



Issue Date: 12 June 2020

BALCA Case No.: 2020-TLC-00078

ETA Case No.: H-300-20109-498110

In the Matter of:

BTW OSTRICH FARM LLC

Employer

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“DOL” or the “Department”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

BACKGROUND

On April 27, 2020, Employer submitted an H-2A Application for Temporary Employment Certification for one laborer. (AF 27-53.¹) The nature of temporary need was listed as seasonal, and the period of intended employment was listed as July 1, 2020, to April 30, 2021. (AF 27, 35.) In its statement of temporary need, Employer explained:

Need a disciplined and diligent temporary worker to manage chick incubation and rearing on ostrich farm. The owner of the ostrich farm suffered a stroke last year, remains incapacitated and needs an experienced laborer to tend for the ostriches while he tries to find a buyer for the farm. When the farm is sold a new owner will take over operations and the position will no longer be needed.

(AF 44.) Employer described the job duties as follows:

Feeding and watering ostriches; collecting, candling, marking and storing eggs, sanitation of incubation facilities and chick rearing facilities, treatment of birds in respect of necessary daily medication, packing eggs into the setter either on a

¹ For purposes of this decision, “AF” stands for “Appeal File.”

weekly basis or two weekly basis depending on egg production, candling of eggs at two weeks and again at 5 weeks in the incubator, continuous monitoring of the incubation process (24 hours/day, seven days/week availability), packing of eggs into the hatcher at 5 weeks, continuous monitoring of the Hatching Process and helping chicks out of their eggs if help is required, releasing the chicks out of their enclosures in the morning and constant monitoring of the chicks throughout the day to ensure that they receive proper sanitation, water, feed and medication as is necessary, are not exposed to extreme hot or cold temperatures by providing the correct balance between shade and sunlight during the day and are sheltered during periods of rain, putting the chicks into their enclosures at night and monitoring the enclosures to ensure a stable temperature range, that is neither too hot or too cold, collect and properly dispose of waste and, when necessary, dead chicks, ensure that the correct feed, medication and sanitizers are ordered in a timely fashion and that sufficient stores thereof are always available and in stock, inspect and report the need for maintenance of all equipment and infrastructure.

(AF 35.)

On May 4, 2020, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). (AF 15-21.) According to the CO, Employer failed to establish a temporary or seasonal need for one additional laborer. The CO compared Employer’s previously certified application (H-300-19206-249662²) to its current one (H-300-20109-498110):

Case Number	Status	Beginning Date of Need	Ending Date of Need
H-300-19206-249662	Certified	09/16/2019	06/30/2020
H-300-20109-498110	Current Application	07/01/2020	04/30/2021

Because the beginning date of need for Employer’s current application is contiguous with the ending date of need for its prior application (and because the job type, job duties, and work location are all the same), the CO concluded that Employer’s “dates of need are from September 16, 2019 through April 30, 2021; a 1 year, 7 month and 15 day period of need.” (AF 18.) Thus, the CO determined that Employer “has not established how this job opportunity is temporary, rather than permanent and full-time, in nature.” (AF 18.) The CO also noted that the “job description includes duties which are generally thought to occur on a year-round basis including the feeding and watering of ostriches and treatment of birds in respect of necessary daily medication.” (AF 19.) To remedy this deficiency, the CO directed employer to “provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature.” (AF 19.)³

On May 6, 2020, Employer responded to the NOD. (AF 12-14.) Regarding the seasonal nature of the job opportunity, Employer wrote: “This application’s dates of need are from 7/1/2020 - 4/30/2021. These dates correspond with the ostrich breeding season in the region where [Employer] is located. During the breeding season, the workload increases as baby

² Documents from this application are found in pages 54 through 150 of the Appeal File.

³ The CO identified two additional deficiencies, which are not at issue here.

ostriches require specialized attention and care during the first 3 months of their life.” (AF 12.) Employer explained that the egg-laying season in the region is May to December. Because the eggs hatch six weeks after being laid, hatching will occur from late June through February. After hatching, the ostriches “require rearing for about 3 months.” (AF 12.) Therefore, according to Employer, “labor is needed from early July (when the first eggs are hatched) until the end of the following March (when the last hatched eggs no longer require rearing).” (AF 12.) To support its explanation, Employer cited an online article titled “Recent Developments in Ostrich Farming.”⁴ According to Employer, this “overview of ostrich breeding ... corroborates the general season for ostrich breeding (as the article states, it varies by latitude).”

Finally, Employer explained that its prior certified application (H-300-19206-249662) did not correspond with the ostrich breeding season because “at the time of that application, the owner/manager of the farm had suffered a stroke and the farm was in need of help indefinitely until a new farm manager could be found.” Employer noted that the farm now has a new manager. (AF 12.)

On May 26, 2020, the CO issued a Denial Letter. (AF 5-10.) After quoting from both the explanation of the deficiency in the NOD and Employer’s response to the NOD, the CO concluded that, because Employer’s “season is not supported by its own evidence, its job opportunity is not considered seasonal.” (AF 10.) Specifically, the CO observed that the article submitted by Employer indicates that the ostrich breeding season in the northern hemisphere spans from March to August/September, whereas Employer’s requested period of need is July through April. (AF 10.) Furthermore, the CO added that Employer’s need for a new manager after the original manager suffered a stroke “speaks to the fact that this job opportunity represents a year round need.” (AF 10.)

On June 1, 2020, Employer filed the instant appeal. (AF 1-4.) Employer explained:

After Ostrich eggs hatch, the baby birds require rearing for approximately 12 weeks. This rearing involves significant additional work: examples of this work include the supervision of hatching, helping chicks out of their eggs, and constant monitoring of chicks throughout day to ensure they are adequately nourished and kept in the proper climate.

(AF 3.) Employer reiterated that in its region, egg-laying season is May to December, the eggs hatch approximately six weeks after they are laid, and once hatched, “there is significantly more work involved in rearing baby ostriches.” (AF 3.) According to Employer: “This work begins in late June (after the May eggs are laid) and will finish at the end of the following March, when the last laid eggs are 3 months old. This period (Late June through Late March) corresponds with the requested work period.” (AF 3.)⁵

⁴ M.M. Shanawany, Food and Agriculture of the United Nations, *Recent Developments in Ostrich Farming*, <http://www.fao.org/3/v6200t/v6200T02.htm> (last visited June 11, 2020).

⁵ Employer cites to additional online articles and submits a statement from another ostrich farmer. I may not consider this evidence because it was not submitted to the CO. 20 C.F.R. § 655.171(a).

In response to the CO's assertion that Employer's prior application and the current application establish a year-round need, Employer acknowledged that it requires "some level of labor for the entire year" (AF 4.) However, Employer clarified that there is a "major increase in the amount of labor required during ostrich rearing months." (AF 4.) At the time of its prior application, Employer needed help "indefinitely" because it did not "definitively know when a new manager could be found, so it needed labor assistance for all tasks until a new manager was hired." (AF 4.) Because a new manager has been hired, Employer explained it "only needs additional help during the ostrich rearing season." (AF 4.) Employer asserts its need for labor in each application should be examined separately as opposed to as one continuous need for labor. Specifically, the first application "involved managing all aspects of the farm until full time help could be found," whereas the second application "involves supplementing the full time manager by focusing on tasks which are seasonal in nature." (AF 4.)

Finally, Employer explained that the job descriptions in its two applications were the same because "the requested temporary worker will at some point assist the farm manager with *all* ostrich related tasks during the breeding season." However, Employer asserted that "the need for this job is seasonal because once rearing season is complete, the number of tasks required is reduced significantly and the farm manager can handle these without additional assistance." (AF 4.)

On June 10, 2020, the CO submitted a brief. The CO requests that I affirm her denial of Employer's application for temporary employment certification because Employer failed to establish a temporary or seasonal need for labor. Because Employer's prior application and the current application combine together to cover a period greater than one year, the CO argues that Employer's need is not "temporary," as defined in C.F.R. § 655.103(d). (CO Brief at 6.) Rather, Employer must establish a seasonal need. The CO argues that Employer has failed to establish a seasonal need because the duties that would be performed by the additional laborer occur on a year-round basis (and thus are not tied to a particular season) and because Employer "did not submit sufficient evidence to support its asserted dates of seasonal need in this application." (CO Brief at 6-8.) The CO also argues that the Employer's prior application and the current application are for a single year-round position, citing to the fact that the job title, job duties, and experience requirement are the same in both applications. (CO Brief at 9-11.)

ANALYSIS

Legal Standard

Employer requested administrative review. Accordingly, I must "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." 20 C.F.R. § 655.171(a). Although no standard of review is specified in the regulation, I review the CO's denial to determine whether it is arbitrary and capricious. *J and V Farms, LLC*, 2016-TLC-00022, at note 1 (Mar. 4, 2016); *see also Resendiz Pine Straw, LLC*, 2019-TLC-00052 (June 14, 2019).

Employer bears the burden of establishing its eligibility. *See Garrison Bay Honey, LLC*,

2011-TLC-00054 (Dec. 2, 2011). The criteria for certification under the H-2A program includes “whether the employer has established the need for the agricultural services or labor to be performed on a temporary or seasonal basis.” § 655.161(a). The applicable regulation 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.

§ 655.103(d) (emphasis added). Here, Employer argues its need is seasonal.

When determining whether an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” *In the Matter of Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added). To meet its burden to show a seasonal need, Employer must “establish when its season occurs and how the need for labor or services during that time of the year differs from other times of the year.” *In the Matter of Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011). In other words, seasonal employment is “employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.” *William Staley*, 2009-TLC-00060 (Aug. 28, 2009). The overarching question is “whether the employer’s need is truly temporary.” *Id.* (citing 52 Fed. Reg. 16,770, 20,497-98 (1987)).

Seasonal Need

In the NOD, the CO cited two rationales for her conclusion that Employer had failed to establish a temporary or seasonal need: (1) considering Employer’s prior application in conjunction with its current application, Employer’s period of need for the same type of labor runs for over one year and seven months, so the need is not temporary; and (2) the job description includes duties (such as feeding, watering, and medicating ostriches) that are generally performed on a year-round basis, so the need is not seasonal. Accordingly, the CO requested “a detailed explanation” of why Employer’s need should be considered temporary or seasonal instead of permanent.

In its response to the NOD, Employer offered a reply to both lines of reasoning: (1) the prior application was for a one-time temporary need because the farm manager had suffered a stroke, whereas the current application reflects a need for seasonal labor based on the ostrich breeding season, so the need is not permanent; and (2) the need for labor is seasonal because the workload in caring for the ostriches increases significantly during the breeding season when baby ostriches require specialized attention.

In the denial letter, the CO rejected Employer’s explanations, concluding: (1) Employer’s need for a new manager after the original manager suffered a stroke “speaks to the fact that this job opportunity represents a year round need” (AF 10); and (2) because the article submitted by

Employer indicates that the ostrich breeding season spans from March to August/September (whereas Employer's requested period of need is July through April), Employer failed to establish that its need is seasonal.

First, the CO's conclusion that Employer's need for a new manager "speaks to the fact that this job opportunity represents a year round need" is vague and unexplained. It does not appear that the CO considered Employer's explanation that its prior application represented a one-time temporary need, whereas its current application represents a recurring seasonal need. Citing to the dates of Employer's two applications and the fact that the job duties are the same, the CO simply concluded (and continues to argue in its brief) that Employer's need cannot be temporary because the total period of need exceeds one year.

Employer's prior application clearly reflects that the basis for its temporary need was that its manager was unable to perform his job because of a medical emergency.⁶ In contrast, Employer's current application clearly reflects that it seeks additional labor based on an increased workload during the ostrich breeding season.⁷ In other words, whereas the first application reflected a non-recurring temporary need, the current application reflects a recurring seasonal need. Thus, Employer's explanation of the difference between the two applications is sufficient to alleviate any concern about Employer having a year-round period of need. Because each application reflects an entirely different basis for its labor needs, it was arbitrary for the CO to determine that Employer's need for labor is year-round based only on the dates of the applications and the fact that the job descriptions are the same.

Next, the CO concluded that, because the article submitted by Employer indicates that the ostrich breeding season spans from March to August/September, and Employer's requested period of need is July through April, Employer failed to establish that its need is seasonal. Again, however, it appears the CO failed to fully consider Employer's explanation.

As the CO observes, the cited article indicates that, in the northern hemisphere, "breeding commences during March and ends around August/September." However, as Employer points out, the article also states that "the timing and duration of breeding can vary with latitude and altitude." Employer explained that the egg-laying season in the region where its farm is located is from May to December. The article Employer cited generally supports the length of Employer's breeding season, indicating that "[o]n average, the breeding/mating season lasts from six to eight months every year."

Employer also explained that the eggs hatch approximately six weeks after they are laid, and newborn chicks require rearing for about three months. This timeline aligns with Employer's requested period of need from July (when the eggs laid in May-June are hatching) to April (when the last chicks [from eggs laid in December and hatched in January-February] are ending the rearing period). Employer further explained that this rearing period requires significant additional work, including supervising hatching, helping chicks out of the eggs, and daily

⁶ I recognize initial application does not reflect this (AF 128), but Employer's response to the NOD does reflect this (AF 103) and thus sufficiently remedies the deficiency in the initial application.

⁷ Again, I recognize initial application does not reflect this (AF 44), but Employer's response to the NOD does reflect this (AF 12) and thus sufficiently remedies the deficiency in the initial application.

monitoring to ensure that the chicks are receiving proper nutrition and being kept in the proper climate. (AF 3, 12.)

In concluding that Employer failed to establish a seasonal need, the CO relied solely on the breeding months listed in the article when the article itself acknowledges that those months may differ depending on latitude and altitude. The CO did not articulate a satisfactory explanation for rejecting Employer's description of its seasonal need and did not acknowledge that Employer's detailed description of the breeding season aligns with its period of requested seasonal need. The CO's rationale for determining that Employer failed to establish a seasonal need is cursory and superficial. The CO requested a detailed explanation of its seasonal need, and Employer provided that explanation. Therefore, I conclude the CO acted in an arbitrary manner in denying Employer's application.

I also reject the arguments presented in the CO's brief. The CO acknowledges that, when determining whether an employer's need is seasonal, it is appropriate "to determine if the employer's needs are seasonal, not whether the duties are seasonal." *In the Matter of Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999) (emphasis added). Nonetheless, the CO focuses on the fact that the job duties listed in both Employer's prior application and the current application are the same.

Relying in part on *D & G Frey Crawfish*, 2012-TLC-00099 (Oct. 19, 2012), the CO argues that Employer is essentially using two applications to fill a year-round need for labor at its ostrich farm. (CO Br at 10.) This case is not analogous to *D & G Frey Crawfish*, which involved an artificial division of duties (preparing for fishing activities versus actual fishing activities) between two applications that actually reflected a year-round need for fishing workers. Here, Employer is not trying to fill a year-round need for labor by creating a false division of duties through separate applications. Rather, as explained above, Employer's first application was for a temporary period until a new manager could be found (and thus was unrelated to any specific aspect of its business cycle), whereas its current application is strictly based on a seasonal need (related to the ostrich breeding season). This case is more analogous to *Hillenmayer Landscape Servs.*, 2019-TLC-00047 (May 3, 2019), in which the ALJ determined that the Employer established a seasonal need for labor based in part on the annual horse breeding season when the workload was increased.

The CO also suggests that Employer is "manipulating" its season to fit the criteria of the temporary labor certification program, and Employer's two applications reflect only "minor seasonal variations" for a year-round position. (CO Br. at 10-11.) The CO's arguments are misplaced. Employer is not attempting to manipulate its season. Employer credibly explained that its seasonal need for labor is tied to an annual pattern, namely the ostrich breeding season. Employer's need for labor is seasonal because the workload in caring for the ostriches increases significantly during the breeding season when newborn ostrich chicks require specialized attention. Employer has thus demonstrated that its need for labor is "tied to a certain time of year by an event or pattern," specifically the ostrich breeding season. *See* § 655.103(d).

Similarly, Employer has not attempted to disguise a year-round labor need as temporary by identifying only minor seasonal variations in work. In contrast to *Lancaster Truck Line*, 2014-

TLC-00004 (Nov. 26, 2013)—where the ALJ determined that the employer had a “consistent need for workers whose job duties change according to the farming requirements of the season, but whose work is required year-round”—Employer in this case does not require a temporary worker year-round. Employer only requires a temporary worker during the ostrich breeding season. As Employer explains:

In short, the requested temporary worker will at some point assist the farm manager with *all* ostrich related tasks during the breeding season, which is why the two submitted job descriptions (last year and this year) are identical. However, the need for this job is seasonal because once rearing season is complete, the number of tasks required is reduced significantly and the farm manager can handle these without additional assistance. Again, this was not the case last year as there was temporarily no farm manager because the previous manager suffered a stroke.

(AF 4.)

Obviously, by virtue of owning an ostrich farm, Employer is going to perform year-round ostrich-related tasks such as daily maintenance and care. However, the CO’s observation that the general job duties of caring for ostriches are performed year-round is an insufficient basis on which to conclude that Employer’s need is not seasonal. The fact that someone must care for the ostriches year round does not change the fact that there is increased ostrich-care work to be performed during the breeding season. Again, the critical question is whether Employer’s need for labor is seasonal, not whether the job duties are seasonal. Because the breeding season requires significantly more work, Employer has sufficiently demonstrated that its need for labor is seasonal, even though many of the ostrich-care duties are performed year round.⁸

⁸ Though Employer requests only one additional laborer, it appears Employer only has one full-time employee (its new manager), meaning an additional laborer is a 100% increase in Employer’s work force. Although this represents a small increase in terms of the absolute number of employees, a doubling of the workforce is sufficient to conclude that Employer “requires labor levels far above those necessary for ongoing operations” during the ostrich breeding season, as required by 20 C.F.R. § 655.103(d).

CONCLUSION

Based on the foregoing analysis, I conclude the CO acted arbitrarily in denying Employer's application for temporary agricultural labor certification under the H-2A program. I also conclude Employer has established that its need for labor is seasonal, as defined by 20 C.F.R. § 655.103(d).

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **REVERSED**. *See* 20 C.F.R. § 655.171(a). This matter is **REMANDED** to the Certifying Officer for further processing consistent with this decision.

For the Board:

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey