



Issue Date: 23 September 2016OALJ Case No.: 2016-TLC-00076

ETA Case No.: H-300-16229-696370

In the Matter of

RAINBROOK FARMS, LLC.,
Employer

Certifying Officer: Shane Barbour
Chicago Processing Center

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER

Rainbrook Farms, LLC (“Employer”) appeals the Certifying Officer’s (“CO”) denial of the above-captioned application for H-2A temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188 and the implementing regulations promulgated by the U.S. Department of Labor (“DOL” or “Department”), Employment and Training Administration (“ETA”) at 20 C.F.R. Part 655.¹ For the reasons set forth below, the Certifying Officer’s denial is AFFIRMED.

STATEMENT OF THE CASE

On August 16, 2016, the United States Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. AF 488 – 524.² In particular, the Employer requested certification for ninety-nine “Farmworkers and Laborers, Crop, Nursery and Greenhouse.” The CO issued a Notice of Deficiency (“NOD”) on August 18, 2016, to inform the Employer that its application failed to meet the criteria for acceptance. AF 463 – 473. The NOD specified thirteen deficiencies and identified the modifications required for acceptance. *Id.* Most relevant to this appeal, the CO identified a failure to establish the Employer’s temporary need for workers and requested further information and documentation to demonstrate Employer’s temporary need. Specifically, the CO determined

¹ The H-2A nonimmigrant visa program enables agricultural employers in the United States to import foreign workers on a temporary basis to perform temporary, agricultural labor or services. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a “temporary labor certification” from ETA. 8 U.S.C. § 1188(a)(1).

² Citations to the 1481-page Administrative File will be abbreviated “AF” followed by the page number.

that “the requested dates of need coupled with the recent filing history for Rainbrook Farms, LLC indicates the employer has an ongoing, year round need for workers from March 20, 2015 to March 15, 2017, for a total of one year, 11 months, and 23 days for the same number of workers at the same worksite location.” AF 465. The CO noted that the duties in each of Employer’s applications fall within the same occupation code and title, and are for the same crops: “harvest tomatoes, cucumbers, banana peppers, jalapeno peppers and sweet jalapeno peppers at the same piece rates.” AF 466. The CO therefore requested that Employer provide:

1. Summarized monthly payroll reports for a minimum of March 2015 through June 2016 that identified, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation was to be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and
2. A written explanation documenting the temporary need for H-2A workers.

Id.

On August 25, 2016, the Employer responded to the Notice of Deficiency, providing in relevant part the requested payroll documentation. AF 42 – 411. Employer further detailed:

In order for there to be crops to harvest, there must first be a planting season. After the crops are planted, a greater number of workers are needed to harvest the crops. Thus, there is a pattern of seasonal need based upon the innate stages of growing produce.

Specifically, this application for temporary labor certification is being submitted to cover the cultivation period that is tied to the vegetable season. The job description in the instant application states: "*Plant and cultivate* tomatoes, cucumbers, banana peppers, jalapeno peppers, sweet jalapeno peppers, and some field care. Some of the job duties include the following: tie plants, stake plants, prune plants, clean drip emitters and microjets, remove plastic drip lines, remove dead plants, and weed removal. . . .

The job description as stated above is *distinguishable* from the prior filings in that it *does not include* the *harvesting* of any of the crops listed. This was done purposely to begin distinguishing between the time period that the workers will be used to cultivate and plant the crops versus those periods in which they will harvest. If the application does include harvest as a part of the job duties or description it was included in error, and must be amended.

Moreover, in general, the planting and harvest season for the specific types of vegetables that will be harvested is approximately April thru March, with a break in work for the month of March. Thus, the typical season for vegetables will last approximately eleven (11) months. However, the typical season can be drastically affected by weather patterns and climate conditions. Thus, although still being

driven by an event or pattern, the overall crop yield and timing is at the mercy of climatic changes. Which was the case for the 2015-2016 season. The 2015 - 2016 season was drastically affected by El Nino weather conditions that are evidenced in multiple weather and agriculture publications. (See attachments). Considering the exceptional weather conditions that only occur once every two to seven years, it is rational to expect the season of vegetable farming to be altered. Also, it is reasonable to expect that a farmer will need to adjust their cultivation and harvesting schedules to procure the best crop yields. (See attached agweb.com publication).

AF 412 – 413. Employer further argued that, under 29 C.F.R. § 500.20, vegetable farming is seasonal in nature, and it is distinguishable from dairy farming, which was at issue in *In the Matter of Grandview Dairy*. See 2009-TLC-00002 (2008). In support of its position, Employer attached a news article, indicating in relevant part that El Nino caused higher yields of corn and soybean crops; a printout from the Department of Labor’s website providing an overview of the H-2A program; an article from the Florida Climate Center describing the weather relating to El Nino; a copy of the National Weather Service’s FAQs on El Nino and El Nina; a copy of 29 C.F.R. § 500.20AF 415 – 416; 417 – 418; 419 – 423; 424-434; 435 – 438.

Based on Employer’s NOD response, the CO determined that Employer had corrected all of the previously noticed deficiencies, except for the temporary nature of Employer’s need for foreign labor. AF 461 – 462, 479. Accordingly, on September 1, 2016, the CO issued a Denial Letter. AF 34 – 39. The CO cited the Employer’s failure to establish a temporary need as required by 20 C.F.R § 655.103(d). AF 36. In particular, the CO found that:

[B]ased on the employer’s requested dates of need, and the previously established dates of need, the employer has failed to demonstrate a temporary or seasonal need for farmworkers from October 11, 2016 to March 15, 2017.

...

[T]he application as submitted, and the employer’s response to the Notice of Deficiency for all other sections of the application still contain the harvesting of crops. The employer’s statement of temporary need, outlined in ETA Form 9142, Section B, Item 9 contradicts the employer’s NOD response and specifies its need is only based on the harvesting season, and no other time of year, “the crops being harvested mature at certain times of the year, and additional labor is needed in order to harvest those crops when they are ready to be harvested. Additional labor is not necessary at times during the year which are not harvesting periods. Generally, the crops mature at approximately the same time every year.”

Also, the piece rates and production standards outlined in the application and in the NOD response are specifically relating to the harvesting of vegetable crops. Indeed, the NOD response when requesting clarification on piece rates specifies piece rates are for harvesting of both jalapenos and sweet jalapenos. As the

remainder of the application and NOD response stand, the offered pay rates and production standards remain tied to vegetable harvesting.

The employer's NOD response also stated that vegetable farming is seasonal, usually lasting approximately 11 months, and that the employer's recent growing season has been impacted due to weather conditions. Though the Chicago National Processing Center (NPC) does not dispute vegetable farming is seasonal, the employer's use of labor has proven to not be seasonal, but rather year round. Specifically, though the requested dates of need do not span over a 10 month period of need, its requested dates of need compiled with its recent filing history indicates the employer has a year round need. This was confirmed by the employer, specifically stating in its response to the NOD that its growing season is approximately 11 months and, "in general, the planting and harvest season for the specific types of vegetables that will be harvested is April through March."

Additionally, the employer provided payroll documentation as part of its NOD response, spanning April 2015 through July 2016. The employer provided a summary statement indicating that the records provided were for temporary workers. The summary statement indicated that in March 2015 it did not have any employees, but from April 2015 through July 2016 it consistently had a range of 91 to 196 temporary workers, depending on month. Therefore the payroll documentation as given shows the employer has had temporary workers year round since April 2015.

AF 34 – 36.

On September 7, 2016, the Employer appealed the CO's denial to the Office of Administrative Law Judges (OALJ). In its appeal, Employer states:

Rainbrook has attempted to clarify the specific details of the cyclic and seasonal nature of its business multiple times, and Rainbrook feels that the evidence provided should suffice to carry the employer's burden of proving that the job opportunity in the present application is seasonal in nature. To begin, Rainbrook has explained that in order for there to be crops to harvest, there must first be a planting season. After the crops are planted, a greater number of workers are needed to harvest the crops. Based on the need for additional labor during specific periods of Rainbrook's vegetable season, Rainbrook has filed multiple applications for temporary labor certification to cover the two specific events within the vegetable growing cycle (e.g. cultivation and harvest).

Despite there being overlap in the dates covered by Rainbrook's independent and separate applications, the number of workers vary, and the workers' employment is not extended under subsequent filings. Each of the applications filed by Rainbrook are treated as separate and distinct contracts/periods which cover the employment of different individuals for the different job types. Thus, there is a pattern of seasonal need based upon the innate stages of growing produce, and

Rainbrook has filed its applications for temporary labor certification in accordance with its varying needs throughout the season.

In addition to its attempt to designate the distinct periods of the cultivation and harvest of vegetables, in its most recent filing, Rainbrook also explained that the extreme weather conditions caused by El Nino, created extraordinary circumstances leading to an extended season for 2015 – 2016. Because of the case here. In fact, the payroll records provided prove the employer's position that it needs workers to perform different tasks at certain times during the year that are driven by specific occurrences.

AF 1 – 2. Employer further argues that its demonstrated need satisfies the definition of seasonal under the Migrant and Seasonal Worker Protection Act, 29 C.F.R. § 500.20. Employer avers that the CO failed to consider this definition and failed to consider the entire record in rendering its decision. AF 2 – 3. Employer also attached five exhibits, which were previously included in the record before the CO. AF 5 – 32.

After I issued an Order Setting Briefing Schedule on September 14, 2016, the CO filed a brief in this matter.³ Therein, the CO argued that the record shows that Employer has a permanent job opportunity which it is trying to refashion as a temporary position. CO Brief at 5. The CO noted that Employer is currently certified under a previous application and cannot get overlapping certifications. *Id.* The CO further notes that Employer's temporary need statement solely discusses the harvesting, and not the cultivating or planting, of crops, and that the application overall discusses both the cultivation and harvesting of crops. *Id.* at 5 – 6. The CO concludes that the Employer's division of responsibilities is a manipulation of Employer's alleged need that does not meet the criteria of the regulations. *Id.* at 9.

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

³ The CO filed its brief on September 21, 2016. CO's cover letter to its brief explained that:

Although this brief is not filed in accordance with the Briefing Schedule, dated September 14, 2016 in this matter, we respectfully request leave to file it out of time. The scheduling order was faxed to the Solicitor's office, ETLs, on September 15, 2016 and indicated that the brief was due on Friday, September 16, 2016 in this matter. However, the order was misplaced and was not transmitted to the undersigned attorney in a timely manner. It was not identified until late afternoon on Monday, September 19, 2016.

The Employer objected to this filing as untimely, citing the September 16, 2016 deadline in my Order Setting Briefing Schedule. As Employer did not present evidence or argument that this delay prejudiced Employer, and considering the CO's reasonable explanation for the delay, I find good cause to accept the CO's otherwise untimely brief.

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 cited to five exhibits that were previously included in its response to the NOD. As this evidence was a part of the record before the CO, I have considered 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 positions requested in its application. The Department’s H-2A regulations provide:

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.

8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d).⁴ In determining whether the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011). Accordingly, I must consider whether the Employer’s need for labor or services during its specified “season” differs from its need for such labor or services during other times of the year.

Upon review of the record, I find that the Employer failed to establish a seasonal need for agricultural services or labor. The Employer contends that its current need is distinguishable from previous applications, as its current need for foreign labor is related to the cultivation and planting season versus the harvesting season. However, the record before me does not support this contention. In some sections of Employer’s current application, Employer explains that its need for labor relates to harvesting. *See, e.g.*, AF 487, 489, 491, 499. In other sections, Employer explains that its need relates to the cultivation and planting. *See, e.g.*, AF 489, 498, AF 487. Moreover, Employer’s Statement of Temporary Need details that, “additional labor is not necessary at times during the year which are not harvesting periods.” While Employer argues in its cover letters that its current need for foreign labor is separate and distinct from previous applications, such internal inconsistencies weigh heavily against this argument.

Even if the job responsibilities in Employer’s current application were clearly distinguishable, when determining whether an employer’s need is seasonal, it is appropriate “to 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). Employer asserts a need for temporary workers to work at the same worksite year-round, with one set of workers harvesting and the other

⁴ I note that these are the regulations applicable to this matter, and Employer’s reliance on the definitions under the Migrant and Seasonal Worker Protection Act is misguided.

planting and cultivating crops. I am unconvinced that this division of responsibilities establishes that Employer's need for temporary labor is seasonal, as it is the employer's need and not the nature of the duties that controls. As the CO found, Employer's filing history does indicate that Employer has a need for workers on a single work-site year-round. I therefore find that Employer failed to establish a seasonal need for the positions requested in this application.

Finally, while El Nino may have constituted an extraordinary weather occurrence that altered the ordinary vegetable farming season in 2016, I do not find that this factor alone establishes that Employer's need is temporary or seasonal. Employer's application estimates that, without the impacts of El Nino, its need for labor would have been abbreviated by one month. A one-month pause in Employer's operations does not cure the deficiencies discussed above. 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**.

CARRIE BLAND
Administrative Law Judge
Washington, D.C.