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Issue Date: 30 October 2015

OALJ Case No.: 2016-TLC-00003

ETA Case No.: H-300-15247-722273

In the Matter of

HENKE DAIRY, LLC,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Kellie Sutton, Agent
Placement Services Global, LLC
Gower, Missouri
For the Employer

Jeffrey L. Nesvet, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On October 16, 2015, Henke Dairy, LLC ("Employer") filed an appeal from the Certifying Officer's ("CO") denial of an H-2A application pursuant to 20 C.F.R. § 655.171(b). The H-2A program generally permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

Background

On September 4, 2015, the United States Department of Labor, Employment and Training Administration ("ETA") received an ETA Form 9142 *Application for Temporary Labor Certification* ("Form 9142") from Employer. (AF 28-36).[1] Employer requested H-2A labor certification for 3 "farm workers, general" for the period of October 25, 2015 to August 25, 2016. (AF 28). I note that Employer appointed Placement Services Global, LLC as its representative for this application.[2] (AF 52).

On September 8, 2015, the CO issued a Notice of Deficiency stating that the application failed to meet the criteria for acceptance. (AF 15). The CO cited two deficiencies. The first was that pursuant to 20 C.F.R. § 655.103(d), "the job opportunity must be on a seasonal or other temporary basis" and that according to case law, "10 months is a permissible threshold at which to question the temporary nature of a stated period of need." (AF 17). Because the application had a period of need that lasted ten months and one day, the CO concluded that Employer had "not established how this job opportunity is temporary." (AF 17). The CO requested that Employer provide a detailed explanation as to the seasonal or temporary nature of the position, or reduce the period of need to October 25, 2015 to August 24, 2016.

The second reason cited in the letter was that pursuant to 20 C.F.R. § 655.103(d), the job must be temporary in nature and the job description of caring for livestock is something that is presumed to occur year-round. (AF 17). Employer had therefore not established how the job is temporary. (AF 18). I note that Employer's Form 9142, item B-9, "Statement of Temporary Need" lists "N/A." (AF 28). The CO instructed Employer to submit supporting evidence, including payroll reports, demonstrating that a temporary need exists. (AF 18).

Employer submitted modifications via email on September 14, 2015 changing the end date of the period of need from August 25, 2016 to August 20, 2016. (AF 11). However, item B-9, "Statement of Temporary Need," on the Form 9142 was left blank. (AF 13).

After reviewing the response, the CO denied the application on October 9, 2015 finding employer's explanation "failed to address the lack of a temporary need statement" or otherwise demonstrate that the job was temporary or seasonal and that the care of livestock is "presumed to occur on a year-round basis." (AF 8). Employer appealed this determination on October 16, 2015 by submitting a fax cover sheet entitled "Notice to Appeal Decision." (AF 1-5).

There are two types of appeals in H-2A labor certification cases. In administrative review cases, the administrative law judge will issue a decision on the basis of the written record. 20 C.F.R. § 655.171(a). A *de novo* hearing may be granted if an employer specifically requests it. 20 C.F.R. § 655.171(b). In this case, the fax cover sheet did not specifically request a de novo hearing. (AF 2). Therefore, treating Employer's appeal as an administrative review based on the written record, a scheduling order was issued on October 22, 2015, with briefs due on October 28, 2015.

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[1] As used in this decision, "AF" refers to the Administrative File.

[2] For purposes of this appeal, I accept that Placement Services Global, LLC has the authority to proceed with this appeal. I take no position on whether this agency has the authority to represent Employer.

On October 28, 2015, the CO filed a brief arguing that Employer had not demonstrated a temporary need because it could not show how its need for these workers differed from a general need at any other time of the year. (CO Brf. at 4). Additionally, the CO avers that this is a case in which Employer has provided no statement of temporary need, as opposed to an insufficient one, so it cannot satisfy its burden under the regulations. (CO Brf. at 6). Employer did not file a brief by the submission deadline.

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 criteria for certification include whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis . . .") Temporary or seasonal basis is defined as follows:

> 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). Throughout the labor certification process, the burden of proof in alien certification remains with Employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). In this particular case, Employer has given no reason or explanation as to why caring for livestock on a dairy farm is temporary or seasonal in nature. In fact on the original Form 9142, the Employer wrote "N/A" for its "Statement of Temporary Need." (AF 28). In its modification, the Employer left this box blank. (AF 13).

The CO had noted in the initial Notice of Deficiency letter that a period of need over ten months is a "permissible threshold at which to question the temporary nature of a stated period of need." (AF 17). The CO informed Employer it could reduce the period of need to correct this problem. (AF 17). It appears that Employer wrongly assumed this was all that needed to be done to address the deficiencies. Not only does reducing the time period not actually prove that the need is temporary, but the CO specifically requested evidence and an explanation as to how caring for livestock is temporary, which Employer failed to provide. (AF 17-18).

Conclusion

I find Employer has not established its need for employment is seasonal or temporary in nature as required under 20 C.F.R. 655.103(d) and therefore has not met its burden of establishing that it is entitled to labor certification. *See Garrison Bay Honey Co, LLC*., 2011-TLC-00054 (Dec. 23, 2010). Accordingly, I find the CO's denial should be affirmed.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of temporary alien labor certification in the above captioned case be, and hereby is, **AFFIRMED**.

So Ordered:

Digitally signed by STEPHEN R. HENLEY
DN: CN=STEPHEN R. HENLEY, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN R. HENLEY
Chief Administrative Law Judge