



Issue Date: 03 July 2019

OALJ Case No.: 2019-TLC-00055
ETA Case No.: H-300-19091-555696

In the Matter of:

PINNACLE ALLIGATOR FARMS, LLC,
Employer.

Before:

JONATHAN C. CALIANOS
Administrative Law Judge

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

This matter involves an appeal arising under 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 the Employer's *H-2A Application for Temporary Employment Certification*.

STATEMENT OF THE CASE

On April 2, 2019, the Employer, Pinnacle Alligator Farms, LLC, filed an H-2A *Application for Temporary Employment Certification* ("Application") with the U.S. Department of Labor's ("DOL") Employment and Training Administration. (AF at 33). The Employer seeks temporary certification for four seasonal "Farmworkers, Farm, Ranch, and Aquacultural Animals" positions whose daily tasks include:

- Handling, sorting, and grading live alligators for harvesting and stocking movements;
- Hatching alligator eggs;
- Vaccinating hatchlings;
- Harvesting alligators;
- Moving alligators;
- Loading and unloading of alligators;
- Returning alligators to the wild;
- Stocking incubators;

- Preparing alligators for harvesting process;
- Preparation and maintenance of alligator pens, incubators, and hatchling houses;
- Feeding alligators;
- Upkeep and maintenance of vegetation and water treatment ponds;
- Ground keeping;
- Sanitizing and disinfecting barns/ equipment; and
- Cleanup and maintenance of worksite.

(AF at 35); *see also* (AF at 8, 13-14).

On April 9, 2019, the Certifying Officer (“CO”) issued the Employer a Notice of Deficiency (“NOD”), identifying five deficiencies with the Application. (AF at 21). On April 18, 2019, the Employer responded to the NOD and provided additional documentation addressing the deficiencies. (AF at 10). On May 1, 2019, the CO denied the Employer’s Application because the Employer failed to adequately address one deficiency. (AF at 5). The CO denied the Application because “the employer failed to demonstrate that the job opportunity is seasonal or temporary in nature as required by 20 C.F.R § 655.103(d).” (AF at 9). Specifically the CO reasoned: “The submitted statements and payroll records do not support the employer’s claim that it has a need for labor levels for the months of May through November which are above those necessary for the employer’s ongoing operations.” *Id.*

On May 8, 2019, the Employer requested an expedited administrative review before the Office of Administrative Law Judges. (AF at 3). With its request, the Employer included an additional explanation in response to the denial issued on May 1, 2019. *Id.* On June 21, 2019, pursuant to the conference call I held, the Employer decided to proceed with administrative review under 20 C.F.R. § 655.171(a). The Employer filed a brief accordingly. The CO did not file an appellate brief.

DISCUSSION

A. Definition of “Seasonal or Temporary”

Under 20 C.F.R. § 655.103(d), temporary or seasonal nature is defined as:

[E]mployment is of a seasonal nature where it is tied to a certain time of the 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.

20 C.F.R. § 655.103(d).

B. The Farmworkers, Farm, Ranch, and Aquacultural Animals Position Does Not Constitute Seasonal or Temporary Labor Or Services to Qualify for Temporary Employment Certification Under the H-2A Program.

Although the Employer states that it has a seasonal and temporary need for additional labor during specific aspects of the alligator raising and harvesting cycle, it fails to provide adequate evidence to demonstrate this seasonal need as defined under 20 C.F.R. § 655.103(d). Employer states that it has a seasonal need from late February/March through October/early November. (AF at 13). Nevertheless the Employer fails to demonstrate a seasonal need for this specific time period based on its submission of summarized payroll reports for the “Farmworkers, Farm, Ranch and Aquacultural Animals” position (hereinafter the “Position”). The summarized payroll report for the 2018 calendar year provides information on the number of hours worked by permanent or temporary employees for the Position. (AF at 17). The temporary employees for the specific Position is broken down between temporary employees hired from Express, or outside employees borrowed from Cyprus Briar. *Id.*

With the exception of April,¹ the total hours worked by both permanent and temporary employees of the Position was between 1,200 and 1,350 hours each month. The 2018 summarized payroll report did not suggest that there was a greater seasonal need between the months of late February/March through October/early November than the months of December and January. (*See* AF at 17-19). For example, the total hours worked in the alleged “slow” months of December and January exceeded the total hours worked in the alleged “busy period” of June.² *See id.* Additionally, the total hours worked in the “slow” month of January is almost on par with the “busy” month of July.³ *See id.*

In response to the NOD, the Employer also submitted a letter from Cypress Briar, a company that previously provided additional help to Pinnacle when needed. (AF at 10). In the letter, Cypress Briar said it provided supplemental labor to assist with the Employer’s harvesting activities. (AF at 12). However, based on the summarized payroll report for the 2018 calendar year, the supplemental labor provided by Cypress Briar also does not demonstrate an increased

¹ The total hours worked by Farmworkers in April was 1,629.8 hours. (AF at 17).

² January’s total of 1,253 hours and December’s total of 1,212 hours both exceed June’s total of 1,204.25 hours. (*See* AF at 17-19).

³ July’s 1,257.5 total hours worked is only 4.5 more hours than January’s 1,253 total hours worked. (*See* AF at 17-19).

need for labor between the period of late February/March through October/early November. For example, Cyprus Briar provided more hours of supplemental labor for the “slow” month of January than any of the “busy periods.”⁴ (See AF at 17-19). Further, it shows that Cyprus Briar provided zero hours of supplemental labor for the month of June, which is supposed to be one of the Employer’s busier months. *Id*; see (AF at 14).

Lastly, the Employer states that the Express employment hours recorded on its summarized payroll record does not reflect the seasonality of the Employer’s operation. (AF at 4). Employer states that it uses Express to find domestic full time employees, and labor provided by Express does not reflect the busy season. *Id*. However even without considering the Express employment hours, based on the other information in the 2018 summarized payroll report, the Employer failed to show that the Position is seasonal or temporary in nature. Accordingly, the Employer failed to prove its eligibility for temporary employment certification.

ORDER

Because the Employer failed to establish that the “Farmworkers, Farm, Ranch and Aquacultural Animals” position is on a seasonal or other temporary basis in accordance with 20 C.F.R. § 655.103(d), 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.

JONATHAN C. CALIANOS
Administrative Law Judge

⁴ The only month that Cyprus Briar provided more supplemental labor than January is February, which is considered a “transition season” as opposed to a “busy period.” (See AF at 14).