



Issue Date: 25 August 2020

BALCA Case No.: 2020-TLC-00104

ETA Case No.: H-300-220188-697350

In the Matter of:

LVJ PIMENTEL RESOURCES, LLC,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises from a request by LVJ Pimentel Resources, LLC's (Employer) request for administrative review of the Certifying Officer's (CO) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO's denial of certification will be affirmed.

Statement of the Case

On July 21, 2020, Employer submitted an Application for Temporary Employment Certification, requesting certification for 60 Farm Workers and Laborers from September 5, 2020 through December 5, 2020. Administrative File (AF) 25-49. Employer submitted the following statement of temporary need:

LVJ PIMENTEL RESOURCES, LLC IS A FARM LABOR CONTRACTOR THAT PLANTS, HARVESTS, AND CULTIVATES CROPS IN THE GROWING SEASONS IN GEORGIA. THIS WORK IS DONE EVERY YEAR AT THE SAME APPROXIMATE TIME OF THE YEAR. THE NATURE OF THE TEMPORARY JOB OPPORTUNITIES AND NUMBER OF WORKERS BEING REQUESTED REFLECT A TEMPORARY NEED BECAUSE THE WORK IS PERFORMED EXCLUSIVELY AT A CERTAIN SEASONS AND PERFORMANCE OF THE WORK IS OF SHORT DURATION AND WILL NOT CONTINUE INDEFINITELY.

AF 44.

On July 27, 2020, the CO issued a Notice of Deficiency. AF 13-18. The CO identified four deficiencies in Employer's application, including failure to demonstrate a "seasonal" need. AF 16-18. The CO requested Employer "explain what has changed about either its operation or this job opportunity such that a seasonal need now exists." AF 17.

On July 28, 2020, Employer submitted its response to the Notice of Deficiency. AF 11-12. Employer wrote:

The nature of this job opportunity is of seasonal nature because the work is performed exclusively during this season and is of short duration and will not continue indefinitely. I am requesting H-2A workers because of the lack of workers domestically. I have posted fliers in and in surrounding counties trying to recruit workers for the job at hand, but no one is interested in working especially during this time of pandemic. I have petitioned for workers before but that was for completely different seasons/crops/ and farmers. There is a desperate need for workers but unfortunately with these uncertain times, if it was harder before, it is near impossible to recruit workers domestically.

AF 11. Employer also requested modification of the application to address the other three deficiencies identified in the Notice of Deficiency. *Id.*

On August 5, 2020, the CO issued a Final Determination denying Employer’s application for failure to establish seasonal need. AF 3-8. The CO wrote:

The court in *In the Matter of 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. The dates of need described on the employer’s ETA Form 790A, Section A.3 and A.4, coupled with the dates of need for the employer’s previous applications shows the employer’s need for Farm Workers and Laborers exceeds 10 months.

The job opportunity described in the ETA Form 790A, Section A indicates the employer has a seasonal need and its current dates of need are from September 05, 2020 through December 05, 2020. A review of the employer’s filing history indicates that it has filed for Farmworker and Laborer job opportunities in the same area of intended employment in the State of Georgia for a period covering nearly the entire calendar year. Moreover, the employer’s previous application was denied for failure to establish a seasonal need.

The employer’s recent program history is show below.

Case Number	Employer	Status	Beginning Date of Need	Ending Date of Need
H-300-19343-188405	LVJ Pimentel Resources, LLC	Certified	2/15/2020	7/30/2020
H-300-20032-291629	LVJ Pimentel Resources, LLC	Certified	4/1/2020	7/30/2020
H-300-20153-617014	LVJ Pimentel Resources, LLC	Denied	8/1/2020	12/20/2020
H-300-20188-697350	LVJ Pimentel Resources, LLC	Received	9/5/2020	12/5/2020

All four applications list the same SOC Code and occupational title, 45-2092.02, Farmworkers and Laborers, Crop. Furthermore, all four applications list two months

experience required, a 52 pound lifting requirement and list job duties such as pulling weeds, bending, stooping and heavy lifting done on a daily basis.

A NOD was issued on July 27, 2020. The employer was to explain how its job opportunity represented a temporary need of a seasonal nature. The burden to demonstrate a “temporary” or “seasonal” need for agricultural services rests with the employer.

The employer’s response was received on July 28, 2020.... The employer also indicates that the previous applications were for different crops and farmers.

First, while an insufficiency of U.S. workers is one of the criteria for certification under 20 CFR 655.161, it does not supplant the need of an employer to establish that it has a seasonal need.

Second, in assessing the employer’s need, it is the nature of the need and the not the duties which must be examined. Here, although the specific crops being harvested may change throughout the course of the year, the employer has a year round for the same type of underlying labor. In effect, the employer’s need is not limited by a growing season or specific aspect of a longer cycle as the regulation requires, but only by the length and quantity of contracts that it chooses to enter into.

Finally, as defined in the Department’s regulations at 20 CFR 655.103(d), a seasonal need “...requires labor levels far above those necessary for ongoing operations.” The employer states that it does not have full-time permanent staff, i.e., no non- H-2A labor force. In the context of a seasonal need, the H-2A program is intended to augment an employer’s existing workforce, and not represent the entirety of an employer’s year in year out workforce. The employer’s desired used of the H-2A program does not therefore comport with the regulatory requirements of a seasonal need.

AF 7-8 (emphasis in the original).

On August 10, 2020, Employer filed its request for administrative review. AF 1-2. Employer wrote:

It has come to my attention that the application seeking temporary labor certification under the H-2A temporary agricultural program has been denied. I would like to appeal this decision. The Certifying Officer denied the petition because my job opportunity is not seasonal or of temporary nature. I respectfully disagree and would like to appeal this decision. The duration of this job is of short term and does not last long. This is the same for all my seasons. There are breaks in between some seasons and there may not be in others. Due to this uncertain times and a lack of domestic workers that are interested in this type of labor the growers and I find ourselves in desperate need of foreign labor. If we do not get workers in the sites the crop will spoil and we will loose [sic] the entire season.

I am in desperate need of the workers. I therefore am requesting an expedited administrative judicial review.

AF 2.

This case was docketed with BALCA on August 12, 2020, and the CO transmitted the AF to BALCA on August 19, 2020. Due to the strict time constraints imposed by the regulations,

see 20 C.F.R. § 655.171(a), the parties were permitted to file briefs within 3 business days after I received the AF. Neither Employer nor the Solicitor filed a brief, and the time for doing so has passed.

Discussion

When an employer requests administrative review of an unfavorable decision made by the CO, the administrative law judge must affirm, reverse, modify the CO's decision, or remand to the CO for further action, and specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Neither the statute nor regulations supply a standard of review. Under BALCA precedent, the CO's decision will be upheld unless that decision is arbitrary, capricious, or otherwise not in accordance with law. *GreenTop Acres*, 2020-TLC-00088, slip op. at 4 (July 8, 2020) (citing *J&V Farms, LLC*, 2016-TLC- 00022, slip op. at 3 (March 4, 2016)).

To qualify for the H-2A program, an employer must establish it has a need for “agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a). Section 655.103(d) defines both “temporary” and “seasonal;” it states:

[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.

20 C.F.R. § 655.103(d).

The CO concluded that Employer failed to demonstrate a temporary or seasonal need because the record tends to show Employer's need for workers is permanent rather than seasonal. Employer previously filed three applications for temporary labor certification. The first two applications were approved. *See* AF 136-228 (H-300-20032-291629), 229-357 (H-300-19343-188405). Employer received certification to hire 69 Farmworkers and Laborers, Crop, for the period of February 15, 2020 through July 30, 2020, and 49 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, for the period of April 1, 2020 through July 30, 2020. *Id.* Employer also applied for certification to hire 60 Farmworkers and Laborers, Crop, for the period of August 1, 2020 through December 20, 2020. *See* AF 50-135 (H-300-20153-617014). That application was denied for failure to establish a temporary or seasonal need. *Id.*

Besides conclusory statements of need, Employer has not submitted anything in this case that would suggest its need for 60 Farm Workers and Laborers 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). Accordingly, I find no good reason to disturb the CO's rationale for denying the application.

ORDER

Based on the foregoing, IT IS ORDERED that the Certifying Officer's denial of Employer's Application for Temporary Employment Certification is AFFIRMED.

SO ORDERED.

LARRY W. PRICE
Administrative Law Judge

LWP/PML/ksw
Newport News, Virginia