U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 November 2014

OALJ Case No.: 2015-TLC-00006

ETA Case No.: H-300-14288-241244

In the Matter of

PAINTBRUSH ADVENTURES,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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. 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, consisting of the Appeal File ("AF") forwarded by the Employment and Training Administration, and the written submissions of the parties.

BACKGROUND

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary 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 October 16, 2014, the DOL's Employment and Training Administration ("ETA") received an *Application for Temporary Employment Certification* from Paintbrush Adventures ("Employer"). (AF 30, 39-48).[1] In this application, the Employer requested temporary labor certification for 1 "Open Range Livestock" employee from December 15, 2014 through September 15, 2015, based on a temporary seasonal need. (AF 39). Under "Statement of

[1] Citations to the Administrative File will be abbreviated "AF" followed by the page number.

Temporary Need" the Employer wrote "N/A." (AF 39). The SOC (ONET/OES) code for the position is 45-2093, "Farmworkers, Farm, Ranch, and Aquacultural Animals." (AF 39).

On October 23, 2014, the Certifying Officer ("CO") sent Employer a Notice of Deficiency ("NOD"). (AF 20-28). The CO found that the job opportunity described in the Employer's application, coupled with the Employer's recent filing history, indicated that the Employer's dates of need are actually from September 2, 2013 through September 15, 2015. (AF 22). The CO provided the below chart, identifying the Employer's recent requests for temporary labor certification.

Case Number	Employer Name	Status	Beginning Date of Need	Ending Date of Need
H-300-13200-536207	PAINTBRUSH ADVENTURES	Certified- Full	9/2/2013	6/30/2014
H-300-14151-827303	PAINTBRUSH ADVENTURES	Denied	7/1/2014	6/30/2015
H-300-14288-241244	PAINTBRUSH ADVENTURES	Received	12/15/2014	09/15/2015

(AF 22; *see also* AF 32). All three applications requested one worker to work in a Farmer, Farm, Ranch and Aquacultural Animals based job opportunity (SOC code 45-2093) at the same worksite. (AF 22). All applications listed the same point of contact and involved similar job duties and requirements involved with open range livestock duties. (AF 22). In regard to the previous case H-300-14151-827303, the Employer was issued a notice of deficiency and was given an opportunity to explain the temporary nature of the position. While the Employer did respond to the NOD, it did not address the temporary need deficiency and the application was denied. AF 22-23. Similarly, in order to cure the temporary need deficiency in the current application, the Employer was directed in the NOD to "provide a detailed explanation as to why the job opportunity is seasonal or temporary rather than permanent in nature."[2] (AF 23).

On November 3, 2014, the Employer responded to the NOD. (AF 12-16). The Employer did not address the temporary need deficiency in its response, and did not provide any explanation of why the job opportunity is seasonal or temporary. *Id.*

On November 6, 2014, the CO denied the Employer's application. The CO stated the Employer failed to provide an explanation of how its job opportunity was seasonal, rather than permanent in nature, citing to 30 C.F.R. § 655.103(d). (AF 10-11).

[2] The NOD also identified several other deficiencies based on errors in the application, and the Employer was given an opportunity to amend its application. AF 23-28. The Employer did amend its application, and the CO accepted the corrections. AF 10-11, 13. Accordingly, the additional deficiencies are not part of the appeal before me.

On November 10, 2014, the Employer appealed the CO's denial to the Office of Administrative Law Judges ("OALJ"). In its request, the Employer wrote:

> The dates of employment we are requesting are 12/15/2014-09/15/2015. I miss understood [sic] and thought if I fixed dates it would be ok.[3] We consider this to be seasonable work because these are the busy months. There's lambing, calving, branding and taking care of the livestock in the range and moving of the livestock from pasture to pasture.

(AF 2).

On November 18, 2014, I issued a Briefing Order. The CO filed a brief on November 20, 2014; the Employer did not file a brief.

DISCUSSION

Scope of Review

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only 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 or amici curiae." Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO. Here, the Employer's appeal letter for the first time, provided an explanation of why the job opportunity is seasonal work. As this new evidence was not a part of the record before the CO, I am unable to consider it in my review.

Temporary Need

To qualify for the H-2A program, 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 only issue before me is whether the Employer has established a seasonal need for the position requested in its application. The DOL's H-2A regulations provide:

> *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.

[3] Despite Employer's statement, it did not change its dates of employment in its response to the NOD. The dates 12/15/2014 to 9/15/2014 are the original dates of employment requested in the Employer's application. (AF 39).

20 C.F.R. § 655.103(d). The Employer has the burden to establish eligibility for the H-2A program. *Altendorf Transport, Inc.*, 2011-TLC-00158, PDF at 13 (Feb. 15, 2011).

The CO in the NOD identified for the Employer its concerns regarding the temporary nature of the job opportunity, specifically the fact that the Employer has submitted multiple applications for what appears to be the same position, covering almost a 2 year period. The Employer was given an opportunity to address the CO's concern and provide an explanation of why the job opportunity was seasonal in nature and not permanent. The CO's NOD stated that "if you file a modified application, and it does not address all the modifications listed in this notice, we will not be able to accept it for consideration." (AF 20) (emphasis in original).

The Employer in its response to the NOD did not provide any explanation of why its job opportunity is temporary or seasonal in nature, as required by Sections 655.103(d) and 655.161(a), and therefore the CO properly denied the application.

In the Employer's appeal request, it did provide a statement of seasonal need, namely: "We consider this to be seasonable work because these are the busy months. There's lambing, calving, branding and taking care of the livestock in the range and moving of the livestock from pasture to pasture." (AF 2). As stated above, this statement, made for the first time in the appeal request, cannot be considered on appeal because pursuant to 20 C.F.R. § 655.171, it constitutes new evidence that was not part of the record before the CO. However, even if I were to consider the Employer's stated explanation, it is not a sufficient explanation to establish the position is temporary or seasonal because it did not address the CO's primary concern regarding its prior applications for the same work, dating back to September 2, 2013.

The Employer has failed to demonstrate that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d). Since it is the Employer's burden to establish eligibility for the H-2A program, and the Employer failed to do so, 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.

Digitally signed by JONATHAN CALIANOS
DN: CN=JONATHAN CALIANOS, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

JONATHAN C. CALIANOS
Administrative Law Judge