



Issue Date: 12 December 2014

Case No.: 2015-TLC-00007

ETA Case No. H-300-14089-438059

In the Matter of

ROBERT JOOS

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. 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 (“ETA”), 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 March 11, 2014, the DOL’s Employment and Training Administration (“ETA”) received an *Application for Temporary Employment Certification* from Robert Joos (“Employer”). AF 49.¹ In this application, the Employer requested temporary labor certification for ten (10) Farmworker employees from May 18, 2014 through November 11, 2014, citing a temporary seasonal need. AF 49. Under “Statement of Temporary Need” the Employer wrote:

Robert Joos is a grain & livestock farming operation in eastern North Dakota. Mixed grain and cattle farming operations in the Dakota’s [sic] traditionally have a fixed calving season in the springtime. Also calves/nursing mothers are in need of additional care during the spring months, when sickness runs rampant due to

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

fluctuating temperatures. Fencing and haying are also cattle duties that are seasonal and can only be done in the warm weather months. Grain farming in North Dakota is a strictly seasonal business, as North Dakota weather prohibits an operator from producing grain crops during the winter months. Therefore, mixed grain and cattle farming operations hire temporary workers in the spring in time for preparation, planting and calving work; and then let them go by November, when the crops have been harvested and all fencing and haying has been completed. At that point temporary seasonal farm hands are no longer needed by Robert Joos until the following spring. According to the Bureau of Labor Statistics February 2014 Monthly Unemployment Rate Report, the state of North Dakota has less than a 3% unemployment rate, which is the lowest in the nation by far. The reason for this dramatically low unemployment rate is due to the oil boom that has hit North Dakota in the last couple of years, in which oil companies are paying general laborers exceedingly high wages that other industries simply cannot compete with (See the April 20th, 2010 [sic] New York Times article entitled “A State with Plenty of Jobs but Few Places to Live”). It is therefore nearly impossible for companies to secure a temporary workforce with these types of conditions, as all general laborers in the state who desire to obtain permanent positions that pay very high wages are able to do so. With our current labor statistics, low population and rural locality, it becomes more difficult to secure seasonal farm help in North Dakota each year.

AF 49. The SOC (ONET/OES) title for the requested position is “Agricultural Equipment Operators,” with code 45-2091.

On April 16, 2014, the Certifying Officer (“CO”) issued a Notice of Acceptance (“NOA”), by e-mail. AF 23.

On November 6, 2014, the Employer sent an email requesting a five (5) month extension of the labor certification. AF 21. The rationale provided for this extension-request was:

Due to a combination of unforeseeable weather events and an unforeseeable lack of available qualified workers we need a 5 month extension of our current Labor Certification. Due to the Polar Vortex shifts that occurred Dec 2014 [sic] and Jan 2014 that caused much below average temperatures we experienced deeper than expected frost levels which damaged water lines and related infrastructure. This extreme freezing also created a much deeper frost in the soil profile which prevented normal soil warming and water infiltration which by itself and then when combined with some localized extreme rainfall events during May and June causes serious troubles and damage to our yards, feedlots and agricultural lands. We also were unable to properly and timely plant 80% of our farm this past spring due to the weather related troubles.

We have a dire and unmet temporary need of labor to help to remediate these damages including repairs to damaged yards and feedlots and also different and later than normal field operations and fall winter seeding that will need to be throughout the remainder of this fall and winter. Due to the ongoing unavailability of qualified domestic and foreign workers our initial positions approved on our original Labor certification have mostly been unfilled. We only were able to have two workers for 30 days during the first 2 months of our certification and one during the last month

giving us less than 5% of our initial labor needs.²

AF 21.

On November 12, 2014, an ETA service employee contacted Job Service North Dakota to confirm the weather conditions represented by the Employer. A Job Service employee verified that North Dakota had a very cold winter in 2013-2014 and that the area proximate to the Employer's business was subjected to excessive rain. However, this representative expressed reservations about the kinds of work that could be accomplished outdoors during the foreseeable future because the weather had again turned "unseasonably cold" within the past week. AF 17.

On November 17, 2014, the Certifying Officer (hereafter "CO") denied the Employer's long term extension request. AF 13-16. The CO noted that the weather condition reference had occurred prior to the Employer's request and therefore they could have been reasonably foreseeable by the Employer. They further noted that the North Dakota State Workforce Agency indicated that it was unsure whether any outdoor work could now take place, and therefore it was unclear how the Employer could continue the fall/winter seeding activities it indicated in its extension request.

On November 24, 2014, a lay representative for the Employer filed an appeal of the CO's denial of the extension request. AF 8. However, this request did not come from the Employer's agent of record. AF 8.³ Employer separately filed an appeal, also on November 24, 2014, and requested an expedited review of this matter. AF 4. In this appeal, the Employer alleged "non-performance" by his agent of record. The Employer further alleged that in his petition for extension he had intended to reference weather events that occurred after his original application for labor certification, not before. He also asserted that there were farming activities that occurred during the winter months, including gathering hay bales, dormant seeding, manure spreading, temporary fence installation and crop processing/conditioning.⁴

On December 5, 2014, this case was assigned to me. In an order dated December 5, 2014, I gave the parties three business days to file any briefs that they wished to submit.⁵ On December 10, 2014, the Director filed a response brief.

DISCUSSION

Scope of Review

² *Id.* Employer also submitted hyperlinks to document the flooding and a 2014 crop acreage summary sheet showing 1,345.6 acres "prevented planting."

³ Kevin Opp is identified as the agent of record throughout the correspondence in this file. *See* AF 12, 13, 22, 23, 29, 30, 51, and 55.

⁴ I note that some of these activities were not listed as part of the "seasonal" workers' duties and in some respects directly contradict the initial justification for the temporary nature of the work. *See* AF 49 ("Fencing and haying are also cattle duties that are seasonal and can only be done in the warm weather months. Grain farming in North Dakota is a strictly seasonal business, as North Dakota weather prohibits an operator from producing grain crops during the winter months.").

⁵ After notifying the parties that they had three business days to file a brief, the Order erroneously noted December 8, 2014. On December 8, 2014, a member of my staff noticed this error and I directed that the parties be notified via email that the correct due date was December 10, 2014. Also, the Notice of Assignment and Order indicated the case number was 2014-TLC-00007 when it should have been 2015-TLC-00007.

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.”⁶ Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Here, the Employer’s appeal letter, for the first time, provided an explanation of the averred weather conditions, as well as issues with his agent of record. Based on a review of the record, I find that these issues 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 § 655.171.

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms*, 2001-TLC-00006 (ALJ May 31, 2001) *citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures). 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. § 655.170(b).

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).⁷ On its application for an extension, the Employer stated that it required “seasonal” workers. AF 49. Thus, 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.

20 C.F.R. § 655.103(d).

The CO denied the Employer’s application because “[t]he employer has primarily attributed its need for an extension to the weather conditions that took place during the winter prior to [its March 30, 2014] *Application for Temporary Employment Certification*.” AF 15. It

⁶ 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.”

⁷ 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). Here, the CO has previously determined that the Employer is eligible and the CO has not withdrawn its earlier certification so I find that Employer has met its burden to show its eligibility for the H-2A program.

also cited as a reason that “current weather conditions in the employer’s region have turned *unseasonably* cold, and the [North Dakota State Workforce Agency] is therefore, unsure that any outdoor work can now take place.” *Id.* (emphasis added). It concluded that the employer had not provided sufficient evidence of factors beyond its control that could not have been reasonably foreseen. AF 16.

I note several shortcomings in the CO’s analysis. First, it attributes the need for an extension primarily to weather conditions that took place the winter prior. However, the Employer identified an intervening unforeseen cause: *extreme* rainfall events during May and June causing a delay in the timely planting of 80% of his crops. AF 21. While it is true that the Employer referenced the winter prior, it is also true that he referenced weather events that occurred after his original application for labor certification, not before. The CO never directly addressed this intervening unforeseen event. Instead the CO relied on the current weather being *unseasonably* cold to justify why there is no current need for the workers. Unseasonable weather is not reasonably foreseeable weather and is definitely a factor beyond the Employer’s control. Further, there is no way to assess the conclusory opinion of the person making the representation that “I am unsure of what can be done out-of doors at this time.” AF 17. Farming by its very nature is an outdoor profession that labors on during both extreme heat and cold and is subject to the whims of Mother Nature. There is no evidence in this file, other than this comment, that seeding, fencing repair, or other activities could not be accomplished, during the winter period to compensate for the loss of productivity due to the unforeseen weather events from the 2013-2014 winter and 2014 summer.

There is a more general concern I have concerning this request for extension. While I certainly appreciate the Employer’s candor regarding the job duties that it plans to have its H-2A workers perform, the extensive and varied nature of the work reveals that the Employer’s need is not seasonal at all. The Employer initially sought workers in connection with its seasonal calving operation and its seasonal operation of growing hay, grain, and grass, in addition to general farming and repair work. However, the Employer’s rationale for the extension discounts his own earlier statements that the work requested is seasonal. For example, in the initial application the Employer represented “[g]rain farming in North Dakota is a strictly seasonal business, as North Dakota weather prohibits an operator from producing grain crops during the winter.” Yet on his request for extension he represents the need for seeding to occur during the fall and winter. This request for extension indicates that the crop work is actually year round and not seasonal. Following this logic, the H-2A workers would perform virtually every task imaginable on the Employer’s farms, from repair and infrastructure work, to clean-up and maintenance work, to agricultural work related to the Employer’s crops, to feeding, watering, and monitoring livestock. AF 49. This would allow the Employer to circumvent the Department’s requirements such as recruitment, advertisement, and other prerequisite, and eviscerate much of its regulations in this area. *See Haiti/USA Workforce LLC*, 2014-TLC-0095 (June 23, 2014). In short, there is no indication that this work is in any way “seasonal” in nature as the term is defined under § 655.103(d). Rather, it appears that the Employer simply requires workers for a longer period of time because the owners are unable to retain employees because of the favorable job market in North Dakota resulting from the oil industry.

The Employer's description of the job duties reveals that the work it needs is not "tied to a certain time of the year by an event or pattern," requiring labor levels above those necessary for ongoing operations. § 655.103(d). Rather, these H-2A workers would be responsible for tasks crucial to the ongoing operation of the Employer's farming and ranching. Based on the record before me, such a need appears not to fall into the definition of the term "seasonal" as it is defined in § 655.103(d).

For the foregoing reasons, the Employer has failed to meet its burden that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d); and therefore, while the CO's reasoning is, in part, faulty, the CO nonetheless 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.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey