



Issue Date: 02 December 2019

OALJ Case No.: 2019-TLC-00045
ETA Case No.: H-300-19057-319088

In the Matter of:

STURGEON AQUAFARMS, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c)(1), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis.

On February 26, 2019, the United States Department of Labor, Employment and Training Administration (“ETA”) received an ETA Form 9142 *Application for Temporary Labor Certification* (“Application”) from Sturgeon Aquafarms, LLC (“Employer”), requesting H-2A labor certification for one (1) Assistant Marine Biologist, Beluga Breeding for the period of April 1, 2019 to January 31, 2020. (AF 53-59). Employer represented that the “Nature of Temporary Need” was “Seasonal” in Section B, Item 8 of the application.

On March 5, 2019, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). (AF 38-47). While the NOD contained ten (10) separate deficiencies, the basic deficiency was that Employer had not established temporary need because the job duties for the requested position included care and feeding of beluga sturgeon and other sturgeon fish, which the CO found were duties that are presumed to occur on a year-round basis, thus exceeding the ten (10) months normally considered as seasonal or temporary.¹

On March 6, 2019, the CO received Employer’s written response and documentation, but determined it still failed to establish a temporary or seasonal need as required by 20 C.F.R. § 655.103(d) and denied the application by letter dated March 20, 2019. (AF 3-7). By facsimile dated March 27, 2019, Stephen Campos, Employer’s CFO & Director of Human Resources, filed a request for a *de novo* administrative hearing on behalf of Employer to review the CO’s denial, pursuant to 20 C.F.R. § 655.171(b)(1). (AF 1-2).

¹ In the NOD, the CO cited 20 C.F.R. § 655.103(d), defining temporary need as “employment [that] 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.”

On April 23, 2019 and April 30, 2019, a member of my staff attempted to contact Mr. Campos to schedule a telephone hearing, leaving messages on both occasions. On May 7, 2019, having receiving no response, I issued a *Notice of Docketing and Order Requiring Certification of Mootness*, requiring Employer to certify whether the job identified in the Application was still open and available on the same terms as set forth in the Application and whether Employer was still seeking an individual to fill the position. On May 23, 2019, this Office received a response from Employer certifying that the position remained unfilled and continued to be pursued. Consequently, on June 7, 2019, I issued *Notice of Telephone Hearing*, scheduling this matter for a telephone hearing to commence on July 2, 2019. However, on July 1, 2019, I granted Employer's request to continue the telephone hearing and notified the parties that the hearing would take place on August 12, 2019. I subsequently converted the hearing to a telephone conference to discuss the status of this case with the parties. The telephone conference was then moved to August 30, 2019 to accommodate Mr. Campos's schedule.

Mr. Campos did not call in to the first telephone conference call, and I scheduled a second status conference for September 6, 2019. Mr. Campos did not call in to this status conference or respond to subsequent attempts by members of my staff to reschedule it. Plaintiff's counsel indicated that she had not heard from Mr. Campos since late August 2019.

On November 1, 2019, I wrote a letter to Mr. Campos advising him that the period of need he requested in the original H-2A application ends on January 31, 2020. I gave him fifteen (15) days from the date of the letter to contact my law clerk and inform her whether he wanted to continue with his appeal or whether he intended to a file a new application with a new period of need. To date, Mr. Campos has not contacted my office.

29 C.F.R. § 18.21(c) provides that "when a party has not waived the right to participate in a hearing, conference or proceedings but fails to appear at the scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceedings, or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear."

ORDER

Here, Employer has not contacted this office since July 1, 2019. I find that Employer has effectively abandoned its claim. Since it is the Employer's burden to establish eligibility for the H-2A program, and has failed to do so here, I find that the CO properly denied certification. Accordingly, the Certifying Officer's denial of temporary labor certification in the above captioned matter is **AFFIRMED**.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge