



Issue Date: 08 November 2019

CASE NO.: 2020-TLC-00005
ETA CASE NO.: H-300-19255-724223

In the Matter of:

FAMILY FRESH HARVESTING, LLC,
Employer,

**DECISION AND ORDER REVERSING AND REMANDING DENIAL OF LABOR
CERTIFICATION**

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 set forth at 20 C.F.R. Part 655, Subpart B. *See also* 8 C.F.R. § 214(h)(5) The H-2A program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary or seasonal basis.

In this matter, Employer Family Fresh Harvesting, LLC (“Employer”), acting as a H-2A labor contractor for fixed site grower Four Star Greenhouse, Inc. (“Four Star”), filed an application for temporary labor certification for 85 seasonal workers. The Certifying Officer denied Employer’s application for temporary alien labor certification under the H-2A non-immigrant pursuant to 20 C.F.R. § 655.160.

SUMMARY

Employer is a labor contractor for a greenhouse, providing seasonal workers to Four Star Greenhouse to work in their greenhouses. For 2019, they requested temporary labor certification for 85 temporary and seasonal workers. The regulations governing certification refer to “temporary *or* seasonal workers.” 20 C.F.R. § 655.161(a) (emphasis added). The Certifying Officer denied Employer’s request for temporary labor certification. The Certifying Officer’s Denial Letter stated that Employer failed to establish temporary need as “presumed” the job duties could be performed year-round in the fixed-site greenhouse. The Certifying Officer stated Employer’s submissions as to the nature of the growing season also were “unclear that there was a temporary need for 85 workers.” AF 7. Based on the evidence in the record, the decision of the Certifying Officer is REVERSED, for the reasons stated below.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On September 12, 2019, the Office of Foreign Labor Certification received Employer's ETA Form 9142A application requesting temporary labor certification under the H-2A program for 85 "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" nursery workers. *See* AF 1289.¹ On Employer's ETA Form 9142A application, it listed its statement of temporary need was "seasonal." *Id.* (emphasis added). The job duties for the requested position included working in a greenhouse "[p]ulling master, sorting line, Online order line, boxing line dock, customer pickup, move, lay down, hang, transplant, dump, consolidate, space, crop maintenance, harvesting, sticking, cutting, harvesting cuttings..." and other tasks related to agriculture. AF 1272. These workers would assist with "crop production, crop maintenance and shipping functions, as well as greenhouse assembly and the general maintenance of the premises during Four Star's season from approximately November 18, 2019 to September 18, 2020." AF 1330.

On September 19, 2019, the Certifying Officer issued a Notice of Deficiency ("NOD") indicating the following deficiencies:

Temporary Need: The job duties take place in a greenhouse. The fixed-site grower on this application is Four Star Greenhouse and per its website the employer has '...more than 20 acres of indoor growing area...' These duties are presumed to occur on a year-round basis. Documentation to establish and support the employer's temporary need for workers was not provided as part of this H-2A application. Modification Required: Because the employer failed to establish a temporary need as required by 20 CFR sec. 655.103(d), it is now required to provide supporting evidence that a temporary need exists. The employer must submit a written explanation which documents the temporary need for H-2A workers. Supporting evidence in the form of summarized payroll reports is required to substantiate the employer's temporary need for the H-2A worker(s) in the case. The employer is required to submit summarized payroll reports for a minimum of one previous calendar years (2016, 2017, 2018 and January-August 2019) for Nursery Workers. These payroll reports must be a summary of 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. The summarized payroll reports must be signed by the employer with the following statement attesting that the information was compiled from the employer's accounting records or system: I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records

¹ The ETA Administrative File ("AF") submitted for review includes pagination on the bottom right corner of each page of the file. This AF page number will be cited to maintain consistency of the internal citations in the AF. *See Index - Memorandum to the Chief Administrative Law Judge from Certifying Officer Alejandra Dominguez, Chicago NPC, OFLC, UNITED STATES DEPARTMENT OF LABOR, November 1, 2019.* The AF was received by the Administrative Law Judge on November 4, 2019.

maintained by Family Fresh Harvesting LLC. for Calendar Years 2016, 2017, 2018 and January-August 2019.

See AF 1270 - 1273.²

On September 20, 2019, in written response to the Notice of Deficiency, the Employer stated that:

This job is of temporary need because their peak season is from November 18 to September 18. During the other months they have little to no labor according to their General Manager. It is considered their down time of which they use small workload to keep their current domestic labor busy. According to Fourstar Greenhouses they will no longer need H2A labor during the months of September 19 thru[sic] November 17. There are not sufficient U.S. workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the foreign worker(s) in such labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. Attached are payroll records listed to support the statement listed above.

See AF 1190.

Employer also submitted a "Payroll List" which provided an accounting of their payroll from November 2018 to August 2019. AF 660-1188, 1194-1265. These records provided a list of workers, their status as either "STD" or "H2A," their hours worked per week, subdivided by day, their hourly rate, gross and net pay, and taxes withheld. *Id.*

On September 26, 2019, after consideration of these records and the Employer's statement, the Certifying Officer issued a Notice of Required Modifications ("NRM"). The Certifying Officer stated that the provided documentation did not establish and support the Employer's temporary need and requested supporting evidence. The Notice of Required Modifications requested a written explanation of temporary need and summarized payroll reports to, "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 650-653. These records were to identify the permanent and temporary workers employed as "Nursery Workers." AF 653.

On September 27, 2019, the Employer responded. It resubmitted payroll documentation including the total number of workers for the time periods that they covered and certified their

² There were a number of other deficiencies noted in the September 19, 2019 Notice of Deficiency, including a failure to comply with 20 C.F.R. § 655.132(b)(2) as it related to the Farm Labor Contractor Certificate provided, arrangement for transportation of the workers, expired workers' compensation insurance certificate, a failure to submit a signed copy Appendix A.2 with the ETA Form 9142A, and various inconsistencies between information provided on the ETA Form 790 and the ETA Form 9142A. See AF 1270-1279. These other deficiencies were addressed by Employer in later submissions. AF 8-649, 1189-1269. They will not be discussed here as they were addressed by Employer and were not cited in the Certifying Officer's Notice of Denial as reasons the application was not certified. AF 1189-1269

accuracy. *See generally* AF 8, 59, 118, 239, 248, 289, 359, 483, 539, 557, 562, 569, 573, 634, 642, 649. Employer explained the lack of payroll records through November 2018. Employer stated that “[w]e had zero payroll records for the year of 2016, 2017, and beginning of 2018. 2018 was our very first year in operation.” AF 301. Employer also provided a written response addressing temporary need. It stated the following:

Employer grows plants which require intensive labor to harvest, cultivate, cut, stick, pack, pull, move, separate, load, unload, tag, transplant, divided, and care for from November 18 until September 18 each year. Employer does not need as many seasonal labor from November to January and from January to mid July the need for labor increases and labor needs start to decrease from mid July to the beginning of September. In reviewing labor needs and working hours, employer found that operations require the work of only 30 total workers to complete final harvest tasks and a total of 85 workers for the main growing season. Domestic labor is increasingly difficult to find and employer anticipates shortage in final harvest positions. Employment meets the definition of seasonal nature under 20 CFR 655.103(d) because employment is tied to the annual growing and packing season of crops listed. Please note, this employer's dates of need have changed in respect to past approved applications due to the encompassing of harvesting tasks. 2018 was our first year working with Fourstar Greenhouses. We started in November 2018 and our temporary season came to an end in July 2019. They hire us on a temporary basis.

Id.

On October 15, 2019, the Certifying Officer reviewed this submission and noted that the payroll records were not complete. The Certifying Officer stated Employer “failed to identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation.” AF 6-7. The Certifying Officer compared Employer’s statements provided in response to the Notice of Deficiency and Notice of Required Modifications. The Certifying Officer stated that:

“[T]he NRM contradicts the statement submitted in response to the Notice of Deficiency and the period of need requested (November 18, 2019 to September 18, 2020). In response to the NRM, the employer indicates it does not need as many seasonal laborers from November to January and its need decreases from mid-July to the beginning of September. The employer further indicates that from January to mid-July the need for labor increases. Therefore, it is unclear that the employer has a temporary need for the 85 workers requested from mid-November through mid-September.

Id.

After review, the CO stated it was “unclear that the employer has a temporary need for the 85 workers requested from mid-November through mid-September.” *Id.*

On October 15, 2019, the Certifying Officer issued a Denial Letter to Family Fresh Harvesting, LLC, based upon the “employer’s failure to establish a temporary need as required by 20 C.F.R. sec.655.103(d).” AF 7. On October 17, 2019, Employer filed a request for expedited administrative review. It was timely filed.

APPLICABLE LAW

Employers who seek to bring foreign agricultural workers into the United States under the H-2A program must apply to the Secretary of Labor for a labor certification that:

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.100; *Form ETA-9142A, H-2A Application for Temporary Employment Certification*, U.S. DEPT. OF LABOR (“ETA Form 9142A”).

The implementing regulations at 20 C.F.R. Part 655, Subpart B set forth a multi-step process by which this certification may be applied for and denied or granted. The petitioning employer must file a job order with the State Workforce Agency (“SWA”) serving the area of intended employment. *See* 20 C.F.R. § 655.121(a). The SWA will review the job order for compliance with the regulations and, if found to be acceptable, post the job order on its intrastate clearance system and begin recruitment. *Id.* at (c). If the SWA does not locate able, willing, and qualified workers to fill the position(s) for which the employer seeks certification, the employer may then file an ETA Form 9142A with the United States Department of Labor (“Department”), Employment and Training Administration (“ETA”), Office of Foreign Labor Certification (“OFLC”). 20 C.F.R. § 655.130. A CO within the OFLC will then review the application for compliance with the requirements set forth in the regulations. 20 C.F.R. § 655.140. If the application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the CO will notify the employer within seven calendar days. 20 C.F.R. § 655.141.

Where the employer operates as a labor contractor supplying workers to a fixed-site agricultural business, their application must also comply with the requirements of 20 C.F.R. § 655.132. The employer must provide the name and location of the fixed-site business, with dates of employment and descriptions of the work to be done, proof of its ability to discharge its financial obligations, a Farm Labor Contractor Certification of Registration if required, and copies of executed contracts with the fixed-site agricultural business verifying adequate transportation and housing of workers. *See* 20 C.F.R. § 655.132(b).

To receive temporary labor certification under the H-2A program, the employer “must certify that the employment proposed in the certification is of a temporary or seasonal nature.”³ 8

³ The court notes that the requirement that employment proposed in the certification must be of a temporary *or* seasonal nature, is found in the cited regulations. It is also found in other federal regulations that refer to the employment of H-2A visa workers. *See* 20 C.F.R. § 655.1300(a)(1)(i). This contrasts with 20 C.F.R. § 655.100, which uses the phrase “temporary

C.F.R. § 214.2(h)(5)(iv); *see also* 20 C.F.R. § 655.161(a). Under the regulations, “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.” *See* 20 C.F.R. § 655.103(d). “The factfinder 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)).” *See Jonathan Vega*, 2020-TLC-00001, slip op. at 3 (Oct. 9, 2019). When examining an employer’s temporary need “[i]t 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).”⁴ *Id.*

JURISDICTION AND STANDARD OF REVIEW

The undersigned has appellate jurisdiction pursuant to 20 C.F.R. § 655.171. When an employer receives an unfavorable determination in a certification decision, the employer may request review by the Board of Alien Labor Certification Appeals. *Id.* The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361; 20 C.F.R. § 655.161; *see also DeSoto Fruit and Harvesting, Inc.*, 2019-TLC-00032, slip op. at 6 (March 1, 2019). To prevail upon administrative review, the employer must demonstrate that the Certifying Officer’s determination of eligibility was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. *See Catnip Ridge Manure Application Inc.*, 2014-TLC-00078, slip op. at 3 (May 28, 2014). “The CO’s decision in H-2A cases is reviewed on an ‘arbitrary and capricious’ standard. *Blondin Enterprises, Inc.*, Case No. 2009-TLC-56, slip op. at 3-4 (ALJ July 31, 2009); *Keller Farms*, Case No. 2009-TLC-8 (ALJ Nov. 21, 2008).” *J & V Farms, LLC*, 2015-TLC-00022, slip op. at 3 (March 4, 2016).

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (“ALJ”) “shall not receive additional evidence” and must only render a decision “on the basis of the written record and after due consideration of any

and seasonal” in the context of Department of Labor certifications. Recent Administrative Law Judge opinions affirm that the prospective H-2A employment for which certification is requested may be temporary, *or* seasonal, and need not be both. *See Jonathan Vega*, 2020-TLC-00001, slip op. at 3 (Oct. 9, 2019); *Tranel Ranch*, 2019-TLC-00049, slip op. at 2-3 (May 22, 2019); *Intergrow East, Inc.* 2019-TLC 00073 (Sept. 11, 2019) (citing 20 C.F.R. § 655.161(a)). While they are not case precedent, they are noted.

⁴ Note: the quote cites case number 2009-TLC-00009 when citing to the *William Staley* slip opinion. However, the proper case number is 2009-TLC-00060.

written submissions submitted from the parties involved or *amici curiae*....” Accordingly, an employer may not refer to any evidence that was not part of the record as it appeared before the CO. Upon review of the written record and submissions, the ALJ may then either “affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.” *Id.* “The administrative law judge’s decision shall be the final decision of the Secretary.” *Id.*

ANALYSIS AND FINDINGS OF FACT

Employer requested temporary certification under the H-2A program for 85 “Farmworker and Laborer, Crop, Nursery, and Greenhouse Job Opportunities.” AF 1289. In the Notice of Denial, the reason for denial of certification was that Employer did not establish a temporary need per 20 C.F.R. § 655.103(d) (emphasis added). The basis for denial is the focus of this administrative review. *See Tranel Ranch*, slip op. at 2-3. The Certifying Officer wrote that upon review of Employer’s application and its responses to the Notice of Deficiency and Notice of Required Modifications, it was “unclear that the employer has a temporary need for the 85 workers requested from mid-November through mid-September.” *See Notice of Denial to Family Fresh Harvesting, LLC, Enclosure for Denial Letter*, U.S. DEPT. OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION, Oct. 15, 2019 (emphasis added).

As discussed above, to obtain certification an Employer must comply with the implementing regulations in submitting their application. Employer must establish that “the employment proposed in the certification is of a temporary or seasonal nature.” *See* 20 C.F.R. §§ 655.103(d), 655.161(a) (emphasis added).

The court must determine whether Employer established the proposed employment is of a temporary nature. On October 21, 2019, Employer sent additional payroll records to the Office of Administrative Law Judges. Employer supplemented its payroll records with a summary that contained itemized numbers of H-2A and seasonal employees, their total hours worked, and total earnings. On October 21, 2019, Employer also sent a letter to the Office of Administrative Law Judges from CEO Mark Multer of Four Star dated October 18, 2019. The letter stated its need for temporary and seasonal H-2A employees. (emphasis added). As these items were not part of the administrative file before the Certifying Officer, they are additional evidence that cannot be considered by the court. 20 C.F.R. § 655.171. The payroll records submitted in the administrative file,⁵ while not properly summarized as requested in the Notice of Required Modifications, do establish that in November 2018, Employer had 33 total H-2A workers. In December 2018, and January/February of 2019, Employer had 59 H-2A workers on payroll. AF 359, 539, 634. In March and April 2019, this number increased to 117 workers. AF 118, 239. In May 2019, this number decreased to 113 workers. AF 483. In June 2019, H-2A employment decreased to 55 workers. AF 289. In July 2019, it decreased to 20 workers. AF 562. This change

⁵ In the Notice of Deficiency, Employer was also told it must provide payroll records from 2016 to August 2019. AF 653. In response, Employer stated that it had only been in business since 2018 and had “zero payroll records for the year of 2016, 2017, and beginning of 2018.” AF 301. Employer’s explanation is reasonable. Employer’s only other H-2A application was for October 29, 2018 to June 30, 2019 and its payroll records indicate operation beginning November 2018. *See* AF 1288.

supports Employer's response to the Notice of Required Modifications that its need for temporary labor corresponds to the growing season. It increases from November into the main growing season, and then begins to decrease into June and July. While the Certifying Officer was correct that the Employer's response to the Notice of Deficiency referenced a growing season from September 2019 to November 2020 and was not consistent with the Notice of Required Modifications response addressing the 2018-2019 growing season, the anticipated length of the 2019-2020 growing season according to Four Star's President Thomas Smith is from September 2019 to November 2020. *See* AF 1330.

The Certifying Officer stated that the proposed "[greenhouse] job duties... are presumed to occur on a year-round basis."⁶ AF 6. The Certifying Officer's findings focused on *the nature of the duties to be performed* as she "presumed" the job duties were year-round, and not temporary, where the worksite was a greenhouse. *See e.g., William Staley*, slip op. at 4 (emphasis added). Analysis of the temporary nature of employment should focus on *nature of the need for the duties to be performed*. *Id.* Four Star and Employer stated they only temporarily needed 85 H-2A workers from November to September as they lacked domestic labor to perform harvest duties. Employer stated that from September to November, there is no need for H-2A labor as Four Star's "down time" duties can be filled with available domestic labor. AF 1190. Even if the nature of these greenhouse job duties could be performed on a year-round basis, the nature of the need for the duties to be performed in this case only lasts from November 2019 to September 2020 according to Four Star and Employer. This is supported by Employer's 2018-2019 payroll records which show H-2A workers are only needed through Four Star's growing season. Reviewing the nature of the Employer's need for duties to be performed, the court finds that Employer's payroll records, its explanation of the temporary nature of the growing season, its projected shortage of labor for the upcoming growing season, Four Star's request to Employer for temporary labor, and Employer's anticipated need based on Four Star's request for 2019-2020 compared to the previous growing season, establish a temporary need for H-2A laborers to fill these job duties in Four Star's operations from November 2019 to September 2020.⁷ *William Staley*, slip op. at 4.

⁶ The court finds the Certifying Officer's "presumed" that the greenhouse job duties are year-round. There is no evidence in the record that the greenhouse work was "year-round." It is an error to "presume" facts that are not in the application, not in evidence, and not in the record. This presumption does not properly account for the various tasks described in the record, including "greenhouse assembly." AF 1330.

⁷ Inasmuch as the court finds Employer established a temporary need for H-2A employment, it will not address the issue of whether the Employer, in the alternative, established a seasonal need. The court notes an employer may prove seasonal need to establish that they are entitled to temporary agricultural labor certification through the H-2A visa program. *Supra* FN 1; *see generally* 20 C.F.R. § 655.0. In this matter, the record does not indicate that the Certifying Officer made any determination as to Employer's stated seasonal need. Employer stated in the ETA Form 9142A application that its need for 85 workers was "seasonal." AF 1289 (emphasis added). This is supported by its payroll and application records. The records showed a need for up to 117 workers in the peak growing season, Four Star's request to Employer for seasonal labor, and Employer's explanation that "[e]mployment meets the definition of seasonal nature

Based on the evidence in the record, the Employer has established the temporary nature of the proposed H-2A employment. Accordingly, the decision of the Certifying Officer denying Employer's Application for Temporary Labor Certification is reversed for the reasons listed above.

ORDER

It is hereby **ORDERED** that:

1. The Certifying Officer's denial of Employer's application for temporary labor certification is **REVERSED**.
2. The matter is **REMANDED** to the Certifying Officer for further consideration in accordance with this decision.

SO ORDERED.

DANA ROSEN
Administrative Law Judge

DR/TRL/mjw
Newport News, VA

under 20 CFR 655.103(d) because employment is tied to the annual growing and packing season of crops listed." AF 7.