

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 January 2019

Case No.: 2019-TLC-00009
ETA Case No. H-300-18297-738378

In the Matter of:

RAGSDALE EGG PRODUCTION LLC,

Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Appearances: Shelia A. Gray
Non-Attorney Representative, Labor Made Easy
Kingston, Oklahoma
For the Employer

Nora Carroll
Office of the Solicitor
Division of Employment and Training Legal Services
United States Department of Labor
Washington, DC
For the Certifying Officer

Before: **TRACY A. DALY**
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

1. Nature of Appeal. This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. This matter involves Employer’s Employment and Training Administration (ETA) Forms 9142A and 790 application for temporary labor certification for one temporary agricultural worker and an administrative review of the application’s denial.

2. Procedural History and Findings of Fact.

a. On October 24, 2018, the Chicago National Processing Center (CNPC) received for filing an ETA Form 9142A application from Ragsdale Egg Production, LLC (Employer). Employer requested authorization for one “Aviary Hen Housing System Maintenance Worker” to perform work from November 15, 2018 to September 15, 2019. The job opportunity was described as “repair, maintenance, and replacement of systems that monitor the conditions inside the chicken houses, including temperature, humidity, and air quality, feed and water lines to make sure they are providing plenty of fresh water and chicken feed.” (AF 28, 48)¹

b. On October 31, 2018, the CO issued a Notice of Deficiency (NOD) in part because Employer failed to demonstrate a temporary or seasonal need as required by 20 C.F.R. § 655.103(d). The CO cited to Employer’s prior application for the same position with the same job duties, which the CO certified with claimed dates of temporary need from March 1, 2017 to December 31, 2017. The CO stated that because Employer’s current application for the same position and job duties, with claimed dates of temporary need from November 15, 2018 to September 15, 2019, the requested need was not seasonal or temporary. Citing 20 C.F.R. § 655.103(d), the CO explained that “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.” Therefore, the CO concluded Employer failed to demonstrate a temporary or seasonal need.

The CO instructed Employer to submit the following documentation: 1) a statement of Employer’s business history, activities, and schedule of operations; 2) a detailed explanation as to the activities of Employer’s permanent workers in the same occupation during the stated non-peak period; 3) summarized monthly payroll reports for a minimum of two previous calendar years that identified, for each month and separately for full-time permanent and temporary employment in the requested occupation, the total number of workers or staff employed, total hours worked, and total earnings received; 4) summarized monthly production numbers for two calendar years that clearly show the number of products being produced each month by workers in the requested occupation at the worksite location; and 5) other evidence that serves to justify the dates of need being requested for certification. (AF 36-42)

c. The CO received Employer’s timely response to the NOD on November 14, 2018. In response to the NOD, Employer submitted a written statement explaining when it filed its prior application in 2017, it was “in desperate need for a worker as quickly as possible.” However, Employer further stated “the past year has shown us the temporary worker is most needed December 1 through September 15 of each year.” In the future, Employer averred it would consistently request those dates of need in its application for certification. In addition, Employer submitted summarized monthly payroll information as requested by the CO. (AF 31-35)

d. On November 26, 2018, the CO issued a non-acceptance letter and denied certification. First, the CO stated the position was not temporary or seasonal because the job duties demonstrated that the job must be performed year-round to ensure the health and well-being of the hens. Second, the CO noted that Employer failed to submit summarized monthly

¹ References to the Appeal File are by the abbreviation AF and page numbers.

production numbers for two prior calendar years as instructed in the NOD, which made assessing Employer's temporary need "impossible." Next, the CO found that Employer had not provided sufficient justification for altering its temporary date of need set forth in its initial application from March 1, 2017 to December 31, 2017 to November 15, 2018 to September 15, 2019 in its subsequent application. Additionally, the CO examined Employer's summarized payroll records and noted that: 1) Employer did not employ a temporary worker in the months of March, April, and May 2017 despite being certified for a period of need from March through December 2017; and, 2) Employer did not employ a temporary or permanent worker during the claimed dates of temporary need in calendar year 2018. Finally, the CO stated Employer did not submit a statement describing its business history, activities, and schedule of operations for the entire year and a detailed explanation of its permanent workers in the same occupation during the stated non-peak period. Consequently, the CO concluded Employer's need was not seasonal nor tied to a certain time of the year. Because Employer's request demonstrated a need for each month of the year, the CO concluded Employer did not establish a temporary or seasonal need for one worker. (AF 26-30)

e. On December 7, 2018, Employer requested administrative review of the CO's denial of certification pursuant to 20 C.F.R. § 655.164(b). Employer asserted "this is not a routine position, but a position requiring experience in upgrading, repair, and placement of the aviary hen housing system." Employer further stated "no employer wishes to admit that the worker was not brought in earlier due to economic unfeasibility." However, Employer stated "most emphatically" that it will request December 1 to September 15 as the claimed dates of temporary need in future applications. (AF 1-2)

f. On December 7, 2018 the Board of Alien Labor Certification Appeals (BALCA) docketed this appeal. The CO transmitted the Appeal File to BALCA on January 7, 2019. On January 8, 2019, the undersigned issued a Notice of Case Assignment and Order Establishing Brief Filing Deadlines.

g. Neither party submitted a brief urging BALCA to affirm or reverse the CO's decision denying Employer's ETA Form 9142A application.

3. Applicable Law and Analysis.

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a "labor certification" from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Burden of Proof.* Throughout the labor certification process, the burden of proof in alien certification remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). The employer, therefore, must demonstrate that the CO's determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. *See Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28,

2014). Consequently, a 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).

c. *Temporary or Seasonal Need.* Pursuant to the regulations, 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 one year. 20 C.F.R. § 655.103(d).

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). 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).

In this matter, the CO compared Employer's prior 2017 application for temporary labor certification to the 2018 instant application. In Employer's prior application, in which the CO granted certification, Employer's claimed dates of temporary need was March 1, 2017 to December 31, 2017. In the instant application, Employer's claimed dates of temporary need is November 15, 2018 to September 15, 2019. In its request for administrative review, Employer notes that when it filed its first application in 2017, Employer "desperately needed a worker immediately." However, without offering any explanation, reasoning, or justification, Employer averred "the past year has shown us the temporary worker is most needed December 1 through September 15 of each year." In addition, in its request for administrative review, Employer explained "economic feasibility" dictated when it could hire a worker in 2017. However, a shifting need based on economics cannot be properly classified as "seasonal." *Southside Nursery*, 2010-TLC-00157 (Oct. 15, 2010).

Employer's arguments raised in its request for administrative review are confusing, unpersuasive, and insufficient to explain the changes in the claimed periods of temporary need. Consequently, the CO reasonably concluded Employer failed to establish the job opportunity was seasonal in nature or tied to a certain time of the year by an event or pattern as required by 20 C.F.R. § 655.103(d). *See Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) (When the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the changes.); *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016) (An employer must justify a need for changed dates through evidence and argument; mere assertions are not sufficient.)

Moreover, the CO considered the duties of the job opportunity, which Employer described as "repair, maintenance, and replacement of systems that monitor the conditions inside the chicken houses, including temperature, humidity, and air quality, feed and water lines to make sure they are providing plenty of fresh water and chicken feed." Based on this job

description, the CO reasonably concluded these duties must be performed during the entire year to care for the hens. Employer provided no justification to establish these job duties are tied to a certain time of year by an event or pattern and why it required labor levels far above those necessary for ongoing operations. Therefore, the CO reasonably found Employer's claimed need did not comply with the regulatory definition of temporary or seasonal.

Finally, the CO considered Employer's 2017 and 2018 summarized payroll records. These records reflect that Employer did not employ a temporary worker for three months of the 2017 certification period, nor did Employer employ a single permanent or temporary worker for the requested position during any month in 2018. The CO reasonably found this implied that Employer does not have a temporary or seasonal need for the position. *See Wells Cattle Company, LLC*, 2011-TLC-00185 (Feb 8, 2011) (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)).

4. Ruling. Employer failed to carry its burden to establish its eligibility for H-2A labor certification. The CO's denial of Employer's Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

TRACY A. DALY
Administrative Law Judge