



Issue Date: 08 July 2020

BALCA Case No.: 2020-TLC-00088

ETA Case No.: H-300-20151-614210

In the Matter of:

GREENTOP ACRES, LLC,
Employer.

Appearances: Esther Flores
Human Resources Manager
GreenTop Acres, LLC
For the Employer

Nicole Schroeder, Esq.
Jaclyn Lahr
Office of the Solicitor
U.S. Department of Labor
For the Certifying Officer

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises from a request by GreenTop Acres, LLC (“Employer”) for review under the provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c)(1), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. Employer is appealing the denial of its application for an H-2A¹ temporary labor certification by a Certifying Officer (“CO”) within the Department of Labor’s Employment and Training Administration (“ETA”). For the reasons set forth below, I find that the CO’s decision to deny Employer’s application was not an abuse of discretion.

STATEMENT OF THE CASE

On June 1, 2020, Employer submitted an ETA Form 9142 *Application for Temporary Labor Certification* (“Application”), requesting H-2A labor certification for one (1) agricultural

¹ The H-2A visa program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a one-time occurrence, seasonal, peak load, or intermittent basis.

equipment operator (SOC Occupational Code 45-2091.00) for the period of August 1, 2020 to May 31, 2021.² (AF 22-27).³

The CO issued a Notice of Deficiency (“NOD”) on June 3, 2020. (AF 12-21). The basic deficiency was that Employer had not established a temporary or seasonal need, given that it previously requested workers at the same work location for similar job duties that exceeded the ten months normally considered as seasonal or temporary.

The NOD detailed that “the job opportunity described in the ETA Form 790A, Section A indicates the employer has a seasonal need and its current dates of need are from August 01, 2019 (sic) to May 31, 2021. However, the employer’s previous application requested dates of need from October 16, 2019 through August 15, 2020.”

Case Number	Employer Name	Status	Beginning Date of Need	Ending Date of Need
H-300-19224-964492	Greentop Acres, LLC	Certified-Full	10/16/2019	08/15/2020
H-300-20142-593356 (sic)	Greentop Acres, LLC	Received	08/01/2020	05/31/2021

The CO noted that Employer’s current application and the prior application both include job duties related to the operation and maintenance of agricultural equipment in Haviland, Ohio. Based on Employer’s current requested dates of need and its previously established dates of need, the CO concluded that Employer has a need for workers to operate and maintain machinery and equipment for a period of one year, 17 months and 16 days (sic).⁴ In other words, it was not clear to the CO how the current job opportunity could be seasonal in nature. To remedy the deficiency, the CO directed Employer “to explain how its need should be viewed as seasonal, when its need for labor exceeds period of 17 months (sic).” Additionally, the CO directed Employer to **“submit summarized payroll reports for 2017 to 2019 for its requested position. 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.”** (AF 14-15) (emphasis added).

Employer responded the same day, clarifying that: “the [current] job opportunity is temporary in nature and is arise (sic) due to a shortage of employees. Two of our employees had decided not to work for us this year; therefore, I need to request an H-2A certification to hire

² As discussed below, this is not the first H-2A application submitted by Employer. On August 27, 2019, ETA accepted an H-2A temporary labor certification application for one (1) Farmworker, Farm, Ranch, and Aquacultural Animals (SOC Occupational Code 45-2093.00) for the period October 16, 2019 to August 15, 2020. The position required three months experience in handling livestock and paid \$13.26/hour for a 72 hour work week from 7 a.m. to 7 p.m. The Certifying Officer granted certification on September 10, 2019. (AF 43-143).

³ The Administrative File will be abbreviated as “AF” throughout this decision.

⁴ The period October 16, 2019 to May 31, 2021 is approximately 1 year, 7 months and 16 days or over 19 months.

additional worker to work on my farm temporarily during the high season. The last certified H-2A certification (H-300-19224-964492) was for a livestock farmworker which is very different in job nature, requirements, and hourly pay as compared to the current H-2A request for an Agricultural Machine Operator that we are currently requesting.” (AF 9-10).⁵ **However, Employer did not provide the CO with the requested payroll reports.** (AF-8).

On June 17, 2020, the CO issued a Final Determination letter denying the application based on Employer’s continued failure to establish its temporary need under 20 C.F.R. § 655.103(d). (AF 4-8).

In the Final Determination, the CO cited to *In the Matter of Grand View Dairy Farm*, 2009-TLC-00002 (Nov. 3, 2008), which held that ten months is a permissible threshold at which to question the temporary nature of a stated period of need. The CO noted the job opportunity in the instant case, described on ETA Form 790A, Section A Items 5 and 6 and ETA Form 790 Item 6, indicates Employer’s current dates of need are from August 1, 2020 to May 31, 2021. However, Employer’s previous application requested dates of need from October 16, 2019 through August 15, 2020. The CO concluded that Employer’s prior application, coupled with its recent filing history, indicated that its dates of need are from October 16, 2019 through May 31, 2021: a 1 year, 17 month and 16 day period of need.

The CO observed that the job description in the prior application, H-300-19224-964492, was to: “Prepare sites for seeding corn silage; prepare fertilizer; seed and plant corn silage; apply fertilizer and fungicide. Operate trucks, tractors and other farming equipment to distribute corn silage feed to animals. Maintain equipment, move cattle in stalls, prepare animals for calving, assist in delivery of offspring, clean stalls and facilities.” Conversely, the job description in the current application, H-300-2015-1614210, provides the worker would be: “Responsible for operating and performing all field operation services using agricultural equipment and technologies to till soil, harvest crops, seeding; perform routine maintenance and repairs on all machinery & equipment; execute preventive maintenance and notify Manager of current or potential mechanical or electrical issues.”

The CO discerned that, “the job duties are very similar and fail to demonstrate different job opportunities. Therefore, the employer’s filing history demonstrates that it has a need for labor which exceeds a period of 17 months (sic). **In addition, the employer failed to provide the payroll reports as requested. In this instance the employer has not met its burden in establishing its claimed seasonal need as it has not provided any documentation to support it.**” (AF 8) (emphasis added).

On June 17, 2020, Employer submitted a request to the CO for expedited administrative review of the denial before the Office of Administrative Law Judges (“OALJ”). (AF 1-2). In its request, Employer elaborates that the prior H-2A certification required three months experience in farm work and that 50% of the job was farming; 35% moving cattle in stalls, preparing animals for calving, assisting in the delivery of offspring, cleaning stalls and facilities; and 15%

⁵ The current position pays \$14.52/hour for 48 hours/week and requires three months experience in agriculture equipment and equipment maintenance. (AF 30).

of the job was devoted to operating trucks, tractors and other farming equipment but only to distribute corn silage feed to animals. In opposition, 100% of the job in the pending application is farm equipment operation, repair, and maintenance and requires three months experience in agriculture equipment and equipment maintenance. Hence, the two jobs are dissimilar in nature and requirements. Employer, however, did not address the CO's assertion that it failed to provide the requested payroll reports.

ETA then transmitted the request to OALJ, which docketed the case on June 30, 2020, the date it received the AF from the CO. The AF included a copy of Employer's request for expedited administrative review. The case was assigned to me and, on July 1, 2020, the Court issued a *Notice of Docketing and Order Setting Briefing Schedule*. In that Order, I granted the parties three business days from the date of receipt of the appeal file to file briefs. Counsel for the CO filed a brief on July 6, 2020. As of the date of this Order, I have received no such brief from Employer.

Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and issued within five business days of receipt of the ETA administrative file.

LEGAL STANDARD

The burden of proof to establish eligibility for a labor certification is on the petitioning employer. 8 U.S.C. § 1361. The presiding ALJ can either affirm, reverse, or modify the CO's determination, or remand the case to the CO for further action, and must specify the reasons for the action taken. 20 C.F.R. § 655.171(a). Although no standard of review is specified in the statute or regulations, the CO's denial of certification must be upheld unless the decision was arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016).

To qualify for the H-2A program, an employer must establish that it has a need for "agricultural services or labor to be performed on a temporary or seasonal basis." 20 C.F.R. § 655.161(a). The regulations define both temporary and seasonal. *See id.* § 655.103(d). Section 655.103(d) provides:

[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.

Id.

It is well-established that it is not the duties of the position that determine temporary need but, rather, "[i]t is the nature of the need . . . that is controlling" when determining the

temporariness of the position. *William Staley*, 2009-TLC-00060, slip op. at 4 (Aug. 28, 2009). Accordingly, to determine an employer's need for labor, the fact-finder must look at the whole situation and not narrowly focus on the specific job at issue. *Haag Farms, Inc.*, 2000-TLC-00015 (Oct. 12, 2000). The employer's application for temporary labor certification is properly denied when the "consecutive nature of the current and previous application periods in conjunction with the similarity in job requirements and duties demonstrate that Employer's need does not differ from its need for such labor during other times of the year." *Larry Ulmer*, 2015-TLC-00003, slip op. at 4 (Nov. 4, 2014).

To determine whether the need for temporary labor is temporary or seasonal, a CO may properly require an Employer to provide detailed payroll reports. *Rolling Meadow Farm, LLC*, 2012-TLC-00007 (Dec. 6, 2011). Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Company*, 2011-TLC-00109 (Jan. 7, 2011) (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof)).

DISCUSSION

Employer seeks certification for one (1) agricultural equipment operator. The CO does not dispute that the worker sought would be performing agricultural labor. Rather, the CO determined the employment was not temporary or seasonal because Employer's recent history of H-2A applications demonstrated a continuous need for laborers spanning more than a year, relying on the perceived similarity of the work to be performed. Employer takes issue with the CO's determination and contends the jobs performed by the two workers in the two applications are different.

Here, the CO requested documentation in the form of payroll reports to support Employer's explanation of seasonal or temporary need. Independent from prior applications, a CO may require an Employer to submit documentation for the current application to support the temporary or seasonal need for the requested worker and an Employer's mere contentions without such supporting documentation are generally insufficient to meet the regulatory criteria for certification. Here, Employer did not provide the requested payroll reports in response to the NOD.⁶ A denial of certification may be affirmed when an employer fails to submit payroll reports to establish the need for the requested worker. *See generally Carol Rhodes*, 2013-TLC-00041 (July 5, 2013); *Gomez Livestock, Etc., LLC*, 2011-TLC-00029, slip op. at 3 (Nov. 17, 2010).

⁶ When an employer requests an expedited review, the ALJ may only consider the record and written submissions from the parties, which may not include new evidence. 20 C.F.R. § 655.171(a). Because Employer requested expedited administrative and not de novo review, I cannot now allow Employer to supplement the record with the requested payroll reports. .

CONCLUSION

Here, Employer did not submit the summarized 2017 to 2019 payroll reports to support its statement of need, as requested in the NOD. Accordingly, it was not an abuse of the CO's discretion to deny certification because Employer failed to establish a temporary or seasonal need for the requested worker.

ORDER

It is hereby **ORDERED** that the Certifying Officer's June 17, 2020 final determination is **AFFIRMED**.

For the Board:

STEPHEN R. HENLEY
Chief Administrative Law Judge