



Issue Date: 19 March 2020

BALCA Case No.: 2020-TLC-00045
ETA Case No.: H-300-20009-243828

In the Matter of:

SOUTHEASTERN GROWERS, INC.,
Employer.

Before: Jerry R. DeMaio
Administrative Law Judge

**DECISION AND ORDER AFFIRMING
DENIAL OF EMPLOYER'S H2A APPLICATION**

This case arises from Employer's request for review under provisions of the Immigration and Nationality Act government temporary agricultural employment of non-immigrant works (H-2A workers) of the denial of its application for an H-2A temporary labor certification by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA"). *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, & 1188; 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On January 23, 2020, Southeastern Growers, Inc. ("Employer") filed an application for H-2A labor certification with the ETA. (AF 50-72).¹ The application sought authorization to hire 32 seasonal nursery workers from March 9, 2020 to October 31, 2020. (AF 58). On January 30, 2020, the CO issued a Notice of Deficiency based on Employer's deficiency in proving seasonal need, pursuant to 20 C.F.R. § 655.103(d). (AF 37-42). Employer responded and submitted a letter explaining their temporary need on February 3, 2020. (AF 31-36). On March 3, 2020, the CO issued a Notice of Denial of the application based upon Employer's continued failure to support its seasonal need. (AF 12-30).

Prior to the filing of the immediate case, a denial of certification was affirmed for the same employer for 32 seasonal nursery workers from January 6, 2020 to October 31, 2020, in *Southeastern Growers, Inc.*, 2020-TLC-00024. In that case, denial of certification was affirmed as Employer failed to establish the seasonal nature of the nursery worker positions.

¹ Citations to the Appeal File are referred to herein as "AF" followed by the page number.

On March 3, 2020, Employer requested an expedited administrative review. (AF 1-11). This case was assigned to me and on March 13, 2020, the Court issued a Notice of Docketing and Expedited Briefing Schedule, after the Appeal File was uploaded on March 12, 2020. Neither party filed an appellate brief.

DISCUSSION

Under 20 C.F.R. § 655.103(d), temporary or seasonal nature is defined as:

[E]mployment is of a seasonal nature where it is tied to a certain time of the 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).

Although Employer states that it has a seasonal and temporary need for additional labor, it fails to provide adequate evidence to demonstrate this seasonal need as defined under 20 C.F.R. § 655.103(d). Employer claims a seasonal need from March 9, 2020 to October 31, 2020 (AF 58), yet fails to demonstrate a seasonal need for these months. Employer has failed to establish any changes in its business to support a seasonal need from its previously denied application.

Employer argues that in its previous application, BALCA denied certification, based not on a lack of seasonal need, but instead based on a failure to establish seasonal need by the supporting documentation submitted. (AF 3). Additionally, Employer argues that the CO did not look at the new application but instead focused on the previous application and a failure to show a change in condition from the first. (AF 4).

In this second application, Employer has not provided any new documentation and, instead, only provided a letter explaining their purported seasonal need. (AF 31-36). As such, this application is materially the same as the first. The first was denied based on a lack of support to establish that the nursery worker positions are seasonal or temporary in nature and that same lack of support exists here. Employer has not provided any new documentation and this second application is the same as the first, simply with new dates of need. Accordingly, the CO's denial of certification must be affirmed.

ORDER

Because Employer failed to establish that the nursery worker positions are on a seasonal or other temporary basis in accordance with 20 C.F.R. § 655.103(d), it is hereby **ORDERED**

that the Certifying Officer's decision denying Employer's H-2A Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts