



Issue Date: 28 October 2019

OALJ Case No.: 2020-TLC-00002
ETA Case No.: H-300-19228-683882

In the Matter of:

WM. F. PUCKETT, INC.
Employer.

Appearance: Ronald G. Puckett, self-represented
Barberville, FL
For the Employer

Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

Before: Sean M. Ramaley
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its 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 received a letter from Ronald G. Puckett, on behalf of Wm. F. Puckett, Inc. (“Employer”) requesting administrative review of the Certifying Officer’s denial of Employer’s H-2A temporary labor certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on October 22, 2019. By Order dated October 22, 2019, the parties were granted leave to file briefs on or before October 25, 2019.

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 Administrative File.

BACKGROUND

On August 19, 2019, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142A (“Application”). AF 95-105. The Employer’s Application requested certification for two fern cutters under the SOC occupation title of Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period beginning October 20, 2019, and ending August 20, 2020. AF 95. In regard to its statement of temporary need Employer stated:

We cannot get our fern cut quick enough to fill our orders during the high volume order months which is typically associated with the following holidays: Christmas, Valentines Day, Mother's Day, Easter and then also the Florida Wedding Season. We grow our foliage for the florist industry world wide. We grow a wide variety under artificial shade structures. We use mainly Hispanic cutters but lately these workers prefer to work in the construction industry and we get short handed during our busy times. We hope that when the construction-boom in Florida is over we will have more local fern cutters to our disposal again. We would like to apply for H-2A workers to help us fill our orders during the busiest times of the year, since demand for our product is higher than the ability to harvest it at the moment.

AF 95.

By letter dated August 23, 2019, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) finding ten deficiencies in Employer’s application including its failure to establish its job opportunity as “temporary or seasonal in nature.” AF 65-74. (As the other nine deficiencies were successfully remedied, they will not be addressed in this decision. *See* AF 3-11.)

The CO stated that the Employer had not sufficiently demonstrated its standard of need as temporary citing 20 C.F.R. § 655.103(d) which defines temporary or seasonal need as follows:

For the purposes of this subpart, 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 one year.

The CO noted that the employer’s horticultural business appears to be year round and that it was unclear “why the employer did not need temporary workers from late-August through late October.” The CO further stated that based on the employer’s requested dates of need, the employer had not established how the job opportunity is temporary, rather than permanent and full-time, in nature. AF 67.

The CO requested a detailed explanation and supporting documentation addressing why the job opportunity should be considered seasonal or temporary rather than permanent in nature. The CO stated the explanation must include the following:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. A detailed explanation as to the activities of the employer's permanent workers in this same occupation outside the requested period of need;
3. Summarized monthly payroll reports for a minimum of two previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation *Fern Cutter*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer attesting that the information being presented was compiled from the employer's actual accounting records or system;
4. Summarized monthly production numbers for two calendar years that clearly show the number of plants produced each month by workers in the requested occupation at the employer's worksite location, or equivalent facility; and
5. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 67-68.

The Employer responded to the NOD on August 30, 2019. AF 31-64. In support of its temporary need, Employer submitted a statement addressing its "business history, activities and schedule of operations throughout the entire year," a detailed explanation of activities outside its requested period of need, monthly payroll reports and monthly production numbers.

In its statement, Employer explained that it has operated as a business since 1985, producing primarily leatherleaf fern, as well as other varieties of cut ferns and foliage that are sold to the floral industry. In 2018, this business was sold to Grayson Puckett, a nephew of William and Julie Puckett, the original owners. Employer stated that the operation is in business twelve months of the year but experiences a peak during certain months due to major holidays, such as Thanksgiving, Christmas, Valentine's Day, Mother's Day and Easter, which account for

a majority of sales. Employer further explained that the off-season begins in August and typically runs through the middle of October. It asserts that its seasons are not linked to growth cycles or specific harvesting times, but rather, the wide variety of seasonal holidays throughout the year. The product grows year-round summer and winter, but during the winter months they also protect the crops from frost during freezing conditions. Watering is not necessary during summer because of irrigation. Employer also stated, that “[b]ecause of the high demand in the variety of cut foliages during peak months - the busy holiday season – we have to pull some of our fern cutters from fern cutting to help with more specialized chores like garland making, wreath making and coloring, frosting and glitter spraying holiday foliage. This is why we need part time migrant workers to cut fern.” AF 34-35.

In its response, Employer asserted that it was attaching “the complete 2 year summarized earnings report as requested...Records are from June 2017 to July 2019 to match the production summary.” AF 36. Payroll summaries for 2017 are attached to Employer’s statement and found in the administrative file at AF 37-39. However, the payroll summaries for 2018 and 2019 are not found in the administrative file.

Employer also attached monthly compilations of the number of fern bunches cut, as requested by the certifying officer for the years 2017 – July of 2019. AF 40-44. Employer attached “Fern cutter monthly bunch counts for its various crews between June 2017 and July 2019. The monthly counts show a significant drop in the totals for the months of August through October across all eight crew totals which were provided (Crews 2-9). AF 41-44.

Employer also uploaded a supplemental document on September 10, 2019, which provides total monthly bunch counts for all crews for June 2017 through July 2019. AF 28. Monthly totals for the months of August, September, and October range between 61,327 and 69,835. Monthly totals for the remaining nine months for the years 2018 range between 76,772 and 203,377 and for 2019 range between 128,140 and 248,746. AF 28.

On September 10, 2019 the CO issued a Notice of Required Modification. AF 22-27. The CO noted parts of the Employer’s previous response to the Notice of Deficiency, noting that the payroll summaries from 2018 and 2019 were missing from the payroll information supplied. The CO also requested further information to support the Employer’s temporary need. Specifically, the CO requested that the employer clarify its peak season and amend its application so that it is consistent with its clarification. Employer was directed to clarify which holidays were included in its peak season and also to clarify when the Florida wedding season occurs and whether it was included in the peak season. The CO requested summarized monthly payroll information for January 2017 through August 2019, as well as weekly break downs of the fern cutter bunch counts for the months of August and October in 2017 and 2018. The CO also requested:

Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In

lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer's current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

AF 27.

Employer responded to the Notice of Required Modifications on September 13, 2019. AF 14-21. The only information included in the administrative file are six photos, apparently showing individuals performing work at the Employer's business. By emails dated September 23, 2019, and September 24, 2019, Employer noted that it had provided the requested information on September 13, 2019, and inquired as to when a determination would be made on its H-2A application. AF 13-14.

On September 25, 2019, the CO issued a Denial Letter, noting that Employer had responded to the Notice of Deficiency on August 30, 2019, and to the Notice of Required Modifications on September 13, 2019, however the CO determined that Employer had failed to establish its temporary need for two Farmworkers and Laborers, Crop, Nursery and Greenhouse job opportunities and therefore the application was denied.

In the September 25, 2019 denial letter the CO specifically refers to explanations and submissions made by the Employer in response to the Notice of Required Modification which included clarification regarding the Florida wedding season as March, April, May, June, July, and early August, as well as clarification Employer provided indicating that Thanksgiving is one of the holidays included in its peak period. Employer's actual response, however, is not included in the Administrative File.

The CO states that "[t]he production report submitted by the employer showing a breakdown of fern cutter monthly bunch count totals appear to indicate a trend similar to the employer's requested period of need while the payroll documentation submitted by the employer does not support its claimed need for H-2A workers for the requested period of need." AF 10. The CO further notes that the production reports for 2017, 2018 and 2019, there appears to be a trend where the monthly bunch total in August decreases and the monthly bunch total reflects the lowest level in the month of September. Then the monthly bunch total appears to increase during the month of October. The CO then compares payroll information provided for the years 2018 and 2019 although none of this information is found in the administrative file. Later in the denial the CO confirmed that "the employer submitted its summary payroll report from January through August 2019" as well as payroll summaries for 2017 and 2018. See AF 10.

None of the payroll information provided by the Employer in its response to the Notice of required modifications, which the CO refers to in the Final Denial letter is included in the Administrative File.

On October 2, 2019, Employer filed a request for administrative review of the CO's denial of its H-2A application. In its request for review Employer expresses its disagreement with the denial, asserts that it clarified its peak season and detailed the months during which the

fern cutters are not needed, which are mid-August through the end of October. Accordingly Employer argues that the supplied information establishes its need for H-2A workers for the requested period of need.

By Order dated October 22, 2019, the parties were granted leave to file briefs by October 25, 2019. Employer provided a copy of a letter dated October 18, 2019, which it asserts had been previously supplied to the Certifying Officer but was not included in the administrative file. Employer reiterated its position that the monthly bunch counts reflect lower levels in the months of August and September, and start to increase in October, despite discrepancies in the payroll information which reflect duties other than fern cutting.

No brief was submitted by the Solicitor, on behalf of the Certifying Officer, by the stated deadline for filing briefs.

ISSUE

Whether the Employer has met its burden of establishing that its need for agricultural services or labor is “temporary or seasonal” as defined by the applicable regulation at 20 C.F.R. §655.103(d)?

SCOPE OF REVIEW

The current case arises from the Employer’s request for administrative review in regard to the CO’s denial of the Employer’s application for temporary alien labor certification under the H-2A program.

Under the applicable regulation at 20 C.F.R. §655.171(a), in cases where administrative review has been requested, “the ALJ will, 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, either affirm, reverse or modify the CO’s decision, or remand to the CO for further action.”

DISCUSSION

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

- (1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and

(2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive labor certification, an employer must demonstrate that it has a “temporary” or “seasonal” need for agricultural services. 20 C.F.R. § 655.161. 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). A “seasonal” need occurs if employment 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). Ten months has been viewed as an acceptable threshold to question whether an employer’s need is temporary. *See Grand View Dairy Farm*, 2009-TLC-2 (Nov. 3, 2008) (finding that applying ten months as a threshold, where employer is given the opportunity to submit proof to establish the temporary nature of its employment needs, it is not an arbitrary rule).

In determining temporary need for purposes of the H-2 temporary alien labor certification program it is well settled that it is “not the nature of 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.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982). *See Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). (It is appropriate to determine if the employer’s needs are seasonal, not whether the duties are seasonal). *See also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009).

In order to utilize the H-2A program it is the employer’s burden to establish that its need to fill a particular position or job opportunity is either temporary or seasonal. 20 C.F.R. § 655.161(a). Regulatory history indicates that the meaning of temporary was intended to be the same under the H-2A and H-2B program and that the definition of peakload is properly applied to the H-2A program. *See Altendorf Transport*, 2011-TLC-158, slip op at 13-14 (Feb. 15, 2011).

In the instant case, the Employer’s application requests temporary labor certification for two fern cutters under the occupation title of Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period beginning October 20, 2019, and ending August 20, 2020, on the basis of a peakload, temporary need.

Employer stated in its response to the CO’s Notice of Deficiency that the operation is in business twelve months of the year but experiences a peak during certain months due to major holidays, such as Thanksgiving, Christmas, Valentine’s Day, Mother’s Day, and Easter, which account for a majority of sales. Employer further explained that the off season begins in August and typically runs through the middle of October. It asserts that its seasons are not linked to growth cycles or specific harvesting times but rather the wide variety of seasonal holidays throughout the year. The product grows year-round summer and winter, but during the winter months they also protect the crops from frost during freezing conditions. AF 34-35.

In support of its peakload season, and requested dates of need of October 20, 2019, through August 20, 2020, the Employer provided information regarding the fern cutter monthly

bunch totals for nine of its crews (Crews 2-10) between June 2017 and July 2019. The following chart was provided by the Employer at AF 28.

Fern Cutter Monthly Bunch Counts: Total for Crews 2-10			
	<u>2017</u>	<u>2018</u>	<u>2019</u>
January	0	130060	248746
February	0	76772	181390
March	0	86943	134484
April	0	203377	217868
May	0	138921	187158
June	105612	125135	128140
July	100181	101455	183400
August	61394	65928	
September	65843	58870	
October	69835	61327	
November	159784	127533	
December	105553	105097	

In the CO’s final denial, the CO acknowledges that “[t]he production report submitted by the employer showing a breakdown of fern cutter monthly bunch count totals appear[s] to indicate a trend similar to the employer’s requested period of need.” AF 10. The CO further notes that the production reports for 2017, 2018 and 2019, appear to show a trend where the monthly bunch totals in August decreases and the monthly bunch total reflects the lowest level in the month of September. Then the monthly bunch total appears to increase during the month of October. *Id.* The undersigned agrees with the CO’s analysis of the bunch count totals.

However, the CO determined that the payroll documentation submitted by the employer did not support its claimed need for H-2A workers for the requested period of need. *Id.* In the Final denial the CO compares payroll information in various months which it finds to be inconsistent with the bunch count totals. However the CO failed to include this payroll information which he refers to, when the CO compiled the administrative file.

Therefore, the CO’s reliance on the payroll records to deny the Employer’s application in this case is problematic. Although the CO confirms in the final denial that the Employer provided payroll information, the CO failed to include this information in the Administrative File when the CO compiled the file. The CO states in the Final Denial letter that “as requested the employer submitted its summary payroll report from January through August 2019,” as well as “payroll summaries for 2017 and 2018.” AF 10. However, as the CO failed to include the payroll information submitted by the Employer in response to the Notice of Required Modifications in the Administrative File, the undersigned cannot review this information to

determine if the CO's comments are warranted regarding whether certain payroll months are consistent with the fern bunch cut records provided.¹ Accordingly the undersigned finds that the payroll records should not be determinative in denying the Employer's application. Further, it appears from the Employer's explanations that the workers performing the fern cutting work currently, are also performing various other jobs. Therefore it would appear that it would be misleading to view these payroll records as applicable to the fern cutter position alone.

Based on the information found in the record and the explanations provided by the Employer, the undersigned finds that the Employer has met its burden of proving its temporary need based on a peakload need for fern cutters due to the increased need for its product which is used in floral arrangements during the various holiday seasons and the Florida Wedding season. As noted in the CO's final denial the Employer has asserted that there is an increased need in November (Thanksgiving), December (Christmas), January (Preparing for Valentine's Day – [Employer's] busiest holiday, February (Valentine's Day), March (Preparing for Easter as well as a popular Florida Wedding month), April (Easter and Weddings), May (Mother's Day & Weddings), June (Weddings), July (Weddings), and early August (Weddings). Employer has reasonably explained that its need for fern cutters slows down between mid-August though the end of October. The fern cutter monthly bunch counts provided by Employer support this explanation

Accordingly Employer's reasonable explanation of its peakload need, as well as the fern cutter monthly bunch counts provided, support its requested period of temporary need between October 20, 2019, and August 20, 2020.

Accordingly, the undersigned finds that Employer has met its burden of establishing its temporary need for two fern cutters under the occupation title of Farmworkers and Laborers, Crop, Nursery, and Greenhouse for the period beginning October 20, 2019, and ending August 20, 2020.

ORDER

Accordingly, for the foregoing reasons, the CO's denial of this H-2A application, is **REVERSED**, and this matter is **REMANDED** to the CO for additional processing including regulatory recruitment.

¹ The undersigned considered the possibility of remanding this case to the CO to determine why the Administrative File provided was incomplete. However, in light of the delay in receiving this file, which was nearly three weeks after the October 2, 2019 request for administrative review was filed, further delay in processing this application is not warranted, especially when the beginning date of need, October 20, 2019, has already passed.

SEAN M. RAMALEY
Administrative Law Judge