



Issue Date: 23 October 2019

BALCA Case No.: 2019-TLC-00084

ETA Case No.: H-300-19220-807149

In the Matter of:

ESTRADA AND SONS, INC.

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 (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“DOL” or the “Department”) at 20 C.F.R. Part 655. 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 Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

BACKGROUND

On August 8, 2019, Employer submitted an H-2A Application for Temporary Employment Certification for 129 farmworkers and laborers. (AF 37-47¹). The nature of temporary need was listed as seasonal, and the period of intended employment was listed as October 21, 2019, to January 10, 2020. (AF 37.) In its statement of temporary need, Employer explained:

The crops being harvested mature at certain times of the year, and additional labor is needed in order to harvest those crops when they are ready to be harvested. Additional labor is not necessary at times during the year which are not harvesting periods. Generally, the crops mature at approximately the same time every year.

(AF 37.) Employer described the job duties as follows:

Cultivate, pack and harvest tomato, jalapeno, and bell pepper - move around field to picking location and pluck vegetables from plants. Field care tie plants, stake

¹ For purposes of this opinion, “AF” stands for “Appeal File.”

plants, prune plants, clean drip emitters and microjets, remove plastic drip lines, remove dead plants, and weed removal. Workers will walk along rows as specified by employer and remove weeds and grass from fields by hand or using a hoe. Prolonged standing, bending, stooping, and reaching. Job is outdoors and continues in all types of weather. Workers may be requested to submit to random drug or alcohol tests at no cost to the worker. Failure to comply with the request or testing positive may result in immediate termination. Drug testing and background checks may occur during the interview process, and will be conducted at the sole cost and discretion of the employer. Must be able to lift 70lbs. to shoulder height repetitively throughout the workday and able to lift and carry 70lbs. in field. Use of personal cell phone or other personal electronic device during working hours strictly prohibited except for work-related calls or emergencies and violation may result in immediate termination.

(AF 39, 43.)

On August 14, 2019, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). (AF 27-31.) According to the CO, Employer failed to establish a temporary, seasonal need for labor. The CO cited to four prior applications submitted by Employer:

| Case Number | Status | Beginning Date of Need | Ending Date of Need |
|---------------------|---------------------|-------------------------------|----------------------------|
| H-300-18067-845847 | Certified | 05/03/18 | 10/26/18 |
| H-300-18250- 145498 | Denied | 10/31/18 | 07/01/19 |
| H-300-19029-367926 | Denied | 03/15/19 | 01/01/20 |
| H-300-19105-712979 | Certified | 06/20/19 | 10/20/19 |
| H-300-19220-807149 | Current Application | 10/21/19 | 01/10/20 |

Because the dates of Employer’s prior applications overlap with its current application, the CO concluded “it is unclear how this job opportunity is temporary or seasonal in nature.” (AF 29.) The CO explained that, when considering each of Employer’s prior applications, Employer actually has a period of need spanning from October 31, 2018, until January 10, 2020, which exceeds one year. (AF 29.) To remedy this deficiency, the CO required Employer to “explain how its operation has changed such that it now has a temporary or seasonal need for ‘Farmworkers and Laborers’ rather than a permanent need. Each claim as to a changed business practice, e.g., a change in crop, must be accompanied by supporting documentation.” (AF 30.)²

On August 14, 2019, Employer responded to the NOD. Regarding the temporary and seasonal nature of the job opportunity, Employer’s agent explained that Employer “has planted its crops later this year, and planted more acres than it has in the past, which resulted in a larger

² The CO identified two additional deficiencies, which are not at issue here.

area of land to harvest and a larger yield. Thus, [Employer] is requesting workers during the time period which coincides with the new planting and harvesting schedule of each variety of crop that it grows.” (AF 20.)

Employer also attached a “Fresh from Florida” chart, which lists typical harvest times for various crops in Florida. (AF 21-22.) Employer indicated that the chart shows that the crops represented in its filing (tomato, jalapeno, and bell pepper) are being harvested during the time period requested. (AF 20.) Additionally, Employer explained that, when the crops are not being harvested, the land is being cleared and replanted for the next harvest, and Employer needs additional labor during both the harvest and replanting periods. (AF 20.) Employer argued that, even when combining its most recent application, which was certified from June 20, 2019, to October 20, 2019, Employer’s total period of need is only six months and therefore meets the seasonality requirement. (AF 20.)

On September 3, 2019, the CO issued a Denial Letter. (AF 9-13.) According to the Denial Letter, Employer’s response to the NOD failed to properly address its temporary need. (AF 11.) The CO again indicated that, when combining Claimant’s most recent certified application, which had a date of need from June 20, 2019, to October 20, 2019, and its current application, it is unclear how the job opportunity is temporary or seasonal in nature. (AF 11-12.) The CO reiterated that, when combining Employer’s prior two denied applications, which requested workers for the same job duties, Employer actually requested workers from October 31, 2018, through the current filing of January 10, 2020. (AF 12.)

Regarding Employer’s response to the NOD, the CO wrote that the “Fresh from Florida” document submitted by Employer did not include any information specific to Employer’s business. (AF 12-13.) Furthermore, “Employer did not provide any supporting documentation where its own crops are identified by month nor any payroll documentation that supports its need for workers in each crop by each month represented in its application.” (AF 13.) The CO concluded that Employer failed to properly explain its temporary need and, therefore, denied the application.

On September 3, 2019, Employer filed the instant appeal. (AF 1-8.) Employer emphasizes that the “Fresh from Florida” chart reflects typical harvest times for Florida crops for all twelve months of the year, and it was submitted specifically in response to the NOD. (AF 1.) Employer reiterates that its total period of need (considering its prior certified application and its pending application) is only six months. Employer cites case law to support its contention that its need is “far below the ten (10) month threshold in which to question the seasonality of the job opportunity.” (AF 1.)

With regard to “overlapping crops” in its various applications, Employer contends that, “even if there is overlap with part of the crop activities in the employer’s filings, there is also the inclusion of wholly different crop activities in the filings as well. This creates distinct harvesting and cultivation activities resulting from the seasonal production and activities being performed.” (AF 1.) Employer explains that these seasonal activities cease in January, and no labor is needed again for these activities until May or June. (AF 2.)

Finally, Employer contends that its prior application was denied because Employer's previous agent "made inexcusable errors" that "led to the denial and seasonality issues that have continued to negatively impact the employer, to date." (AF 2.) Employer contends the CO did not consider this explanation in denying its application. For all these reasons, Employer argues the CO's denial of its application was arbitrary.

ANALYSIS

Legal Standard

Employer requested administrative review. Accordingly, I must "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, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action." 20 C.F.R. § 655.171(a). Although no standard of review is specified in the regulation, I review the CO's denial to determine whether it is arbitrary and capricious. *J and V Farms, LLC*, 2016-TLC-00022, at note 1 (Mar. 4, 2016); *see also Resendiz Pine Straw, LLC*, 2019-TLC-00052 (June 14, 2019).

Employer bears the burden of establishing its eligibility. *See Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011). The criteria for certification under the H-2A program includes "whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis." § 655.161(a) (emphasis added). The applicable regulation provides:

[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.

§ 655.103(d) (emphasis added). Here, Employer argues its need is seasonal.

When determining whether an employer's need is seasonal, it is appropriate "to determine if the employer's needs are seasonal, not whether the duties are seasonal." *In the Matter of Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added). To meet its burden to show a seasonal need, Employer must "establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year." *In the Matter of Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011). In other words, seasonal employment is "employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year." *William Staley*, 2009-TLC-00060 (Aug. 28, 2009). The overarching question is "whether the employer's need is truly temporary." *Id.* (citing 52 Fed. Reg. 16,770, 20,497-98 (1987)).

Seasonal Need

In its application, Employer explained that its crops mature at certain times of the year, and additional labor is only needed at harvesting time. (AF 37.) Employer specified: “Additional labor is not necessary at times during the year which are not harvesting periods.” (AF 37.) The requested workers would begin on October 21, 2019, and they would “cultivate, pack and harvest tomato, jalapeno, and bell pepper” until January 10, 2020. (AF 39.)

Because the CO raised concerns about whether Employer’s need for labor was truly temporary or seasonal, the CO requested specific information and supporting documentation regarding the “change in dates and crops” as compared to Employer’s prior applications. (AF 30.) In response, Employer offered only the very general statement that it “has planted its crops later this year, and planted more acres than it has in the past,” so it is “requesting workers during the time period which coincides with the new planting and harvesting schedule of each variety of crop that it grows.” (AF 20.) Employer offered no specific information regarding what varieties of crops it planted later, why those varieties were planted later, what crops it intends to harvest in what months, or how many more acres it planted this year.

Even assuming, based on its application, that Employer simply intends to harvest all of its tomatoes, bell peppers, and jalapenos from October to January, Employer’s justification of its labor needs is still insufficient. Employer generally explained that “these activities will cease in January, and normally no labor is needed for these activities until May or June.” (AF 20.) However, the “Fresh from Florida” resource chart that Employer submitted indicates that bell peppers are harvested from November through May, and tomatoes are harvested from October through June.³ (AF 21-22.)

Though Employer’s requested period of need does overlap with the harvesting periods provided in the chart, Employer does not explain: why its harvest season is so much shorter than that provided in the chart; why it does not need labor from January through May—when both tomatoes and peppers are apparently harvested, according to the chart; or why it would need labor for these activities beginning again in May or June, which is the end of the harvest season for tomatoes and peppers, according to the chart. As the CO points out, this general chart provides no information regarding Employer’s actual specific growing and harvesting practices, despite the CO’s request for such information.⁴ Because Employer failed to offer any explanation as to why its period of need differs substantially from the harvesting dates in the chart, I conclude the chart does not actually support Employer’s specific requested period of need.

Moreover, in its response to the NOD, Employer indicated that it needs labor both during the harvest and also when the land is being cleared and replanted. (AF 20.) This appears to directly contradict its application, which states that Employer needs labor only for the harvest. (AF 37.) Again, Employer offered no information regarding when its crops will be harvested

³ This chart did not contain any information concerning the harvesting period of jalapenos.

⁴ If, for instance, Employer’s labor needs result from the specific type of tomatoes and peppers it is planting (as opposed to the general harvest schedules listed in the chart), Employer should have explained why its needs differ from the information in the chart (which was the only evidence Employer submitted to support its position).

versus when the land will be replanted or whether those time periods are different for different crops.

I acknowledge Employer's argument that, even when combining its current application with its most recent application (which was certified from June 20, 2019, to October 20, 2019), Employer's total period of need is only six months. However, it is not only the length of time that is relevant to the question of seasonal need. Employer also is required to specifically establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year. *See* § 655.103(d) (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."). I recognize that an annual harvest may result in a legitimate recurring need for seasonal labor. However, I conclude Employer failed to establish its annual pattern of need for seasonal labor because it failed to provide any specific information or evidence regarding its growing or harvesting schedules, and it did not offer any cogent explanation of why its labor needs differ from October to January, as compared to the rest of the year. Employer is also required to demonstrate that its seasonal need for labor is "far above those necessary for ongoing operations." § 655.103(d). Employer offered no evidence of the labor levels required to maintain ongoing operations, so the record does not reflect whether Employer currently needs labor far above such levels. Without any explanation or evidence of Employer's own crop and labor schedules, I conclude Employer failed to make these required showings.

Additionally, it appears that Employer's two prior certified applications established a seasonal need for labor from May/June to October. Employer does not sufficiently explain why its need now extends from October through January. Employer's vague statement that it "planted its crops later this year" is insufficient to demonstrate that the dates of its seasonal need for labor have changed. *See Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016) (finding the employer failed to sufficiently explain why its seasonal need extended through December when each of its prior applications established a seasonal need only through November). Again, Employer has not explained what specific crop varieties were planted later or why, or how its need for labor from October through January differs from other times of year.⁵

Likewise, Employer's simplistic assertion that it included different crops in this filing, as compared to previous filings, does not establish a seasonal need for more or for different labor. Employer claims "[t]his creates distinct harvesting and cultivation activities resulting from the seasonal production and activities bring performed." (AF 1.) Nonetheless, Employer does not identify these distinct harvesting and cultivation activities, nor the amount of labor required to perform them.⁶

⁵ I do not rely on Employer's prior denied applications, which Employer contends contained "inexcusable errors" that have caused "seasonality issues." (AF 2.) Rather, I conclude Employer's current application is insufficient on its face and in comparison with its prior certified applications.

⁶ Instead, this argument serves only to create even more confusion. Employer points out that its prior application (certified from June to October 2019) was for squash, peppers, tomatoes, eggplant, and cucumbers. (AF 2, 524.) However, according to Employer's "Fresh from Florida" chart, there would be very little of those crops to harvest during that time frame: squash is not harvested from June to September, peppers are not harvested from June to October, tomatoes are not harvested from July to September, eggplant is not harvested from July to October, and cucumbers are not harvested from June to September. (AF 5-6.)

Ultimately, Employer's bare assertions that it will harvest tomato, jalapeno, and bell pepper from October to January, and it needs 129 workers to do so are insufficient to establish seasonal need. *See, e.g., Lodoen Cattle Company*, 2011-TLC-00109 (Jan. 7, 2011) (noting a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc))). Upon consideration of the entire record and the inconsistencies therein, it is simply not clear whether Employer's need is truly seasonal or, if Employer's need is seasonal, when that need truly occurs.⁷ Because it is Employer's burden to prove its seasonal need, I conclude the CO did not act arbitrarily in denying Employer's application.

CONCLUSION

Based on the foregoing analysis, Employer has not established that its need for labor is temporary or seasonal, as defined by 20 C.F.R. § 655.103(d). Therefore, I conclude the Certifying Officer's issuance of a Denial Letter for Employer's application for temporary agricultural labor certification under the H-2A program was not arbitrary or capricious.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **AFFIRMED**. *See* 20 C.F.R. § 655.171(a).

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey

⁷ Similarly, Employer has not demonstrated a separate "temporary" need for labor under § 655.103(d). Examples of temporary need are replacing a sick worker or obtaining help with one unusually large agricultural contract. *William Staley*, 2009-TLC-00060 (Aug. 28, 2009) (citing 52 Fed. Reg. at 20,497-98). The record reflects that Employer's need is not such a non-recurring need of set duration, nor does Employer make such an argument.