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Issue Date: 05 October 2015OALJ Case No.: 2015-TLC-00067
ETA Case No.: H-300-15243-566947

In the Matter of
FEGLEY GRAIN CLEANING
Employer

Before: **Daniel F. Solomon**
Administrative Law Judge

DECISION AND ORDER

Fegley Grain Cleaning, Inc. ("Employer") appeals the Certifying Officer's ("CO") denial of the above-captioned application for H-2A temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188 and the implementing regulations promulgated by the U.S. Department of Labor ("DOL" or "Department"), Employment and Training Administration ("ETA") at 20 C.F.R. Part 655.[1] For the reasons set forth below, the Certifying Officer's denial is AFFIRMED.

STATEMENT OF THE CASE

On August 25, 2015, the Employer submitted its application for temporary labor certification. AF 50-58.[2] In particular, the Employer requested certification for an "Agricultural Equipment Operator" for the period from November 1, 2015 to June 1, 2016. AF 50-66. The application listed the following as the job duties: "Operate and maintain seed cleaning equipment. Unload trucks and operate forklift. Bag grains/seeds/beans. Haul grain to/from storage and grain cleaning facility." AF 52. The Employer listed the temporary need as "seasonal." AF 50. The Employer's statement of temporary need stated "Fegley Grain Cleaning, Inc. is a seed cleaning facility owned and operated by Nathan Fegley where Mr. Fegley cleans over 50% of his own grain. Fegley grain Cleaning's season begins in November and lasts through May when planting begins. From June to October, grain processing slows significantly as grain has been cleaned and exported." AF 50. The worksite address was listed as 10811 240th St NW, Berthold, North Dakota. AF 53.

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[1] The H-2A nonimmigrant visa program enables agricultural employers in the United States to import foreign workers on a temporary basis to perform temporary, agricultural labor or services. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a "temporary labor certification" from ETA. 8 U.S.C. 1188(a)(1).
[2] Citations to the 87 page Administrative File will be abbreviated "AF" followed by the page number.

On September 2, 2015, the CO issued a Notice of Deficiency ("NOD") requesting further information on temporary need and workers' compensation. AF 35-39. The CO noted that the dates of need were from November 1, 2015 through June 1, 2016 but the employer's previous certifications were from March through December. All three applications had the same business and worksite address, requirements of 3 months experience, and the requirement that the employee have a valid driver's license. AF 37. The applications also had similar job duties involving operating or driving equipment and hauling grain to facilities.[3] Therefore, the CO concluded "it appears that the employer has a permanent and year round need for agricultural equipment operators." AF 37. Based on this filing history and the requested dates of needs and those previously established, the CO required the employer to explain why the job opportunity was seasonal or temporary in nature. AF 37.

The CO also noted that the Employer failed to provide a workers' compensation certificate in violation of 20 CFR sec. 655.122(e)(1)-(3). AF 38.

On September 8, 2015, Employer responded to the NOD. AF 18-32. The Employer stated, "You have incorrectly labeled the pending application as Fegley Farm LLC. This pending application is not for Fegley Farm LLC; the pending application is for Fegley Grain Cleaning, Inc, which is a completely different operation than Fegley Farm." AF 18. Adding,

> You have pointed out that the two applications have similar job duties of operating/driving equipment and hauling grain to facilities. I'm sure you understand you are not even comparing the same type of equipment. The equipment operated for Fegley Farm involves tractors, combines, and trucks, all of which are involved with crop farming. I also trust you to understand that the equipment operated for Fegley Grain Cleaning would be seed cleaning equipment, forklifts, and trucks as noted in the job description. The hauling of grain for Fegley Grain would involve grain from other farmer owned storage. The differences are stark and evident with a simple understanding of agriculture and review of each job description…Furthermore, just because two applications may have a similar job duty doesn't make it the same job, as you have asserted. AF 18-19.

On September 15, 2015, the CO denied the application because the Employer failed to establish that its need is seasonal or temporary in nature. AF 13-17. The CO stated that the Employer has a permanent year round need for workers. The CO stated:

> Although Fegley Farm LLC and Fegley Grain Cleaning Inc. are being filed as two distinct business entities, the interlocking nature of these entities and operations renders the fact of separate corporate forms inconsequential. The duties in each application fall

[3] The NOD incorrectly stated the name of the entity. The pending application is for Fegley Grain Cleaning not Fegley Farm LLC.

> within the SOC (O*Net/OES) occupation code and title for 45-2091 Agricultural Equipment Operators and, as such, represent the same job opportunity for purposes of the H-2A program. Furthermore, the employer's worksites, FEIN number, experience equipment and similar job duties indicate there is a full time need for "Farmworker" at these locations. Therefore, based on the employer's requested dates of need, and the previously established dates of need, the employer has failed to demonstrate a temporary or seasonal need for "Farmworker" from November 1, 2015 through June 1, 2016. AF 16.

The CO compared the case to *In the Matter of Lancaster Truck Line,* 2014-TLC-00004 (2013) where the employer wanted to employ agricultural equipment operators for the course of a year. AF 8. In that case, the court wrote that changes in seasonal duties do not demonstrate a temporary need, saying "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." AF 8. The CO also stated that the issue of two nominally distinct corporations functioning as one to service the same need has been addressed in *Altendorf Transport Inc*., 2013-TLC-00026 (2013), and *In the matter of Katie Heger*, 2014-TLC-00001(2013). AF 8-9.

On September 17, 2015, Employer requested expedited administrative review of the denial. In the request, Employer maintains that the two entities are "completely separate companies and run completely different operations." AF 2.

DISCUSSION

In order to be eligible for H-2A temporary labor certification, an employer must establish that is 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 Department's applicable regulations provide:

> Definition of a temporary or seasonal nature. For 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 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). In determining whether 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. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011). Accordingly, I must consider whether the Employer's need for labor or services during its specified "season"

(November 1, 2015 through June 1, 2016) differs from its need for such labor or services during other times of the year.

In the NOD, the CO found that the Employer's business appeared to interlock with another business, Fegley Farms LLC. AF 16. Both entities used the same worksite, requested workers with the same qualifications for the same occupation, and listed similar job duties for the workers. AF 16. Together, these applications cover a yearlong period. AF 17.

Fegley Farm's application was certified for the period from March 2015 to December 2015, and the Employer now seeks to fulfill the same labor need for the overlapping period of November 2014 to June 2016. AF 15. On their applications, Fegley Farm LLC and Fegley Grain Cleaning listed the same work site and housing location for the workers, and designated the same owner and point of contact, Nathan Fegley. The Office of the Solicitor also pointed out that Employer's statement of temporary need "demonstrates the interlocking nature of these two businesses as '50% of his own grain' clearly must come from Mr. Fegley's other related business, Fegley Farms, LLC." Solicitor's Brief pg. 6. Since Fegley Farm LLC and Fegley Grain Cleaning appear to function as a single entity and have requested workers for overlapping periods of time for the same work, their "temporary" need merges into a single year-round need for an agricultural equipment operator. Therefore, I find that the CO reasonably concluded that the Employer has not established that its need for workers is temporary or seasonal in nature. *See Larry Ulmer*, 2015-TLC-00003 (November 4, 2014) ("Ulmer Farms and Larry Ulmer demonstrate an overlapping need for the same H-2A labor year round. This exceeds the 'seasonal and temporary' period for H-2A certification. Since the business entities of Larry Ulmer and Ulmer Farms are so intertwined, it would be reasonable to infer that they function as one and are attempting to circumvent the temporary employment requirement.").; *D&G Grey Crawfish*, 2012-TLC-00099 at 4 (Oct. 19, 2012) ("By dividing crawfishing into two entities working at one job site, Ms. Frey seeks to hire H-2A seasonal livestock workers to perform crawfishing tasks year round and within one area of intended employment. Ms. Frey's ability to separate her operation into two entities does not enable her to hire temporary H-2A workers to fulfill her permanent need for 'Farm workers and Laborers.'")

The Employer argues that the two entities are completely separate companies and have different Federal Employee Identification Numbers ("FEIN")[4] and thus should be considered separately. However, this alone does not establish that the two businesses do not essentially function as one farming operation. *See Katie Heger*, 2014-TLC-00001 at 5 citing *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 also seeks to distinguish the two entities on the basis of the type of work performed by the worker and the type of business operation involved. However, for the purposes of the H-2A program, these differences are not

[4] Larry Ulmer submitted information related to the entities' FFA numbers in his request for review. However, that information may not be considered because it was not previously submitted to the CO. 20 C.F.R. § 655.171.

enough. In *Cressler Ranch Trucking, LLC*, ALJ No. 2013-TLC-00007 (Nov. 26, 2012), the Employer requested temporary labor certification for one farm machine operator to haul harvested corps, prepare equipment and fields for spring planting, and plant spring crops. In that case, the CO denied the certification and the ALJ affirmed the denial because the applicant owned another entity in the same location that had received certification for two farm machine operators to harvest crops. The ALJ stated, "When determining whether an employer's need is seasonal, it is appropriate to determine if the employer's needs are seasonal, not whether the duties are seasonal.'" *Cressler Ranch Trucking, LLC*, ALJ No. 2013-TLC-00007 at 4 (Nov. 26, 2012) citing *Sneed Farm*, 1999-TLC-00007 at slip op 4 (Sept. 27, 1999).

Therefore, I find that the Employer failed to establish a seasonal need for agricultural services or labor. The overlapping nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the Employer's need does not differ from its need for such labor during other times of the year; the need is year round. *See Cressler Ranch Trucking LLC*, 2013-TLC-00007 at 3; *D&G Frey Crawfish LLC*, 2012-TLC-00099 at 4.

ORDER

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

Digitally signed by Daniel Solomon
DN: CN=Daniel Solomon, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE