



**Issue Date: 15 February 2019**

OALJ CASE NO.: 2019-TLC-00035

ETA NO.: H-300-18339-750455

*In the Matter of:*

**BOYCO POULTRY FARMS, LLC,**  
*Employer.*

**DECISION AND ORDER AFFIRMING  
CERTIFYING OFFICER'S DECISION**

This matter is before me on a request for expedited administrative review. It arises under the temporary agricultural 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.

On January 28, 2019, Boyco Poultry Farms, LLC ("the Employer") filed a request for expedited administrative review of the Notice of Denial issued by the Certifying Officer ("CO") in the above-captioned H-2A temporary alien labor certification application. I received the five-hundred-twenty-six-page Administrative File ("AF") from the Employer and Training Administration ("ETA") on February 13, 2019. Under 20 C.F.R. section 655.171(a), I issue this Decision and Order, based on the written record, within five business days of the receipt of the AF.

**The Current H-2A Application**

On or about December 5, 2018, Employer filed its H-2A application (AF pp. 415-423) seeking to hire two Egg Collectors to work from February 1, 2019, until December 1, 2019, at Employer's facility in Hermitage, Arkansas. On December 12, 2018, the CO issued a Notice of Deficiency (AF pp. 403-407), citing Employer to 20 C.F.R. section 655.103, subsection (d), questioning whether Employer's need for two egg collectors met the regulatory definition of "seasonal" or "temporary" employment. The CO also referred Employer to its two unsuccessful H-2A applications filed in 2018. In the CO's view, "the job duties for the requested position include picking up, moving, and packing chicken eggs. These duties are presumed to occur on a year-round basis. Documentation to establish and support the employer's temporary need for workers was not provided as part of this H-2A application. Additionally, in the NOD response for its previous application, the employer failed to establish that the job opportunity is seasonal

and temporary in nature as those terms are defined” (AF p. 405; *see also* pp. 434-438, 459-462, 488-491, 497-502).

That is, the CO had concluded from the 2018 applications that Employer needs egg collectors year-round. She would not grant the most recent application unless Employer explained to her how the needs of the business had changed since the 2018 applications.

For this reason, the CO directed Employer to modify its application:

The employer must explain how its operation has changed such that it now has a temporary or seasonal need for egg collectors.

Each claim to a changed business practice, e.g. a change in operation, must be accompanied by supporting documentation.

**AND**

Because the Employer failed to adequately establish a temporary need as required by 20 C.F.R. § 655.103(d), it is now required to provide supporting evidence that a temporary need exists. The employer must submit a written explanation which documents the need for a *[sic]* H-2A worker. **Supporting evidence in the form of egg production records and flock records are required to substantiate the employer’s temporary need for the H-2A worker.** The employer is required to submit egg production reports and flock records for a minimum of two previous calendar years (2017-2018).

(AF p. 406.)

### Discussion

The burden of proof in alien labor certification matters is on the employer. *See, e.g., Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *Garber Farms*, 2001-TLC-6 (ALJ May 31, 2001). The employer wishing to hire H-2A workers must demonstrate the proposed hiring conforms to applicable laws and regulations. Although an employer has the right to run its business however it may please, such an employer cannot fairly expect the CO simply to defer to the employer’s own business judgment when it comes to hiring foreign workers.

Under 20 C.F.R. section 655.103, subsection (d),

For the purposes of this subpart, employment is of a seasonal nature when 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.

In response to the Notice of Deficiency, Employer wrote

On a year to year basis, flocks are in the houses, laying for 9 months and we allow 1 month variance from year to year. . . . The worker is only needed when the flocks are in the houses and laying. The other two months of the year are cleaning the houses and preparing for the next flock. We have US workers that perform these duties and only need additional workers for egg collections. The current flock will be taken from our houses between 12/31/2018 and 2/26/19. We would like to get egg collectors in prior to this flock being taken from the houses in order to ensure they know how the process of egg collection is. There will be approximately a month prior to the return of the next flock; however, we would like to have the workers here for that time in order for them to see the entire process and be familiar with how the birds are brought in, how they nest, how the belts are set for collections, etc. There will be general farm work for them to do during this 1 month period. The incoming flock should arrive on or around 3/19/2020 *[sic]* and will go out on 1/13/2020. The egg production the last week or so will be low enough that we can handle the collection with our US workers. The additional help is needed temporarily when the birds first arrive and when they are at the peak. The application for the following year would be for the same time period of 02/01/2020 through 12/01/2020 due to the fact that the birds will be coming in on or around 1/30/2020 and will leave on or around 11/26/2020.

(AF pp. 311-312.)

Together with this explanation, Employer submitted 2017 and 2018 egg collection records<sup>1</sup>, and placement reports (AF pp. 313-402).

The CO was not persuaded by the explanation or by the data (AF pp. 195-200).

Requesting expedited administrative review, Employer offered additional explanation:

. . . we have 6 houses. In the upcoming season, 4 of the 6 houses will arrive on or around 03/19/2019 and the last house will come in on or around 04/01/2019, all birds will be picked up between 12/31/2019 and 01/13/2020. This is a 10-month period. We plan

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<sup>1</sup> In the AF, virtually none of the forms submitted under the heading "OK Foods Hatchery Weekly Farm Report" is legible. The ink used to complete these forms apparently did not copy well.

to request workers for the 2020 year for the same time-frame. These birds are brought or taken close to the dates on this placement sheet, with a month or so variance. For instance, the birds by this sheet will be taken out on or around 02/26/2019; however, they will be taken out within the next two weeks. Therefore, this is almost a month ahead of schedule. These dates are suggestions and do not take into account any problems the growers or shippers may have. We are usually completely out of birds from 1-2 months. As stated earlier, the time we need the egg collectors are during the peak season. Yes, from year to year this may change and the time-frame may be shorter but will never be longer than 10 months as we have US workers that are full time and can handle some of the egg collection. This will all depend on the company and growers.

(AF, p. 52.)

Even with the additional explanation, I understand the CO's concerns. First, even Employer admits egg-collecting is taking place outside of the ten-month period during which it wishes to employ foreign workers, but Employer asserts "we have US workers that are full time and can handle" those collections. But Employer does not disclose how many US workers it uses for, or how many worker-hours are devoted to, egg collection at those times. A need for foreign labor is "seasonal" only when it requires "labor levels *far above* those necessary for ongoing operations." And Employer asserts it needs two foreign egg collectors not merely to work for ten months, but to work for ten months per year *every year*. To be sure, ten months is less than one year, and under 20 C.F.R. section 655.103, subsection (d), "[e]mployment 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." Still, a temporary hire who goes away within a year, never to return, is fundamentally different from a foreign worker who is needed for at least ten months every year into the foreseeable future. This is particularly true where, as here, the *task* to be performed by the temporary worker – egg collection – is performed, at least at some level, all through the year.

Second, Employer states the egg collectors are "needed temporarily when the birds first arrive and when they are at the peak." This statement does not seem consistent with the need to have the egg collectors in place for ten months every year.

Third, the CO concluded "the Placement Report<sup>2</sup> shows that all hens placed with the employer are continued in the employer's care for over a year before their respective kill dates . . . based on the placement and kill dates." In the CO's view, this "suggests the job duties described on the ETA Forms 9142 and 790 may be performed year-round in any of the multiple poultry houses" (AF, p. 199). I find the CO's interpretation of the Placement Report, is, at a minimum, reasonable under the circumstances, and Employer nowhere directly refutes the CO's conclusion. (They may even *agree*, since Employer

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<sup>2</sup> AF p. 54.

acknowledges that at times, at least, the egg production is “low enough that we can handle the collection with our US workers” (AF, p. 312). But since neither I, nor presumably the CO, can tell how many US workers Employer devotes to egg collecting during those periods, it is hard to understand how the addition of two foreign workers would affect the process.)

Fourth, the CO reviewed the egg production reports, showing 21,768,810 eggs produced from January 1, 2017, to December 12, 2018, and concluded “egg production occurs outside of the requested dates of need of February through December, and span over 11 months” (AF, p. 199). While I cannot directly review the production reports because many of them did not copy, Employer nowhere directly refutes this conclusion. On the contrary, to an extent, at least, Employer agrees with it.

Perhaps most importantly of all, Employer never discussed how its business had changed – if it had – since the unsuccessful 2018 H-2A applications.

For all of these reasons, I conclude Employer has not met its burden of proof to show a need for two egg collectors as seasonal or temporary workers in this case.

### **ORDER**

The Certifying Officer’s decision is affirmed.

SO ORDERED.

CHRISTOPHER LARSEN  
Administrative Law Judge