U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 07 April 2020

BALCA Case No.: 2020-TLC-00049

ETA Case No.: H-300-20038-305084

In the Matter of:

Goldenview Dairy, Inc.
Employer

Certifying Officer: John Rotterman
Chicago National Processing Center

For the Employer: Amanda Turner
Agent for Goldenview Dairy, Inc.

Before: Judge Francine L. Applewhite

DECISION AND ORDER AFFIRMING FINAL DETERMINATION

The above-captioned case arises under the temporary nonagricultural labor or services provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor program ("H-2A") permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. This proceeding is before the Board of Alien Labor Certification Appeals ("BALCA") pursuant to the request for administrative review of the Certifying Officer's ("CO") Final Determination denying the temporary labor certification application under the H-2A filed by Goldenview Dairy, Inc. ("Employer").

CASE HISTORY

On February 21, 2020, the Employment Training and Administration, Office of Foreign Labor Certification ("OFLC") received the Employer's Application for Temporary Employment Certification ("Application"). AF[1] 45-65. The application sought the approval to hire two Farmworker/Laborer under the H 2-A labor certification program. *Id.*

[1] As used herein, "AF" refers to the OFLC's Administrative File in the above-captioned matter.

Thereafter, the CO issued a Notice of Deficiency to the Employer which specified that the Employer failed to establish a temporary need as required by 20 C.F.R. §655.103(d) and thus was now required to provide supporting evidence that a temporary need existed. AF 34-37. The Employer was to submit a written explanation documenting the temporary need, as well as summarized payroll reports to substantiate the temporary need. The summarized payroll reports were to be for the 2017-2019 calendar years. *Id.*

On March 13, 2020[2], the CO issued a Final Determination which denied the Employer's Application. AF 20-26. In the Final Determination, the CO stated that the Employer failed to demonstrate a seasonal need for H 2-A workers in accordance with 20 CFR §655.103(d). On March 16, 2020, the Employer submitted a Request for Appeal for Notice of Denial ("Request"). AF 2-6.

STANDARD OF REVIEW

The scope of an administrative review in H 2-A cases is limited to consideration of the written record and any written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). The decision on administrative review must specify the reasons for the actions taken and must affirm, reverse, or modify the decision of the CO, or remand to the CO for further action. *Id.* The governing regulation mandates that the presiding administrative law judge "must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* See also *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) ("BALCA reviews decisions under an arbitrary and capricious standard.") (H-2B). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Moreover, the Administrative Law Judge may not consider evidence not before the CO at the time of the CO's determination, even if such evidence is in the Appeal File, request for review, or legal briefs.

DISCUSSION

The CO cited one ground of denial, failure to show seasonal need. An H-2A worker is defined as any temporary foreign worker who is lawfully present in the United States and authorized to perform agricultural labor services of a "temporary or seasonal nature" pursuant to 8 U.S.C. §1101(a)(150(H)(ii)(a). See also 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

[2] AF 13 – 18 contains the Denial letter as reviewed by the CO, which is dated March 24, 2020.

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).

To support a seasonal need the Employer submitted three years of summarized payroll records, 2017 – 2019. Unfortunately, these records actual show lessening of a labor need. Payroll records for 2019 show no clear increase in labor throughout the year. 2018 and 2017 records do show some increase in labor from June through December and March through December, respectively. The H-2A application states the need is for April through December. These records do not support such.

The Employer submitted additional statements and articles concerning new practices and trends to be implemented which will support the seasonal need. However, this was submitted post Final Determination and I cannot consider evidence not before the CO at the time of the CO's determination. 20 C.F.R. § 655.461(e).

Therefore, the Employer has failed to show that the CO's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Accordingly, the CO did not err in denying certification.

ORDER

Based on the foregoing, the CO's Final Determination is **AFFIRMED**.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge
Washington, D.C.