



Issue Date: 27 January 2020

BALCA Case No.: 2020-TLC-00034
ETA Case No.: H-300-19337-175502

In the Matter of:

HOGMILE PORK, LLC,
Employer.

Before: Jerry R. DeMaio
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF EMPLOYER'S H2A APPLICATION

This case arises from Employer's request under provisions of the Immigration and Nationality Act governing temporary agricultural employment of non-immigrant works (H-2A workers) for review of the denial of its application for an H-2A temporary labor certification by a Certifying Officer ("CO") for the Employment and Training Administration ("ETA"). 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, & 1188; 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On December 4, 2019, Hogmile Pork, LLC ("Employer") filed an application for H-2A labor certification with the ETA. (AF 20-37).¹ The application sought authorization to hire two farm workers from February 1, 2020 to November 30, 2020. (AF 28). On December 9, 2019, the CO issued a Notice of Deficiency based on Employer's deficiency in proving temporary need, pursuant to 20 C.F.R. § 655.103(d). (AF 11-14). Employer responded and submitted a letter in support of its position. (AF 9). On December 31, 2019, the CO issued a Notice of Denial of the application based upon Employer's continued failure to support its temporary need. (AF 2-7). The CO noted that a previous application for H2-A labor certification was for the same number of workers, location and job duties, but opposite dates, which indicated a year-round need for workers. (AF 5-7).

On January 6, 2020, Employer requested an expedited administrative review. (AF 1). The case was assigned and the Appeal File was provided on January 17, 2020. The Court issued a Notice of Docketing and Expedited Briefing Schedule that same day. On January 22, 2020, Employer filed a brief in this matter. The CO did not file an appellate brief.

¹ Citations to the Appeal File are referred to herein as "AF" followed by the page number.

DISCUSSION

Under 20 C.F.R. § 655.103(d), temporary or seasonal nature is defined as employment that is:

tied to a certain time of the 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).

Although Employer states it has a seasonal or temporary need for additional labor, it fails to provide adequate evidence to demonstrate this seasonal need as defined under 20 C.F.R. § 655.103(d). Employer claims a temporary need from February 1, 2020 to November 30, 2020, but previously filed an application asking for a period from December 1, 2019 to August 30, 2020.² (AF 5-6, 102). This earlier application was accepted by the ETA on November 13, 2019, but was later withdrawn. (AF 58-62).

Employer argues that the earlier application with need dates of December 1, 2019 to August 30, 2020, was for a particular worker already in the United States who ended up being unable to work. Employer explains that the second application, which is at issue here, is for the "row crop portion of their operation" and not for a combination of working with livestock and row crop work, like the two requested workers in the earlier application.

The applications do not support Employer's perspective. Employer requested the same number of workers, at the same location, for the same job duties in both applications. (AF 20-31, 102-107). Furthermore, while Employer argues this application is to recruit workers for row crop operations only, instead of for a combination of row crop and livestock work, both applications contain identical job duties: "Job requires herding and grazing experience. Duties include building, repairing fences, monitoring livestock on a daily basis, feeding, hauling hay, and administering medications as well as driving & operating farm vehicles for farm use and on public roads. Must have or be able to obtain driver's license within 30 days after hire. 3 months experience & some weekends may be required." (AF 29, 104).

As the applications are essentially identical, but for the dates, Employer has requested two H2-A workers from December 1, 2019 to November 30, 2020. This time period is just shy of a full year, and therefore, is not temporary or seasonal in nature. *See In the Matter of Grandview Dairy*, 2009-TLC-00002 (2008). As Employer lists the same job duties in both applications, the Employer has failed to prove that its need is temporary or seasonal in nature.

² This earlier application has the following ETA Case Number: H-300-19280-293772.

ORDER

Because Employer failed to establish that the farm worker positions are on a seasonal or other temporary basis in accordance with 20 C.F.R. § 655.103(d), it is hereby **ORDERED** that the Certifying Officer's decision denying Employer's H-2A Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge