



Issue Date: 30 October 2020

OALJ Case No.: 2020-TLC-00128

ETA Case No.: H-300-20230-772781

In the Matter of:

MOONLITE SERVICES, LLC.,
Employer.

Certifying Officer: Lynette Wills
Chicago National Processing Center

BEFORE: PATRICK M. ROSENOW
Acting District Chief Administrative Law Judge

DECISION AND ORDER

Nature of Appeal

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act¹ and its implementing regulations.² The temporary alien agricultural labor certification (H-2A) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer (CO) in this matter denied Employer's Employment and Training Administration (ETA) Forms 9142A and 790 application for temporary labor certification for 3 cattle herders.

On 22 Sep 20, pursuant to 20 C.F.R. § 655.171(b)(4), Employer appealed the Final Determination issued by the CO with the Office of Foreign Labor Certification (OFLC) before an Administrative Law Judge (ALJ). Because Employer did not specifically request a de novo hearing, this appeal will only be treated as a request for an administrative review. An ALJ has five business days of receipt of the Administrative File (AF) to render a decision on a request for administrative review.³

On 28 Sep 20, I issued a Notice of Docketing and Prehearing Order, allowing both sides to file a brief in the matter. On 22 Oct 20, I received the AF from the Employment and Training

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188.

² 20 C.F.R. Part 655, Subpart B.

³ 20 C.F.R. § 655.171(a).

Administration (ETA). Neither Employer nor CO filed a brief. This decision and order is based on the AF and Employer's request for review.

Statement of the Case

The Administrative File

On 4 Jun 20 Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (Application).⁴ Employer's Application requested certification of 3 Cattle Herders for Moonlite Services, LLC beginning 3 Aug 20 and ending 28 May 21.⁵ After receiving a Notice of Deficiency, Employer provided supporting documentation and the following statement:

Our company has a temporary seasonal need for persons with these skills because our busiest seasons are traditionally tied to the fall, winter and spring months, from approximately August 3rd to May 28th [sic], during which time we need to substantially supplement the number of workers for our labor force for these positions. By the beginning of August, the cattle must be fed with hay, because the pastures and grass do not grow enough during the hottest month of June and July. During August, the cattle must be fed hay which requires additional help and labor to remove the hay from the barn and take to the cattle. This must be done through December, since the grass and pasture does not grow enough until then to support feeding the cattle. During January through March, the workers are needed to vaccinate, castrate, brand spray and medicate the cattle. During the Spring [sic] through May, the workers are needed to move the cattle for grazing and to help secure hay in the barns and repair any fences.⁶

Employer explained further and provided supporting documentation, such as invoices and payroll reports from 2019 and 2020.⁷

On 7 Aug 20, the CO denied the application, citing a number of deficiencies and contradictions in the application.⁸ Further, the CO determined the documentation Employer provided did not adequately support the need for temporary workers.⁹ For example, the CO noted the payroll reports showed constant labor levels throughout the year.¹⁰ Employer did not request an administrative review or de novo hearing to appeal the denial.¹¹

On 21 Aug 20 Employer filed a second *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (Application).¹² Employer's Application requested certification

⁴ AF 136-57. Employer's June 2020 H-2A application was filed under ETA case number H-300-20151-614026.

⁵ AF 145.

⁶ AF 80 (excerpt from Statement of Temporary Need).

⁷ AF 60-157.

⁸ AF 61-67.

⁹ AF 66-67.

¹⁰ AF 67, 89.

¹¹ See 20 C.F.R. § 655.171.

¹² AF 43-59.

of 3 Cattle Herders for Moonlite Services, LLC beginning 21 Oct 20 and ending 23 Jul 21.¹³ In its application, Employer provided the following written explanation:

We cannot recruit field workers for the opportunity available; so, we have a temporary need for 3 temporary foreign nationals to assist in raising and attending to livestock through the end of May. After May, the workers are not needed since all that is being done is herding and gazing the cattle which can be done by the owners without assistance.¹⁴

On 27 Aug 2020, the Chicago National Processing Center (NPC) issued a Notice of Deficiency (NOD),¹⁵ informing Employer that its Application failed to establish a temporary need as required by 20 CFR § 655.103(d). The NOD instructed Employer to provide the following information to proceed with the application process:

1. A written explanation which documents its temporary need for H-2A workers. In this explanation, the employer must also provide in detail as to why its job opportunity is seasonal or temporary; and clearly state the months during the year when additional workers are needed.
2. A detailed written explanation as to why its dates of need have significantly changed from its previous request of early August through late May to its current request of late October through late July.
3. Supporting evidence in the form of summarized payroll reports is required to substantiate the employer's temporary need for the H-2A worker(s) in the case. The employer is required to submit summarized payroll reports for a minimum of two previous calendar years (2018 and 2019) for **Cattle Herder**. These payroll reports must be a summary of the employer's individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation.
4. **The summarized payroll reports must be signed by the employer with the following statement attesting that the information was compiled from the employer's accounting records or system: I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by Jose R De Luna for Calendar Years 2018 and 2019.**¹⁶

¹³ AF 54.

¹⁴ AF 59. Specifically, Employer's application requested three temporary cattle herders.

¹⁵ AF 32-36.

¹⁶ AF 36 (emphasis in original).

On 3 Sep 20, Employer furnished its written response. As it pertained to issue one, Employer wrote:

Our company has a temporary seasonal need for persons with these skills because our busiest seasons are traditionally tied to the fall, winter and spring months, from approximately August 3rd to May 28th [sic], during which time we need to substantially supplement the number of workers for our labor force for these positions.¹⁷

Employer went on to detail the work required during the aforementioned period and emphasized workers were not needed between June and July.¹⁸ As it pertained to issue two, Employer stated the dates were adjusted from the initial application and the refiled application to ensure compliance with the U.S. Department of Labor's application timeframe; however, the end date remained unchanged and was adjusted in error.¹⁹ Employer stated the correct end date should be 28 May 21, as reflected in the initial application.²⁰ Regarding issues three and four, Employer responded it was unable to provide the requested payroll reports because the business had been established for "a little over a year."²¹ Employer also cited three successful labor certifications filed in the past.²² Employer did not provide additional supporting documentation.

On 15 Sep 20, a CO issued a denial letter. The denial was issued because Employer failed to meet its burden of proof to establish a temporary or seasonal need for H-2A temporary workers.²³ The CO noted Employer provided an explanation regarding the adjusted start date and the erroneously adjusted end date.²⁴ The CO also wrote, "The employer also provided an explanation regarding its temporary or seasonal need."²⁵ The CO went on to note the case numbers Employer cited were attributed to different employers, not Moonlite Services, LLC. The written explanation for denial also cited Employer's failure to provide a copy of its summarized payroll reports or supporting documentation.²⁶ The CO then discussed Employer's previously denied application in which it provided copies of invoices and summarized payroll reports from June 2019 to July 2021 and a chart of ranch inventory.²⁷ The explanation concluded, "[E]mployer has failed to provide any supporting evidence or an explanation as to what has changed in its operations since the previous denied application."²⁸

¹⁷ AF 30.

¹⁸ AF 31.

¹⁹ AF 30.

²⁰ *Id.*

²¹ AF 30-31; *contra* AF 89 (providing payroll reports from June 2019 to July 2020).

²² AF 31 (H-300-17006-192523; H-300-19312-134906; and H-300-18334-816269). Jose De Luna, a supervisor for Moonlite Services, LLC, signed the response asserting, "We have also successfully filed and received labor certifications for the [aforementioned] case numbers without any issue." The three cited cases are not attributed to Moonlite Services, LLC; rather, the cases were filed by legal counsel (Fisher Broyles, LLP) for Moonlite Services, LLC on behalf of three separate businesses, not including Moonlite Services, LLC. The earliest of these three cases was H-300-17006-192523, filed 27 Jan 17.

²³ AF 15.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Employer's Request for Administrative Review

On 22 Sep 20, counsel for Employer filed a Notice of Appeal to the OALJ.²⁹ Although Employer filed no supporting brief, it asserted, “[T]he Honorable Office of Foreign Labor Certification erroneously determined that Moonlite Services failed to establish that its seasonal job opportunity is and will be temporary in nature.”³⁰

Applicable Law

The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL.³¹

Pursuant to the regulations, the employment must be temporary and seasonal in nature. Employment 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. An employer's need to fill the position with a temporary worker may not, except in extraordinary circumstances, last longer than one year.³²

In 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.”³³ In order to determine if the employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the need for labor or services during this time of the year differs from other times of the year.³⁴

The standard of review in H-2A expedited administrative review cases is limited. The burden of proof to establish eligibility for a labor certification is on the petitioning employer.³⁵ The burden of proof in alien certification remains with the employer throughout the labor certification process, including appeals.³⁶ When an employer requests administrative review under 20 C.F.R. § 655.171(a), the Administrative Law Judge may consider only the written record and any written submissions from the parties—and may not consider new evidence. The employer, therefore, must demonstrate that the CO's determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible.³⁷ Consequently, a

²⁹ AF 1.

³⁰ *Id.*

³¹ 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

³² 20 C.F.R. § 655.103(d).

³³ *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999).

³⁴ *Altendorf Transport*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

³⁵ 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011).

³⁶ *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a).

³⁷ *See Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).

CO's denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law.³⁸

Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than in other months of the year.³⁹

Discussion

Application Dates

Employer's two applications provided separate time periods, ranging from August to May and then from October to July. Employer's claim to only need temporary workers from August to May appeared contradictory by later amending its second application to extend the ending date to July. Namely, Employer asserted it did not need temporary workers during June and July. The CO was reasonable in requiring Employer to address this contradiction. In its reply, Employer provided a rational explanation regarding pushing back the beginning date to October in effort to comply with U.S. Department of Labor requirements. However, it is difficult to determine the credibility of its explanation for extending the end date beyond May. Although the CO did not discuss the end date modification in detail in its final determination, it is reasonable to consider this contradiction as supporting evidence of a lack of temporary or seasonal need for employment.

Evidence of Temporary or Seasonal Need for Workers

In its response to the Notice of Deficiency, Employer essentially provided the same explanation found in its first application. The CO noted that Employer provided an explanation for its seasonal need, but did not discuss the weight it accorded to the written explanation. Rather, the CO underscored the lack of supporting documentation.

Employer provided payroll reports in its first application, but neglected to provide payroll reports in its second application. Employer claimed it was a new business and did not have payroll reports to provide. The CO's denial pointed out Employer's first application *did* provide payroll reports. It is reasonable to assume Employer did not provide these payroll reports in its second application because the CO determined it was insufficient evidence in its initial application. Nevertheless, these reports were available and Employer neglected to provide them as required. It is also reasonable to assume Employer had a valid reason for having constant payroll hours from June 2019 to July 2020. For example, as a recently established business, Employer may have learned from its first year in business that it would need additional workers during peak season. However, Employer failed to provide any explanation or furnish payroll reports as required. That Employer provided payroll reports in its first application and claiming payroll reports do not exist in a second application is a reasonable concern.

³⁸ *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

³⁹ *Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)).

The CO determined Employer failed to meet its burden of proof of establishing a temporary or seasonal need for workers because Employer failed to provide the requisite supporting evidence. The CO's decision is in conformity with the law and does not appear arbitrary or capricious.

Previous Certifications

Employer signed its response to the notice of deficiency, stating it (i.e., Moonlite Services, LLC) had three successful filings for temporary workers in the past, dating back to 27 Jan 17. The CO correctly recognized the problem with this claim: none of these previous successful filings were for Moonlite Services, LLC. Because Employer's counsel (Fisher Broyles, LLP)—not Employer—filed each of these three H-2A applications, it is unclear why Employer would purport them to be its own successful filings. Additionally, if Employer was in business on 27 Jan 17, its previous assertion that it lacks payroll reports because it has been in business for less than a year is misleading.

Employer has had multiple opportunities to correct and clarify these issues in its initial and subsequent H-2A application. Further, as the CO stated, Employer failed to provide evidence regarding what has changed in its operations since its previous application was denied. If nothing changed between the two applications, Employer's exclusive remedy would have been to appeal the initial decision, not file a subsequent application. Such an action is contrary to the judicial doctrine of res judicata. Because Employer has failed to explain its inconsistencies or provide supporting evidence with written explanation, I conclude the CO did not err in making its determination.

Order

Employer failed to carry its burden to establish its eligibility for H-2A labor certification. The CO's denial of Employers Application for Temporary Employment Certification is AFFIRMED.

So ORDERED.

PATRICK M. ROSENOW
Acting District Chief Administrative Law Judge