



Issue Date: 19 December 2018

BALCA Case No.: 2019-TLC-00006
ETA Case No.: H-300-18288-103240

In the Matter of:

DONALD PARRISH DAIRY INC.,
Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Before: **TIMOTHY J. McGRATH**
Administrative Law Judge

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

This matter involves an appeal arising under the provisions of the Immigration and Nationality Act governing temporary agricultural employment of non-immigrant workers (H-2A workers) and the corresponding regulations at 20 C.F.R. Part 655, Subpart B. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 & 1188. For the reasons set forth below, I affirm the Certifying Officer's denial of Employer's *H-2A Application for Temporary Employment Certification*.

BACKGROUND

On October 11, 2018, Donald Parrish Dairy Inc. ("Employer") filed an *H-2A Application for Temporary Employment Certification* ("Application") with the U.S. Department of Labor's Employment and Training Administration. (AF 126-34).¹ Employer seeks temporary labor certification for eight seasonal "Agricultural Workers" from December 7, 2018 through October

¹ Citations to the Administrative File are abbreviated as "AF" followed by the page number.

6, 2019.² (AF 126). The Application identified one worksite location in Evant, Texas. (AF 129). In the Application’s “Statement of Temporary Need,” Employer wrote: “UNFORSEEN NEED. IN THE PAST WE HAD BEEN ABLE TO SUB-CONTRACT OUT FOR THE PLANTING AND HARVESTING OF CROPS. WITHOUT THE SUB-CONTRACT WE DO NOT HAVE THE EMPLOYEES FOR THIS PROCESS.” (AF 126) (capitalization in original).

On October 22, 2018, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), notifying Employer that its Application failed to meet the criteria for acceptance because it failed to establish a temporary need as required by 20 C.F.R. § 655.103(d).³ (AF 114-17). In order to prove its seasonal need, the CO requested Employer provide a written explanation “which documents the temporary need for H-2A workers.”⁴ (AF 116-17). The CO noted Employer’s dates of need in its Application are from December 7, 2018 through October 6, 2019, but its “previous certification was for February 13, 2016 through November 28, 2016.” (AF 116). Therefore, the CO requested Employer detail the significant change in its dates of need in its written explanation. (AF 116-17).

The CO also directed Employer to provide supporting evidence of its seasonal need, including summarized payroll reports for a “minimum of one previous calendar year (2017) for Farm Worker.” (AF 117). The CO specified the payroll reports “must be a summary of the employer’s individual payroll records by months, and, at a minimum identify the total number of workers, total hours worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation.” *Id.* (emphasis in original). The CO stated the payroll reports must be signed by Employer with the following attestation: “I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by Donald Parrish Dairy Inc. for Calendar Year 2017.” *Id.* In addition, the CO asked Employer to “submit a copy of summarized expense reports showing funds expend[ed] to subcontractors for the duties listed in this application.” *Id.*

² Employer outlined the work duties for the position as follows: “Operates farm machinery to plant, cultivate, & harvest feed crops. Cleans & fumigates barns and stalls and sterilizes equipment. Maintains & repairs farm machinery, equipment, buildings, and fences. Harvesting of wheat, hay & oats.” (AF 128).

³ The CO identified several other deficiencies unrelated to this appeal. (AF 117-20).

⁴ The CO pointed out that “[t]he job duties and crop activities listed in the present application are the same as job duties and crop activities listed in the employer’s previous application.” (AF 116). “It is . . . unclear how this job opportunity is temporary or seasonal in nature as the year round use of labor is the Department’s understanding of dairy duties.” *Id.*

On November 6, 2018, Employer responded to the NOD with supporting information, including a Statement of Temporary Need, 2017 payroll records by month, and Form 1099s showing payment to subcontractors in 2017.⁵ (AF 48-102). In its NOD response cover letter, Employer stated: “Due to the large amount of rain and lack of help our planting times have been pushed back this year.” (AF 48). In its Statement of Temporary Need, Employer wrote:

In the past, we had been able to sub-contract out for the planting and harvesting of crops. The loss of subcontractors we have used in the past we have not been able to replace them this year. Therefore we do not have employees or subcontractors for this season. We did not anticipate this loss.

Id. On November 16, 2018, the CO denied Employer’s Application because its NOD response failed to demonstrate a seasonal need for temporary workers. (AF 43-47). The CO stated:

Although the employer clarified that its company no longer has dairy operations, the employer failed to establish how its job opportunity for Agricultural Workers is seasonal or temporary in nature. While the employer explained that its dates of need were changed due to a large amount of rain, the employer did not provide any documentation as supporting evidence to show how the adverse weather conditions impacted its crop activities. In other words, the employer failed to explain how its period of need for the same activities could have shifted so significantly from the prior application to the present one.

In its Statement of Temporary Need letter, the employer explained that the loss of sub-contractors it hired last year and not anticipating this loss were the basis for its seasonal and temporary need for H-2A workers. No data was provided as to when or how the subcontractors were used. Critically, even assuming that they were hired to fill the same need present in this and the employer’s prior application, no documentation was provided to show that they were used in a manner which could be described as either temporary or seasonal.

(AF 46-47).

On November 23, 2018, Employer requested an expedited administrative review before the Office of Administrative Law Judges. (AF 1-42). On December 12, 2018, I received a copy of the administrative file. On December 13, 2018, I issued a Notice of Docketing and Order Setting Briefing Schedule. On December 18, 2018, Employer and the CO filed legal briefs in support of their respective positions.

⁵ In its response to the NOD, Employer wrote: “There is no dairy in operation. The dairy was closed in 2005. The corporation name was maintained as all Livestock and Farming was under the corporation.” (AF 48).

DISCUSSION

Employer bears the burden of demonstrating that it has a temporary or seasonal need for agricultural services. 20 C.F.R. § 655.161; *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015). The regulation at 20 C.F.R. § 655.103(d) provides:

[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.

The pertinent inquiry is whether an employer's needs are seasonal, rather than whether the particular job opportunity at issue is seasonal. *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015) (*quoting Sneed Farm*, 1999-TLC-00007, slip op. at 4 (Sept. 27, 1999)). As a seasonal need is tied to a certain time of year, it is of a recurring nature. *See Rodriguez Produce*, 2016-TLC-00013, slip op. at 3 (Feb. 4, 2016). Therefore, an employer is required to justify any change in period of need in order to ensure the need is truly seasonal as opposed to a year-round need for workers. *Rodriguez Produce*, at 3-4 (*citing Thorn Custom Harvesting, LLC*, 2011-TLC-00196, slip op. at 3 (Feb. 8, 2011); *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010)).

To establish eligibility for temporary labor certification, an employer must demonstrate "when the . . . season occurs and how the need for labor or services during this time of the year differs from other times of the year." *Fegley*, at 3 (*citing Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). Denial of labor certification is appropriate when an employer fails to provide evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011) (*citing Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) (finding an employer's bare assertion without supporting documentation insufficient to meet its burden of proof)).

In the present case, the CO denied Employer's Application because it "failed to explain how its period of need for the same activities could have shifted so significantly from the prior application to the present one." (AF 47). The CO acknowledged Employer's explanation that "its

dates of need were changed due to a large amount of rain,” but noted it “did not provide any documentation as supporting evidence to show how the adverse weather conditions impacted its crop activities.” *Id.* Employer’s previous application for temporary labor certification sought six Agricultural Workers from February 13, 2016 through November 28, 2016.⁶ (AF 303, 305-06). The CO therefore noted: “[B]etween its two applications, the employer has demonstrated a need for the same occupation in each month of the year.” (AF 47).

While I do not agree Employer’s purported period of need “shifted so significantly” from the dates listed in its prior application, it nevertheless failed to establish that its need is seasonal. Employer wholly failed to present any evidence in support of its position that its period of need changed “due to a large amount of rain” this year. *See* (AF 48). Aside from this assertion, Employer put forth no detailed reasoning as to why its dates of need altered due to weather conditions. Without any evidence or supporting reasoning, the CO properly found Employer failed to establish a seasonal need.⁷ *See Rodriguez Produce*, at 4 (*citing Carlos Uy III*, 1997-INA-304).

The CO also found Employer’s Statement of Temporary Need insufficient to establish a seasonal need for the period of December 7, 2018 through October 6, 2019. (AF 47). In its Statement of Temporary Need, Employer merely indicated it had been able to use subcontractors for the planting and harvesting of crops in the past, but could not replace them this year. (AF 50). However, Employer did not explain why it requires temporary workers from December 7, 2018 through October 6, 2019 on a seasonal basis. As the CO pointed out, there is no data or evidence about when or how Employer’s subcontractors were used in the past. (AF 47). In fact, Employer

⁶ Employer’s previous application sought workers to perform the same duties involving the same crops at the same worksite address in Evant, Texas as listed in the current Application. (AF 126, 128-29, 303, 305-06).

⁷ Attached to Employer’s request for administrative review and appellate brief were articles and reports about the weather in Texas. Employer also provided a new explanation about how the unpredictable weather conditions in Texas this year affected its alleged period of need in the present Application. *See* (Request for Administrative Review & Employer’s Appellate Brief).

In his brief, the CO argues the new evidence, including the weather related information, should not be considered on appeal in accordance with 20 C.F.R. § 655.171(a). (CO Brief at 3-4). That regulation provides, in pertinent part: “[T]he 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.” § 655.171(a). Therefore, I will not consider the new material and explanation submitted by Employer with its administrative review request and appellate brief. *See* (CO Brief at 3-4); *see also Rodriguez Produce*, at 3; *Paintbrush Adventures*, 2015-TLC-00006, slip op. at 3 (Nov. 24, 2014).

provided no adequate evidence or explanation to the CO demonstrating a distinct seasonal need between December 7, 2018 and October 6, 2019.⁸

Based on the foregoing, Employer has failed to meet its burden that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d). Therefore, the CO properly denied certification.

ORDER

It is hereby ORDERED that the Certifying Officer's decision denying the Employer's *H-2A Application for Temporary Employment Certification* is **AFFIRMED**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

⁸ Employer's documentation submitted in response to the CO's NOD, including its 2017 payroll records by month and 2017 Form 1099s do not establish that it needs more workers in certain months than other months of the year.