



Issue Date: 09 November 2017

BALCA Case No.: 2018-TLC-00003

ETA Case No.: H-300-17262-823044

In the Matter of:

DOGUET RICE FARM,
Employer

Certifying Officer: Chicago National Processing Center

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises out of a request for administrative review of the Certifying Officer’s denial of a re-filed H-2A temporary labor certification application filed by Doguet Rice Farm (Employer).

I. STATEMENT OF THE CASE

This is Employer’s fourth request for certification, and the present application is a refiling of the third request. The prior three requests are as follows:

Case Number	Status	Start Date	End Date
H-300-15362-004234	Granted	03/01/16	01/01/17
H-300-16349-169060	Granted	10/01/17	01/01/18
H-300-17207-139084	Denied	11/13/17	07/01/18

See AF 53.¹

In light of the third application’s denial, on September 19, 2017, Employer filed ETA Forms 790 and 9142 seeking certification for one farmworker, SOC code 45-2093. AF 74-96. The CO issued a Notice of Deficiency (NOD) letter September 26, 2017, in which the CO asked Employer to explain how its job opportunity is temporary, rather than permanent, in nature, considering Employer’s history of certification requests. AF 59-62. On October 4, 2017, Employer responded to the NOD. In its response, Employer explained:

¹ AF is an abbreviation for Administrative File.

We have a registered herd of Brangus cattle, which requires intense labor and knowledge of embryo transfer procedures to produce a superior bovine animal to market to other purebred breeders. Because of the average temperatures in McCoy, Texas, the best months to perform the flushing/insemination process is from November to April. The cattle must then be checked daily to ensure a stable pregnancy as well as other issues that pertain to this embryo transfer process. Due to the painstaking comprehensive documentation required to follow each animal the cattle are grouped. One or more groups are flushed and/or inseminated every 60 days. As each group of animals are inseminated, they must be checked daily for pregnancy until such time as we are certain of a stable, healthy pregnancy, usually 3 to 4 months. By the end of June all donor females have had embryos collected and transferred to the recipient hosts, therefore by the first of July we do not need this extra worker.

When Doguet Rice Farm filed for its first application in 2016, we were in desperate need of a worker as quickly as possible. However, the past two years have shown us the temporary worker is most needed between October 1st and July 1st of each year. In the future, this is the only application we will file.

AF 55-58.

On October 13, 2017, the CO denied certification, finding:

...In its NOD response, the employer submitted a payroll chart showing “0” temporary workers were employed during the months of January, February[,] and March of 2016. This runs counter to the employer’s requested dates of need, which span throughout the months of January, February and March. The employer states “the past two years have shown us the temporary worker is most needed between October 1st and July 1st each year.” However, this statement and the payroll summary submitted appear to contradict one another as the employer’s 2016 summarized payroll report shows that it did not employ any temporary workers in the months of January, February, and March. Furthermore the employer gave no explanation as to how it met its labor needs during their busiest months of the year.

In addition, the employer has shown it has a year round need for workers when the current application requesting workers from November 13, 2017 through July 1, 2018 and application H-300-16349-469060 which was certified from March 1, 2017 through January 1, 2018 are combined. The inconsistencies between the requested dates of need and the employer’s NOD response fail to establish how this job opportunity is temporary, rather than permanent and full-time, in nature[.]

AF 50-54.

The Employer requested administrative review of the CO’s denial of certification on October 23, 2017. AF 1-49. BALCA docketed the appeal on October 24, 2017, and this matter

was assigned to me on October 30, 2017. A Notice of Docketing and Briefing Schedule was entered on November 1, 2017, ordering briefing to be filed by 4:30 p.m. CST on November 6, 2017. Neither Employer nor the Certifying Officer (CO) has filed a brief.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

II. DISCUSSION

The implementing H2A regulations provide, “[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) (*supplied*).

To determine a petitioner’s need, the fact-finder must look at the situation as a whole and not narrowly focus on the employer’s instant position. *See Haag Farms, Inc.*, 2000-TLC-00015 (Oct. 12, 2000); *Bracy’s Nursery*, 2000-TLC-00011 (Apr. 14, 2000). Here, the specific nature and duration of the instant request warrant more than a rubber-stamped denial based solely on observing the start and end dates and SOC occupation code of Employer’s aggregated requests.

In response to the CO’s NOD, Employer thoroughly and adequately explained why its present application for certification differed from its earlier applications. When Employer filed for its first application in 2016, it was “in desperate need of a worker as quickly as possible.” However, Employer indicated that its experience proved the temporary worker is most needed between October 1st and July 1st of each year. Employer’s explanation also clarifies the nature and scope of the season for which it needs a temporary worker. Although there is some overlap among the prior H-2A applications, Employer adequately explained its reasoning and promised to adhere to the present seasonal dates in the future.

I find that Employer has established a need for temporary and seasonal workers for cattle impregnation and observation from October 1 to July 1. Accordingly, I reverse the CO’s denial of certification. As this is the only basis for the CO’s denial, certification should be granted.

However, in the future, should Employer continue to attempt to use the H-2A program to fill its labor needs, it should bear in mind that an employer cannot continually shift its period of need in order to use the program to fill a permanent need. *Salt Wells Cattle Co.*, 2010-TLC-00134 (Sep. 29, 2010); *Salt Wells Cattle Co.*, 2011-TLC-00185 (Feb. 8, 2011). A seasonal need is tied to the weather or a certain event, and a change in the dates for a seasonal need must be justified in order to ensure that the employer is not manipulating its reported season when it really has a year-round need for labor. *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010); *Thorn Custom Harvesting*, 2011-TLC-00196, slip op. at 3 (Feb. 8, 2011). Employer should expect any further H-2A requests to be thoroughly scrutinized for compliance with the regulations.

III. ORDER

In light of the foregoing, the Certifying Officer's decision denying certification is **REVERSED.**

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge

Covington, LA