



Issue Date: 28 April 2020

OALJ Case No.: 2020-TLC-00065
ETA Case No.: H-300-20014-252598

In the Matter of

BURTON K. SIPP,

Employer.

Certifying Officer: John Rotterman
Chicago National Processing Center

Before: LARRY S. MERCK
Administrative Law Judge

DECISION AND ORDER REVERSING CERTIFYING OFFICER'S DENIAL

Burton K. Sipp (“the Employer”) appeals the Certifying Officer’s (“CO”) denial of the above-captioned application for H-2A temporary labor certification. For the reasons set forth below, the Certifying Officer’s denial is REVERSED.

STATEMENT OF THE CASE

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act and its implementing regulations. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188. 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.

Burton K. Sipp is a thoroughbred horse farmer who breeds and races thoroughbred horses in Ohio, West Virginia, Pennsylvania, and Virginia. AF 24 & 420. According to the Employer, he owns fifty-one horses, and has been farming and racing for 50 years. AF 24 & 420. The Employer has a facility in North Randall, Ohio, where he plans on stabling twenty thoroughbred horses during the racing season, which begins on April 26, 2020 and ends on December 2, 2020. AF 421. The remaining thirty-one horses will remain at the Employer’s other facility in West Virginia. AF 24.

On February 14, 2020, the Employer filed an H-2A Application for Temporary Employment Certification on ETA Form 9142 (Application). AF 436-441. The Employer’s

Application requested certification for four Care Takers for Race Horses beginning April 1, 2020 and ending December 15, 2020. AF 444.

On February 20, 2020, the CO issued a Notice of Deficiency informing the Employer that its Application and/or job order failed to meet the criteria for acceptance in accordance with Departmental regulations at 20 C.F.R. § 655.103(d), stating, *inter alia*, that the job opportunity must be of a seasonal or temporary nature. *See* 20 C.F.R. 655.103(d), AF 426-429. The CO noted that the Employer's job opportunity on ETA Form 790A, Section A.8a, described the job duties for the requested position as the care and feeding of horses, which are not, on their face, seasonal. Therefore, the CO determined that, because the Employer failed to establish a seasonal need as required by 20 C.F.R. § 655.103(d), the Employer was required to provide supporting evidence that a temporary need exists. AF 426.

The CO gave the Employer the opportunity to modify its Application by submitting information or documentation to establish that the job opportunity was seasonal and temporary rather than permanent in nature. The CO detailed the documentation required to support Employer's assertion of seasonal need. The supporting evidence was required to be in the form of summarized payroll reports to substantiate the Employer's seasonal need. The CO asked the Employer to submit summarized payroll reports for a minimum of the previous three calendar years, 2017-2019, for Farmworkers, Farm, Ranch, and Aquacultural Animals. The CO further clarified that the payroll reports should summarize 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. AF 426.

On February 26, 2020, the Employer responded to the NOD with the following Statement of Facts:

We do need 4 H-2A employees for the following reasons:

- a. Our thoroughbred horse breeding program allows for 20 horses to race for this year. Therefore, we have set to participate in horse races with all 20 horses this year, although we had raced with about 5-6 horses in last several years.
- b. As our prior statement explains, the 20 horses will be kept at Ohio facility throughout this year's racing season. For the last several years, we employed only 1 stable hand in Ohio facility. For remaining 31 horses need to be taken care of in our West Virginia facility. All 5 stable hands who contracted with us for 2020 live in West Virginia. 4 of them are assigned for 6 horses and 1 of them is assigned for 7 horses, this year in the West Virginia facility.
- c. For this year, so far, we have not been able to find stable hands who would take care of our 20 horses in Ohio facility, not even one. That worries us in great deal.
- d. Each requested H-2A employee will be assigned to 5 thoroughbred horses in order to perform their job duties adequately with decent quality, as the

high stake racing demands. Overall quality of care of thoroughbred horses is the most important aspect of our thoroughbred farming and racing activities.

AF 24.

The Employer stated that there were no payroll reports to provide to the CO since it uses self-employed independent contractors. Instead, the Employer provided copies of payroll checks for the following employees: Fernando Gonzales, dated 6/1/19; Harry Pease, dated 3/6/20; Khatan Baatar, dated 6/15/19; Mike Cloud, dated 3/6/20; Tom Brokover, dated 3/6/20; and Zachary Phillips, dated 6/15/19. The Employer also provided copies of the previous agreements with these independent contractors from January 2017 to December 2020.

On April 10, 2020 the CO issued a denial letter to the Employer. The CO denied the Employer's Application because it concluded that the Employer failed to establish a temporary need for workers, as required by 20 C.F.R. § 655.103(d). AF 23. The CO stated the following in support of his view that the Employer's job opportunity did not meet requirements:

The documentation submitted with regard to its historical use of independent contractors fails to establish that its need is seasonal, or tied to a certain time of year by an event or pattern. Instead, the employer provided contracts which list horse care duties and cover periods of time outside of AF Page 7 the period of need sought indicating that the employer's need for the duties in this application are indeed year round. No evidence was provided supportive of a seasonal need for labor far above what is required for ongoing operations.

Moreover, the employer ties its claimed seasonal need to horse racing. However, the connection between offsite horse racing and onsite horse care is unclear. While the employer may have a temporary need associated with its offsite racing operations, there is no indication that care for horses at its stable is seasonal.

AF 21-23.

The Employer's Statement with Regard to the Seasonal Nature of the Job Opportunities provides the horse farm operations schedule for the 2020 season. The operations schedule presents evidence of the year-round work that the current contracted staff in West Virginia will perform:

Our thoroughbred horse farming operations schedules for 2020 season are below:

- a. Breeding: 04/15/2020-05/15/2020;
- b. Yearling Preparation For Sales: 05/31/2020;
- c. Sales Season: 09/01/2020-11/30/2020;
- d. Year-end procedures before horses are relocated to for winter in the South: 11/30/2020- 12/15/2020;

- e. Transporting horses to their wintering location: 12/15/2020-12/18/2020;
and
- f. Wintering: 12/18/2020-04/15/2021.

AF 421.

The Employer's Statement with Regard to the Seasonal Nature of the Job Opportunities also provides the following evidence of the thoroughbred racing season:

Our thoroughbred horse racing season, for this year, will start April 26, 2020 and end in December 02, 2020. We have planned to participate in the following thoroughbred horse races in 4 states in 2020:

- a. Mountaineer Park Race Track, New Cumberland, West Virginia: April 26-December 02, 2020
- b. Jack Thistle Down Racino, North Randall, Ohio: April 27, 2020-October 17, 2020
- c. Presque Isle Downs, Erie, Pennsylvania: May 18, 2020-October 22, 2020
- d. Colonial Downs, New Kent, Virginia: July 23, 2020-August 28, 2020

AF 421.

The CO explained that the job opportunity as described in Section A.8a of the ETA Form 790A stated that the job duties for the requested position included the care and feeding of race horses ("Feed horse, groom them and exercise them"). The CO reasoned that these duties were not, on their face, seasonal. Therefore, the CO concluded that the documentation to establish and support the Employer's claimed seasonal need for workers was not provided as part of the Employer's H-2A Application.

On April 14, 2020, the Employer filed a request for expedited administrative review of the Final Determination issued by the CO. AF 1-2. I received the Administrative File (AF) from the Employment and Training Administration (ETA) on April 22, 2020.

DISCUSSION

An employer must have a temporary or seasonal need for agricultural labor or services in order to be eligible for temporary labor certification under the H-2A program. The applicable regulations provide, in relevant part:

[E]mployment 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.

20 C.F.R. § 655.103(d). “It 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.” *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009). Nevertheless, duties are relevant inasmuch as the care and feeding of animals are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. However, the Employer can overcome this presumption if it can sufficiently explain why it does not need workers on a year-round basis. *See Gisi Pheasant Farm*, 2011-TLC-139 (Jan. 25, 2011).

The CO’s NOD requested that the Employer provide a detailed explanation why its job opportunity is seasonal or temporary. AF 426. In responding to the NOD, the Employer explained what the duties of its current workers are at the West Virginia facility and then explained why it needs four temporary workers from April through December, during the racing season at the Ohio facility. AF 24 & 420-422. Specifically, the Employer stated that while its independently contracted workers will provide day-to-day care of the thirty-one horses in the West Virginia facility, these workers are unable to handle the additional duties for the twenty thoroughbred horses transported to the Ohio facility during the racing season. AF 24 & 420-421. Moreover, the Employer stated that the rigorous routine of caring for the thoroughbred horses during the racing season from April to December requires four stable hands to provide quality grooming and care for the participating horses. AF 24 & 420-421.

The CO’s denial letter focused on the horse care duties described in the Application instead of looking at the Employer’s detailed statements explaining why it has a need for temporary workers to manage the rigorous routine duties necessary for the thoroughbred horses to perform successfully in the racing activities. AF 21-23. The CO disregarded the fact that the twenty racing horses will be in a separate facility in a different state from the thirty-one horses who will not be participating in the racing events. Finally, the CO did not note the supporting evidence that explained the connection between the rigorous routine of care required to successfully prepare the thoroughbreds for a racing event. AF 415-418.

The job duties listed on the Employer’s Application form ETA 709 Section A8a, simply states, “Feed horse, groom them and exercise them.” AF 444. However, the supporting statements provided by the Employer detail the job duties for the temporary workers at the Ohio facility, the racing schedules for the 2020 season, and the 2020 farm operations schedule for the year-round breeding, selling, and wintering duties. AF 24, & 421. The racing and farm operations schedules demonstrate the distinction between the year-round work schedule at the West Virginia facility and the temporary racing schedule at the Ohio facility. It is not relevant that the job duties are similar; the duties for breeding and racing are both related to the care of thoroughbreds and will necessarily require the same kinds of basic care. What is relevant is that the temporary duties are only needed for the twenty thoroughbreds that are at the Ohio facility specifically for the racing season. The horses at the Ohio facility will only need these basic care duties during the ten months of the racing season. This set of facts meets the requirements of a seasonal need in that it is a certain time of year tied to an event.

The Employer also provided supporting documentation on the handling and care of racehorses during the racing season. The Employer also notes that, for high stakes racing, the “[o]verall quality of care of thoroughbred horses is the most important aspect” of the racing activities. AF 24. The Employer provided some articles on the rigorous routines required in the daily care of racehorses during the racing season. AF 418. The documentation clearly makes a connection between that care provided to the horses onsite at the Ohio facility and the performance of those horses offsite at the racetrack.

Because the CO did not address the Employer’s detailed explanation of its temporary need, I find that the CO’s denial was improper. See generally *Blondin Enterprises, Inc.*, 2009-TLC-56, slip op. at 3-4 (July 31, 2009); *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (May 16, 2008). The Employer provided the information that the CO requested in its NOD and sufficiently explained why it does not need these four temporary workers on a year-round basis. The Employer clearly provided evidence supporting the seasonality of the racing schedule and the reasons why the current staff in West Virginia will be providing the year-round horse care that includes the “wintering” months. Based on the foregoing, I find that the Employer has demonstrated a temporary need for four stable hands from April 26, 2020 to December 15, 2020. Accordingly, the CO’s denial of temporary labor certification is vacated and this matter is remanded for further processing.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **REVERSED** and **REMANDED** for further processing.

LARRY S. MERCK
Administrative Law Judge