



Issue Date: 22 May 2019

BALCA Case No.: 2019-TLC-00049
ETA Case No.: H-300-19063-716626

In the Matter of:

TRANEL RANCH,

Employer.

Appearances: Christopher J. Flann, Esq.
Immigration Law of Montana, PC
Shepherd MT
For the Employer

Micole Allekotte, Attorney
Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington DC
For the Certifying Officer

Before: **JERRY R. DeMAIO**
Administrative Law Judge

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

This case arises from the Employer's request for review before the Board of Alien Labor Certification Appeals ("Board" or "BALCA") of the denial of its application for an H-2A temporary labor certification by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA"). 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1103(a), 1184(a)(c); 8 C.F.R. § 214.2(h); 20 C.F.R. Part 655, Subpart A. For the reasons set forth below, the CO's denial of temporary labor certification in this matter is reversed.

STATEMENT OF THE CASE

On March 5, 2019, Tranel Ranch ("Employer") filed an application for H-2A temporary labor certification with the ETA. (AF 34-62.).¹ The application sought authorization to hire one individual as a general ranch hand from April 19 through December 31, 2019. (AF 34, 36.) Under a letter dated March 12, 2019, the CO issued a Notice of Deficiency. (AF 23-28), which

¹ Citations to the appeal file are abbreviated "AF" followed by the page number.

identified six issues for the Employer to remedy before the certification could be approved. The Employer responded to the Notice (AF 9-22); however, the CO determined that the deficiencies had not been fully corrected, and issued a denial of the application on April 19, 2019. (AF 3-8.)

The CO identified one deficiency on which they based their denial—that the Employer failed to establish a temporary need for the employment opportunity, as required by 20 CFR § 655.103(d). Specifically, the CO noted that the payroll data submitted by the Employer did not support the employer’s requested dates of need, and in places, the payroll report even contradicted the Employer’s statement of temporary need.

In its Statement of Temporary need in Section B.9 of the ETA Form 9142, the Employer stated that the dates requested were consistent with the production cycle historically associated with livestock and agriculture activities in that part of the country. (AF 34.) Furthermore, the Employer noted that, this year, the number of heifers they are calving has increased significantly, and requires an augmented staff. (AF 17.)

The CO began by asserting that a ten-month employment request was an acceptable threshold to question the temporary nature of the position. (AF 5.) Because the job description included taking care of livestock, the CO presumed the position was actually for year-round employment, and went on to look at the payroll records submitted by the Employer.

In looking at the payroll data submitted by the Employer (AF 18-19) the CO noted that the month of March 2017 (which is outside of the employer’s period of need) had a higher total number of hours worked (1280) than the total number of hours worked (1200) in the month of December 2017, which is within the Employer’s requested period.

Likewise, the 2018 payroll summary data shows that the highest number of hours worked last year was in the month of February, and the fourth-highest month was March—neither of which are within the Employer’s request. The lowest months in 2018 were April and December—both within the request. (AF 18.) Furthermore, the high-employment months in the winter contradicts the Employer’s statement that the winter months are generally less productive. (AF 18). As a result, the CO concluded that the evidence submitted did not support, and at time contradicted, the Employer’s statement of temporary need. The CO thus denied the application under 20 C.F.R. § 655.103(d).

On April 24, 2019, the Employer requested administrative review of the denial with the Board in a letter. The case was referred to this office on April 29, 2019. On May 10, 2019, this office received the Administrative File, and on May 13, 2019, a Notice of Docketing and expedited briefing schedule was issued. The Employer filed a brief in support of its position.²

DISCUSSION

Because the CO only cited one ground in the final denial—failure to show that the employment requested was of a temporary or seasonal nature under 20 C.F.R. § 655.103(d)—

² A letter from the Employer was attached to the brief in this case. Because this is an expedited review, the Board is limited to the Record as it existed before the CO, so the letter is not considered in this decision.

that is the only issue that will be considered. An H-2A worker is defined as any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a “temporary or seasonal nature” pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(a). *See* 20 C.F.R. § 655.103(b). Employment is of a seasonal nature when 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.” 20 C.F.R. § 655.103(d). 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.” *Id.* A temporary agricultural labor certification application must be accompanied by a statement establishing either that an employer’s need to have the job duties performed is temporary—of a set duration and not anticipated to be recurring in nature; *or* that the employment is seasonal in nature—that is, employment which ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. *Grandview Dairy*, 2009-TLC-00002 (2008). On review of the record, the Employer met the standard necessary.

The error in the CO’s reasoning comes with the fact that the CO started by assessing whether or not the position was temporary and, deciding that further evidence was needed to show the *temporary* nature of the position, sought payroll and wage records, which they used to decide that the position was not *seasonal*. Seasonal and temporary employment, while maybe related, are not interchangeable under the regulation. They are two distinct ways in which the H-2A standard can be met—thus the use of the word “or” in the text of the regulation. Either is acceptable.

To start, the CO began by noting that the Board in *Grandview Dairy*, 2009-TLC-00002 (2008), found that 10 months is a permissible threshold at which to question the temporary nature of a stated period of need—a threshold close enough to the statutory one-year mark to begin to question whether or not the employment is truly temporary. This “ten-month rule” has been looked at in several decisions, and is not an absolute requirement for further review by the CO, but has been an accepted guideline for the CO to seek further information to ensure that the temporary employment opportunity is not, in fact, a permanent position with a short break between purported hiring periods. The application of it in this case, however, is unusual from the beginning, as the Employer’s application only asks for an eight-month period of employment, from April to December. This is farther on the temporary side of the threshold, and farther yet on the acceptable side of the one-year “extraordinary circumstances” cutoff in the regulations. The request is well within the guidelines for temporary employment, and there is nothing unusual suggesting that it is not.

But even if the temporary nature of the position were in question, the Employer articulated the need:

Our normal operation for spring calving includes calving 300 heifers. Due to market considerations and other factors, we are calving 800 heifers this spring. Calving that number of heifers requires two to three people working eight hour shifts or a total of nine people to monitor and care for the heifer calving process.

Those nine people are over and above our normal staff which means we needed to almost double our staff. In addition to the increased number of employees, there is the challenge of finding people who are available to live and work on the ranch premises. I have advertised and recruited for several months and found a limited number of applicants who are available and qualified for the position.

(AF 17.) There is, admittedly a seasonal component to the request, as the Employer describes the general cycle of calving, haying, and weaning. (AF 9-10.) And if that were the only consideration, it would make sense to look at the past wage records to determine if the employment is, in fact, is necessary only for certain periods during the year. However, that is not what the Employer appears to be asking for in this case. Here, the Employer cites a significant increase in production this year, on top of any seasonal considerations, and the inability to hire qualified workers for the peak period. The proof of temporary nature of the position is sufficient, as justified by the increased number of heifers expected to calve, compared to normal years.

As previously stated, this was not a case of needing seasonal workers—it was a case of requiring temporary workers, and the regulation requires that the Employer show that the need is temporary *or* seasonal. As the temporary standard was met, the further seasonal analysis was unnecessary, and denying the application on those grounds was in error.

ORDER

It is hereby **ORDERED** that the Certifying Officer's denial of the Employer's Application for Temporary Employment Certification is **VACATED** and that this matter is **REMANDED** to the Certifying Officer for further processing in accordance with the decision in this case.

For the Board:

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts