



Issue Date: 04 February 2016

Case No.: 2016-TLC-00013
ETA Case No. H-300-15352-187674

In the Matter of

RODRIGUEZ PRODUCE
Employer

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This proceeding 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 United States Department of Labor (the “DOL”) at 20 C.F.R. Part 655. The Employer timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties.

BACKGROUND

The H–2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

On December 18, 2015, the DOL’s Employment and Training Administration (“ETA”) received an *Application for Temporary Employment Certification* from Rodriguez Produce (“Employer”). AF 39.¹ In this application, the Employer requested temporary labor certification for thirty (30) farmworker employees from February 23, 2016 through December 23, 2016, citing a temporary seasonal need. AF 49. The SOC (ONET/OES) title for the requested position is “Farmworkers and Laborers, Crop, Nursery and Greenhouse,” with code 45-2092. *Id.* Under “Statement of Temporary Need” the Employer wrote: “[l]ack of temporary workers in farming operation.” AF 39.

On December 22, 2015, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), finding that the Employer failed to establish that its job opportunity is seasonal or

¹ Citations to the Administrative File will be abbreviated “AF” followed by the page number.

temporary pursuant to 20 C.F.R. §655.103(d). AF 28. Specifically, the CO noted that the Employer's dates of need have changed since the Employer's previous application. *Id.* The Employer previously requested workers from January 19, 2015 through November 19, 2015 and was now requesting workers from February 23, 2016 through December 23, 2016.² *Id.* The CO wrote that the Employer did not provide an explanation for the date change. *Id.* Accordingly, the CO asked the Employer to "explain why its job opportunity is seasonal or temporary" and to provide a detailed explanation "as to why its dates of need have significantly changed from its established season of January through November to its current request of February through December." AF 29.

By email dated December 22, 2015, the Employer's Agent responded to the NOD with the following:

The employer states that the dates are only 1 month and 4 days later than the previous year's request. The reason being that last year's extreme winter weather, which was not common, caused delays and in some cases prevented work to get done. This year the employer is looking to hopefully avoid some of that extreme weather and complete the work that was not completed the previous year due to weather. The job opportunity is temporary in nature due to the work not being performed year round.

AF 24.

On January 11, 2016, the CO denied the Employer's certification. AF 15. The CO again stated that the Employer failed to explain why its job opportunity is on a seasonal or temporary basis. AF 17. The CO explained that "the employer's reasoning of avoiding extreme winter weather would lead to an earlier start and end date of the employment period as opposed to a later one." AF 18. The CO went on to state that "[b]y seeking workers for February, the employer would be employing workers in the middle of winter and would potentially subject itself to more uncommon, extreme winter weather thereby undermining its own explanation for the change in dates of need." *Id.* The CO concluded that based on the Employer's current and previous dates of need, the Employer could operate year round from January through December. *Id.*

By letter dated January 12, 2016, the Employer appealed the CO's decision. AF 1. Along with the letter, the Employer attached a planting calendar for the Tennessee region, a housing inspection report showing that there were no applicants for the Employer's seasonal job, and a weather graph of Tennessee's average temperatures. AF 2-6. In the appeal letter, the Employer explained that from January 2015 to November 2015, work was delayed because there was an extended period of extreme weather. AF 1. The Employer wrote that it is "seeking workers for late February 2016 because a lot of the land preparation that I did last year will not need to be done in 2016." AF 1. The Employer also noted that late February is not the middle of winter in Tennessee. *Id.*

² Petitioner's request for workers for ten months does not, by itself, preclude a finding of temporary need. *See Kentucky Growers Association*, 98-TLC-1 (Dec. 16, 1997) (explaining that nine months is a red flag for further inquiry rather than contrary to the regulatory definition of temporary).

On January 28, 2016, this case was assigned to me. In an Order dated January 29, 2016, I gave the parties three business days to file any briefs that they wished to submit. On January 29, 2016 the Director filed a response brief.

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 new evidence) from the parties involved or amici curiae.”³ Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Here, the Employer’s appeal letter, for the first time, included three documents, namely a housing inspection report, a planting calendar for the Tennessee region, and a weather graph of Tennessee’s average temperatures. AF 2-6. Based on a review of the record, I find that these documents were not presented before the CO. As this new evidence was not a part of the record before the CO, I am unable to consider it in my review, under § 655.171.

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms*, 2001-TLC-00006 (ALJ May 31, 2001) *citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures).

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).⁴ The only issue before me is whether the Employer has established a seasonal need for the position requested in its application. The DOL’s H-2A regulations provide:

Definition of a temporary or seasonal nature. For the 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.

20 C.F.R. § 655.103(d). As a seasonal need is tied to a certain time of year based on an event or pattern, it is of a recurring nature. An employer must therefore justify any change in the dates

³ Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”

⁴ The Employer has the burden to establish eligibility for the H-2A program. *Altendorf Transport, Inc.*, 2011-TLC-00158, PDF at 13 (Feb. 15, 2011). Here, the CO has previously determined that the Employer is eligible and the CO has not withdrawn its earlier certification so I find that Employer has met its burden to show its eligibility for the H-2A program.

for a seasonal need in order to ensure that the need is truly seasonal, and that there is not a year-round need for the workers. *See, e.g., Southside Nursery*, 2010-TLC-157, slip op. at 4 (ALJ, Oct. 15, 2010); *Thorn Custom Harvesting*, 2011-TLC-196, slip op. at 3 (ALJ, Feb. 8, 2011).

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. *See, e.g., Salt Wells Cattle Co.*, 2010-TLC-134 (ALJ, Sept. 29, 2010). In *Salt Wells Cattle Co., LLC*, an ALJ explained:

An employer's ability to manipulate its "season" in order to fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the definition established at 20 C.F.R. § 655.103(d).

2011-TLC-185 (ALJ, Feb. 8, 2011). In order to determine if 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).

In the present case, the CO denied the Employer's application because the Employer's explanation for changing its dates of need did not establish a "distinct temporary need." AF 18. The CO found that the Employer's new dates of need undermined the Employer's argument; the CO wrote that based on the Employer's extreme weather argument, the Employer should have requested an earlier start date rather than a later one. *Id.* The CO found that "the employer has instead demonstrated that it can operate year round from January to December." *Id.*

The CO properly found that the Employer failed to establish a seasonal or temporary need for its job opportunity. However, I note that the CO misconstrued the Employer's explanation. The CO presumed that based on Tennessee's extreme winter weather the previous year, the Employer would need to start its season even earlier to complete the necessary work before winter starts. According to the CO, the Employer's start date suggests that the Employer will start production in the middle of winter, which would defeat the Employer's intent. Based on my review of the Employer's response, the Employer in fact argued that the previous year's extreme weather created significant delays in production, thus the Employer had to adjust its season to a later date in order to avoid the cold weather.

Although the Employer presented a reasonable argument for requesting a start date of need that is approximately one month later than the prior start date of need, the Employer nevertheless failed to establish that its need is seasonal. First, the Employer failed to present any evidence to support its position. In its response to the NOD, the Employer stated that last year's weather caused production delays and that the Employer hopes to avoid the extreme weather this year. AF 24. However, the Employer did not present any evidence showing which months in Tennessee constitute "extreme weather" or any evidence showing that last year's winter weather was extreme. There is no evidence to suggest that a start date in late February would be sufficient to avoid Tennessee's cold weather. As the Employer's argument is not supported with any evidence, it fails to carry the Employer's burden of proof. *See generally Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

Second, the Employer's argument does not address why the Employer's dates of need must extend through the end of December. While the Employer's argument may justify postponing the Employer's start date, it does not justify extending the Employer's temporary need to off-season months. The Employer's previous *Applications for Temporary Employment Certification* contained the following dates of need:

Citation	Date of Application	Start Date	End Date
AF 183	02/25/2013	04/15/2013	11/25/2013
AF 135	02/04/2014	04/10/2014	11/07/2014
AF 89	11/19/2015	01/19/2015	11/19/2015 ⁵

Based on the Employer's prior dates of need, the Employer's seasonal need ends in November. The Employer does not explain why the Employer now requires temporary workers through the end of December nor does the Employer present any evidence to show that it requires workers in December.⁶ As discussed above, an Employer must establish when its season occurs. In the present case, there is no evidence establishing when the Employer's temporary need actually begins and ends and how the Employer's need in late February through December differs from its need in January and February. Consequently, the Employer failed to establish a distinct temporary need under 20 C.F.R. §655.161(a).

For the foregoing reasons, the Employer has failed to meet its burden that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d); and therefore, while the CO's reasoning is, in part, faulty, the CO nonetheless 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.

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

⁵ The Employer's need for seasonal workers increased in 2015 because the Employer acquired additional land and so had an earlier growing season. AF 78, 28.

⁶ As discussed above, although the Employer submitted a planting calendar for the Tennessee region and a chart documenting Tennessee's average temperatures, these documents are not considered on appeal.