

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 May 2019

BALCA Case No.: 2019-TLC-00043
ETA Case No.: H-300-18339-587591

In the Matter of:

CULBERTSON, LLC,

Employer.

Certifying Officer: Chicago National Processing Center

Appearances: Heleen van Tonder, Esq.
Golden Opportunities International, LLC
Sevierville, Tennessee
For the Employer

Micole Allekotte, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: **CARRIE BLAND**
Administrative Law Judge

DECISION AND ORDER

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.

On March 7, 2019 (“the Employer”) filed a request for expedited administrative review of the Final Determination issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on May 2, 2019. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

STATEMENT OF THE CASE

On December 19, 2018, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Employer. AF 67 – 75.¹ Employer requested certification for 2 General Farmworkers from March 1, 2019 until November 30, 2019. AF 67. Employer indicated that the nature of its temporary need was a seasonal need, and explained that:

We operate a cattle, vegetable and small grain farm. We need seasonal employees to assist with the planting, raising and harvesting of small grain and vegetables as well as assist with livestock. Duties will include herding, grazing, castrating, branding, weighing, catching and loading animals. During the summer the employees will also need to assist with building and maintaining fences and buildings, work cattle and complete routine maintenance and service on equipment. Grow vegetables in the market garden. Duties include market delivery and working the farmers market.

AF 67.

On December 26, 2018, the CO issued a Notice of Deficiency ("NOD") citing one deficiency in Employer's application. AF 56 – 59.

The CO identified a failure to establish the job opportunity as temporary in nature and stated the following:

The job opportunity, described on ETA Form 9142, Section F(a) Item 5 and ETA Form 790 Item 15, indicate the job duties for the requested position include the care and feeding of livestock including cattle. 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.

AF 58.

To correct Employer's failure to establish the job opportunity as temporary in nature, the CO requested that the Employer submit supporting evidence and documentation to support the number of positions being requested, including, but not limited to:

1. A written explanation which documents the temporary need for H-2A workers;
2. Summarized monthly payroll reports for a minimum of one calendar year (2018) that identify, by month, and at a minimum, the total number of workers, total hours worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation; and
3. The summarized payroll reports must be signed by the employer with the following statement attesting that the information was compiled from the employer's accounting

¹ References to the 91-page appeal file will be abbreviated with an "AF" followed by the page number.

records or system: I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by Culbertson, LLC for Calendar Year 2018.

AF 58.

After reviewing the documentation that Employer submitted in response to the NOD, the CO concluded that Employer did not meet the regulatory requirements and issued a Final Determination denying the Employer's application for temporary labor certification on March 1, 2019. AF 22 – 25. The CO denied Employer's application because Employer failed to correct the stated deficiency in the NOD. Specifically, the CO noted that the Employer failed to establish the job opportunity as temporary in nature.

The CO determined that Employer did not sufficiently demonstrate the requested standard of temporary need. AF 22 – 25. Specifically the CO concluded:

The job opportunity, described on ETA Form 9142, Section F (a) Item 5 and ETA Form 790 Item 15, indicate the job duties for the requested position include the care and feeding of livestock including cattle. 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.

AF 24.

The CO stated that the provided payroll report supported a temporary need for H-2A workers for the months of March through August, rather than March through November.

March through August had the highest number of workers employed as well as the highest total number of hours worked. Likewise, the months of September through February have the lowest number of workers employed as well as the lowest number of hours worked.

...

There is no evidence that employer has a need for extra labor from September through November and employer did not supply any additional documentation illustrating this need.

AF 25.

On March 7, 2019, Employer requested administrative review of the CO's Final Determination/Denial. AF 1 – 21.

APPLICABLE LAW

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (ALJ) may only render a decision “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.” Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO.

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). The only issue before me is whether the Employer has established a seasonal need for the positions requested in its application. The Department’s H-2A regulations provide:

Definition of a temporary or seasonal nature. For purposes of this subpart, 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 1 year.

8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d). In determining whether 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-158, slip op. at 11 (Feb. 15, 2011). Accordingly, I must consider whether the Employer’s need for labor or services during its specified “season” differs from its need for such labor or services during other times of the year.

DISCUSSION

The CO denied certification because the Employer failed to establish the job opportunity as temporary in nature. Employer argues that its need is directly tied to the crop season for vegetables and small grain, and only looking at the 2018 payroll records does not correctly demonstrate the projected growth and additional workload expected in 2019. The Employer also notes that this is the first year they are requesting seasonal H-2A help due to a growing business and planning for the upcoming season.

Employer addresses one of the CO’s arguments specifically:

In the denial the certifying officer also states that “feeding of livestock including cattle . . . are presumed to occur on a year-round basis.” Please note that nowhere in the job description does it refer feeding cattle. Grazing is where animals graze out in the fields, which does not occur in the winter months.

AF 2.

Upon review of Employer's monthly payroll report for 2018, I find the CO's argument that Employer's seasonal need is only from the months of March through August insufficient. The CO argues that "March through August had the highest number of workers employed as well as the highest total number of hours worked." Although I note that the month of September reflects a decline in number of employees and total hours worked, in October there was a significant increase in total hours worked as well as total earnings. During the month of October a total of 4,121 hours was worked. This exceeds the months of March, June, and August, all months the CO concedes are within the employer's seasonal need period. I find that this is a good indication that the month of October should be included in Employer's season of temporary need. Following October the number of employees as well as hours worked begins to drastically decrease, indicating an end to Employer's crop season.

Insofar as the CO depends on the argument that feeding livestock occurs on a year-round basis to arrive at the denial of Employer's application, I disagree with this conclusion. Nowhere in the employer's job description listed on Form 9142 or Form 790 does the phrase "feeding of livestock" appear. I find that this argument by the CO is not well-reasoned.

Employer submitted the documentation requested by the CO, which was the 2018 monthly payroll report. As indicated above, I find that the payroll report establishes that Employer's crop season occurs from March through October and the need for labor or services during this time of the year differs from other times of the year. I disagree with the CO's finding and remand for further processing for the reduced seasonal time period of March through October.

ORDER

In light of the foregoing, it is hereby ordered that the Certifying Officer's Final Determination denying the Employer's ETA Form 9142A, *H-2A Application for Temporary Employment Certification* for two General Farmworkers is MODIFIED and the matter is REMANDED to the Certifying Officer for further processing with the seasonal need dates between March and October.

SO ORDERED.

For the Board:

CARRIE BLAND
Administrative Law Judge

Washington, D.C.