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Issue Date: 26 March 2019

OALJ Case No.: 2019TLC00038
ETA Case No.: H-300-18365-303704

In the Matter of:

LITTLE WICOMICO OYSTER, LLC,
Employer.

Certifying Officer: Chicago National Processing Center

Appearances:

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Before: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER
REVERSING THE CERTIFYING OFFICER'S
DENIAL AND REMANDING FOR FURTHER ACTION

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 presented at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

STATEMENT OF THE CASE

Little Wicomico Oyster, LLC. (the “Employer”) is an oyster farm in Heathsville, Virginia. On December 31, 2018, the Employer filed an H-2A Application for Temporary Employment Certification (“Application”) with the United States Department of Labor’s Employment and Training Administration (“ETA”). (AF 53, 63).¹ The Employer requested certification for six “Farmworker-Oysters” positions (“farmworkers”) under SOC Code 45-2093 between February 15, 2019 and November 15, 2019.² (AF 53, 63). The Employer noted the job duties as:

[C]lean the buckets or “silos” daily and sieve the oysters frequently, moving the larger ones to silos with larger mesh...Workers clean and tumble oysters from the floats/baskets, separating the small ones from the large ones, which go back into cleaned floats or baskets...Workers retrieve the cages about monthly, clean and tumble the oysters, removing those that have reached market size and putting the smaller ones back in cages. The market-sized product must be inspected visually, counted, packed and refrigerated before sale.

(AF 59).

On January 7, 2019, the Certifying Officer (“OC”) at the Office of Foreign Labor Certification (“OFLC”) issued a Notice of Deficiency (“NOD”). (AF 38-42). The CO cited a failure to establish a temporary or seasonal need and failure to meet housing requirements.³ (AF 38-42). The CO reasoned that the Employer’s filing history showed a year round need. (*Id.*). The CO explained that the Employer previously received workers between February 18, 2018 and November 15, 2018 (Case Number H-300-18005-480236), but then filed a “winter” application requesting additional workers between November 14, 2018 and February 28, 2019. (Case Number H-300-18257-894188; AF 174). The CO denied the winter application and on Appeal an Administrative Law Judge determined that based on the filing history, the Employer had a year round need and affirmed the CO’s determination. (*Little Wicomico Oyster, LLC*, 2018TLC00029, slip. op. at 8 (November 1, 2018); AF 98).

The Employer responded to the NOD stating it has an increased need for workers between mid-February and mid-December. (AF 10-36). The Employer attached payroll records, sales records, a statement from its president, and a statement stating the Employer would request no additional winter applications. (AF 10-36, 16).

The CO issued a Denial letter dated February 4, 2019. (AF 5). The CO reasoned the Employer failed to meet its burden of proving a temporary or reasonable need based on the prior filing history. (AF 5). The CO opined that the Employer failed to show a change in operation that would support a finding of temporary or reasonable need. (AF 6).

¹ In this Decision and Order, “AF” refers to the Administrative File, “DOLX” refers to the CO’s Exhibits, “EX” refers to Employer’s Exhibits, “Tr.” refers to the transcript of the telephone conference on March 14, 2019.

² The Employer originally requested 8 workers, but due to housing constraints reduced the request to 6 workers.

³ Only the temporary/seasonal need is at issue on appeal.

Pursuant to 20 C.F.R. § 655.171(b), the Employer requested a *de novo* administrative hearing to review the Certifying Officer's ("CO") denial of its H-2A Application. (AF 2). The Employer alleges that it clearly has a seasonable need as it needs more employees during the summer months. (AF 2).

The Office of Administrative Law Judges received the Administrative File on March 7, 2019. The parties agreed to participate in a telephonic hearing on March 14, 2019. At the hearing, I admitted EX A-D and CO 1-4 into the record. Five witnesses testified during the hearing: Ms. Cynthia Webb, agricultural and foreign labor program manager for the Virginia Employment Commission, Mr. Lynton Land, oyster farmer in the area, Mr. Myles Cockrell, Employer's President and Co-Owner, Mr. John Rotterman, the OFLC CO in this matter, and Mr. Manuel Fick of USA Farm Labor, Inc. The Employer and the CO filed post-hearing briefs, and the record is now closed.

The only issue before me is whether the Employer established a temporary or seasonal need for the positions listed in its application, as defined by 20 C.F.R. § 655.103(d). This decision is based on the administrative file, the arguments of the parties, the testimony and evidence presented at the hearing, and the applicable laws and regulations. This decision is issued within ten business calendar days of the hearing, as required by 20 C.F.R. § 655.171(b)(1)(iii).

ARGUMENTS OF THE PARTIES

The CO asserts that the Employer has failed to establish a temporary or seasonable need for H-2A workers. The CO relies on the Employer's application filing history, arguing that the filing of the winter application shows that the Employer has a year round need and its needs are not seasonable or temporary in nature. The CO asserts that the duties performed by both summer and winter employers are the same with only minor differences.

The Employer asserts that its need is seasonal in nature and it has a need for additional workers only during the ten months requested in this application. The Employer argues that the merits of this application should be analyzed separate from that of the winter application. The Employer states that Oysters grow when the weather is warm and go dormant in colder weather increasing the need for workers during the warmer months. While the Employer sells oysters year round, The Employer contends that it has a seasonable need of less than 10 months when the majority of the work is completed and while similar duties occur year round, the number of individuals needed to complete those duties changes depending on the season. The Employer further asserts that if it hadn't filed the "winter" application then this application would have been approved.

DISCUSSION

I held a *de novo* hearing in this matter pursuant to 20 C.F.R. § 655.171(b). Therefore, I will independently examine the evidence and testimony to determine the Employer's eligibility for temporary labor certification. *David Stock*, 2016-TLC-00040 (May 6, 2016). The burden

remains with the Employer throughout the process. *Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).

To succeed on an H-2A application, the Employer must establish “the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” § 655.161(a). The regulations specifically 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.

§ 655.103(d). Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either:

- (1) that an employer’s need to have the job duties performed is “temporary”—of a set duration and not anticipated to be recurring in nature; or
- (2) that the employment is seasonal in nature—that 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).

Both parties spent a large amount of time arguing whether the duties performed in this case overlap among seasons and times of year. However, 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.” *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added). 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-00158, slip op. at 11 (Feb. 15, 2011).

Duties are relevant inasmuch as the duties involve the care and feeding of livestock, which are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. *Cowboy Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011). However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis. See *Gisi Pheasant Farm*, 2011-TLC-00139 (Jan. 25, 2011) (employer overcame presumption by explaining that although it needed temporary workers from March to December to hatch, maintain, and raise the poultry, it does not need workers in January and February because by December, it has slaughtered or sold its poultry and shuts down production during the winter).

Clearly the duties performed by the oyster farmworkers overlap throughout the year. That is not the question. The question is whether the Employer has a reasonable need for additional workers performing those duties and others during the requested application period. If it wasn't for the "winter" application, then this wouldn't be an issue and the CO would have granted certification. If we take the "winter" application out of the equation then the need is clear. The Employer needs more workers during those months of the year. The payroll records, employment history, and the testimony of Mr. Cockrell, which I find credible, all illustrate a reasonable need during the requested period of time. Mr. Cockrell testified at length regarding how the changes in temperature affect the business during the winter months. Oysters lay dormant during the winter months and, therefore, workers are mainly needed to facilitate the sale and packaging of oysters. Prior to this drop in temperature workers are needed to facilitate the movement of the oysters from shallow to deeper water and this takes an abundant amount of man power to complete.

I agree with the CO that BALCA has routinely affirmed the CO's denials where, as here, an employer applies for consecutive certification of agricultural workers under the same SOC Code and job title. *See, e.g., Lancaster Truck Line*, 2014-TLC-00004, slip op. at 5 (Nov. 26, 2013). The precedent states an employer cannot claim that its need is temporary and seasonal based on the "winter months" when its labor certification request lasts through the summer months, including through September. *River Seeds*, 2011-TLC-00001 (Oct. 21, 2010). An employer's "season" must be tied to a certain time of year for an event or pattern.

The record is still unclear exactly why the Employer filed the "winter" application. The Employer appears to be a company that has grown relatively quickly and appears to be continuing to learn to adequately estimate its needs. It remains unclear whether the Employer really believed they had a yearlong need at the time of the prior "winter" application, whether the Employer relied on improper legal information when filing the application, or whether the Employer was just fearful that they would possibly have a need so they filed. Either way, I find the only evidence showing a "winter" need is the underlying "winter" application. I find that the actual testimony in this case does not show a need during that time frame.

I find that while the filing history of the Employer on its face seems to support the CO's position, I do not find that it should result in an absolute affirmance. *See Mammoser Farms*, 2017-TLC-00001 (Nov. 22, 2016) (the ALJ reversed a denial of certification for the winter season where the employer had also been certified for the prior spring and summer). If an employer can justify a need for changed dates through evidence and argument the Employer can be successful; however, mere assertions are not sufficient. *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016).

In this case even if a prior "winter" need was established, I find that the evidence supports that the Employer's situation has changed since the filing of the prior "winter" application. Mr. Cockrell testified that part of his reasoning for filing the "winter" application was fear that they wouldn't get the oyster cages moved in time. However, since that time he has built a new refrigerated facility to store the oysters and two new boats that allow the workers to move the cages more quickly before the cooler months. Mr. Cockrell testified that the workers move 8000 cages of oysters from shallow to deeper water and the new boats help facilitate this

process more quickly and they are able to move them in the timeframe requested. He testified and there is no evidence to dispute that even if he had received approval for winter workers he would have sent them home as he did not need them. Mr. Cockrell testified that during the winter months workers tend to work only a few hours a day and he often has to send workers home for lack of work, unlike during the rest of the year when he is in need of constant help.

For these reasons, I conclude Employer has established a need for labor during the requested period that is different from the prior “winter” application. Accordingly, the Employer has established a seasonal need for labor, as defined in § 655.103(d).⁴

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **REVERSED**. I remand this matter back to the Certifying Officer for further processing.

JOSEPH E. KANE
Administrative Law Judge

⁴ As the Employer has established a seasonable need, I will not address the issue of Temporary need.