



Issue Date: 09 October 2019

OALJ Case No.: 2020-TLC-00001
ETA Case No.: H-300-19214-312191

In the Matter of

JONATHAN VEGA,
Employer.

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. 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.

On October 2, 2019, the Office of Administrative Law Judges (“OALJ”) received a copy of the Administrative File (“AF”) directly from the Certifying Officer (“CO”), which includes a copy of Jonathan Vega’s (“Employer”) request for expedited administrative review dated September 11, 2019. This matter was assigned to me on October 2, 2019. On October 3, 2019, I issued a Notice of Docketing and Pre-Hearing Order (“Oct. 3 Order”). In that Order, I granted the parties three days from the date of receipt of the AF to file briefs. Oct. 3 Order at 1. As of October 9, 2019, I have received no such briefs.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the AF.

BACKGROUND

The Employer filed ETA Form 790 on July 22, 2019. AF at 43. The Form 790 listed the anticipated period of Employment to span from “07/31/2019” through “02/19/2020.” AF at 43 (emphasis omitted). The Employer filed ETA Form 9142A on August 2, 2019. AF at 40. The Form 9142A, however, listed the period of intended employment as “09/20/2019” through “07/20/2020.” AF at 33 (emphasis omitted). In its statement of temporary need (section B.9) on the Form 9142A, Employer noted that:

This work is done every year at the same approximate time of the year. The nature of the temporary job opportunities . . . reflect a temporary need because the work is performed exclusively at a [sic] certain seasons and performance of the work is of short duration and will not continue indefinitely.

Id.

On August 2, 2019, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). The NOD, in relevant part, highlighted the issue whether the job opportunity described in the Employer’s petition is temporary, rather than permanent and full-time in nature. AF at 21. The CO identified that the Employer had previously “requested workers to perform the same job duties at two of the same worksite locations . . . listed in its current application . . . and previously certified applications.” AF at 22. Additionally, all work performed under the three applications were listed under the same SOC code, 45-2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse, contained the same experience and lifting requirements, and included the same crop activities. *Id.* Moreover, the dates of need for the previous certified applications combined reflect a 10 month, 20 day period for the same two fixed site growers. *Id.* As such, the CO requested that the Employer modify its application. *Id.*

The Employer sent a letter to the CO on August 12, 2019. In its letter, the Employer stated:

The contracts with both of my farmers covers is [sic] season and of temporary nature. As described in the itinerary the contractor plants, harvests and cultivates crops in the growing season. The workers being requested reflect a temporary need because the work is performed exclusively at certain [sic] season and will not continue indefinitely.

AF at 14. The Employer also requested that the CO amend its application by removing all statements regarding a production standard, adding the lifting requirement of 52 lbs to item 16(2) of ETA Form 720 and the attachments of the ETA Form 790, adding a one day training for all crop activities to item 5 of the ETA Form 9142, and adding the itinerary and directions to housing and worksites. *Id.*

On August 30, 2019, the CO issued a Denial Letter (“Denial”). AF at 9. The CO summarized 20 C.F.R. § 655.103(d), which requires the job opportunity to be seasonal or temporary. AF at 11. In the Denial, the CO stated that “[t]he dates of need for the current and previous filings combined reflect a 1 year, 9 month and 20 day period from October 11, 2018 through July 20, 2020.” AF at 7. The CO also noted all three applications listed the same SOC code, 45-2092, Farmworkers and Laborers, Crop, Nursery, and Greenhouse, contained the same experience and lifting requirements, and included the same crop activities. *Id.* Moreover, the CO identified that the Employer’s application request covered the same work related to planting and harvesting crops for the same worksites, but for a significant longer period than the previous year. AF at 8.

In response to the Denial, the Employer filed its appeal to the CO on September 11, 2019. AF at 3.

DISCUSSION

I. Legal Standard

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. If the petition is denied by the CO, the standard of review is limited. When an employer requests an expedited review by an administrative law judge (“ALJ”), the ALJ may consider only the record and written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). The presiding ALJ must affirm, reverse, or modify the CO’s determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. *Id.* The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011). The CO’s denial of certification must be upheld unless its decision was arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (March 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

To qualify for the H-2A program, an employer must establish that 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); *Fegley Grain Cleaning*, 2015-TLC-00067, slip op. at 3 (Oct. 5, 2015). A “seasonal need” occurs if employment is tied to a certain time of year by an event or pattern and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103(d). The fact-finder must determine if the employer’s needs are seasonal, not whether the particular job at issue is seasonal. *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015). Therefore, “[i]n determining whether 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.” *Fegley Grain Cleaning*, slip op. at 3 (citing *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011)). Attempts by employers to continually shift their purported periods of need in order to utilize the H-2A program to fill permanent needs have been rejected. *Salt Wells Cattle Co., LLC*, 2010-TLC-00134 (Sept. 29, 2010). Denial of certification is thus appropriate where the employer fails to provide any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Co.*, 2011-TLC-00109, slip op. at 5 (Jan. 7, 2011).

Similarly, employment is “temporary” where the employer’s need to fill the position with a temporary worker lasts no longer than one year, except in extraordinary circumstances. 20 C.F.R. § 655.103(d). It is well-established that “[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position.” *William Staley*, 2009-TLC-00009, slip op. at 4 (Aug. 28, 2009). Accordingly, to determine an employer’s need for labor, the fact-finder must look at the whole situation and not narrowly focus on the specific

job at issue. *Haag Farms, Inc.*, 2000-TLC-00015 (Oct. 12, 2000); *Bracy's Nursery*, 2000-TLC-00011 (Apr. 14, 2000). The employer's application for temporary labor certification is properly denied when the "consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that the employer's need does not differ from its need for such labor during other times of the year." *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014).

II. Analysis

Here, the Employer has not established that its employment need is seasonal or temporary. The Employer relies on the premise that the work is exclusively performed during certain seasons and is short in duration. *See* AF at 15, 33. On this record, however, Employer has not established that its need is either seasonal or temporary in nature.

First, while reviewing its past applications (ETA Case No. H-300-19072-853069 and ETA Case No. H-300-18239-100873), along with its current application, the dates do not align for the Employer's purported season. In the Employer's first application, it requested workers from October 11, 2018, to July 20, 2019. AF at 204. In the Employer's second application, to replace workers that left from its first application, it requested workers from May 5, 2019, to August 20, 2019. AF at 119. However, in its most recent application, the Employer first listed the anticipated period of employment from July 31, 2019, to February 19, 2020, on the Form 790, and then from September 20, 2019, to July 20, 2020, on Form 9142A. AF at 40, 43. In all three applications, the Employer provides identical job titles, SOC codes, work locations, and job descriptions (except for adding or substituting a different crop within the job description).¹ Yet, even with these similarities, the Employer requests different start dates, end dates, and ultimately, a longer anticipated work period in its current application. The lack of consistency among the applications indicates that the Employer is manipulating or shifting its "season" in order to fulfill its continuous contracts and unceasing need for workers throughout the year. As such, the Employer has provided no evidence that its need for labor during the specified season differs from its need for the same farm workers and laborers during the other times of the year.

Second, it appears that the Employer attempts to distinguish its need for workers by emphasizing the differences in "seasonal" farming duties (raking, weeding, and harvesting), crops, and worksites within the enclosed itinerary. *See* AF at 15. However, these distinctions do not make the Employer's need seasonal. Instead, a review of the contract agreements submitted with the instant application coupled with the contract agreements submitted with the previous certified applications demonstrates that the Employer has a consistent need for year-round farm workers; specifically, a permanent need for workers to perform job duties related to harvesting squash at P and P Farms, Inc. and a permanent need for workers to perform job duties related to harvesting greens and watermelons for Brewer Pope Farms.

¹ The Employer's most recent application states, "all general farm labor related to cucumbers, peppers squash, broccoli, greens, watermelon, and cabbage." AF at 35 (capitalization omitted). In Employer's previous applications, the job descriptions state, "all general farm labor related to squash, sweet potatoes, greens, and watermelon" and "all general farm labor related to squash, broccoli, greens, watermelon, and cabbage." AF at 121, 206 (capitalization omitted).

Third, I am not convinced that the Employer's need is of a temporary nature. The Employer's prior applications demonstrate that its need is year-round due to the consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties. *Larry Ulmer*, slip op. at 4. As noted by the CO, the Employer's past certified applications, combined with its current request, indicate a need for workers from October 11, 2018, through July 20, 2020; a period of 1 year, 9 months, and 20 days.

The overlapping nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrates that the Employer's need for workers in its proposed season does not differ from its need for such labor during other times of the year. Rather, the record demonstrates that its need for farm workers and laborers is permanent and year-round, not seasonal or temporary. Accordingly, I find that the CO did not err in denying certification in this matter.

ORDER

Given the foregoing, the CO's Denial is **AFFIRMED**.

I am requesting that this order be served by fax or email in addition to by regular mail.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge