setting Briefing Schedule," which notified the parties that they could file written briefs with the undersigned no later than the close of business on May 11, 2015. *Id.*

On May 8, 2015, Employer submitted a letter to the undersigned explaining that he needed temporary foreign workers to meet his seasonal farming needs. Employer's agent, Garold Dungy, also submitted a letter to the undersigned that same day emphasizing that Employer was a separate business entity from "Ahler's Farm." He asserted that Employer should not be denied temporary foreign workers merely because he had the same need for workers as "Ahler's Farm."

On May 11, 2015, the Office of the Solicitor for the United States Department of Labor ("the Solicitor") filed a timely brief on the CO's behalf. The Solicitor argued that the CO correctly found that Employer had failed to demonstrate a temporary or seasonal need for workers because Employer failed to submit sufficient evidence showing that it is not the same entity as "Ahler's Farm." The CO thus properly found that Employer and "Ahler's Farm" were essentially acting as one entity and seeking to circumvent the temporary employment requirement contained at 20 C.F.R. § 655.103(d). The Solicitor noted that Employer and "Ahler's Farm" had the same work address and submitted applications containing same job requirements, duties, and point of contact. The Solicitor thus argued that a permanent employee or employees could fill the available position at the location. Accordingly, it argued that the CO's decision to deny temporary labor certification should be affirmed.

ISSUE

Federal regulations state that an employer seeking temporary labor certification under the H-2A program must establish that it has a "temporary" or "seasonal" need for the agricultural services or labor to be performed. 20 C.F.R. § 655.161. In this case, has Employer demonstrated that it has a temporary or seasonal need for agricultural services or labor?

SCOPE OF REVIEW

When an employer requests an expedited administrative review in a TLC case, the ruling of the assigned administrative law judge must be based on the written record and any legal briefs from the parties involved or amici curiae. 20 C.F.R. § 655.171(a). The administrative law judge cannot consider new evidence. *Id.* The written decision must be issued within five business days after the administrative law judge received the administrative file. *Id.* In this matter, the undersigned received the administrative file on May 5, 2015. Therefore, the undersigned must

issue a decision no later than May 12, 2015. In rendering a decision, the undersigned must take one of the following actions:

- (1) affirm the CO's decision;
- (2) reverse the CO's decision;
- (3) modify the CO's decision, or
- (4) remand to the CO for further action.

20 C.F.R. § 655.171.

APPLICABLE LAW

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161. Employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). A “seasonal” need occurs if employment 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).

Furthermore, it is well-established that “it is not the nature or the duties of the position which must be examined to determine the temporary need.” *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). Instead, “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). Finally, in assessing whether an employer has demonstrated a temporary or seasonal need for temporary labor, the fact finder must look at the situation as a whole and not narrowly focus on the instant position. *See Haag Farms, Inc.*, 2000-TLC-15 (Oct. 12, 2000); *Bracy’s Nursery*, 2000-TLC-11 (April 14, 2000).

DISCUSSION

The CO's decision to deny Employer's application must be affirmed because Employer has failed to demonstrate that it has a temporary or seasonal need for agricultural services, as required by 20 C.F.R. § 655.161. A review of the situation as a whole, including the two previous certifications granted to "Ahler's Farm," reveals that although Employer has only requested foreign workers for a ten-month period, there is a continuous need for certain agricultural services at the same location. Given that there is a continuous need for the same agricultural services at the same location, it cannot be said that Employer's need is temporary or seasonal. Specifically, "Ahler's Farm" received certification for temporary foreign workers from September 15, 2014 – June 15, 2015. AF-35; AF-109. In that application, "Ahler's Farm" listed the same job title (farmworkers), nature of temporary need (seasonal), address (48542 231st Street, Flandreau, South Dakota 27028), point of contact (Deb Ahlers), number of work hours per week (40), hourly work schedule (8:00 AM – 4:00 PM), and job duties as Employer's current application. AF-78-84; AF-140-145.

Employer's amended application now requests workers from June 6, 2015 – March 30, 2016. AF-61. As the CO properly pointed out, if Employer's application were granted, farmworkers would be continuously performing the same job duties at the same work location from September 15, 2014 – March 30, 2016 – a period of one year six months and fifteen days. Given that the need for labor would exceed one year, the undersigned finds that Employer does not have a "temporary" need for agricultural services. 20 C.F.R. § 655.103(d). Similarly, Employer has failed to demonstrate that it has a "seasonal" need for agricultural services. Given that workers are needed to perform the same job duties at the same work location for more than a year and a half, such employment is plainly not tied to a certain time of year by an event or pattern.

Accordingly, the undersigned finds that the CO properly denied Employer's application for temporary foreign workers because Employer failed to demonstrate that it has a "temporary" or "seasonal" need for agricultural services, as required by 20 C.F.R. § 655.161.

ORDER

Accordingly, it is **ORDERED** that the Certifying Officer's decision to deny Employer's *H-2A Application for Temporary Labor Certification* is **AFFIRMED**.

SO ORDERED.

DREW A. SWANK
Administrative Law Judge