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Issue Date: 13 April 2020

OALJ Case No.: 2020-TLC-00060
ETA Case No.: H-300-20064-376285

In the Matter of

MACFARLANE PHEASANTS, INC. (MISSOURI),

Employer.

Certifying Officer: Alejandra Dominguez,
Chicago National Processing Center

Appearances:

Heleen H. Van Tonder
Golden Opportunities International, LLC
Sevierville, Tennessee
For the Employer

Rebecca Nielson, Esquire
Office of the Solicitor
U.S. Department of Labor
Washington, DC
For the Certifying Officer

Before: Steven D. Bell
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL AND REMANDING TO CERTIFYING OFFICER

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States ("U.S.") on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor ("Department").[1] A Certifying Officer ("CO") in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies

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

certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.[2]

STATEMENT OF THE CASE

On March 4, 2020, MacFarlane Pheasants, Inc. (Missouri) ("Employer") filed (1) Form ETA 9142A, *H-2A Application for Temporary Employment Certification* ("Application"); (2) Appendix A.3 to Form ETA 9142; (3) Form ETA 790, *Agricultural and Food Processing Clearance Order*, 790A, and Addendums, (4) Statement of Temporary Need, (5) Workers Compensation Insurance Documentation, (6) Agent Agreement, (7) Assurances Letter, and (8) Emergency Justification [3] The Employer requested certification for six Pheasant Egg Collector/Pheasant Loaders,[4] from April 18, 2020 until September 15, 2020, based on an alleged seasonal need during that period.[5]

After an email, the CO issued a Notice of Deficiency ("NOD") dated March 11, 2020, stating that Employer had failed to establish temporary need under 20 C.F.R. § 655.103(d) based on the fact that Employer had previously requested different dates of need and that it failed to provide evidence that labor demands increased at a particular time of the year, or by a reoccurring event or pattern, therefore, failing to sufficiently establish that its need was seasonal. The CO required that Employer explain why its job opportunity is seasonal or temporary, providing in detail as to how the current application request differed from the previous denied requests.[6]

On March 17, 2020 Employer responded to the NOD, stating that the seasonal need for the Missouri location was different from the needs of the Wisconsin location and that the need had changed due to a change in the processing done at that location, namely the expanded service production and addition of an egg washing facility to the location in 2019, causing egg-washing to begin taking place at the Missouri location. Employer noted that egg production begins in January and that once the birds are sold in September, there is no need for additional labor. Employer attached charts of the hours worked in 2019, and payroll records for 2018 and 2019 and noted that charts of past egg production and predicted 2019 egg production, showing the egg-laying season had been attached to its previous filings.[7]

In a Denial Letter dated March 25, 2020, the CO stated that Employer had failed to establish a seasonal need as required by 20 CFR § 655.103(d). The letter defined seasonal or temporary need under 655.103(d).[8] The CO found that although the Employer claimed that its dates of need changed when it expanded its production to include an egg washing facility, it "did not explain how this speaks to the employer's seasonality as the washing of eggs can occur indoors, year-round and should not impact an employer's temporary need for workers." The CO also noted that the payroll records of 2018 showed a virtually consistent need year round, and

[2] 20 C.F.R. § 655.171.
[3] AF 49-75. In this Decision and Order, "AF" refers to the Administrative File.
[4] SOC (O*Net/OES) occupation title "Farmworker, Farm, Ranch, and Aquacultural Animals" and occupation code 45-2093. AF 55-57.
[5] AF 49, 57.
[6] AF 39-42.
[7] AF 30-33.
[8] AF 20.

that the 2019 data showed an increase from February to August. The CO concluded that the payroll records did not show a consistent season or establish the temporary need for workers between April 2020 and September 2020.[9]

In an April 2, 2020 Denial Letter, the CO reiterated its finding that there was insufficient data to establish temporary need and included the charts referenced in the early letter, that were absent from it.[10]

On March 31, 2020 Employer appealed the CO's denial to the Office of Administrative Law Judges ("OALJ") and requested expedited administrative review of the CO's decision, arguing that temporary need was established because there were no pheasants to lay eggs after September and the 2019 payroll records, from the first year of having the egg washing facility there, along with the documented egg production from 2018 and 2019 and the projected egg-laying season of 2020 established the increased need during requested time.[11] On April 1, 2020, I issued a Notice of Docketing and Order Setting Briefing Schedule, acknowledging the Employer's request for expedited administrative review and permitting the parties to file briefs within three business days of the receipt of the Appeal File.

Employer filed a brief on April 8, 2020, arguing that its temporary need lasted from egg-laying season until the last of the pheasants were sold in September. Employer stated that there were 500 hours not reflected in the payroll records for 2019 between August and September because Employer had to bring workers from its Wisconsin facility to finish the work, that they lost two Missouri employees, and that a third of the H-2A workers did not finish their contracts.[12] The CO filed a brief on April 9, 2020 arguing that the decision should be affirmed because the "written record does not establish the seasonal need for the period of April 18, 2020 to September 15, 2020, particularly for the months of August and September."[13]

DISCUSSION AND APPLICABLE LAW

Employer bears the burden to establish eligibility for temporary labor certification.[14] In this case, the Employer has appealed the CO's decision to deny its application. When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only render a decision "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." Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO.

Employer's argument that it had to bring workers from its Wisconsin facility, that they lost two Missouri employees, and that a third of the H-2A workers did not finish their contracts during the last season was not presented to the CO. Therefore, I may not consider it.

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[9] AF 22-23.
[10] AF 24-29.
[11] AF 1-16.
[12] *Emp. Bf.* at 1-2.
[13] *C.O. Bf.* at 7.
[14] *See e.g. Altendorf Transport, Inc*., 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011); *see also Shemin Nurseries*, 2015-TLC-00064, slip op. at 3 (Sept. 8, 2015).

Under 20 C.F.R. § 655.103(d):

> 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. 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."

In assessing the existence of a temporary need, the CO can look at the situation as a whole and need not confine the analysis to the existing application. [15] When the dates of need listed on an application vary from the dates listed on previous applications, the employer must justify the reasons for the changes.[16]

In this case, I find that Employer has established a seasonal need for workers between April and August 2020, but has failed to establish a seasonal need for workers in September 2020. In the job description given on Form ETA 790, it stated that the temporary workers would be required to:

> collect eggs and walk the pheasant pens (outside and inside) and bend over to pick up eggs. They will collect the eggs and put it in trays. Starting in August employees will need to catch birds by their feet, with nets or by hand. The pheasants will need to be placed in crates and prepared for shipment.[17]

The payroll records from 2019, which Employer explained was the first year that it had established an egg-washing facility at its Missouri location, showed an increase of temporary workers between February and August 2019 along with overall increased hours from the previous year.[18] I find that Employer's explanation that the addition of the egg washing facility and its increased labor requirements was adequate to show the change in dates of need from previous applications. In addition, both the egg-laying projections for 2020 and the documented egg production of 2018 and 2018 established that it occurs between February and June or July.[19] Based on the consistent egg-laying pattern and the increased need for workers established by the 2019 payroll records, I find that Employer has established that its labor need is "tied to a certain

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[15] *Haag Farms*, 2000-TLC-00015 (Oct. 12, 2000); *Bracey's Nursery*, 2000-TLC-00011 (April 14, 2000); *Rainbrook Farms*, 2017-TLC-00013 (March 21, 2017); *Stan Sweeney*, 2013-TLC-00039 (June 25, 2013); *Rodriguez Produce*, 2016-TLC-00013 (Feb. 4, 2016).

[16] *Thorn Custom Harvesting*, 2011-TLC-00196 (Feb. 8, 2011) (employer is required to justify a change in its dates of seasonal need in order to ensure that the employer is not manipulating its "season" when it really has a year-round need for labor); *Southside Nursery*, 2010-TLC-00157, slip op. at 4 (Oct. 15, 2010) (finding that a seasonal need is tied to the weather or a certain event, and a change in the dates from a previous application for a seasonal need must be justified).

[17] AF 57.

[18] AF 30-32.

[19] AF 73-74.

time of year by an event or pattern" and "requires labor levels far above those necessary for ongoing operations."[20] However it has not established that this temporary need extends into the month of September as there is no evidence of increased hours worked or labor requirements during that month. I therefore find that Employer has established a temporary seasonal need for workers from April through August 2020.

ORDER

Accordingly, the court **REVERSES** the Certifying Officer's determination and **REMANDS** it to the Certifying Officer to further process the claim under the shortened period of need of April 18, 2020 to August 30, 2020.

Steven D. Bell
Administrative Law Judge

[20] 20 C.F.R. § 655.103(d).