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Issue Date: 31 December 2014

Case No.: 2015-TLC-00012

ETA Case No.: H-300-14332-498640

In the Matter of

H Bar H Farms

Employer

DECISION AND ORDER

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (the “DOL”) at 20 C.F.R. Part 655, Subpart B. The Employer timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification. This Decision and Order is based on the written record.¹

BACKGROUND

The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary or seasonal basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On November 24, 2014, the DOL’s Employment and Training Administration (“ETA”) received an Application for Temporary Employment Certification from Mark Howard, on behalf

¹ The record before me consists of the following: Employment and Training Administration (ETA) Form 9142A (“H-2A Application for Temporary Employment Certification”), with appendices and attachments; Notice of Deficiency, dated December 4, 2014 (4 pages); Employer’s Response to Notice of Deficiency, dated December 10, 2014 (1 page); Final Determination Letter, dated December 16, 2014 (4 pages); Employer’s Request for expedited administrative review, dated December 18, 2014 (2 pages), with enclosures (first page of 2013 tax returns for H Bar H Farms and Rocking H Orchards, LLP). The record also contains a cover letter from the agent for the Employer, dated February 21, 2014, listing these documents. I find, though, that the cover letter’s date must be in error, as the cover letter refers to the documents dated November and December 2014.

of H Bar H Farms, (hereinafter, “Employer”).² In this application, the Employer requested temporary labor certification for five (5) farmworker employees from February 1, 2015 through December 1, 2015, with the SOC (ONET/OES) occupation title of “Agricultural Equipment Operator,” with code 45-2091. Under “Statement of Temporary Need” the Employer wrote: “N/A.”

On December 4, 2014, the Certifying Officer (“CO”) issued a “Notice of Deficiency.” In addition to informing the Employer about the procedural requirements under the regulation, the CO stated the following:

The job opportunity ... indicates the employer’s dates of need are from February 2, 2015 through December 1, 2015. However, different dates of need have been established by Rocking H Orchards, LLP, which operates on the same property (#1 Cimarron Drive, Dalhart, TX) and has the same point of contact as H Bar H Farms. The previously certified application for Rocking H Orchards, LLP established a period of need of approximately December 1, 2013 through October 1, 2014. The present application deviates significantly from that period of time.³ Although these applications are filed under a different employer name, both have similar job duties involving the harvesting of crops and both applications indicate they have the same rental housing location.⁴ These applications also have similar requirements such as 3 months experience, no minimum education and the requirement to obtain a driver’s license within 30 days.

The interlocking nature of these entities and operations renders the fact of separate corporate forms inconsequential. The duties in each application fall within the ... code and title for 45-2091 Agricultural Equipment Operator, and as such represent the same job opportunity for the purposes of the H-2A program. Furthermore, the employer’s worksite, experience requirements and similar job duties indicate there is a full time need for Agricultural Equipment Operators.....

Therefore, based on the requested dates of need, and the previously established dates of need, the employer has failed to demonstrate a temporary or seasonal need for Agricultural Equipment Operators.

The CO directed that the Employer “must explain why its job opportunity is seasonal or temporary” and also must “provide in detail why its dates of need have significantly changed from its established season of December through October, to its current request of February through December; or must explain the difference in business operations between H Bar H Farms and Rocking H Orchards, LLP.”

By letter dated December 10, 2014, the Employer responded to the Notice of Deficiency. In its entirety, the Employer’s response is as follows:

Our family farming operation consists of raising grain and cotton crops. We begin our season in February of each year transporting any crops from storage to elevators for market, cleaning bins for new crops, tilling, cultivating, fertilizing, planting crops, irrigating, row tilling during the summer months for weed control and harvesting crops finishing by December. Our dates of need

² The application is not dated but is stamped “Received” on this date.

³ Here a table summarizing the periods for which the two business entities had requested approval of employees under H-2A was inserted.

⁴ I infer, from the CO’s statement regarding housing, that the CO has concluded that the two business entities’ worksites are close enough to each other so that their workers can be housed in the same place.

have not changed as this has been our seasonal need for the past several years. Therefore, our seasonal need continues and will continue to be from February – December of each year.

It is very difficult in a rural area to find willing, able and qualified US workers that are willing to work and perform the job duties so that the crops can be planted and harvested in a timely manner.

On December 16, 2014, the CO issued a final Determination Letter denying the Employer's application, and provided the Employer with notice of the requirements for appeal. See 20 C.F.R. § 655.164. In the final Determination Letter, the CO stated that the Employer attempted to describe a seasonal need for workers for the H Bar H Farms but had "completely failed to address the issue of Rocking H Orchards, LLP, which operates on the same property ... and has the same point of contact as H Bar H Farms." The CO also stated: "Because the employer failed to address its temporary need in light of the other farm operating on the same property which appears to be filling the same need, it has not overcome this deficiency." The CO also concluded that the facts of the Employer's application were similar to two cases in which nominally distinct corporations were functioning as one to service the same need.⁵

By letter dated December 18, 2014, the Employer requested an expedited administrative review. I find that the Employer's request for administrative review is timely.

In its request for expedited administrative review, the Employer provided the following new information:

- H Bar H Farms is a family partnership, owned by "family members of nephews and nieces" who delegated to Mr. Howard the responsibility to "manage the paperwork" out of his home address.
 - Mr. Howard's home address is the business address for the partnership, as the worksite address, which was provided, does not have mail service.
 - H Bar H Farms carries its own worker compensation coverage and files its own tax return (copy of page 1 of tax return provided).
 - H Bar H Farms has filed previous H-2A applications with certification dates for February 1 through December 1 for the years 2009-2013.
 - Its need for seasonal workers runs from February through December, and includes specified tasks.
- Rocking H Orchards LLP is a farming operation that Mr. Howard operates, along with other specified family members, and he manages the paperwork out of his home.⁶
 - Rocking H Orchards carries its own worker compensation coverage and files

⁵ The cases the CO cited were: Altendorf Transport, Inc., 2013-TLC-00026 (2013) and In the Matter of Katie Heger, 2014-TLC-00001 (2013). In these cases administrative law judges found that employers had failed to establish that multiple businesses that required workers for the same types of work were independent entities.

⁶ Mr. Howard noted that the business' apple orchard has been sold and will not be in operation. I presume, therefore, that Rocking H Orchards LLP conducts farming operations only.

- its own tax return (copy of page 1 of tax return provided).
- Its need for seasonal workers runs from December through October, and includes specified tasks.

On December 23, 2014, this case was received in my office and assigned to me.⁷ I did not authorize any additional submissions from the parties, and have made this decision based solely on the record before me.

DISCUSSION

It is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. Altendorf Transport, Inc., 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011). Therefore, in an appeal of a denial of an extension of a labor certification, it is the employer's burden to establish by a preponderance of the evidence that it meets the requirements of 20 C.F.R. § 655.161, which include establishing the need for agricultural services or labor to be performed on a temporary or seasonal basis. 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-00027, slip op. at 3 (Nov. 26, 2012).

The applicable regulation provides:

Definition of a temporary or seasonal nature. For the 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 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).

When conducting an administrative review, the presiding Administrative Law Judge ("ALJ") is to render a decision "on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved..."⁸ 20 C.F.R. § 655.171(a) (emphasis added). Accordingly, an ALJ may not refer to any evidence that was not a part of the record as it appeared before the CO.

In the final Determination Letter, the CO concluded that the Employer had failed to provide information, as specified in the Notice of Deficiency, regarding the relationship between the two business entities, H Bar H Farms (the entity for which the certification was requested) and Rocking H Orchards, LLP (an entity for which certification had already been approved). The CO also concluded that the Employer failed to provide the information required per the

⁷ Government offices were closed on December 25, 2014 for the Christmas holiday. Per an Executive Order of the President, government offices were also closed on December 26, 2014.

⁸ Section 655.171 affords ALJs the ability to "either affirm, reverse, or modify the CO's decision, or remand to the CO for further action."

Notice of Deficiency because “[t]he [E]mployer failed to address its temporary need in light of the other farm operating on the same property which appears to be filling the same need.”

The CO correctly noted that the Employer’s response to the Notice of Deficiency did not fully address the issue of the relationship between H Bar H Farms and the Rocking H Orchards LLP, as the Notice of Deficiency specified. That information is before me, however, because the Employer included it in the request for expedited administrative review. On my review of the record, I find that the Employer’s discussion of the relationship between the two business entities, as well as its explanation of the seasons during which workers are needed for each entity, were not presented before the CO. As this new evidence was not a part of the record before the CO, I am unable to consider it in my review, under 20 C.F.R. § 655.171. Accordingly, I will confine my review to the information that the Employer did provide to the CO in the initial application and in response to the Notice of Deficiency.

In the initial application, the Employer noted “N/A” in providing information in the section titled “Statement of Temporary Need.” In the response to the Notice of Deficiency, the Employer stated that H Bar H Farms has a seasonal need for employees from February to December in 2015 (the year for which the application applies), and these are the same months for which employees have been required in the past. I conclude, therefore, that H Bar H Farms’ “seasonal” need is consistent for these months each and every year.

As the CO noted in the Notice of Deficiency though, H Bar H Farms and Rocking H Orchards LLP appeared to be conducting related business operations (operating out of the same business address, using the same point of contact, and housing employees in the same location). Moreover, both businesses employ, or seek to employ, persons with identical qualifications as Agricultural Equipment Operators. Additionally, the CO noted, Rocking H Orchards employed Agricultural Equipment Operators from December through the first of October.

Based on the record that was before the CO, if both business entities are considered, the timeframes for which Agricultural Equipment Operators are needed overlap significantly. Indeed, with Rocking H Orchards LLP requiring such employees from December through the first of October and H Bar H Farms requiring such employees from February through the first of December, it appears that the need for Agricultural Equipment Operators is neither temporary nor seasonal, but rather is permanent. The information the Employer provided in its initial application and in its response to the Notice of Deficiency does not establish otherwise. Notably, the Employer has the burden to demonstrate that the businesses are “truly independent entities.” Altendorf Transport, Inc., 2013-TLC-00026, slip op. at 8 (Mar. 28, 2013). The Employer did not provide any information on that issue to the CO.

For the foregoing reasons, I find that the Employer has failed to meet its burden that it has a seasonal or temporary need for H-2A workers under 20 C.F.R. § 655.103(d); and therefore, I find that the CO properly denied certification.

ORDER

In light of the foregoing discussion, it is hereby ORDERED that the Certifying Officer's decision denying the above-captioned H-2A temporary labor certification matter is AFFIRMED.

SO ORDERED.

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey