

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 07 April 2016

OALJ Case No.: 2016-TLC-00032
ETA Case No.: H-300-16043-851470

In the Matter of:

HAAS FARMS,
Employer.

Before: Colleen A. Geraghty
Administrative Law Judge

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, 8 U.S.C. 1101(a)(15)(H)(ii)(a), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The Certifying Officer (“CO”) denied Haas Farms’ request for temporary labor certification. For the reasons set forth below, I affirm the CO’s decision.

STATEMENT OF THE CASE

On February 12, 2016, Haas Farms (“Haas Farms” or “Employer”) submitted an application for temporary employment certification to the U. S. Department of Labor’s Employment Training Administration seeking to certify three “Agricultural Equipment Operators.” AF-78-99.¹ Haas Farms indicated it sought to fulfil a “seasonal” need from April 11, 2016 to December 31, 2016. AF 78. The Employer provided the following Statement of Temporary Need:

In March, trucks/trailers, farm vehicles, tractors, sprayers, planter, and other various machinery/implements are brought into the employer’s shop for general maintenance and also inspected for any needed repairs and repaired if necessary. During this time farm stored grain is also delivered to elevator storage as well as seed and fertilizer transported back to the farm for spring planting needs. The employer must have all equipment field ready and needed products on the farm by the end of March in order to be ready for spring field work which typically begins the first week of April, depending on the weather. Summer crop harvest

¹ For purposes of this decision and order, the Administrative File will be referred to as “AF” with the corresponding page number.

commences in May followed by field cultivation. Fertilizer is applied late summer. In the fall, winter crops are planted and spring crops are harvested. Field cultivation and spraying follows. Once harvest is complete, equipment is cleaned and prepared for winter storage.

Id.

An Agricultural Equipment Operator’s duties are described as “drive trucks and tractors to perform crop raising duties. Plant, cultivate, harvest crops using tractor drawn machinery. Apply fertilizer/chemicals to crops. Operate, repair farm implements. Haul grain to market.” AF 80.

The CO issued a Notice of Deficiency (“NOD”) on February 19, 2016. The NOD indicated the application was defective because the Employer failed to show the job opportunity was a “seasonal” or “temporary” need as required by 20 C.F.R. 655.103(d). AF 65-68. In reviewing HAAS Farms application, the CO recognized its similarity to an application previously submitted by another business, Legume Matrix, which the CO had recently denied.² AF 67-68. The NOD stated the applications for Legume Matrix and Haas Farms are for Agricultural Equipment Operators job opportunities (SOC code 45-2091), and list the same employer, same point of contact address and both applications include grain crops. AF 67. The NOD stated although Legume Matrix and Haas Farms are being filed as two distinct entities, “the interlocking nature of the operations renders the fact of separate corporate forms inconsequential.” AF 67-68. The NOD found when the dates of need for the job opportunity Haas Farms sought to fill in this case, are considered together with the recent filing history for Legume Matrix, Haas Farms failed to demonstrate the current job opportunity is temporary because the employer’s dates of need are from December 1, 2015 through December 31, 2016, exceeding a one year period of need. AF 67-68.

<u>Case Number</u>	<u>Employer Name</u>	<u>FEIN</u>	<u>SOC Code</u>	<u>Status</u>	<u>Beginning Date of Need</u>	<u>Ending Date of Need</u>
H-300-14035-473257	Haas Farms	45-0429815	45-2091	Certified	04/01/2014	12/31/2014
H-300-14279-710440	Legume Matrix, LLC	20-2977256	45-2091	Certified	12/15/2014	04/30/2015
H-300-15037-605763	Haas Farms	45-0429815	45-2091	Certified	04/01/2015	12/31/2015
H-300-15280-741852	Legume Matrix, LLC	20-2977256	45-2091	Denied	12/01/2015	04/01/2016
H-300-15357-318166	Haas Farms	45-0429815	45-2091	Denied	03/01/2016	12/31/2016
H-300-16043-851470	Haas Farms	45-0429815	45-2091	Pending	04/11/2016	12/31/2016

AF 67. The NOD also stated the “single employer” finding and denial of Legume Matrix application because it failed to demonstrate temporary need was affirmed after review by

² In denying Legume Matrix’s application, the CO found that HAAS Farms, a grain producer and Legume Matrix, a seed cleaning and processing company were so intertwined as to constitute a single entity so that the CO combined their respective dates of need for the Agricultural Equipment Operator position identified in their separate applications. AF 141-150.

an administrative law judge. (*Legume Matrix, LLC*, 2016-TLC-00008 (Dec. 8, 2015)).³ AF 68. To correct this deficiency, the CO instructed “[b]ecause it has been previously established that the employer has a permanent need for Agricultural Equipment Operators, it must explain how its operation has changed such that it now has a temporary or seasonal need.” *Id.*

Haas Farms responded to the NOD on February 19, 2016. AF 54. The Employer asserted the CO made several errors. AF 54-55. First, the CO erred in finding the point of contact address for Haas Farms and Legume Matrix were the same. AF at 54. Second, the CO erred in finding both applications include grain crops. *Id.* Employer states the CO erred in determining the duties of the position HAAS Farms seeks to fill and the duties Legume Matrix sought to fill are not similar. AF 54-55. Finally, Employer maintains the CO erred in finding Employer failed to demonstrate a seasonal need and is discriminating against Employer as compared to the processing of similar cases. AF 55. Thus, Employer “requests more thorough attention and consideration to facts, not assumptions and incorrect information, be given to his request for seasonal Agricultural Equipment Operators as per the application....” AF 55.

On March 4, 2016, the CO denied Employer’s application for failure to demonstrate the job opportunity was temporary as required by 20 C.F.R. 655.103(d). AF 47-50.⁴ On March 18, 2016, Haas Farms requested expedited administrative review of the CO’s decision. AF 1-4. The United States Department of Labor’s Office of Administrative Law Judges received the Employer’s request on March 18, 2016; the case was assigned to me on March 21, 2016. On March 25, 2016, I received the Administrative File. The parties were afforded the opportunity to file closing briefs. I received the closing brief from counsel for the Certifying Officer at COB March 29, 2016. (DOL Br.) Employer did not submit a closing brief.

³ The Legume Matrix’s application involved in that decision is ETA Case No. H-300-15280-741852. AF 141-250. The judge affirmed the denial of Legume Matrix’s application finding that “although Legume Matrix and Haas Farms are organized as separate legal entities, their applications for labor certification share many common features.” *Legume Matrix, LLC*, 2016-TLC-00008 (Dec. 8, 2015). slip op at 5. The judge determined there was a “pattern of coordinated behavior” and “numerous commonalities” between the two companies’ applications and found Legume Matrix 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.” Slip op. at 6 and AF 68.

⁴ The denial stated:

[T]he Chicago NPC has concluded that these two filers do not represent distinct temporary or seasonal needs, but rather are working cooperatively to use the H-2A program to employ H-2A workers in the same job on a permanent basis. There is a year-round overlap of job duties, the employer is using separate business names for the ultimate benefit of one combined business and employer, and numerous commonalities exist between the two applications. Furthermore, when asked for evidence as to how the business had changes such that it now had a temporary need, the employer again failed to provide any detail. AF 50.

ISSUE

The issue to be determined is whether HAAS Farms has demonstrated the job opportunity herein is “temporary” or “seasonal” in nature, as required by 20 C.F.R. 655.103(d).

SCOPE OVERVIEW

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’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. *Pleasantville Farms LLC*, 2015-TLC-00053, at 3 (June 8, 2015) quoting *Sneed Farm*, 1999-TLC-7, slip op at4 (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 UyIII*, 1997-INA-304 (Mar. 3, 1999)(*enbanc*)).

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 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 WL1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-9, slip op. at4 (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, they will be considered one employer and their dates of need will be combined when assessing whether the employer's needs are temporary. 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); *Larry Ulmer*, 2015-TLC-00003, slip op 3 (business so intertwined they function as one); *Cressler Ranch Trucking, LLC*, 2013-TLC-00007 (denial proper where applicant submitted applications from separate entities with consecutive dates of need, and applications listed address that represented same geographic location and same job duties in statement of temporary need). The burden is on the employer to demonstrate that it and another business entity are truly independent business entities. See *Altendorf Transport*, slip op at 8.

DISCUSSION

I must affirm, reverse, modify the CO's decision or remand to the CO for further action. 20 C.F.R. § 655.171. The evidence presented indicates the application filed by HAAS Farms in this case reflects many of the underlying commonalities with Legume Matrix that resulted in the "single employer" determination for Legume Matrix and Haas Farms in the December 2015 decision and order denying Legume Matrix's application. (*Legume Matrix, LLC*, 2016-TLC-00008 (Dec. 8, 2015). For example, although Haas Farms and Legume Matrix filed applications under different corporate names having different Federal Employer Identification Numbers ("FEINs"), they list the same point of contact, Kevin Hass, (AF 79, 122, 233, 278, 323, 383), who is also identified as owner of both companies (AF 79, 86, 93, 122, 136, 140, 233, 240, 246, 250, 260, 278, 285, 292323, 330, 336, 354, 383, 390, 397, 400). Mr. Haas signed the applications for H-2A certification and supporting documents on behalf of both entities (AF 86, 93, 95, 97, 130, 136, 138, 140, 240, 246, 248, 250, 260, 285, 292, 294, 306, 330, 336, 339, 340, 354, 390, 397, 399, 400). In addition, both Haas Farms and Legume Matrix provided business and worksite locations in Jamestown, North Dakota. The entities use the same housing addresses for their H-2A workers, the Two Rivers Inn in Jamestown, and employer owned housing at 7411 46th Street SE, Jamestown. AF 348, 391, 331, 287, 241, 131, 88. The evidence reflects that Legume Matrix cleans and processes a significant portion of the grains grown by Haas Farms. AF 232, 322 (Legume Matrix applications stating the company "is a seed cleaning facility owned and operated by Kevin Haas where Mr. Haas cleans over 50% of his own grain."

Based on the evidence considered as a whole, I find Haas Farms as a grain producer and Legume Matrix as seed cleaner are interrelated and essentially operated as a single entity.

I find the employer's arguments that Haas Farms and Legume Matrix are independent unpersuasive. The fact the point of contact address for Haas Farms and Legume Matrix are not the same is not sufficient under the totality of the circumstances presented to establish the separateness of the entities. AF 3. While the two entities may have different point of contact addresses both are in Jamestown, ND and Kevin Haas is the point of contact for both entities, and signed all applications, and both entities use the same housing addresses for their H-2A employees.

Employer asserts the Chicago NPC is discriminating against Haas Farms and Kevin Haas because the NPC initially denied and later certified an application from another unrelated employer involving a similar "single employer" issue, Fegley Farms, involving a similar single employer issue is troubling. AF 4. However, other than its assertion, Haas Farms provided no other evidence upon which its claim can be evaluated.⁵ AF 4.

Lastly, Employer contends that because the CO denied Legume Matrix's application there is no basis to deny Haas Farms' application as Haas Farms has a clear seasonal need. AF 4. However, Haas Farms has not explained why its need is seasonal. Based on the evidence presented, Haas Farms and Legume Matrix are a single entity seeking temporary labor certification to fill Agricultural Equipment Operator positions on a year round basis. *See Salt Wells Cattle Company, LLC, 2011-TLC-00185* (Sept. 29, 2010) (employer had filed and been granted four prior applications, the fifth application was denied with the ALJ finding employer's filling history since its first application, showed the employer had used or attempted to use temporary workers to fill the same position, affirming the CO's denial). The evidence here indicates Haas Farms and Legume Matrix have together used temporary workers to fulfill a year round need for Agricultural Equipment Operators by filing overlapping applications in 2014, 2015, and 2016.⁶

Haas Farms has failed to meet its burden of establishing it is not a single employer with Legume Matrix and that when aggregated the need was not temporary or seasonal. Therefore, I find the CO properly denied certification.

⁵ The CO argues applications involving "single employer" are "fact-specific" and "each application is unique," but the CO's brief did not address Haas Farms allegations with regard to a recent application by Fegley Farms. DOL Br. at 19. However, to the extent the Department may not be applying the analysis in a consistent manner, in that entities with similar factual scenarios in the same geographic area are not evaluated consistently under the single employer analytical framework, the Department's administration of the H-2A program is undermined. Therefore, it behooves the Chicago NPC to ensure consistency and fairness in evaluating single employer issues raised in applications.

⁶ The Employer acknowledges the application for Legume Matrix and Haas Farms are for Agricultural Equipment Operators. AF 3. It then argues the Legume Matrix job opportunity was classified incorrectly. That argument is not properly raised in the context of this case. As the CO's brief noted the SOC code is assigned by the State Workforce Agency, in this case North Dakota, and a challenge to the code assigned is not proper at this stage of proceedings or this forum. DOL Br. at 17-18.

ORDER

In light of the foregoing, it is hereby ORDERED the Certifying Officer's decision is affirmed.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts