



**Issue Date: 08 December 2015**

**CASE NO.:** 2016-TLC-00008  
**ETA CASE NO.:** H-300-15280-741852

**IN THE MATTER OF:**

**LEGUME MATRIX, LLC,  
Employer**

**DECISION AND ORDER**

This matter involves a request for certification of non-immigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended,<sup>1</sup> and the implementing regulations promulgated by the U.S. Department of Labor.<sup>2</sup> The Certifying Officer (CO) previously denied Legume Matrix, LLC's request for temporary labor certification. For the reasons set forth below, the undersigned affirms the CO's decision.

**STATEMENT OF THE CASE**

On October 7, 2015, Legume Matrix, LLC (Employer) submitted an application for temporary employment certification (ETA Form 9142A) to the U.S. Department of Labor, Employment and Training Administration. AF-92-100.<sup>3</sup> Employer requested certification for two full-time "agricultural equipment operators" to fulfill a "seasonal" need from December 15, 2015 – April 30, 2016. AF-92. Employer provided the following "Statement of Temporary Need":

Legume Matrix is a seed cleaning facility owned and operated by Kevin Haas where Mr. Haas cleans over 50% of his own grain. Legume Matrix's season begins in July at the onset of harvest and continues through April when planting begins. From May – Jun, grain processing slows significantly as grain has been cleaned and exported.

*Id.*

An agricultural equipment operator must "operate and maintain seed cleaning equipment...unload trucks and operator forklift...[and] bag peas, lentils, and chickpeas." AF-94. Employer listed Kevin Haas as the company owner, and filed a job order with the applicable state workforce agency. AF-93, 96.

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<sup>1</sup>8 U.S.C. § 1101(a)(15)(H)(ii)(a).

<sup>2</sup>20 C.F.R. Part 655, Subpart B.

<sup>3</sup>For purposes of this decision and order, the undersigned will refer to the Administrative File as "AF," followed by the relevant page number(s). For example, "AF-1" will mean page 1 of the Administrative File.

After receiving Employer's application, the CO issued a Notice of Deficiency (NOD) on October 14, 2015. AF-77-78. Employer's application was defective for two reasons. AF-79-81. First, Employer failed to show that the job opportunity was a "seasonal" or "temporary" need, as required by 20 C.F.R. § 655.103(d). AF-79. The CO found that another business, Haas Farms, was located at the same worksite as Employer and had been previously certified for agricultural equipment operators. AF-79-80. Haas Farms and Employer also listed the same addresses for the point of contact; the job duties in both applications were also within the same occupation code and title. AF-80. The CO thus found that "although Legume Matrix, LLC and Haas Farms are being filed as two distinct business entities, the interlocking nature of these entities and operations renders the fact of separate corporate forms inconsequential." *Id.* When the dates of need for Haas Farms and Employer were considered together, the CO concluded that Employer failed to establish that the current job opportunity is temporary because the dates of need exceed one year. AF-79-80. To remedy this deficiency, the CO instructed Employer to submit "summarized payroll reports for a minimum of one previous calendar year (2014) for Agricultural Equipment Operators."<sup>4</sup> AF-80.

Second, the CO found that Employer failed to demonstrate that it would provide adequate housing for its temporary foreign workers, as required by 20 C.F.R. § 655.122(d)(1)(ii). AF-81. To remedy this deficiency, the CO instructed Employer to "provide a tentative contract from the hotel" where it planned to house its temporary workers. *Id.*

Employer responded to the NOD on October 14, 2015. AF-81. Employer stated that the CO erred in finding that Employer and Haas Farms are located at the same worksite. *Id.* Moreover, the CO erred in finding that both companies listed the same employer and point of contact addresses. *Id.* Employer thus asked the CO to "please correct your errors and issue an amended NOD that contains facts." AF-75.

On October 22, 2015, the CO issued a revised NOD. AF-69-74. The CO now found four deficiencies in Employer's application. AF-71-74. First, the CO found that Employer did not demonstrate that the job opportunity is a seasonal or temporary need, as required by 20 C.F.R. § 655.103(d). AF-71. To remedy this deficiency, the CO instructed Employer to submit summarized payroll reports for both Employer and Haas Farms for a minimum of one previous calendar year for agricultural equipment operators.<sup>5</sup> AF-72.

Second, Employer's application was incomplete, in violation of 20 C.F.R. § 655.141(a). AF-72-73. Employer subsequently resolved this deficiency; accordingly, the undersigned will not address this issue any further.

Third, Employer failed to provide assurance that the potential housing accommodations for its temporary foreign workers complied with local, state, or federal housing standards, as required by 20 C.F.R. § 655.122(d)(1)(ii). AF-73. Employer subsequently resolved this deficiency; accordingly, the undersigned will not address this issue any further.

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<sup>4</sup>The CO also instructed the CO to sign the payroll reports. AF-80.

<sup>5</sup>The CO also instructed the CO to sign the payroll reports. AF-72.

Finally, the CO found that Employer failed to provide proof of workers' compensation insurance, as required by 20 C.F.R. § 655.122(e)(1)-(2). AF-73-74. To remedy this deficiency, the CO instructed Employer to provide a valid workers' compensation certificate. AF-74.

On October 26, 2015, Employer submitted a modified application in response to the CO's revised NOD. AF-47-68. On November 19, 2015, the CO denied Employer's modified application for two reasons. AF-35-40. First, Employer failed to provide a valid workers' compensation certificate, as required by 20 C.F.R. § 655.122(e)(1)-(2). AF-37.

Second, Employer failed to demonstrate that the job opportunity was temporary or seasonal, as required by 20 C.F.R. § 655.103(d). AF-37-38. The CO found that "[this] job opportunity...coupled with the employer's recent filing history, indicates the employer's dates of need are from 04/01/2015 to 04/30/2016, which is over a one year period of need." AF-38. The CO stated that, "although Legume Matrix, LLC and Haas Farms are filed as two distinct business entities, the interlocking nature of these entities and operations renders the fact of separate corporate forms inconsequential." *Id.* The CO found that the duties in both applications fell within the same occupation code and title (agricultural equipment operator) and thus represented the same job opportunity for purposes of the H-2A visa program. *Id.* The CO also concluded that Employer's area of intended employment, crops, and point of contact are the same as Haas Farms. AF-39. Kevin Haas also owns both companies and signed the documents submitted with both applications for temporary labor certification. *Id.* Both applications also listed the same housing address for temporary workers. *Id.*

Moreover, Employer failed to submit a payroll report even though the CO specifically requested one in its revised NOD. AF-39. Employer stated that it did not provide a payroll report because it does not employ agricultural equipment operators, but CO found that Employer had previously been certified for agricultural equipment operators in November 2013 and November 2014. *Id.* The CO thus concluded, "either the employer's assertion that it did not have a payroll report for the position of Agricultural Equipment Operators at Legume Matrix LLC is not accurate, or it repeatedly, and under penalty of perjury, filed inaccurate applications in the past."<sup>6</sup> AF-40. For all of these reasons, the CO denied Employer's application for temporary foreign workers. *Id.*

On November 20, 2015, Employer requested an expedited administrative review of the CO's decision. AF-1. The Office of Administrative Law Judges in the U.S. Department of Labor received Employer's request on November 25, 2015; the case was assigned to the undersigned later that day. On December 1, 2015, the undersigned received the Administrative File. Later that day, the undersigned issued an order granting the parties permission to file closing briefs. The undersigned received a closing brief from counsel for the Certifying Officer (the Solicitor) on December 7, 2015. Employer did not submit a closing brief.

## ISSUE

The undersigned must address the following issues in this case:

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<sup>6</sup>The CO also stated that Employer failed to sign the payroll report for Haas Farms, in violation of the CO's instructions in its revised NOD.

1. Has Employer demonstrated that the job opportunity at issue is “temporary” or “seasonal” in nature, as required by 20 C.F.R. § 655.103(d)?
2. If yes, has Employer also provided proof of workers’ compensation insurance coverage, as required by 20 C.F.R. § 655.122(e)(1)-(2)?

### **SCOPE OF REVIEW**

In an expedited administrative review, the undersigned’s ruling must be based on the written record and any legal briefs from the parties involved or amici curiae. 20 C.F.R. § 655.171(a). New evidence cannot be considered. *Id.* The undersigned must issue a written decision within five business days after receiving the Administrative File.<sup>7</sup> *Id.* The undersigned’s ruling constitutes the final decision of the Secretary of Labor. *Id.*

### **APPLICABLE LAW**

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed; and
- (2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

The employer bears the burden of demonstrating that it has a temporary or seasonal need for agricultural services. 20 C.F.R. § 655.161. A “seasonal need” occurs if employment 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. 20 C.F.R. § 655.103(d). The fact-finder must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal. *Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Company*, 2011-TLC-109 (*citing Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*)).

Similarly, employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20

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<sup>7</sup>The undersigned received the administrative file on December 1, 2015. The undersigned must therefore issue a written decision by December 8, 2015.

C.F.R. § 655.103(d). As with a “seasonal” need, the fact-finder must determine if the employer’s needs are temporary, not whether the job itself is temporary. *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). To determine an employer’s need for labor, the fact-finder must look at the whole situation and not narrowly focus on the specific job at issue. *See Haag Farms, Inc.*, 2000-TLC-15 (Oct. 12, 2000); *Bracy’s Nursery*, 2000-TLC-11 (Apr. 14, 2000).

Finally, an employer cannot continually shift its period of need in order to utilize the H-2A program to fill a permanent need. *Salt Wells Cattle Co.*, 2010-TLC-134 (Sept. 29, 2010). Therefore, if two legally distinct companies are so interlocking that they essentially function as the same business entity, an administrative law judge may find that an employer’s need for labor is not temporary or seasonal in nature. *See Katie Heger*, 2014-TLC-00001 (Nov. 12, 2013) (employer did not establish that it was a separate business with distinct business needs because it had the same worksite address as another business, and both businesses sought certification for the same number of workers with the same qualifications to perform the same job duties); *Altendorf Transport, Inc.*, 2013-TLC-00026 (Mar. 28, 2013) (employer and another business were so intertwined that they functioned in concert to circumvent the requirements of the H-2A program because they shared the same owner, president, general manager, registered agent, and telephone number and performed the same type of farm work); *Lancaster Truck Line*, 2014-TLC-00004 (Nov. 26, 2013) (employer’s attempt to divide work between separate legal entities does not demonstrate a temporary need because employer had a consistent need for workers year-round, although the job duties changed by season).

## DISCUSSION

In reviewing a CO’s decision, the undersigned must take one of the following actions:

- (1) affirm the CO’s decision;
- (2) reverse the CO’s decision;
- (3) modify the CO’s decision; or
- (4) remand to the CO for further action.

20 C.F.R. § 655.171.

In this case, the undersigned affirms the CO’s decision denying Employer’s application for temporary labor certification because Employer has not established that it has a temporary or seasonal need for labor. Although Employer and Haas Farms are organized as separate legal entities, their applications for labor certification share many common features. These commonalities suggest that both companies function as a single entity to fill a permanent, year-round need for farmworkers through the H-2A visa program.

For example, Employer’s current application for labor shares the following features with two recent applications by Haas Farms:

- Type of need (seasonal);

- Occupational title (agricultural equipment operator);
- Educational requirements for the position (none);
- Months experience required for the position (3);
- Training required for the position (none);
- Place of employment – city and state (Jamestown, ND);
- Housing address for temporary workers (7411 46<sup>th</sup> St. SE, Jamestown, ND 58401);
- Company owner (Kevin Haas);
- Point of contact (Kevin Haas);
- Point of contact’s city and state (Jamestown, ND);
- Attorney/agent (Lesli Downs);

Additionally, the following features are similar (although not identical) in Employer’s current application and the two previous applications by Haas Farms:

- Number of workers requested; and
- Rate of pay.

Furthermore, Employer and Haas Farms have repeatedly applied for agricultural equipment operators shortly before the other company’s certification expires. This pattern of coordinated behavior strongly suggests that they function as one entity to fulfill a permanent, year-round need for farmworkers need through the H-2A visa program.

For example, Haas Farms initially received certification for three agricultural equipment operators from April 1 – December 31, 2014. Employer then applied for – and was granted – certification for two agricultural equipment operators with a start date of December 15, 2014. This start date is roughly two weeks before Haas Farms’ certification expired on December 31, 2014.

Next, Haas Farms applied for – and was granted – certification for three agricultural equipment operators with a start date of April 1, 2015. This start date is roughly a month before Employer’s previous certification expired on April 30, 2015.

Employer now seeks certification for two agricultural equipment operators with a start date of December 15, 2015. If granted, this start date would begin approximately two weeks before Haas Farms’ certification expires on December 31, 2015.

Based on this pattern of coordinated behavior, as well as the numerous commonalities between the two companies’ applications discussed *supra*, the undersigned finds that Employer and Haas Farms are so intertwined that they function as one entity to fulfill a permanent, year-round need for farmworkers through the H-2A visa program. Thus, even though the farmworkers may perform different duties during different seasons, the undersigned finds that the CO reasonably concluded that Employer failed to demonstrate that it has a temporary or

seasonal need for labor, as required by 20 C.F.R. § 655.103(d). Accordingly, Employer's application for temporary labor certification must be denied.<sup>8</sup>

**ORDER**

Accordingly, it is **ORDERED** that the Certifying Officer's Notice of Deficiency concerning Employer is **AFFIRMED** and the associated labor certification application is **DENIED**.

**SO ORDERED.**

DREW A. SWANK  
Administrative Law Judge

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<sup>8</sup>Given that Employer has failed to establish that it has a seasonal or temporary need for labor, the undersigned need not address whether Employer submitted proof of workers' compensation insurance coverage, as required by 20 C.F.R. § 655.122(e)(1)-(2).