



Issue Date: 04 November 2014

CASE NO: 2015-TLC-00003

ETA CASE NO: H-300-14268-091439

In the Matter of:

Larry Ulmer,
Employer.

Certifying Office:

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

DECISION AND ORDER

Larry Ulmer (“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 September 25, 2014, ETA received the Employer’s application for temporary labor certification. AF 34.² In particular, the Employer requested certification for two “Agricultural Equipment Operators” for the period from December 1, 2014 through April 30, 2015. AF 7. The application listed the following as the job description: “Performs any of the following tasks: repairing and maintaining farm machinery; hauling fertilizer for spring planting; hauling grain crop to market; cleaning equipment for spring planting; hauling grain crop to market; cleaning seed for spring planting; maintaining farm buildings and structure; calibrating new farm equipment for spring plating. Must be able to lift 60 pounds. Minimum three months experience. No minimum education required. Must be able to obtain a driver’s license within 30-90 days of

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.

hire.” AF 60. The Employer listed the temporary need as “seasonal.” AF 58. The worksite address was listed as 8217 96th Avenue SE, Fullerton, North Dakota. AF 61.

On September 30, 2014, The CO issued a Notice of Deficiency (“NOD”) requesting further information on seasonal need. AF 43-46. The CO noted that two other H-2A applications for “Agricultural Equipment Operators” had been filed for the same worksite address by Ulmer Farms, although their period of need was from March 2014 to April 2015 and they were filed under a different employer name and FEIN. All three applications had the same business and worksite address, requirements of 3 months experience, and requirement to obtain a driver’s license within 30-90 days. AF 45. The applications also had similar job duties such as driving, repairing and maintaining farm machinery, and transporting crops.³ 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 46.

On October 6, 2014, Larry Ulmer responded to the NOD. AF 39-40. Larry Ulmer noted that Ulmer Farms is owned by his son, Chad Ulmer. AF 39. He stated that they operated “separate businesses out of the same location, but with different agricultural focuses and annual needs.” The response stated that Ulmer Farms focuses on growing and harvesting the crops and Larry Ulmer focuses on hauling the crops grown by Ulmer Farms, repairing and winterizing the machinery used by Ulmer Farmers. AF 39.

On October 9, 2014, the CO denied the application because the Employer failed to establish that its need is seasonal or temporary in nature. AF 34-36. Although the Employer tried to distinguish the job duties contained in Ulmer Farms’ application from the job duties contained in his application, the CO found that the duties in each application fell within the SOC occupation code and title for an “Agricultural Equipment Operator” and thus represented the same job opportunity for purposes of the H-2A program. AF 37. The CO also determined that because the applications from Ulmer Farms and Larry Ulmer contained the same worksite location and experience requirements, listed similar job duties, and spanned the period from March 15, 2014 through April 30, 2015, there was a full time need for agricultural equipment operators at the location listed on the Employer’s application. AF 37. The CO also stated “the interlocking nature of these two entities and operations renders the fact of separate corporate forms inconsequential.” AF 37.

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 37-38. 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 38. 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*

³ The NOD incorrectly states that Larry Ulmer owns both entities. Ulmer Farms is owned by Larry Ulmer’s son, Chad Ulmer.

Transport Inc., 2013-TLC-00026 (2013), and *In the matter of Katie Heger*, 2014-TLC-00001(2013). AF 38.

On October 16, 2014, Larry Ulmer requested expedited administrative review of the denial. In the request, Mr. Ulmer maintained that the two entities were unrelated and said the *Lancaster* case did not apply because in that case Mr. Lancaster owned both entities that submitted applications.

DISCUSSION

In order to be eligible for H-2A temporary labor certification, an employer must establish that it 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" (December 1, 2014 through April 30, 2015) 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 his son's business, Ulmer Farms. AF 37. 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 37. Together, these applications cover a yearlong period, from March 2014 to April 2015. AF 37.

Ulmer Farms' application was certified for the period from March 2014 to December 2014, and the Employer now seeks to fulfill the same labor need for the sequential period from December 2014 to April 2015. AF 37. Since Ulmer Farms and Larry Ulmer appear to function as a single entity and have requested workers for sequential periods of time for the same work, their "temporary" need merges into a single year-round need for equipment operators. 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.

The Employer argues that the two entities 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”). Larry Ulmer even acknowledged that his farm performs the winter duties while Ulmer Farms works during the rest of the year. AF 39. He also stated that last year the two farms used the same employee. AF 39.

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. *See Altendorf Transport, Inc.*, 2013-TLC-00026 at 8; *Katie Heger*, 2014-TLC-00001 at 4-6 (finding that different FEINs and names do not establish that two business entities are entirely separate and do not function as one operation).

Therefore, I find that the Employer failed to establish a seasonal need for agricultural services or labor. The consecutive 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**.

DANIEL F. SOLOMON
Administrative Law Judge

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.