

**Issue Date: 08 January 2020****OALJ Case No.: 2020-TLC-00022****ETA Case No.: H-300-19296-103452**

In the Matter of:

**HAGYARD DAVIDSON MCGEE ASSOCIATES, PLLC,
d/b/a HAGYARD EQUINE MEDICAL INSTITUTE,
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. 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.

SUMMARY

Employer Hagyard Davidson McGee Associates, PLLC, d/b/a Hagyard Equine Medical Institute (“Employer”), operates a horse veterinary clinic in Lexington, Kentucky. On October 30, 2019, Employer filed an application with the Office of Foreign Labor Certification requesting H-2A temporary labor certification for six stable attendants. Employer stated these workers are needed to work during the horse breeding and foaling season from January 5, 2020 through June 26, 2020. The Certifying Officer denied Employer’s application. In his Denial Letter, the Certifying Officer stated “employer’s response to the [Notice of Deficiency] did not provide sufficient explanation and documentation to support a need for additional workers under a seasonal need from January 5, 2020 to June 26, 2020. The employer has failed to establish a seasonal or temporary need as required by 20 CFR sec. 655.103(d).” After review of the administrative file¹, the court finds that the evidence submitted does establish Employer’s seasonal need for six stable attendants and REVERSES and REMANDS the Certifying Officer’s denial.

ISSUE

¹ The court received the administrative file on January 7, 2020.

The issue before the court is whether Employer established a seasonal need for six stable attendants from January 5, 2020 to June 26, 2020.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On October 30, 2019, the Office of Foreign Labor Certification received Employer's ETA Form 9142A application requesting temporary labor certification under the H-2A program for six "Stable Attendants." (AF 90, 103). Employer applied to employ these stable attendants from January 5, 2020 through June 26, 2020.² Employer requested these workers to fill a projected need for seasonal labor during the 2020 horse breeding and foaling season. (AF 33-35). The job duties for the stable attendants included working in a horse veterinary clinic, caring for horses, and cleaning barns located on the veterinarian's farms. (AF 30-31). On Employer's ETA Form 9142A application, it stated its seasonal need was for the "care & groom of horses." (AF 102-103).

On November 1, 2019, the Certifying Officer issued a Notice of Deficiency ("NOD") which stated that Employer "failed to establish a temporary need as required by 20 CFR sec. 655.103(d)." ³ (AF 75-76). Employer was required to "submit a written explanation which documents the temporary need for H-2A workers." (AF 75-76). The Certifying Officer also stated "[s]upporting 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." (AF 75-76).

On November 7, 2019, Employer filed a response to the Notice of Deficiency that included supporting documents to demonstrate its seasonal need for additional stable attendants from January 5, 2020 to June 26, 2020. (AF 26-27). These documents included:

- (1) Employer's statement of seasonal need,
- (2) Customer invoices from the 2019 season ("invoices"),
- (3) A chart with the number of horses in Hagyard's surgery barns from January to October 2019 ("surgery barns chart"),
- (4) A chart with the number of horses in Hagyard's medicine barns from January to October 2019 ("medicine barns chart"), and
- (5) A 2018 payroll chart for "barn crew."

On November 26, 2019, the Certifying Officer issued its Final Determination and Denial Letter. In this letter, the Certifying Officer found that employer "failed to establish a temporary or

² Employer also applied for six stable attendants from January 5, 2020 to September 22, 2020. This was filed in a separate H-2A application and is addressed in the court's Decision and Order in 2020-TLC-00023.

³ The Notice of Deficiency also required Employer to provide "provide a written statement describing how its application should properly be considered as agricultural labor or services as those terms are defined for the purposes of the H-2A program." (AF 75). Because this deficiency was addressed by Employer and was not raised in the Denial Letter as a ground for the application's denial, the court will not address it.

seasonal need” as required by the regulations.⁴ (AF 10). He noted that “the job duties described in employer’s application included the care of horses and barn areas. These duties are presumed to occur on a year-round basis.” (AF 9). The Certifying Officer stated that the Notice of Deficiency required Employer to provide “documentation to establish and support the employer’s temporary need for workers.” (AF 9) (Emphasis added).

Reviewing Employer’s application and documents submitted in response to the Notice of Deficiency, the Certifying Officer stated it:

Is not clear how the employer’s invoices support the employer’s seasonal or non-seasonal period as the invoices do not represent an entire year period. Further, the submitted surgery and medicine barn charts also represent a partial year. These documents do not make clear the employer’s operations from October through December and therefore, cannot support the employer’s statement.

(AF 9-10) (Emphasis added).

Reviewing Employer’s 2018 full-year payroll chart, the Certifying Officer found this did not support the Employer’s need for six Stable Attendants from January 6, 2020 through June 26, 2020. (AF 10) The Certifying Officer stated:

Specifically, the payroll does not represent more hours worked during the employer’s requested seasonal period and a decrease in hours worked during the employer’s stated non-seasonal period. For instance, the employer reports its most hours worked during its non-seasonal month of November. Further, the employer’s non-seasonal month of December charts more hours worked than its seasonal months of January through April.

(AF 10) (Emphasis added).

Based on the breakdown of the 2018 payroll staffing, the Certifying Officer stated “the chart shows the use of one to two seasonal workers every month of the year. The employer also employs 16-18 workers throughout the year. In its non-seasonal months of October, November, and December, the employer employs the most workers out of the year.” (AF 10). The Certifying Officer found that “employer’s payroll chart does not support a seasonal need but rather illustrates a permanent need for Stable Attendants.” (AF 10).

⁴ The Denial Letter is unclear on whether the Certifying Officer made a finding on temporary need, seasonal need, or both. In the “Background” section of the Denial Letter, the Certifying Officer stated Employer failed to establish a “temporary” need in its initial application and was required to provide documentation to establish “temporary” need in the Notice of Deficiency. (AF 9). However, in the section entitled “Temporary Need,” the Certifying Officer referred multiple times to Employer’s failure to establish a “seasonal” need in the application documents. The “Conclusion” section stated that Employer did not establish a “seasonal” need, and that “the employer has failed to establish a ‘seasonal or temporary need’ as required by 20 CFR sec. 655.103(d).” (AF 9-10) (Emphasis added). As the court makes a finding that Employer established seasonal need, it will not address whether temporary need was improperly considered.

On December 3, 2019, Employer appealed the Certifying Officer’s Final Determination to the Office of Administrative Law Judges. (AF 1). Employer argued that its invoices and barn charts showed “there is a major surge during the months of January through June and Hagyard requires assistance caring for the large amount of horses during the breeding season.” (AF 12). Addressing the Certifying Officer’s analysis of Employer’s 2018 payroll, Employer argued that the Certifying Officer failed to properly account for Employer’s staggered pay periods. (AF 13). Employer stated that it advised the Certifying Officer in its response to the Notice of Deficiency, that November 2019 had more hours worked than its seasonal months because there were three pay periods in November. (AF 13). Employer argued that the Certifying Officer improperly analyzed the Employer’s “Hours worked” calculation on its payroll chart. (AF 13). Employer noted that the “Hours worked” calculation on the payroll only included data from the “Hour,” “Overtime,” and “Rescue” columns. (AF 13). However, the “Total Hours” column which the Certifying Officer cited to in making his findings, included time periods not included in the actual “Hours worked” and did not reflect the Employer’s actual labor demand during its seasonal need. (AF 13).

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*, UNITED STATES DEPARTMENT 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. 20 C.F.R. § 655.121(a). The State Workforce Agency 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. 20 C.F.R. § 655.121(c). If the State Workforce Agency does not locate able, willing, and qualified workers to fill the position(s) for which the employer seeks certification, the employer may 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 Certifying Officer within the Office of Foreign Labor Certification reviews 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 Certifying Officer notifies the employer within seven calendar days. 20 C.F.R. § 655.141.

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.”⁵ 8 C.F.R. § 214.2(h)(5)(iv); 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.” 20 C.F.R. § 655.103(d).

ANALYSIS AND FINDINGS OF FACT

On November 26, 2019, the Certifying Officer denied Employer’s H-2A application on the ground that “employer’s response to the [Notice of Deficiency] did not provide sufficient explanation and documentation to support a need for additional workers under a seasonal need from January 5, 2020 to June 26, 2020. The employer has failed to establish a seasonal or temporary need as required by 20 CFR sec. 655.103(d).” The sufficiency of this denial is the focus of this court’s administrative review. The court must decide whether Employer established that the proposed employment is of a seasonal or temporary nature.

I. Did Employer Establish a Seasonal Need for Six Stable Attendants from January 5, 2020 through June 26, 2020?

Employer argued that its need for additional workers is seasonal because it is a period of increased labor tied to the horse breeding and foaling season. Employer stated that its need for labor is far above normal because, during this season, the Employer manages and cares for an increased number of horses, which requires additional labor. To support this argument and prove its seasonal need, Employer provided client invoices, a surgery barn chart, and a medicine barn chart showing the increase in horses cared for from January to July.

The Certifying Officer stated that Employer’s invoices, surgery, and medicine charts only covered a partial year, such that they “cannot support a seasonal need in [employer’s] annual operations.” Employer provided these records to show the seasonal demand of its most recent foaling season. Employer noted these records were illustrative of “the amount of work that we have during this season.” (AF 34). These records were offered to establish when Employer’s foaling season occurs and how Employer’s need for labor or services during that time of the year differs from other times of the year. These records, including the off-season month of October 2019, support Employer’s projected seasonal need in early 2020 based upon its actual need in 2019. Partial yearly records can be considered to help make a factual determination on whether Employer has carried its burden to show a seasonal or temporary need.

⁵ The court notes that the requirement that employment must be of a temporary *or* seasonal nature, is found in the 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 *and* seasonal” in the context of Department of Labor certifications. (Emphasis added).

The number of horses cared for was broken down by month on the surgery barns chart.

2019 – Horses in Surgery Barns (AF 34).

January	February	March	April	May	June	July	August	September	October
309	548	1256	1646	1698	1040	1037	670	761	653

This chart supports that the number of horses cared for by the Hagyard surgery barn rose steadily from 309 horses in January 2019 to 1698 horses in May 2019. It then declined to 670 horses in August 2019, before again rising to 761 horses in September 2019. This chart supports Employer’s statement that its seasonal need is tied to a certain time of year by an event or pattern, i.e., the breeding and foaling season of horses. 20 C.F.R. § 655.103(d). During peak season, Employer cared for more than 1600 horses in its surgery barns. This increased demand for care supports Employer’s position that its labor needs are tied to the annual pattern of horse breeding and foaling, as this season requires an increased level of veterinary care.

The medicine barns chart supports a similar seasonal increase in horses cared for, with the majority of the horses cared for during the months of March, April, and May 2019.

2019 – Horses in Medicine Barns (AF 34).

January	February	March	April	May	June	July	August	September	October
92	270	317	392	278	169	154	134	87	89

In March 2019 and April 2019, Employer cared for more than 300 horses in its medicine barns. The number of horses cared for slowly declined until it reached 87 horses in September 2019, and 89 horses in October 2019. Both barn charts show a demand curve that supports Employer’s argument that it needs additional workers during the horse breeding season. This is a seasonal need because it is tied to the time in which horses primarily foal and is not a continuous event.

Employer’s payroll records also show a seasonal need. While the Certifying Officer is correct that Employer had 16-18 barn workers employed throughout 2018, these workers worked more hours during the foaling season.

Employer’s 2018 “Barn Crew” Payroll (AF 53).

Month:	Number of Workers:	Standard Hours:	Overtime Hours:
January	18	2,376.18	393.78
February	18	2,703.34	652.37
March	17	2,623.87	767.45
April	17	2,574.04	794.80
May* ⁶	17	3,811.89	1,300.04
June	17	2,466.29	624.3
July	17	2,528.6	573.52

⁶ May 2018 and November 2018 are outlier months and have more hours worked as they included three pay periods. (AF 33). Despite this, May 2018 had significantly more hours worked than November 2018.

August	16	2,469.62	664.45
September	17	2,428.91	556.20
October	18	2,559.51	661.42
November*	18	3,800.19	874.52
December	18	2,297.01	574.25

The Certifying Officer's finding that December 2018 contained more hours worked than February, March, and April of 2018, was not supported by the evidence and facts in the record. Excluding leave and holidays, the payroll records showed that Employer's heaviest workload occurred during the peak of its foaling season, from February 2018 to May 2018. This is shown by a corresponding increase to over 3,300 hours worked per month, during this period by its barn crew. This increase in labor beyond what is normally required for Employer's ongoing operations shows that Employer's need is seasonal. It is tied to the foaling season and Employer's need to care for a larger number of horses than usual.

Based on the evidence in the record, the court finds that Employer has established its seasonal need for six stable attendants from January 5, 2020 to June 26, 2020. The Certifying Officer's denial was in error and not supported by the evidence in the record.

ORDER

It is hereby ORDERED that the Certifying Officer's denial of Employer's application for temporary labor certification is REVERSED and REMANDED to the Certifying Officer for further processing in accordance with this decision.

SO ORDERED.

DANA ROSEN
Administrative Law Judge

DR/TRL/mjw
Newport News, VA