



Issue Date: 10 January 2019

BALCA Case No.: 2019-TLC-00010
ETA Case Nos.: H-300-18304-1025808

In the Matter of:

Quail International, Inc.,
Employer.

Before: DANA ROSEN
Administrative Law Judge

DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S
DENIAL OF TEMPORARY LABOR CERTIFICATION

This case is before the Board of Alien Labor Certification Appeals (“BALCA”) pursuant to the Employer’s request for review of the Certifying Officer’s denial in the above-captioned H-2A temporary labor certification matter. 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), and the implementing regulations at 20 C.F.R. Part 655, Subpart B.¹ On December 5, 2018, Quail International, Inc. (“Employer”) appealed the Certifying Officer’s November 28, 2018 denial of its H-2A application for temporary labor certification.

BACKGROUND

On October 31, 2018, Quail International, Inc. (“Employer”) filed an *H-2A Application for Temporary Employment Certification* (“Application”) with the United States Department of Labor Employment and Training Administration. (AF 38-45).² Employer seeks temporary labor certification for six seasonal “Farmworkers, Farm, Ranch, and Aquacultural Animals” from January 1, 2019 through October 31, 2019. (AF 38). The Application identified one worksite location in Greensboro, Georgia. (AF 41). In the Application’s “Statement of Temporary Need,” Employer wrote:

Quail International, Inc. is a vertically integrated poultry (quail) production enterprise. This means that we produce everything in house, except for the feed supply. We are closed circuit of animal production of meat for human consumption. The traditional poultry companies can buy breeding stock from worldwide know [sic] suppliers who specialize in genetic selection to sell the poultry producers their breeding stock. These suppliers are not available in the quail industry. The

¹ Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.

² Citations to the Administrative File are abbreviated as “AF” followed by the page number.

operation of selection is best done in Spring time, but we need to start in January to train the crew and to maintain the fertile egg production. We select breeders until October before the daylight starts shortening too much. During the months of November and December we don't do breeder selection, which is a process that we perform periodically to improve the genetics of our birds. Due to the cooler weather we keep minimal birds in stock. Due to this we have no need for additional workers. (AF 38).

On November 7, 2018, the Certifying Officer issued a Notice of Deficiency, 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). (AF 25-29). The Certifying Officer indicated the following deficiencies in the Notice of Deficiency (AF 25-29):

Deficiency 1: Temporary Need

Because the Employer failed to establish a temporary need as required by 20 CFR sec. 655.103(d), it is now required to provide supporting evidence that a temporary need exists. The Employer must submit a written explanation which documents the temporary need for H-2A workers.

The Employer must provide a detailed explanation as to why the job opportunity is seasonal or temporary in rather than permanent in nature.

That explanation must include:

1. A statement describing the Employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the Employer's permanent workers in this same occupation outside of the requested period of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation Farmworker; Animal, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the Employer attesting that the information being presented was compiled from the Employer's actual accounting records or system;
4. Summarized monthly production numbers for two calendar years that clearly show the number of quail produced each month by workers in the requested occupation at the Employer's worksite location, or equivalent facility; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the Employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the Employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the Employer must submit any other evidence and documentation relating to the Employer's current business activities and trade industry that similarly serves to justify the dates of need being requested for certification.

Deficiency 2: Job Qualifications and Requirements

...if the Employer prefers elementary education, but does not view it a minimum job qualification necessary to perform the job, it should be removed from the application. In addition, if the Employer prefers 3 months of experience, but does not view it a minimum job qualification necessary to perform the job, it should be removed from the application.

Modification Required:

Given the Employer's characterization of this education and experience stipulations as a preference, they are not a basic job requirement. Therefore, the Employer must remove the elementary education preference from Section F Sub Part Education and Experience of the ETA Form 9142 Attachments. In addition, the Employer must remove the three-month experience preference from Item 16 of the Employer's ETA Form 790/ETA Form 790 attachment and the Employer must remove from the experience requirement from Item F.b.4a/F.b.4. and the ETA Form 9142 attachment.

In the alternative, the Employer may clarify that the education preference and the 3 month experience preference are actually requirement(s). Furthermore, if the Employer selects this alternative, it must also add the elementary education requirement to the ETA Form 790 and it must remove the statement from Section F Sub Part Education and Experience of the ETA Form 9142 Attachments, where the Employer states, "...some experience in farming is desired, but not required."

Deficiency 3: Notice of Deficiency

Throughout the application, the Employer has listed its lifting requirement as "70lbs." However, in Item 16(2) of the ETA Form 790, the Employer lists its lifting requirement as, "50lbs." Therefore, the exact lifting requirement remains unclear.

Modification Required:

The Employer must clarify the exact lifting requirement and provide Chicago National Processing Center (NPC) with permission to amend the lifting requirement throughout the application or Item 16(2) of the ETA Form 790 so that all forms are complete and consistent.

...the Employer did not include the same job duties in the ETA Form 790, Item 16. Furthermore, work with bees is not included as a job duty in the remainder of the application.

Modification Required:

The Employer must clarify the job duties that will be performed and provide permission to amend its application accordingly, so that it is consistent throughout.

On November 15, 2018, Employer responded to the Notice of Deficiency with supporting information, including a Statement of Temporary Need, payroll records by month, and updated job qualifications and requirements. (AF 16-22). In its Statement of Temporary Need, Employer wrote:

January the need for workers increases for Quail International. This is when they begin training workers to begin the season. You will notice that Quail International did not request workers with quail experience as they will be difficult to find. They have requested workers with farm worker experience as they feel those are the workers that they will be able to successfully train to perform the duties listed in the contract.

Quail International needs to begin preparing for their season in January. Quails grow very fast and gain maturity faster than any other poultry birds. They start laying eggs within their 6 to 7 weeks of age. It takes about 16 to 19 days to hatch their eggs. In order to successfully begin their season, they need to begin ensuring the hens begin producing eggs, so that the breeding begins in the spring, they are able to have enough hens laying to keep up with production.

Quail International has a need for temporary workers beginning in January that will run through October. Their need evolves [sic] around the duties of farming quail. The months of November

and December due to the cooler temperatures, less quail are kept on the farm and their permanent workers can handle the demand for work.

The unemployment rate in Georgia is at 3.7%. Attached you will find an Attachment A that contains the Employer's payroll records for the last 2 years. You will notice that as the unemployment rate dropped so did their number of permanent workers. They have never hired temporary workers before and this year are forced to due to an increase in production.

This season Quail International is increasing production by 15%. Instead of producing 280,000 birds a week they will need to do 340,000 per week. This increase means they will need to hire temporary workers for the first time, as with the smaller flocks in the winter they don't have a need for permanent workers. (AF 16-17).

On November 28, 2018, the Certifying Officer denied Employer's Application because its response to the Notice of Deficiency did not sufficiently address temporary need. (AF 11). The Certifying Officer stated:

The Chicago NPC received the Employer's response to the NOD via email on November 15, 2018. The response included further information in support of the Employer's claimed seasonal need as well as payroll records for the years of 2016 and 2017. However, the Employer did not submit the following as required:

1. A detailed explanation as to the activities of the Employer's permanent workers in the same occupation outside the requested period of need.
2. Summarized monthly payroll reports including the total number of workers or staff employed, total hours worked.
3. Summarized monthly production numbers for two calendar years that clearly show the number of quail produced each month by workers in the requested occupation at the Employer's worksite location, or equivalent facility; and
4. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. (AF 12).

On December 4, 2018, the Employer filed a timely formal request for administrative review of the denial determination with additional documentation. The information included the previously sent payroll records and did not address quail output. (AF 1-8). On January 7, 2018, the undersigned received a copy of the administrative file.

DISCUSSION

Based upon the evidence in the Appeal File, the Certifying Officer's Denial of Determination is affirmed.

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 Certifying Officer denied Employer's Application because "the limited payroll records submitted do not support either the claimed seasonal need or a temporary need." (AF 13). In the Certifying Officer's Denial Letter dated November 28, 2018, the Certifying Officer stated:

The payroll records do not distinguish permanent workers for the job opportunity, i.e. occupation listed on the application and other job functions within the organization. They likewise do not provide summarized monthly payroll reports including the total number of workers or staff employed, total hours worked per month or summarized monthly production numbers for two calendar years that clearly show the number of quail produced each month by workers in the requested occupation at the Employer's worksite location, or equivalent facility. It is therefore impossible to assess if or when the Employer might have a seasonal need, i.e., a need that 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.

Additionally, the limited payroll records submitted do not support either the claimed seasonal need or a temporary need. The highest volume of labor 2017 was in the months of June through August and the lowest levels of labor in September through December. This is inconsistent with the claimed period of need of January through the end of October and particularly the months of January through May, September, and October. The earnings for the year 2017 also indicate that in the month of December workers had the fourth highest monthly earnings in the year. This again undermines the claimed period of need of January through the end of October. The Employer's temporary need explanation states in part, "The months of November and December due to the cooler temperatures, less quail are kept on the farm and their permanent workers can handle the demand for work..." Its December 2017 payroll, however, shows that earnings exceeded that of all other months that year save three. The payroll does not support Employer's statement that December is part of its slow season. The Employer's explanation of its period of need is not supported by its payroll documentation. (AF 13).

In the Notice of Deficiency issued November 7, 2018, the Certifying Officer required Employer to provide payroll documentation from two previous calendar years showing the number of quail produced each month by the workers requested as well as the hours worked by employees. (AF 25-29). In Employer's response to the Notice of Deficiency, Employer provided payroll records from two calendar years that indicates the number of workers on staff each month and the earnings. (AF 19). Employer did not present any evidence in support of its position that quail has a breeding and growing season from January to October and more workers are required on the farm during that season.

In the Certifying Officer's Notice of Deficiency, this information was specifically requested from Employer to establish a seasonal need, and this information was not provided by the Employer. Employer presented no detailed evidence regarding the output of quail from January to December and the number of workers required to assist with the increased output during those months. The payroll records provided during those months also showed that December 2017 was one of the busiest months during the 2017 calendar year, which is inconsistent with Employer's assertion that December is not part of the busy season. This inconsistency makes it difficult to determine whether Employer has a busy season and when the busy season exists. Given that the Employer provided limited payroll records instead of providing records the Certifying Officer requested in the Notice of Deficiency, the Certifying Officer properly found Employer failed to establish a seasonal need.

The Certifying Officer also found the Employer's Application to be "internally inconsistent." (AF 14). The Certifying Officer stated:

The Employer thus concurrently claims that cooler temps produce a decreased need for labor, increased production an increase in needed labor, and that when the payroll shows a decreased use of labor, it was attributable to a lack of available labor, and not anything inherent [sic] to the Employer's business. These differing rationales are irreconcilable.

It is important to note that while the Criteria for Certification at 20 CFR 655.161(a), (b), does require a determination as to the non-availability of domestic workers, a labor shortage does not obviate the need for the Employer to meet its burden with respect to a showing of temporary or seasonal need. (AF 14).

Based on the evidence in the record, the Regulations, and the case law, the undersigned agrees with the Certifying Officer that the Employer's statement there is a shortage of workers in Georgia is not sufficient to meet the burden of proof substantiating a seasonal or temporary need.

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

Dana Rosen
Administrative Law Judge

DR/mjw
Newport News, Virginia