



Issue Date: 03 May 2019

OALJ Case No.: 2019-TLC-00047

ETA Case No.: H-300-19065-243701

In the Matter of

Hillenmayer Landscape Services, LLC,

Employer

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (the “DOL” or the “Department”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

STATEMENT OF THE CASE

Employer submitted an application requesting H-2A temporary labor certification for sixty Farmworkers, Farm, Ranch, and Aquacultural Animals job opportunities on March 7, 2019. (AF 77¹.) The nature of temporary need was listed as seasonal and the period of intended employment was listed as April 22, 2019 to November 30, 2019. (*Id.*) The Chicago NPC issued a Notice of Deficiency (“NOD”) on March 14, 2019. (*Id.* at 63-66.) In the NOD, Employer was directed to submit the following:

It must submit documentation to establish that the work described 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. This summary must include an explanation as to how the facially year round tasks involving animal care are seasonal and likewise how a seasonal job, i.e., one tied to a certain time of year, will encounter the temperature extremes listed.

¹ For purposes of this opinion, “AF” stands for “Appeal File.”

Employer responded to the NOD on March 20, 2019. (Id. at 46-53.) Employer submitted an explanation that stated, in part:

The employer concedes that horses are cared for year-round. This is not the threshold question for seasonality. The question is whether the employer's need for temporary workers is tied to a certain time of year by an event or pattern that requires labor levels far above those necessary for ongoing operations. In the present case, it is.

(Id. at 47.)

The Chicago NPC issued a Notice of Required Modifications (“NRM”) on March 26, 2019. (Id. at 34-36.) The NRM requested that Employer submit the agreements referenced in the work contract with Don Alberto Farm. (Id. at 36.) Employer responded to the NRM on March 26, 2019 by providing another copy of the work contract with Don Alberto Farm. (Id. at 20-21.)

Employer’s application requesting H-2A temporary labor certification for sixty Farmworkers, Farm, Ranch, and Aquacultural Animals job opportunities was denied on April 3, 2019. (AF 11-17.) The denial letter stated that Employer failed to establish a temporary or seasonal need as is required by 20 C.F.R. § 655.103(d), and failed to submit its completed work contracts as is required by 20 C.F.R. § 655.132(b)(4). (Id. at 17.) Employer submitted its request for administrative review on April 5, 2019. (Id. at 1-3.)

SCOPE OF REVIEW

Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the ALJ will, 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, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ's decision is the final decision of the Secretary. 20 C.F.R. § 655.171(a).

DISCUSSION

I. HAS EMPLOYER ESTABLISHED A SEASONAL NEED?

According 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.” 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.” In the Matter of 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. In the Matter of Altendorf Transport, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

As explained in their response to the NOD, Employer provides farm labor contracting services to Kentucky horse farms whose operations are tied to the breeding, foaling, and sales cycles. (AF at 47.) The existing workforce at its clients' farms is able to handle the workload during the winter months. (Id.) However, the volume of work at each farm increases significantly when the cold weather subsides and the breeding activities begin. (Id.) Rather than hiring their own seasonal workforce, these fixed-site horse farms have opted to contract with Employer to furnish workers on a contract basis to keep pace with the added demands during spring, summer, and fall. (Id.) They do not require Employer's services during the winter months because their existing workforce is adequate to care for the small number of horses that remain on the farm during that time. (Id.)

According to Employer, breeding generally starts sometime between mid-February and early March and continues through early June. (Id. at 47-48.) During the breeding cycles, each stallion breeds between sixty and ninety times per month. (Id. at 48.) The majority of foaling occurs in March and April and continues through June. (Id.) All horses on the farm will require additional care and attention at this time. (Id.)

During the breeding and foaling cycles, the number of horses at each farm increases dramatically. (Id.) One of Employer's clients, Gainesway Farm, anticipates starting the year with 390 horses. (Id.) By the end of the spring months, the farm will add 120 foals, resulting in a total of 510 horses. (Id.) Gainesway Farm anticipates that 120 horses will be sold in September, bringing the head count back down to 390 horses. Employer's other customers experience a similar seasonal increase in the number of horses on the farm. (Id.)

Because of the increase in the number of horses on each farm, Employer's clients experience a shortage of labor during the spring and summer months. (Id.) In order to address this shortage of labor, they have contracted with Employer to provide additional workers to help satisfy these seasonal demands. (Id.)

Additionally, during the summer months, the existing workforce on the farms begins to prepare for the sales season, which occurs from the middle of the summer until early November. (Id.) According to Employer, this time of the year is labor- and time-intensive. (Id.)

During the sales season, Employer's clients' full-time employees regularly travel for business and are unable to perform their normal job duties on the farm. (Id.) For example, one of Employer's clients, Lanes End Farm, sends ten of its U.S. workers to the Fasig-Tipton Saratoga sale and up to fifty of its U.S. workers to the September Keeneland sale. (Id.) Another one of Employer's clients, Gainesway Farm, anticipates that up to fifty of its full-time employees will travel to each of the six sales event, leaving their farm shorthanded. (Id.) Because of the travel commitment of Employer's clients' full-time employees, Employer states that additional workers are needed to tend to its clients' farms while the permanent workforce is absent or greatly diminished. (Id.)

Once the horses are sold at the various sales events, Employers' client's need for additional labor is greatly reduced. (Id.) The last sales event occurs in November, which is the last month of intended employment in Employer's application. (Id.)

Based on the foregoing, the undersigned finds that Employer has established a seasonal need. As the regulation states, a seasonal need occurs where it is tied to a certain time of year by an event or pattern and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103. Employer's response to the Notice of Deficiency established a seasonal need based on its clients breeding, foaling, and sales seasons. The breeding and foaling season results in a need for additional labor because of the large increase in the number of horses on each farm. Furthermore, Employer's clients have a need for additional labor during the sales season, which requires its full-time employees to travel to various sales events in Kentucky and New York, leaving inadequate staff to care for the horses remaining on the farm. Thus, given the overlapping breeding, foaling, and sales seasons, which result in Employer's clients having a shortage of labor, the undersigned finds that Employer has established a seasonal need.

II. DO THE TEMPORARY EMPLOYEES ENGAGE IN AGRICULTURAL WORK?

According to the applicable regulation,

Employees engaged in the breeding, raising, and training of horses on farms for racing purposes are considered agricultural employees. Included are such employees as grooms, attendants, exercise boys, and watchmen employed at the breeding or training farm. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture. For this purpose, a training track at a racetrack is not a farm. Where a farmer is engaged in both the raising and commercial racing of race horses, the activities performed off the farm by his employees as an incident to racing, such as the training and care of the horses, are not practices performed by the farmer in his capacity as a farmer or breeder as an incident to his raising operations. Employees engaged in the feeding, care, and training of horses which have been used in commercial racing and returned to a breeding or training farm for such care pending entry in subsequent races are employed in agriculture.

29 C.F.R. § 780.122. The Director argues that the work performed by Employer's temporary employees falls outside the scope of agricultural work because its client's horses are being sold at thoroughbred auctions in Kentucky and New York.

This argument is flawed because neither Employer nor its clients are engaged in racing activities directly. Furthermore, even if Employer was engaged in the breeding, raising, and training of horses for racing purposes, its temporary employees would still be engaging in agricultural work. As the regulation states, "Employees engaged in the breeding, raising, and training of horses **on farms** for racing purposes are considered agricultural employees." 29 C.F.R. § 780.122 (emphasis added). Employer's application and supporting documentation makes clear that all of the work performed by the temporary employees occurs on the farm.

Although Employer's clients' full-time employees leave to transport certain horses to the various sales events, the temporary employees never leave the farm, caring for the horses who remain on the farm. Because the temporary employees work exclusively on the farm, the undersigned finds that they engage in agricultural work.

III. HAS EMPLOYER SUBMITTED FULLY EXECUTED WORK CONTRACTS?

An H-2A Labor Contractor Application for Temporary Employment Certification must contain "Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section." 20 C.F.R. § 655.132(b)(4).

Employer submitted a total of thirty-one work contracts with its application. (AF 137-166.) The Certifying Officer found an issue with one of these contracts. The Don Alberto Farm Contract listed services to be performed as, "Provide maintenance of pasture land/grounds in connection with horse farm operations pursuant to agreements for limited services under supervision of and employed solely by contractor." (Id. at 148.) According to the Certifying Officer, Employer failed to provide "fully executed" agreements referenced in this work contract.

The undersigned finds that the work contracts submitted by Employer comply with 20 C.F.R. § 655.132(b)(4). Submitting fully-executed work contracts simply requires Employer to submit **signed** contracts. Employer and Don Alberto Farm entered into a work contract and Employer submitted the signed contract with its application. See AF at 148. Given that all of the contracts submitted by Employer were fully-executed, the undersigned finds that Employer's application is in compliance with the applicable regulation.

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer's Final Determination denying Employer's ETA Form 9142, H-2A Application for Temporary Employment Certification is REVERSED

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey