



Issue Date: 09 July 2019

OALJ Case No.: 2019-TLC-00059
ETA Case No.: H-300-19130-637168

In the Matter of:

IMAGINE THOROUGHBREDS,
Employer.

Certifying Officer: Lynette Wills,
Chicago National Processing Center

Appearances:

Thomas Nicholl, Esquire
Thomas Nicholl Law Firm
Orlando, Florida
For the Employer

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U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: Steven D. Bell
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL
OF TEMPORARY LABOR 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 (“Department”).¹ A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies

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

certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.²

STATEMENT OF THE CASE

On May 10, 2019, Imagine Thoroughbreds (“Employer”) filed (1) Form ETA 9142, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A to Form ETA 9142; (3) ETA Form 790, *Agricultural and Food Processing Clearance Order* with corresponding attachments; and (4) a Business Verification.³ The Employer requested certification for one farmhand,⁴ from July 11, 2019 until May 11, 2020, based on an alleged peakload need during that period.⁵

Following email correspondence requesting confirmation of the job order number, the identification of any potential sources of U.S. workers within the area of intended employment, and a referral report which documents all referrals generated by the SWA,⁶ the CO issued a Notice of Deficiency (“NOD”) dated May 16, 2019, stating that Employer failed to establish that it had a temporary need under 20 C.F.R. § 655.103(d) and that although Employer had listed one month of experience as a job qualification, it had indicated that it might not be a qualification but only a preference, which would affect what was required to be included in recruitment under 20 C.F.R. § 655.122(b). The CO required Employer to either remove the one month of experience preference from its application or to clarify that the one month of experience preference is actually a requirement.⁷ In order to cure the deficiency under 20 C.F.R. § 655.103(d) the CO stated that:

Supporting evidence in the form of summarized payroll reports is required to substantiate the employer’s temporary need for the H-2A worker(s) in the case. The employer is required to submit summarized payroll reports for a minimum of one previous calendar year (2018) for Farmhand. These payroll reports must be a summary of the employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation.⁸

Employer responded to the NOD via email, stating that it was removing the one month of experience preference from its application and that Employer:

² 20 C.F.R. § 655.171.

³ AF 40-69. In this Decision and Order, “AF” refers to the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Farmworker, Farm, Ranch, and Aquacultural Animals” and occupation code 45-2093. AF 40-42.

⁵ AF 40.

⁶ *Id.* at 34

⁷ *Id.* at 31-33.

⁸ *Id.* at 31.

need[s] help at [his] peak season, which is late summer, fall months and into the spring. This is the time of year when the farm has a large number of sale prep horses. We need extra temporary workers, there are not enough willing, or able workers available to perform agriculture labor. This is why we are requesting an H-2A worker.⁹

Employer also submitted a summary of the monthly payroll records for 2018, including the amount paid to permanent employees and the amount paid to temporary workers, but did not include the number of employees or the number of hours worked.¹⁰

In a Denial Letter dated May 30, 2019, the CO found that that Employer's response to the NOD was insufficient to establish temporary need under 20 C.F.R. § 655.103(d). It based this finding on the fact that Employer had both permanent and temporary workers during every month of 2018 aside from November, and a finding that "the lowest levels of labor need were found to be in October through December; which are included in the employer's requested dates of need." The CO found that based on the payroll records and the dates requested by Employer, that Employer had a year round need for workers and had failed to show a temporary need.¹¹

On June 3, 2019, Employer appealed the CO's denial to the Office of Administrative Law Judges ("OALJ") and requested expedited administrative review of the CO's decision or a de novo hearing, arguing that the reason that the payroll records show almost no temporary payroll is that the temporary help available in the summer was lost during those months and that Employer takes in more horses during those months.¹² On June 13, 2019, I issued a Notice of Docketing and Order Setting a Telephone Conference, in order to determine whether Employer intended to request a de novo hearing or an expedited review. After a June 17, 2019 conference call in which counsel for Employer and for the CO participated and Employer indicated that it wished to pursue an expedited review, I issued an order setting a briefing schedule. With the consent of the parties, I set the deadline for briefs to be submitted on July 8, 2019.

Employer filed a brief on July 8, 2019. In its brief, Employer argued that the "decision was arbitrary and capricious because of the illogical nature of the denial." It argues that the sworn affidavit of Employer explained the seasonal nature and that the lack of a payroll increase for seasonal workers supported the argument that Employer was unable to obtain temporary workers during those months.¹³

DISCUSSION AND APPLICABLE LAW

Employer bears the burden to establish eligibility for temporary labor certification.¹⁴ In this case, the Employer has appealed the CO's decision to deny its application. When

⁹ *Id.* at 15-17.

¹⁰ AF 18-19.

¹¹ *Id.* at 11-13.

¹² AF 1-7.

¹³ *Emp. Bf.* at 2-3.

¹⁴ See e.g. *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); see also *Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

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.” Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO.

Employer’s argument that its temporary summer workers return to school during its peak season was not presented to the CO. Therefore, I may not consider it.

Under 20 C.F.R. § 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, 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.”

The payroll records submitted by Employer do not establish the number of hours worked by its employees throughout the year. Although Employer’s statement asserts that the peak season goes from late summer, through the fall months, and into early spring, August, September, and October show the lowest overall pay throughout the year, including permanent and temporary workers, while May most of which was not included in the request, had the highest overall salary payment of any month, and June, which was not included, had the fifth highest salary payment.¹⁵ Thus the payroll records do not establish that the requested time period required labor levels above those necessary for ongoing operations. Nor did Employer submit any evidence of the additional horses brought in during the supposed peak season, which would require the additional labor. Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than in other months of the year. A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof.¹⁶

The CO thus accurately concluded that Employer failed to sufficiently establish that Employer has a temporary or seasonal need for workers under 20 C.F.R. § 655.103(d).

Because Employer has failed to establish that its need for labor was temporary or seasonal under 20 C.F.R. § 655.103(d), it has not met its burden of establishing it is entitled to labor certification.¹⁷ Accordingly, the CO’s denial of certification is hereby affirmed.

¹⁵ AF 18.

¹⁶ *Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999) (en banc)).

¹⁷ See *Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (Dec. 2, 2010).

ORDER

It is hereby **ORDERED** that the CO's decision denying temporary labor certification be, and hereby is, **AFFIRMED**.

Steven D. Bell
Administrative Law Judge