



Issue Date: 28 September 2016

BALCA Case No.: 2016-TLC-00078

ETA Case No.: H-300-16222-247021

In the Matter of:

**WILLIAM ASHBY MALTSBERGER
dba MALTSBERGER RANCH**

Employer

Certifying Officer: Lynette Wills
Chicago National Processing Center

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL

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), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration. Since Employer requested an expedited administrative review, I considered only the evidence that was before the Certifying Officer (“CO”), with no new evidence submitted on appeal. In expedited administrative review cases, the administrative law judge has five working days after receiving the AF to issue a decision on the basis of the written record.

The AF for this case was received on September 19, 2016. On September 26, 2016, Employer informed the undersigned’s office that he had shipped additional documents in support of his position that the CO incorrectly denied its August 2016 H-2A temporary labor certification application. Consequently, I withheld issuing a decision in this matter until I received these documents in order to base my decision on a complete record.

I. BACKGROUND

On June 19, 2016, Employer's application for H-2A temporary labor certification for fourteen farmworkers, farm, ranch, and aquacultural animal workers job opportunities for the period of June 15, 2016 through April 14, 2017 was certified by the Employment and Training Administration (ETA). AF 5; 303-304.

Employer filed an ETA Form 790 on August 6, 2016 and a Form ETA 9142A on August 9, 2016 with the U.S. Department of Labor (DOL), Employment and Training Administration (ETA). AF 58-115. In his application, Employer requested H-2A temporary alien labor certification for four workers under the job title "Farmworkers, Farm, Ranch, and Aquacultural Animal workers." AF 58. Employer stated that he had a temporary need for workers from December 1, 2016 to September 30, 2017. AF 58. Employer identified his temporary need as "Seasonal." AF 58. Section F.5 of the ETA Form 9142A stated that the job duties were to monitor, feed, graze, market, medicate, and care for all livestock, including cattle and horses. Job duties also included training and shoeing horses; repairing, cleaning, and maintaining riding equipment, fences, corrals, water troughs, and water lines; running diesel generators to pump water for livestock; and burning thorns of cacti in order to feed cattle. AF 60.

On August 16, 2016, the Certifying Officer (CO) issued a Notice of Deficiency, notifying Employer of two deficiencies in his application: (1) he failed to demonstrate how the job opportunity is temporary or seasonal in nature (specifically, why his previous and current temporary labor certification applications have requested H-2A workers to perform virtually identical jobs for a continuous 15½-month period); and (2) the number of workers listed in his application were inconsistent. AF 23-27.

On August 19, 2016, Employer responded to the Notice of Deficiency with an explanation in hopes the CO would accept his application. Employer also requested administrative review of his application in the event his explanation was insufficient to accept his application. AF 13-14. Employer stated he had difficulty finding qualified workers and filed this current application in order to provide a cadre of on-call workers for emergency feeding situations. AF 14. Employer also stated that his previous applications with overlapping dates had been accepted several times due to his extraordinary circumstances regarding the feeding and care of livestock. AF 15-18. Employer also corrected the inconsistent number of workers listed in his application such that the application properly stated that certification for four workers was requested. AF 19.

On September 9, 2016, the CO denied Employer's application due to his failure to establish that its need is seasonal or temporary in nature. AF 3-8. The CO explained that new regulations effective November 16, 2015 regarding the certification for temporary workers for

job opportunities in the herding and production of livestock, except sheep and goats, on the range limit the period of need to no more than ten months. *See* 20 C.F.R. § 655.215(b)(2). The CO found that Employer failed to demonstrate how his previous and current temporary labor certification applications are not the same job opportunity. Therefore, when combined, Employer's previous and current temporary labor certification applications detail a year round need for H-2A workers to perform identical jobs, which is in excess of the maximum time period allowed for in 20 C.F.R. § 655.103(d) and 20 C.F.R. § 655.215(b)(2). AF 5-6.

Specifically, the CO found that Employer had previously established his ten month need for workers under the current rule upon submission of his first application on April 11, 2016. Further, the CO found that Employer did not sufficiently explain what extraordinary circumstances justify acceptance of its application and that even if Employer could state an extraordinary circumstance, he would still be unable to utilize H-2A labor on a permanent and year round basis due to recurring extraordinary circumstances. AF 7.

Finally, the CO found Employer's reliance on prior BALCA decisions based on regulations which no longer controls was misplaced. The CO stated that new current regulations limit employment to a maximum period of ten months. Hence, Employer's request was deemed not valid and denied by the CO. AF 7-8.

On September 14, 2016, Employer requested administrative review of the denial of the extension request, pursuant to 20 C.F.R. § 655.171. AF 1-2. On September 15, 2016, the Chicago NPC sent this matter to the Office of Administrative Law Judges for administrative review. On September 19, 2016, the Court invited Employer and the CO to submit briefs supporting their position.

On September 20, 2016, Employer filed his brief, which included three parts discussing the processing of its application, his reliance on previously affirmed BALCA decisions, and his position regarding the period of need identified in its application. Employer also included a response to the CO's September 9, 2016 denial letter as well as copies of the documentation provided to the ETA regarding its application.

In support of his position that his application should be accepted for processing, Employer also attached previously affirmed OALJ and USCIS appeal rulings in his favor that discuss Employer's needs, the extraordinary circumstances surrounding his business, and the seasonal or temporary nature of the job opportunity. (Emp. Br., Part 2, pp. 1-7).

Employer contends the changes made to the H-2A Rules governing the range production of livestock disregard the intent of Congress, the needs of employers, and past BALCA decisions. (Emp. Br., Part 1, pp. 1-2). Also, Employer contends shortening the period of need to

ten months is disruptive to its business and livelihood. Consequently, this hinders variations in Employer's practices. In addition, Employer contends extraordinary circumstances regarding the job opportunity discussed in previous rulings allow for the period of need to last 364 days rather than ten months. (Emp. Br., Part 3, pp. 107).

In his response to the September 9, 2016 denial letter, Employer contends he has used the H-2A Program to employ ranch workers since 1991 and all applications have been processed in the same manner as those of sheep and goat herders. Employer also stated he has only been able to fill three of the job positions previously certified and filed his current application in order to be in position to hire qualified workers in December or January. (Response, pp. 1-5).

On September 22, 2016, the CO filed her brief. The CO maintains that the denial should be affirmed because Employer's submissions fail to demonstrate a temporary need and due to the standard for temporary need having changed with respect to cattle herding. (CO Br., pp. 6-7). Under the new rule, the period of need of workers for an employer filing an application for the range production of livestock is strictly limited and cannot exceed ten months. As a result, the CO contends Employer's reliance on prior decisions does not control in the matter. (CO Br., pp. 9-10). Further, the CO contends the extraordinary circumstances exception under 20 C.F.R. § 655.103(d) does not apply in this matter as 20 C.F.R. § 655.215(b)(2) expressly governs the temporary need for cattle herders. (CO Br., p. 10).

On September 28, 2016, the undersigned received Employer's response to the CO's brief as well as a three-ringed binder containing Employer's expansion, clarification, and correction of the AF, including documents that are not part of the AF.¹ Employer also noted that the inclusion of the June 2016 application submitted in the AF "appeared to be scrambled, incomplete, and unusable." (Resp., p. 2). Employer also contends the AF does not include a Notice of Deficiency and Employer's response dated April 2016. As such, Employer included both documents in its September 28, 2016 submission.

In its response to the CO's brief, Employer contends his reliance on prior decisions best emphasize the seasonality and temporariness of his job opportunities. Employer also argues that the denial of his application as well as the changes made to the H-2A rules governing range producers of livestock are arbitrary, capricious, and not in compliance with the law. Employer contends the new rules ignore the intent of Congress and the needs of employers engaged in the production of livestock. In his opinion, Employer believes range producers of livestock have been discouraged from using the H-2A program. (Resp., pp. 1-2).

¹ Such documents include an email with the Texas Workforce Commission, Employer's comments to the proposed rule changes to the H-2A program, previous Statements of Temporary or Seasonal Need, pictures of H-2A workers, a copy of ETA Form 790, and copies of prior decisions with the respective applications.

II. DISCUSSION

The burden of proof in alien labor certification process matters remains with the employer. *See, e.g., Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); *Garber Farms*, 2001-TLC-6 (ALJ May 31, 2001). When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding administrative law judge may only render a decision “on the basis of the written record and after due consideration of any written submissions from the parties involved.” Accordingly, an ALJ may not refer to any evidence that was not a part of the record as it appeared before the CO.

Initially, I note that several documents submitted by Employer on September 28, 2016 were not part of the AF. Unfortunately for Employer, documents submitted with the employer’s appeal cannot be considered at this time by BALCA in an administrative review. 20 C.F.R. § 655.171; *Jared Adrian Sod Service*, 2010-TLC-35 (June 11, 2010). Accordingly, my decision is based solely upon the written record and the consideration of the briefs submitted by both parties.

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 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).

Unless otherwise specified in 20 C.F.R. §§655.200-655.235, the employer must satisfy the requirements for filing an *H-2A Application for Temporary Employment Certification* with

the NPC designated by the OFLC Administrator. 20 C.F.R. § 655.215(a). An employer must file a completed *H-2A Application for Temporary Employment Certification* (Form ETA-9142A), *Agricultural and Food Processing Clearance Order* (Form ETA-790), and an attachment identifying, with as much geographic specificity as possible for each farmer/rancher, the names, physical locations and estimated start and end dates of need where work will be performed under the job order. 20 C.F.R. § 655.215(b). The period of need identified on the *H-2A Application for Temporary Employment Certification* and job order for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats, must be for no more than 10 months. 20 C.F.R. § 655.215(b)(2).

In this matter, Employer seeks certification of four farmworkers, farm, ranch, and aquacultural animal workers in addition to the fourteen farmworkers, farm, ranch, and aquacultural animal workers previously certified by the ETA on June 19, 2016 in order to anticipate a shortage of available workers to feed and care for its livestock and due to its difficulty in finding qualified workers. AF 5; 13-14.

I find that the job opportunities listed in both the June 2016 and August 2016 applications represent the same job opportunity based upon identical job descriptions, necessary time of experience, rate of pay, and job location. AF 6; 58-115; 389-431. Specifically, both job opportunities have the same job duties, such as monitoring, feeding, grazing, marketing, medicating, and caring for all livestock; training and shoeing horses; repairing, cleaning, and maintaining equipment, fences, corrals, water troughs; running diesel generators to pump water for livestock; and burning thorns of cacti in order to feed cattle. *Id.* In addition, both job opportunities require six months experience and are both located at the same worksite location, Maltsberger Ranch. *Id.* Accordingly, I find that both job opportunities listed in the previous and current labor certification applications are representative of the same job opportunity in the range based herding or production of cattle and livestock.

Consequently, the undersigned affirms the CO's decision denying Employer's application for temporary labor certification, because Employer has not established that he has a temporary or seasonal need for labor. Although Employer filed two separate labor certification applications, its applications for labor certification share many common features. The similarity in job requirements and duties as well as the overlapping nature of the current and previous application periods demonstrate that Employer's need does not differ from his need for such labor during other times of the year. Rather, his need is year round. *See Cressler Ranch Trucking LLC*, 2013-TLC-00007 at 3 (Nov. 26, 2012); *D&G Frey Crawfish LLC*, 2012-TLC-00099 at 4 (Oct. 19, 2012).

Employer relies on previous BALCA and USCIS decisions to illustrate the seasonality and temporariness of his job opportunities as well as the extraordinary circumstances of his need.

AF 156-209; 265-274. Specifically, Employer references previous decision detailing the extraordinary circumstances Employer faces as a cattle rancher in South Texas as well as his frequent and unpredictable need for temporary cattle ranch workers. (Emp. Br., Part 2, pp. 1-7).

I find that Employer has not demonstrated extraordinary circumstances beyond his control to the CO to meet the H-2A regulatory requirements. Specifically, I find that Employer failed to provide the CO with a sufficient justification of his extraordinary circumstances such that his need for H-2A workers should extend beyond the ten month limitation imposed by 20 C.F.R. § 655.215(b)(2), which expressly governs the temporary need of cattle rangers.

Further, Employer's reliance on BALCA decisions to establish that his job opportunities are temporary and seasonal and that extraordinary circumstances warrant his need to overlap requested temporary labor certifications is without merit. Those decisions were governed by the Training and Employment Guidance Letter ("TEGL") No. 15-06, Change 1: Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock. Under the TEGL, there was no specific limit on the period of need, and decisions were made on a case-by-case basis. However, the TEGL was supplanted by 20 C.F.R. § 655.215(b)(2) in November 2015. Unlike the TEGL, 20 C.F.R. § 655.215(b)(2) mandates a maximum ten month period for certification of an H-2A worker for range herding or production of cattle, horses, or other domestic hooved livestock, except sheep and goats. While Employer is correct that the period of need in his current application expressed a ten month need for four H-2A workers from December 2016 to September 2017, Employer previously established a ten month need in his previous application for the same job opportunity for a period of June 15, 2016 through April 14, 2017. When both periods of need are combined, Employer seeks a fifteen month period of need, which is in excess of the ten month limit as stated in 20 C.F.R. § 655.215(b)(2).

Employer contends his need, the intent of Congress, and prior rulings from OALJ and USCIS have not changed. However, the regulations governing the issuance of H-2A certifications for temporary workers for job opportunities in the herding and production of livestock on the range changed in November 2015. Unfortunately for Employer, I am bound by the current law and must apply it in this manner.

Accordingly, the undersigned finds that the CO reasonably concluded that Employer failed to demonstrate he has a temporary or seasonal need for labor as required by 20 C.F.R. § 655.103(d) and 20 C.F.R. § 655.215(b)(2). Therefore, Employer's application for temporary labor certification must be denied.

III. ORDER

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

SO ORDERED.

**CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE**