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Issue Date: 11 October 2017

OALJ Case No.: **2017-TLC-00028**
ETA Case No.: H-300-16133-423623

In the Matter of:

ROSALBA GONZALES,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Graciela Gomez, Agent
Douglas, Georgia
For the Employer

Jeffrey L. Nesvet, *Esq.*
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States ("U.S.") on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor.[1] A Certifying Officer ("CO") in the Office of Foreign Labor Certification of the Employment and Training

[1] 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.[2]

STATEMENT OF THE CASE

Rosalba Gonzales ("Employer") is a farm laborer contractor who supplies workers for farms in Georgia. (AF 61).[3] On August 29, 2017, the Employer filed an Application for Temporary Employment Certification (ETA Form 9142A) and Form ETA 790, Agricultural and Food Processing Clearance Order. (AF 61-93). The Employer requested certification for 362 farmworkers and laborers[4] to "harvest, pull, plant, pick, top sucker, place in barn, tobacco, onions, cabbage, tomato, eggplant, squash, and peppers" and to perform other duties such as field maintenance, pulling weeds, raking up plastic, camp sanitation and loading and unloading from October 15, 2017 to July 15, 2018, based on an alleged seasonal need during that period. (AF 61-63).

On September 5, 2017, the CO issued a Notice of Deficiency, stating that the Employer had not demonstrated how the job opportunity was seasonal or temporary in nature.[5] (AF 32-41). The CO noted that the Employer had a previous request for farmworkers and laborers certified for a period from May 1, 2017 through December 31, 2017 (ETA case no. H-300-17069-723207). (AF 34, 190). The CO noted that in the current Form 9142A (ETA case no. H-300-17241-684745) the Employer had requested workers for the same work location and for the same job duties from October 15, 2017 through July 15, 2018. (AF 34-35, 61). The CO concluded that the job opportunity described on the Employer's ETA Form 9142, Section B Items 5 and 6, coupled with the Employer's recent filing history, indicated that the Employer's dates of need were from May 1, 2017 through July 15, 2018, a 15 month and 14 day period of need. (AF 34). The CO cited to *Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008) and noted that a 10 month period had been determined to be a permissible threshold at which to question the temporary nature of a stated period of need. (AF 34). The CO directed the Employer to explain why its job opportunity was seasonal or temporary. (AF 35).

On September 8, 2017, the Employer responded to the Notice of Deficiency, stating that the applications were for two different seasons and that in the first application (H-300-17069-723207) season the workers harvested blueberry, watermelon and corn and were prepping for

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[2] 20 C.F.R. § 655.171.
[3] In this Decision and Order, "AF" refers to the Administrative File.
[4] SOC (O*Net/OES) occupation title "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" and occupation code 45-2092. AF 61.
[5] The CO identified six other areas of deficiency, which are not at issue on appeal as the denial was only based on the Employer's failure to establish temporary or seasonal need. AF 10-14.

onion and tobacco but that with the second application (H-300-17241-684745) season the workers main crops would be onion, tobacco, pepper, squash, cabbage and eggplant. (AF 19).

On September 26, 2017, the CO issued a Notice of Denial ("Denial"), finding that the fact that the same job duties were associated with different crops did not create a district seasonal or temporary need for labor as required by 20 C.F.R. § 655.103(d). (AF 10-14).

On September 27, 2017, the Employer appealed the CO's decision to deny its application.[6] (AF 5). On October 3, 2017, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer's request for expedited administrative review and permitting the parties to file briefs within three business days after receipt of the Administrative File. On October 5, 2017, counsel for the Certifying Officer ("Solicitor") filed a notice stating that it would not be filing a brief in this matter. The Employer did not file a brief.

DISCUSSION AND APPLICABLE LAW

The standard of review in H-2A is limited. When an employer requests a review by an administrative law judge ("ALJ") under §655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.* The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011). The CO's denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op.at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

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); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015). 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, slip op. at 3 (June 8, 2015). Therefore,

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[6] In its Notice of Appeal, the Employer proposed amending its application to drop a duplicative worksite from its current application (ETA case no. H-300-17241-684745). However, the regulations state that amendments to an application must be approved by the CO. 20 C.F.R. § 655.35(c). Thus, no amendments can be made after a CO issues a Denial and I will consider the application as it was originally filed.

"[i]n 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." *Fegley Grain Cleaning*, slip op. at 3 (*citing Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). 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 Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011).

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). It is well-established that "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." *William Staley*, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009). Accordingly, 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. *Haag Farms, Inc.*, 2000-TLC-00015 (Oct. 12, 2000); *Bracy's Nursery*, 2000-TLC-00011 (Apr. 14, 2000). However, the employer's application for temporary labor certification is properly denied when the "consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer's need does not differ from its need for such labor during other times of the year." *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014)(finding that an "overlapping need for the same H-2A labor year round. . . exceed[ed] the "seasonal and temporary" period for H-2A certification.")

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. *Salt Wells Cattle Co., LLC*, 2010-TLC-00134 (Sept. 29, 2010). In other words:

> 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).

Salt Wells Cattle Co., LLC, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011).

Here, the Employer has not established that its employment need is seasonal or temporary. As noted by the CO, the Employer's past certified application, combined with its current request, indicate a need for workers from May 1, 2017 to July 15, 2018. The Employer relies on the premise that the work that is to be completed at various worksites on different crops determines the temporary or seasonal nature of employment. However, it is an Employer's

need, and not an individual task or worksite, which dictates whether a need for workers is seasonal or temporary. *Pleasantville Farms LLC*, slip op. at 3. Looking at the whole situation, it is clear that the Employer's need, irrespective of crop or worksite, is nether seasonal or temporary in nature.

In regard to seasonal need, the Employer has provided no evidence that its need for labor during the specified season (October 15, 2017 to July 15, 2018) differs from its need for the same farm workers and laborers during the other times of the year. The Employer's previous application specifically contradicts its current statement by indicating that the Employer also has a need for farm workers and laborers from July 16 to October 14. Thus, the Employer has not tied its alleged employment need to a certain time of year by an event or pattern, as required by 20 C.F.R. § 655.103(d), but instead has continuously entered into contracts with agricultural producers in order to create continuous work and an unceasing need for workers. There is also no evidence in the record to show that the Employer requires labor levels far above those necessary for ongoing operations from October to July. Therefore, the Employer has not met its burden to show that it needs more workers in certain months than in other months of the year. *Farm-Op, Inc.*, slip op. at 7; *Lodoen Cattle Co.*, slip op. at 5.

Additionally, I am not convinced that the Employer's need is of a temporary nature. The Employer's prior applications demonstrate that its need is year round due to the consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties. *Larry Ulmer*, 2015-TLC-00003, slip op. at 4. The CO may properly consider the Employer's previously certified dates of need when determining whether a need is temporary. *Farm-Op, Inc.*, slip op. at 10. To allow otherwise would provide employers with an opportunity and ability to continually shift their purported periods of need in order to utilize the H-2A program. The Employer's previous application (ETA case no. H-300-17069-723207) shows that the Employer needed temporary farm workers and laborers, SOC code 45-2092, to harvest, pull, pick, pack, load and unload produce from May 1, 2017 to December 31, 2017. (AF 190-192). The Employer's current application includes the same job title and SOC code, includes a similar work description and shows that the Employer needs temporary workers to harvest, pull, pick, pack, load and unload produce from October 15, 2017 to July 15, 2018. (AF 61-63). The Employer attempts to distinguish its need for workers in this current application by asserting that the workers will be working on different crops. Again, this distinction between crops does not make the Employer's need seasonal. Rather, the record demonstrates that the Employer has a consistent need for year-round workers whose job duties do not change.

The overlapping nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrates that the Employer's need for workers in its proposed season does not differ from its need for such labor during other times of the year; rather the record demonstrates that its need for farm workers and laborers is permanent

and year-round, not seasonal or temporary. Accordingly, I find that the CO's denial of certification based on the Employer's failure to show that the employment need was seasonal or temporary was reasonable and not arbitrary, capacious, or not in accordance with the law.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the CO's decision denying the Employer's Application is **AFFIRMED**.

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE