



Issue Date: 08 June 2015

Case No.: 2015-TLC-00053
ETA Case No.: H-300-15119-224067

In the Matter of

Pleasantville Farms LLC
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arises from the request of Pleasantville Farms, LLC (“Employer”) for expedited administrative review of a United States Department of Labor Certifying Officer’s (“the CO”) denial of its application for temporary alien labor certification under the H–2A temporary agricultural labor certification program. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171(b).

On June 2, 2015, the Office of Administrative Law Judges received the Administrative File (“AF”) from the CO. The regulations require the Administrative Law Judge issue a decision within five business days, beginning with the day after receipt of the AF. 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On April 29, 2015, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application under the H-2A temporary agricultural labor certification program (ETA Form 9142A) from Employer, seeking temporary labor certification for 10 positions classified as “farmworkers and laborers.” AF 57, 59.¹

Employer stated that it had temporary need for the workers from June 10, 2015 to April 10, 2016. AF 57. In its statement of temporary need, the Employer maintained that “[d]uring the months of June and April our permanent workers become short handed due to the increased volume o [sic] produce demand in the market,” and “that [t]he temporary additional workers will help our business to keep up with such high demand and increase our sales.” *Id.*

In describing the job duties, the Employer stated, in relevant part:
Planting/cultivating/harvesting vegetables. This job requires a minimum of three months of prior experience harvesting vegetables for fresh market. Workers may plant vegetables seed by hand, hand till, water and hand select/harvest vegetables.

¹ Citations to the 174-page Administrative File will be abbreviated “AF” followed by the page number.

Worker may perform any combination of the following duties using both manual and machine associated with vegetables production; cultivating and otherwise participating in vegetables production, including preparing the greenhouses for filling with soil, sweeping and cleaning greenhouses houses. Lifting requirements 50 pounds. Perform all duties to grow market quality vegetables.

AF 59.

The CO issued a Notice Of Deficiency (“NOD”) dated May 4, 2015 advising Employer that its application failed to meet criteria for acceptance and citing application deficiencies in the areas of “temporary need,” “emergency situation,” “offered wage,” “transportation and subsistence,” and “first week wage guarantee.” AF 20-25. With regard to the “temporary need” deficiency, the CO specifically stated that it was unclear how the job opportunity is seasonal or temporary and directed Employer to explain in detail why the dates of need identified in its April 2015 H-2A labor certification application “have significantly changed from its established season of November through August to its current request of June through April.” AF 20. The NOD stated that Employer’s previous H-2A application listed its dates as need were November 3, 2014 to August 19, 2015. *Id.*

The NOD also stated that failed to complete or inconsistently completed parts of required forms. AF 24-25. The NOD also outlined the required modifications to the application for approval. AF 20-25.

By letter dated May 13, 2015, Employer, through its agent of record, submitted its response to the NOD, giving permission to amend its application as referenced in the NOD. AF 14-16. As for “temporary need” and the different dates of need in the current application as compared to its previous one, Employer stated the following:

We chose different dates . . . because every phase of the business plan to begin have [sic] been met. The process necessary to begin the intended crop is similar to those grown in Lackawanna, Luzerne, Adams and Lancaster counties. [Employer] is anxious and ready to begin now due to its unique availability of greenhouses and land available to plant and harvest this crop. This coincides with the specific language of 20 CFR sec. 655.103(d) which states that, “employment [that] is tied to a certain time of year by an event or pattern. . . . and requires labor levels far above those necessary for ongoing operations.” Due to the unique area and facilities available to [Employer] the event or pattern is interchangeable. The understanding that it is seasonal relates to the time the crop needs to grow once planted; this takes it out of the year-round business.

AF 14-15.

Employer maintained that, in its previous H-2A temporary labor application, the seasonal need was planned for the months of November to August, taking into consideration the time need for “seeding, germination, and pollination through harvesting.” AF 14.

In a letter dated May 19, 2015, the CO notified Employer that its application seeking temporary labor certification under the H-2A temporary agricultural program had been denied. AF 2. The CO's denial letter enclosure concluded that Employer failed to demonstrate that its need for temporary workers correlated to a certain time of year as required under the applicable regulation.

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 only issue before me is whether Employer has established a temporary or seasonal need for workers.

The applicable regulation provides the following:

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 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)

In determining whether a job opportunity referenced in an application for labor certification is temporary, “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. 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). Accordingly, in determining seasonal need, I must “determine if the employer's needs are seasonal, not whether the duties are seasonal.” *Sneed Farm*, 1999-TLC-7, slip. op at 4 (Sept. 27, 1999).

It is the employer's burden to establish eligibility for temporary labor certification. 20 C.F.R. § 655.161(a). An employer is required to justify a change in its dates of seasonal need in order to ensure that it is not manipulating its “season” when it really has a year-round need for labor. A seasonal need is tied to the weather or a certain event, and a change in the dates for a seasonal need must be supportable or warranted. *Southside Nursery*, 2010-TLC-157, slip op. at 4 (Oct. 15, 2010).

Here, Employer's response to the NOD provided no indication of either the duration of Employer's growing season or which job duties are performed during particular months. *See e.g., Steven Cox Associates*, 2011-TLC-00087, slip op. at 3-4 (Dec. 23, 2010)(CO denial of temporary labor certification application reversed where the employer correlated its temporary need to weather patterns); *Thorn Custom Harvesting, LLC*, 2011-TLC-00196, slip op. at 3-4

(Feb. 28, 2011)(CO denial vacated where the employer specified the beginning of its planting season and tied its temporary labor need to a time of year). Despite Employer's response to the NOD implying that the performance of different duties necessitated the change in the dates of seasonal need, the job duties Employer listed in Section F(a), Item 5 of the ETA Form 9142 (H-2A Application for Temporary Employment Certification) for both its current and prior applications for temporary labor certification are, as the CO stated in the NOD, identical. *Compare* AF 59 and AF 149.

Finally, Employer suggests in its response to the NOD that "the unique area and facilities available to [it]" varies the timing of its temporary employment need. AF 15. I agree with the CO that this contradicts the requirement of 20 C.F.R. 655.103(d) that such employment need be "tied to a certain time of year by an event or pattern."

CONCLUSION

Based on the foregoing, I find that Employer has failed to demonstrate it has a temporary seasonal need for H-2A workers under 20 C.F.R. § 655.103(d).

ORDER

It is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

LYSTRA A. HARRIS
Administrative Law Judge