U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

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OALJ Case No.: 2016-TLC-00012
ETA Case No.: H-300-15338-926485

In the Matter of:

GRASSLANDS CONSULTANTS, LLC,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Martha Neville Hereford
Armstrong Teasdale LLP
St. Louis, MO 63105
For the Employer

Vincent C. Constantino, Esq.
Senior Trial Attorney
Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C. 20210
For the Certifying Officer

Before: MONICA MARKLEY
Administrative Law Judge

DECISION AND ORDER

This matter 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) (the Act), and the implementing regulations at 20 C.F.R. Part 655, Subpart B (H-2A Temporary Labor Certification). By letter received on January 13, 2016, Grasslands Consultants, LLC (Employer) filed a request for expedited administrative review of the Certifying Officer's (CO) determination in the above-captioned temporary agricultural labor certification matter. (AF[1] 5-7). The Employer and Solicitor each filed briefs on January 25, 2016. In administrative review cases, the administrative law judge will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. §655.171(a).

[1] Citations to the 197-page Appeal File will be abbreviated AF followed by the page number.

BACKGROUND

The Employer is a "pastoral based dairy farming business" with 35 workers, more than 4,000 cows, and operations in five counties in Missouri. (AF 75). On December 9, 2015, the Employer filed an H-2A application with the Employment and Training Administration's Chicago National Processing Center, seeking two temporary workers for the position of "Farm Manager." (AF 50). The job description stated:

> The role is Farm Manager on a seasonal pasture based dairy operation. The work is directly related to Grasslands milking season which begins in February and ends in November. The Farm Manager is responsible for the day to day operations of the farm including ensuring all stock is fully fed and in good health and managing staff in an organized and appropriate manner. Duties will include pasture and feed management, animal health, milk production and quality, staff management, reproductive management, farm maintenance, other duties…. Grasslands considers the reproductive cycle of the cows to availability of forage. To explain, the highest nutrient requirements of the cow, which occur during calving and lactation, are timed to occur in the season of highest quality and quantity of forage, which is usually the spring. Therefore, when utilizing seasonal dairying techniques, the goal is for all the cows to calve during the months of February and March. Thereafter, the milking season will begin and it will last to November 30, 2016. The cows are not able to produce milk again until they start to calve in early February 2017…. Although US dairy farms traditionally milk their cows all year round, Grasslands, in utilizing the seasonal calving techniques, milks its cows for 10 months of the year. Therefore, the employment of Farm Managers is seasonal in nature.

(AF 52, 59). The Employer listed January 4, 2016, through November 30, 2016, as the period of intended employment. (AF 50).

On December 15, 2015, the CO issued a Notice of Deficiency informing the Employer that its application "fails to meet the criteria for acceptance" and requesting that the Employer modify its application. (AF 34). Regarding the first deficiency, the CO explained that the application was not timely filed. It instructed the Employer to either provide good and substantial cause for a waiver of the filing time period "or amend the start date of need to no earlier than 01/23/2016," which would bring the filing into compliance. (AF 36). Regarding the second deficiency, the CO noted the job opportunity must be on a seasonal or other temporary basis, and observed: "10 months is a permissible threshold at which to question the temporary nature of a stated period of need." (AF 36). Because the Employer's temporary need statement requested workers for 11 months of the year, the CO stated it "is not seen as temporary for the H-2A program." (AF 36). The CO continued: "Based on the employer's requested dates of need and its previously established dates of need, the employer has not established how this job is temporary, rather than permanent and full-time, in nature." (AF 37). The CO instructed the

Employer to "provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature." (AF 37).[2]

On December 18, 2015, the Employer responded to the Notice of Deficiency. Regarding the first deficiency, the Employer amended the start date of need to no earlier than January 23, 2016, to comply with the filing time period. (AF 23, 30). Regarding the second deficiency, the Employer first noted that, with the amended start date, "the job opportunity is now 10 months and 7 days, which is consistent with *In the Matter of Grandview Dairy*, which states that the permissible threshold for a temporary position is 10 months." (AF 30). The Employer also responded:

> The change in the start date, coupled with the evidence previously submitted to the DOL clearly demonstrates that the nature of the position is temporary. Grasslands Consultants utilizes seasonal calving dairy techniques, which matches the reproductive cycle of the cows to the availability of forage. Grasslands Consultants requires the need for two farm managers to assist in the calving season, which begins in February, to handle the spring grass management, breeding, summer crop establishment, including irrigation and heat management, the fall crop establishment and then the dry-off season, which occurs in November.

(AF 30).

On January 8, 2016, the CO denied the application (AF 19), stating:

> On December 21, 2015, the Chicago NPC received the employer's response to the NOD, in which the employer satisfactorily addressed some, but not all of the deficiencies noted in the NOD letter. Specifically, the employer declined to provide good and substantial cause for waiving the time filing requirement. Instead, the employer agreed to change the start date to January 23, 2015 [sic], which is a 10 month and 7 day period of need. Furthermore, the employer failed to establish that its need is seasonal or temporary in nature. Therefore, this application is denied ….

(AF 21).

The CO quoted from the cover letter submitted with the Employer's response to the Notice of Deficiency (*see* AF 23)—which noted that the amended start date reduced the period of need to 10 months and 7 days, "consistent with *In the Matter of Grandview Dairy*"—and found it inadequate:

> The employer argues that its need is temporary because it had reduced its time of need closer to the 10 month threshold in response to the NOD. There is no indication, however, that the employer's actual need has changed from the nearly 11 month period originally sought, indeed its contention that its period of need

[2] The Notice of Deficiency listed other deficiencies that were ultimately deemed satisfied. (AF 21; AF 27-29).

> above the threshold for inquiry complies with the "spirit" of the threshold is indicative of the degree to which it is trying to force a permanent job opportunity into the H-2A program. Critically, the employer has provided an explanation [sic] as to why an 11 month need should be viewed as temporary or seasonal.

(AF 22).

The CO concluded:

> The employer originally requested a need of 11 months. The employer reduced the period of need requested not because in so doing the reduced period of need would more accurately reflect its true need, but under protest. That it cannot now reduce its need below the threshold for inquiry and provides no rational[e] beyond the unsupported idea as to the "spirit" of the threshold as to why its need should be viewed as temporary serves to underscore its ineligibility for the H-2A program. The employer has failed to establish how its job opportunity is seasonal or temporary rather than permanent in nature. Therefore, the application … is denied.

(AF 22).

As noted above, the Employer timely requested expedited administrative review. (AF 5-7).

DISCUSSION

The critical issue for administrative review is whether the Employer established a temporary or seasonal need for H-2A workers. The CO's denial letter also discusses the issue of timeliness, but does not appear to rely upon that ground as a basis for the denial, as only the "Temporary Need" is addressed in the Analysis section of the letter. (AF 21-22). As a threshold matter, I find that the Employer's ETA application as amended complied with the filing time period.

Federal regulations require that an application for temporary employment certification "must be filed no less than 45 calendar days before the employer's date of need." 20 C.F.R. § 655.130(b). The Employer submitted its application on December 9, 2015, and listed a date of need beginning January 4, 2016. (AF 50-56). With just 26 days between those dates, the CO correctly noted that the filing was untimely. The CO directed the Employer to either apply for a waiver of the filing time period (stating good and substantial cause), or amend the start day of need to no earlier than January 23, 2016 (the 45th day after the application was submitted). (AF 36). In its response to the Notice of Deficiency, the Employer amended the start date to January 23, 2016. (AF 30, 32). The CO's Denial Letter acknowledges that "the employer agreed to change the start date…." (AF 21). The change in the start date satisfies the 45 calendar day filing requirement of Section 655.130(b). Thus, per the CO's instructions, the Employer was not required to provide good and substantial cause for a waiver as no waiver was sought. Accordingly, the application cannot be denied as untimely.

Turning to the dispositive issue, the CO correctly observed that an H-2A worker must "perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended." 20 C.F.R. § 655.103(b). Federal regulations define seasonal and temporary work:

> [E]mployment 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 after concluding that the Employer failed to show the job opportunity is seasonal or temporary rather than permanent in nature. (AF 21). The CO reasoned that the Employer's change in its date of need did not show that "the employer's actual need has changed from the nearly 11 month period originally sought." (AF 22). The CO determined that the Employer "is trying to force a permanent job opportunity into the H-2A program. Critically, the employer has provided [sic] an explanation as to why an 11 month need should be viewed as temporary or seasonal." (AF 22). The CO's denial letter did not address the Employer's explanation regarding its milking practices or its "seasonal dairying techniques." On review, the Solicitor addressed those practices and argued that the Employer's temporary need statement and the proposed workers' job duties do not show a temporary need. The Solicitor also asserts that "[m]ere change for economic reasons cannot meet the H-2A requirements."

A. Ten Month Threshold

The CO's denial is based, in part, on the view that the Employer amended the start date to bring its period of need closer to the "ten month threshold" for inquiry into whether a job opportunity is temporary, but the Employer's actual need did not change. The CO viewed the Employer's actual need as "11 months of the year, a period of time representing substantially the entire year …." (AF 22). The CO believed the Employer was "trying to force a permanent job opportunity into the H-2A program." (AF 22). It bears noting that, regardless of whether an Employer's job opportunity is for ten months or eleven months, if the actual need is seasonal or temporary in nature, the Employer is eligible for the H-2A program. The regulations allow for employment of a "temporary nature" that "except in extraordinary circumstances, last[s] no longer than 1 year." 20 C.F.R. § 655.103(d).

The "ten month rule" serves only as a signal that an employer may need to substantiate that its labor need is truly temporary. The holding in *In the Matter of Grand View Dairy* rejects any bright-line rule establishing ten months as a point beyond which work cannot be temporary, but approves use of the rule "as a threshold at which the CO will require an employer to either modify its application or prove that its need is, in fact, of a temporary or seasonal nature." 2009-TLC-00002 (ALJ Nov. 3, 2008).

Thus, whether the Employer's period of need was closer to 11 months or closer to 10 months is ultimately irrelevant (although the amended start date was necessary to render the application timely). Under either set of dates, the Employer is eligible for the H-2A program if its need is truly seasonal or otherwise temporary, and the CO could ask the Employer to prove that its need is, in fact, of a temporary or seasonal nature.

B. Temporary or Seasonal

The Employer's ETA Form 9142A includes a Statement of Temporary Need which describes the operations of its "seasonal pastoral based dairy farming business" and its need for temporary workers. (AF 50, 59). It explains that the Employer does not use "traditional U.S. style confinement based operations"; instead, the cows are kept outdoors and rotated through small paddocks every 12 hours. (AF 50). Additionally, the Employer uses "seasonal calving dairy techniques":

> [T]he goal is for all cows to calve during the months of February and March. Thereafter, the milking season will begin and it will last to November 30, 2016. The cows are not able to produce milk again until they start to calve in early February 2017…. Grasslands, in utilizing the seasonal calving techniques, milks its cows for 10 months of the year. Therefore, the employment of Farm Managers is seasonal in nature.

(AF 50, 59).

The Employer's application included portions of six publications (totaling more than 70 pages) describing the seasonal nature of pastoral based milk production. Pastoral based milk production uses "seasonal calving dairy techniques, which matches the reproductive cycle of the cows to availability to forage." (AF 76). Essentially, the cows' grazing season is timed to when the pastures are most abundant, providing the highest nutrition for the cows to then go into calving and lactation. (AF 76). The cows produce milk for 260 – 300 days per year during the "milking season." The milking season is much more labor-intensive, requiring the seasonal, temporary help. The cows stop producing milk after ten months. The goal for the next two months is to have the cows calve and to then begin producing milk again. (AF 86-157).

I find that this technique of milk production "is tied to a certain time of year" and requires additional labor, bringing it within the definition of seasonal work. See 20 C.F.R. § 655.103(d). The Employer has met its burden in demonstrating the temporary or seasonal nature of its employment need. The Employer has shown the milking season requires additional labor and occurs during the same period every year, February through November. Thus, its need is seasonal and eligible for H-2A certification. 20 C.F.R. § 655.161(a).

C. Proposed Workers' Job Duties

The Employer's position description for the Farm Managers includes pasture and feed management, animal health, milk production and quality, and staff management. The Solicitor argues that the broad scope of the job duties, *e.g.* managing staff, "contradicts that these workers

are only temporary." The Solicitor argues the duties for the proposed workers are year-round responsibilities, so the demand for labor is not temporary.

The nature of the proposed work need not be limited strictly to milking duties. The critical factor for temporary agricultural labor certification is that the work is temporary; whether or not the job duties are strictly tied to milking activities is immaterial. "[W]hat is relevant in determining whether an employer has made a bona fide H-2 application is 'whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.'" *Grand View Dairy, supra*, (quoting *Matter of Artee Corp.*, 18 I. & N. Dec. 366 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982)).

Here, the need for H-2A workers is due to the seasonal demands of the milking season. The Employer sufficiently explained that the milking season is more labor intensive than the dry season (when, for two months of the year, the Employer's 4,000 cows do not produce milk). It is not necessary that the temporary workers be assigned duties that are strictly limited to milking. Employer has shown that its need for performance of the job duties identified on the ETA Form 9142A is seasonal as the duties are tied to the milking season.

D. Economic Need v. Temporary Need

The Solicitor argues: "Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected." I do not find that the change from a need of 10 months and 26 days (based on the initial application) to 10 months and 7 days (based on the amended application) constitutes an attempt to misuse the H-2A program. The Employer's initial application explains that the milking season begins in February (with calving) and ends in November. (AF 59). The milking season lasts 10 months. The Employer's initial application requested a start date of January 4, 2016, and stated: "Grasslands requires that the two temporary farm managers begin in January 2016. This will ensure the Farm Managers are prepared for the calving season, which begins in February." (AF 50, 59). The Employer amended its application to comply with the time period filing requirements, changing the start date to January 23, 2016 (thus reducing the period of need by two and one-half weeks). The Employer continued to request a start date in advance of the calving season in February. This amendment does not suggest an attempt to manipulate or misuse the H-2A program. I find that the change was intended to make the application timely, and nothing more.

The Solicitor also argues that the Employer's dairy techniques represent "[m]ere change for economic reasons" that cannot properly be classified as seasonal in nature. CO's Brief at 8 (quoting *South Side Nursery*, 2010-TLC-00157 (ALJ Oct. 15, 2010)). The Solicitor cites *Altendorf Transport, Inc.*, which held that the Employer's increased need for truck drivers was "not tied to a certain time of year by an event or pattern, but rather depends on the price of grain." CO's Brief at 8 (quoting *Altendorf Transport, Inc.*, 2011-TLC-00158 (Feb. 15, 2011)). I find the comparison inapposite. As set forth above, I find that Employer's seasonal dairy techniques are tied to a certain time of year; they are tied to the cows' calving and milking season.

CONCLUSION

I find that the Employer's application presents a need for agricultural labor or services of a temporary or seasonal nature. Therefore, the CO's denial of temporary labor certification under the H-2A program is **REVERSED**.

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's denial of temporary labor certification is **REVERSED** and the Employer's application is **APPROVED**.

Digitally signed by Monica F. Markley
DN: CN=Monica F. Markley,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

MONICA MARKLEY
Administrative Law Judge

MM/mc
Newport News, VA