



Issue Date: 23 October 2019

BALCA CASE NO.: 2019-TLC-00093

ETA CASE NO.: H-300-19235-648575

In the Matter of:

SAM SCHIPPERS,
Employer.

**DECISION AND ORDER AFFIRMING DENIAL
OF EMPLOYER'S H-2A APPLICATION**

This matter arises under the labor certification process for temporary agricultural employment of non-immigrant workers in the U.S. under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(i)(a), 1184, and 1188, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B, (collectively the "H-2A program").

On September 25, 2019, Sam Schippers ("Employer") requested administrative review pursuant to 20 C.F.R. § 655.171(a) challenging the Denial Letter dated September 19, 2019, issued by the Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center ("NPC"). This Office was notified of the appeal, and I directed the parties to file any briefing by October 7, 2019.

Neither party filed a brief, but on October 2, 2019, the Certifying Officer ("CO") filed a Motion to Dismiss Appeal Filed by Debarred Entity or, in the Alternative, to Require the Employer to Perfect the Appeal ("Motion"). The Motion argued that Employer's agent, Placement Services Global, had been debarred from participating in H-2A proceedings prior to filing the appeal with BALCA and that the filing must therefore be rejected and the appeal dismissed. Motion at 1. In the alternative, the CO requested an order directing Employer to state that it wishes to continue the appeal pro se or with a new representative. Motion at 2. I issued an Order Requiring Status Report on October 10, 2019, directing Employer to indicate whether it wished to proceed with the case. Later that day, this Office received a letter from Employer indicating an intent to pursue the appeal pro se, the two communications having essentially crossed in the mail.¹

¹ The timeline of underlying events is somewhat complicated. Employer's initial application was signed by him on July 6, 2019, and received by the NPC on August 14, 2019. AF at 85. On July 17, 2019, the Office of Foreign Labor Certification ("OFLC") issued a Final Determination of Debarment ("Final Determination") to Employer's agent, Placement Services Global, relating to substantial violation of H-2A program regulations in another employer's application. Motion, Exhibit 1 at 1. The Final Determination advised that, unless Placement Services Global requested a hearing before an Administrative Law Judge by August 16, 2019, the Final Determination would become the decision of the Secretary of Labor and the Department of Labor would not process or accept for processing any application filed

This Office received the Administrative File on October 17, 2019. This Decision and Order is based on the written record, which consists of the Administrative File, the request for review, the CO's Motion with attached Exhibit, and the Employer's letter indicating his desire to proceed with the appeal. 20 C.F.R. § 655.171(a). As explained below, this Decision and Order affirms the denial and denies Employer's request for relief.

Background

On August 23, 2019, Employer filed an *Application for Temporary Employment Certification* (ETA Form 9142A) with the Chicago NPC for two temporary foreign workers as "Farm Worker General" for the period of October 15, 2019, to April 15, 2020. AF at 76. Under "Statement of Temporary Need," Employer averred that he needed seasonal help to care for his livestock during the winter months, beginning with calving in October, but no longer needed workers once the livestock go back out to pasture in April. AF at 76. The job description listed a number of duties related to livestock care, as well as "assist in harvesting and transport of crops and daily farm maintenance." AF at 78.

On August 29, 2019, the CO issued a Notice of Deficiency because Employer had not demonstrated how the job opportunity is seasonal or temporary in nature.² AF at 46, 48-49. The CO noted two specific deficiencies relevant here. First, the job duties include care of livestock, which the CO said is "presumed to occur on a year-round basis," and the application did not include documentation to establish a temporary need. AF at 48. The CO required a written explanation of the need and supporting evidence in the form of summarized payroll records. AF at 48. Second, the CO noted that Employer's point of contact, Sam Schippers, had an extensive filing history under the business names Schippers Harvesting, LLC and Sam Schippers. Combining the most recent filing from Schippers Harvesting, LLC (ETA case number H-300-18361-875724) with the present application, the total period of need was from February 20, 2019, through April 15, 2020, or nearly 14 months. AF at 49. The CO noted that, although the two organizations had separate FEIN

by them for a two-year period from August 16, 2019, to August 16, 2021. Motion, Exhibit 1 at 1. Placement Services Global did not file a written request for hearing. Motion, Exhibit 1 at 2. The OFLC issued a Notice of Debarment – Final Agency Action dated September 23, 2019, officially debarring Placement Services Global from participating in any action related to H-2A labor certifications under 20 C.F.R. Part 655, Subpart B; 8 U.S.C. § 1188; or 29 C.F.R. Part 501 for the two-year period beginning August 16, 2019, and ending August 16, 2021. Motion, Exhibit 1 at 1-2. The expedited appeal process for BALCA review of certification denials is provided for at 8 U.S.C. § 1188(e) and 20 CFR § 655.171, so participation in this appeal is not permitted under the debarment.

Employer's application (ETA Form 9142A) was stamped by the Chicago NPC on August 23, 2019, which is after the effective date of the debarment (though before the notice of final agency action was issued), so it is possible that the application should have been rejected for that reason. Regardless, the Denial Letter for Employer's application was issued on September 19, 2019, and Employer's appeal was filed by Placement Services Global on September 25, 2019, so Employer's certification appeal was filed after the time for Placement Services Global's appeal of the Final Determination ran out and after the Notice of Debarment was issued, but likely before Placement Services Global received the Notice of Debarment. Therefore, Placement Services Global was indisputably debarred at the time it filed the appeal. When debarred employers file applications for H-2A visa labor certifications, the applications are routinely denied without consideration of their substance, and appeals of the denials are similarly perfunctory. *See, e.g., In the Matter of Global Horizons, Inc.*, 2007-TLC-00002 (2006). Here, however, the employer itself has not been debarred, and the notice of debarment was not issued until after the application was filed, so the application was considered on the merits. Under the circumstances, I elected to permit Employer to proceed with the appeal if it so chose.

² The CO also cited three other deficiencies, which are not at issue on appeal as the denial was based only on Employer's failure to establish a temporary need. AF at 6, 51-52.

numbers, Sam Schippers was the operator of both companies, the two worksites were only 3.5 miles apart, and the worksite address for Schippers Harvesting, LLC was the same as the housing address for Sam Schippers. AF at 49. The CO also noted that both applications listed some of the same job duties, notably harvesting crops and transporting crops. AF at 49. The CO then explained that OFLC uses the Single Employer Test to determine whether two or more nominally separate entities are sufficiently intertwined that they should be treated as a single employer and required Employer to submit extensive information to explain the differences in business operations between the two entities. AF at 49-51. The CO also required employer to explain “how the similar job duties performed at the adjacent worksites for the same crops are considered seasonal or temporary when they can be performed year round.” AF at 50.

On September 4, 2019, Employer Responded to the Notice of Deficiency. AF at 32-33. Regarding its temporary need for livestock workers, it explained that in prior years all livestock care had been performed by Sam Schippers and his wife, so they did not have payroll records to provide.³ AF at 33. However, they had grown to over 400 head of livestock with over 200 head of bottle-fed calves for the upcoming season, so they needed additional workers. AF at 33. Regarding the separation between the two entities and jobs, Employer provided responses to many of the CO’s questions. AF at 33-34. Employer explained that the two organizations did have a number of things in common: Sam Schippers was the owner of both, and he and his spouse had control over both; they have the same personnel, namely Sam Schippers; basic HR material is the same between both entities; and Sam Schippers makes hiring/firing decisions for both. AF at 33-34. However, Employer explained, there were also a many differences. Each entity maintained separate money, payroll, expenses, insurance, bank accounts, and records. AF at 33-34. Although they retained the same agent to file, each entity had a separate agreement with the agent. AF at 34. They also used separate housing and did not transfer workers between them. AF at 33. Schippers Harvesting was a “crop/harvest farm” and handled all the grain/crop harvest duties, while Sam Schippers (the entity) was a livestock entity and dealt only with livestock care, namely cattle. AF at 33. Finally, the dates of need for the two positions overlapped “because harvesting is not complete when the calving season begins.” AF at 33.

On September 13, 2019, the CO issued a Notice of Required Modification that repeated the explanation of deficiency related to the two employers having overlapping job duties for a year-round period of need. AF at 26. The Notice required Employer to clarify what type of crops would be harvested and transported in connection with the present job opportunity. AF at 26. Employer responded the same day by email, saying that the crops were hay, silage, and corn “all for the feeding and care of the livestock.” AF at 23.

On September 19, 2019, the CO issued a Denial Letter (“Denial”) on the grounds that Employer had not established how the job opportunity was temporary or seasonal in nature as required by 20 C.F.R. § 655.103(d). AF at 18, 20. The CO looked at Employer’s recent filing history and found that the dates of need from both Sam Schippers’ and Schippers Harvesting, LLC’s applications were from February 20, 2019, through April 15, 2020, which is a nearly 14-month period, well over the one-year limit for seasonal or temporary need in the absence of extraordinary circumstances. AF at 20-21. Both applications contained the same job duty of “assist in harvesting

³ Employer provided 2018 payroll records for Schippers Harvesting, LLC because it had no payroll records for itself to provide. AF at 33, 35-42.

and transport of crops and daily farm maintenance” and identified the same crops of corn and silage. AF at 21-23, 147. Furthermore, the two employers had common points of contact and personnel, and the worksites and housing for the two applications are within 3.5 miles of each other and in the same area of intended employment. AF at 21-22. The CO concluded that the businesses were intertwined such that there was really one common job opportunity and that Employer had failed to show why the new application should be considered distinct. AF at 22. It therefore denied the application for failure to demonstrate a temporary or seasonal need as required by 20 C.F.R. § 655.103(d). AF at 20-22.

Employer filed a Request for Administrative Review on September 26, 2019. AF at 1. In its letter, Employer argued that the employment need is seasonal/temporary in nature because the contract is only for six months, saying they had been unable to find local help for only that time period. AF at 1. Employer also argued that it had proved that the two entities, though they are owned by the same person, “are completely different” because the other one does harvesting while this one does care of livestock. AF at 1. “The entities do completely different job duties and they do not share workers,” and payroll, billing, and insurance are separate. AF at 1. The letter ended with a request to allow for the H-2A program so they could care for their livestock and grow their business. AF at 1. Employer’s letter indicating its intent to proceed with the appeal pro se said they didn’t understand why their workers for planting and harvest had “anything to do” with workers for their cattle because the operations were separate and needed their own workers.

Discussion

The standard of review in H-2A cases is limited. When an employer requests a review by an administrative law judge (“ALJ”) under § 655.171(a), the ALJ may consider only the written record and any written submissions from the parties (which may not include new evidence). 20 C.F.R. § 655.171(a). The ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.*

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185, slip op. at 4 (Feb. 8, 2011). The 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). A decision is not arbitrary and capricious if the decision-maker examined “the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Three Seasons Landscape Contracting Serv.*, 2016-TLN-00045, slip op. at 19 (June 15, 2016) (quoting *Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)).

To qualify for the H-2A program, an employer must establish that it has a “need for agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015). According to the regulations:

[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).

To determine whether an employer's need 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." *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). The ALJ must determine if the employer's needs are seasonal, not whether the particular job at issue is seasonal. *Pleasantville Farms, LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015). "Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year." *Farm-Op Inc.*, 2017-TLC-00021, slip op. at 7 (July 7, 2017) (citing *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011)). Similarly, "[i]t is the nature of the need for the duties to be performed which determines the temporariness of the position." *Id.* If "[t]he consecutive nature of...current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer's need does not differ from its need for such labor during other times of the year; the need is year round." *Lodoen Cattle Co.*, slip op. at 4.

Here, the CO's finding that Employer had not established that its employment need is seasonal or temporary was not arbitrary and capricious. Employer's prior application (H-300-18361-875724), which was approved, requested nine Farmworkers General to operate harvesting machines, transport crops to elevator or storage area, and service and repair machinery. AF at 104, 135, 137. The crops to be handled were corn, bean, wheat, and silage. AF at 147. Although Employer emphasizes that the current application is for workers to care for his livestock rather than for harvesting, his application lists "assist in harvesting and transport of crops and daily farm maintenance" among the job duties, and he later clarified that the crops in question were hay, silage and corn "for the feeding and care of the livestock." The CO denied the application because both jobs involve the harvesting and transport of crops and daily farm maintenance, noting that the same crops were identified for both positions, namely corn and silage. AF at 20-22. With these common job duties, performed at worksites within a few miles of each other and in the same area of intended employment, for companies with common owners, points of contact, and personnel, the CO concluded that "employer has failed to show why [the current application] should be regarded as a separate distinct job opportunity from its previous certification." AF at 22.

Employer's repeated argument that he has a temporary or seasonal need for workers to care for his livestock fails to address the basis for the CO's denial, instead addressing a deficiency that is no longer at issue. The initial Notice of Deficiency issued by the CO listed two deficiencies in Employer's application related to whether his need was temporary or seasonal. In addition to the objection that the two applications showed a year-round need for harvest workers, the CO also found that Employer had not demonstrated his need for livestock workers was temporary, because it was assumed that livestock need care year-round. AF at 48-50. Employer responded that he and his wife had previously handled all the livestock care themselves, but this year they had increased the size of their herd, including over 200 bottle-feeding calves, so they needed assistance until the calves

were weaned and the cattle were sent out to pasture. AF at 33, 76. The CO evidently found this explanation satisfactory, because the Notice of Required Modification and the final Denial Letter did not mention this issue at all. AF at 20-22, 26.

But Employer has not addressed the issue of common duties related to harvest and transport of crops or farm maintenance. He has argued that the contract is only for the six-month period of October 15, 2019, to April 15, 2020, but the length of a job or employment contract does not establish the length of need; if it did, employers could easily establish temporary need by simply hiring workers for eight months at a time, even when the work itself was constant year-round. AF at 1. Employer has also argued that the two entities of Schippers Harvesting, LLC and Sam Schippers are “completely different” entities because of their different functions and separate payroll, billing, and insurance. AF at 1. However, the two entities here are owned and controlled by the same individual, are located in the same area of intended employment, and share personnel in the form of Sam Schippers himself. The job titles are identical, the worksites and housing locations are just a few miles apart, and the job duties overlap. The CO’s determination that the two entities’ different FEINs and financial accounts is not sufficient to render them separate and distinct employers is not arbitrary and capricious.

The CO’s determination explained that the issue of two nominally distinct job opportunities functioning as one to service the same need has been addressed in *Altendorf Transport Inc.*, 2013-TLC-00026 (2013), and *In the matter of Katie Heger*, 2014-TLC-00001(2013). AF 6. In both cases, two nominally separate employers filed separate applications for workers to do the same work, and in one case the CO inferred that the second “employer” was specifically created to circumvent the H-2A requirements. The circumstances of this case are less clear-cut than those cases. However, many other cases make the same point. *E.g. Pepperco-USA, Inc.*, 2015-TLC-00015, slip op. at 26, 30-31 (Feb. 23, 2015) (finding two companies with separate finances and employees that grew different crops with different growing seasons at different worksites nonetheless functioned as an interlocked single employer because they shared the same corporate ownership and overall control); *Larry Ulmer*, 2015-TLC-00003, slip op. at 3-4 (Nov. 4, 2014) (finding that separate businesses owned by a father and son functioned as a single, intertwined entity because they used the same worksite and had requested workers with the same qualifications for the same occupation to do similar job duties). The presence of different job duties is not dispositive either, as seasonal variation in job duties is not the same as seasonal variation in need for workers. *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3-6 (Oct. 5, 2015). Furthermore, if I take as true Employer’s assertion that the Sam Schippers operation is solely concerned with livestock, then the harvest and crop transport duties referred to in the job description can only involve work done for Shippers Harvesting, LLC. Therefore, the CO’s determination that the two jobs and employers function together and the overall period of need for workers spans from February 20, 2019, to April 15, 2020 was not arbitrary or capricious.

Schippers Harvesting, LLC’s filing history indicates a consistent nine-month seasonal period of need, from approximately late February to the first of December, so there is not prior evidence of a year-round need for harvest workers or an attempt to shift the period of need to utilize the H-2A system improperly. AF at 75. However, Employer did not satisfactorily address the overlapping job duties and need for workers over a 13-month, 26-day period of need. Employer said that he did not understand how his planting and harvest workers are connected to workers for his cattle, but the CO’s Notice of Deficiency and Denial Letter clearly explained that considering the entirety of the evidence, Employer has not shown that its need is temporary or seasonal.

Accordingly, I find that the CO's denial of certification based on Employer's failure to show that the employment need was seasonal or temporary was reasonable, and not arbitrary, capricious, or not in accordance with law.

ORDER

Based on the forgoing, the Certifying Officer's denial decision is affirmed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge