

U.S. Department of Labor

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
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BALCA Case No.: 2020-TLC-00129
ETA Case No.: H-300-20200-722780

In the Matter of:

JBO HARVESTING, INC.,
Employer.

Before: Jerry R. DeMaio
Administrative Law Judge

Appearances: Leon R. Sequiera, Esq.
LRS Law
Prospect, Kentucky

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DECISION AND ORDER AFFIRMING
DENIAL OF EMPLOYER'S H-2A APPLICATION

This case arises from a request by JBO Harvesting, Inc. ("JBO" or "Employer") for review by the Board of Alien Labor Certification Appeals ("BALCA") under provisions of the Immigration and Nationality Act ("INA") concerning temporary employment of non-immigrant agricultural workers ("H-2A workers"). Employer is appealing the denial of its application for an H-2A temporary labor certification by a Certifying Officer ("CO") with 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 August 10, 2020, JBO Harvesting, Inc. filed an application for H-2A labor certification with the ETA. AF 24-65.¹ The application sought authorization to hire 24 nursery workers from September 24, 2020, to June 30, 2021. AF 42. On August 17, 2020, the CO issued a Notice of Deficiency based on Employer's failure to prove seasonal need under 20 C.F.R. § 655.103(d), in addition to other reasons which were not retained upon final determination. AF

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

22-26. On August 21, 2020, Employer responded and submitted a response letter. AF 18-20. On August 28, 2020, the CO requested further documentation in a Minor Deficiency Email and on August 31, 2020, Employer submitted its response, including a response letter and a copy of 2018 to 2020, payroll summary. AF 13-17. On September 3, 2020, the CO issued a Final Determination denying the application based upon Employer's continued failure to support its seasonal need. AF 6-12.

On September 17, 2020, Employer requested a de novo hearing with BALCA under 20 C.F.R. § 655.171(b). AF 1-5. The Appeal File was uploaded on September 21, 2020. The case was assigned under section 655.61(d) for single-judge review, and on October 14, 2020, a Notice of Hearing was issued. On October 30, 2020, a formal hearing was held using Microsoft Teams, where Employer and the CO were represented by counsel. The Parties submitted post-hearing briefs on November 4, 2020.²

HEARING TESTIMONY³

A representative for Employer, Jesus Barajas ("Barajas"), and the CO, John Rotterman ("Rotterman"), testified at the de novo hearing on October 30, 2020.

A. Testimony of Jesus Barajas

Jesus Barajas testified that JBO Harvesting, Inc. has participated in the H-2A program for 18 years. Tr. 10-11. Barajas explained that JBO is a farm labor contractor and "I bring in the labor for . . . fixed-site employers as they need them." Tr. 11. His contracts overlap at times when the H-2A workers are at more than one farm at the same time. Tr. 12. He also employs approximately 12 to 13 U.S. workers, but has had a hard time finding any other U.S. workers. Tr. 12-13.

The current contract, pertaining to this application, is with Windmill Nurseries and per the regulations, JBO secured a contract with them prior to filing the H-2A application on June 8, 2020. Tr. 16-17; AF 59. JBO had two other H-2A applications pending at the time of the submission of this H-2A application. Tr. 19. Both H-300-20175-673745 and H-300-20183-688950 were both subsequently denied. Tr. 18-20; AF 32. Besides these two cases and the instant matter, Employer has not had any other H-2A denials. Tr. 20.

When Barajas filed the H-2A application for this case, he was unaware that his filing was not in compliance with Department of Labor ("DOL") regulations. Tr. 21. Barajas additionally testified that this application, and the other two denials, were no different than his past applications for H-2A workers. Tr. 21. Barajas explained that Windmill Nurseries has a domestic year-round workforce, so these workers were for "the workload, the highest, when they need the most people." Tr. 23. The workers are maintaining and growing the plants in preparation to deliver them to retail customers. Tr. 23. Barajas testified that if he is unable to provide the 24

² Employer submitted Employer's Exhibit 1 ("EX-1") with its post-hearing brief. EX-1 is a summary of AF 32, but contains no new information.

³ The Appeal File was also thoroughly reviewed and will be discussed herein as relevant.

requested H-2A workers he could be sued because he signed a contract. Tr. 24-26. Barajas noted that he “signed a contract because I was very sure that I was going to be able to bring them . . . I was sure that the Department was going to approve me because they’ve been approving me every . . . contract before that. For 18 years, the contract have been approved and approved.” Tr. 27.

Barajas testified that over the last two years he has been filing H-2A applications which cover the entire 12 months of the year. Tr. 31. He made this change because his business was growing and there was more demand. Tr. 32. He believed he was following DOL guidance and rules until he was denied. Tr. 33.

B. Testimony of John Rotterman

John Rotterman also testified at the de novo hearing. He is a CO with the DOL and has been since 2009. Tr. 37. Rotterman has a staff that reports directly to him; the system assigns cases to his staff, but if there is a novel or complicated issue, a case is elevated to him personally. Tr. 41-43.

Rotterman reviewed the application in this case. Tr. 37. He testified that the reason the application was denied was because when “aggregated with prior filings, it manifested a year-round need.” Tr. 39. 56. This denial was based on looking at JBO’s filing history and the type of work requested. Tr. 39. Rotterman explained he looked at the need of the employer of record, JBO Harvesting, and “beyond looking at the contracts to verify that the job offer is a bona-fide job offer for a recruitment, we don’t look at the need of the fixed-site [employer].” Tr. 40.

Rotterman testified that many of Employer’s past H-2A applications were certified in error because they exceeded one year when looked at in the cumulative. Tr. 45-54; AF 32. Rotterman described these certifications as an “oversight” and explained that they were not evaluated correctly. Tr. 59. The first “oversight” was when employment from September 1, 2018, to June 30, 2019 (H-300-18199-782285) was certified after employment was previously certified from July 10, 2018, to September 10, 2018 (H-300-18142-025778), as this period exceeds 10 months. Tr. 64-65; AF 32.

DISCUSSION

It is an employer’s burden to show that certification is appropriate. 20 C.F.R. § 655.161(a). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361. Under 20 C.F.R. § 655.103(d), temporary or seasonal nature is defined as follows:

[E]mployment is of a seasonal nature where it 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). Here, although JBO states that it has a seasonal and temporary need for additional labor need from September 24, 2020, to June 30, 2021 (AF 42), it fails to provide adequate evidence to demonstrate this seasonal need as defined under 20 C.F.R. § 655.103(d).

JBO argues primarily that it relied on the longstanding approval of its H-2A applications, and that the ETA has essentially changed its interpretation of the regulations to deny its H-2A applications and that this change in interpretation has resulted in harm to JBO. *See generally* Er. Brief. Conversely, the ETA argues that, JBO simply failed to establish a seasonal need, and therefore, there is no legal basis to require the CO to accept an application that does not comply with the legal requirements, regardless of whether a CO may have previously accepted similar applications in error. *See generally* SOL Brief.

JBO has, in fact, filed many other requests for certification and, as noted in the hearing testimony, was first denied in July 2020, after a long history of certifications dating back several years. AF 32. The CO in this case, testified that these overlapping applications, certified or not, constituted a year round need and any approvals were made in error. Tr. Tr. 45-54, 59.

The long string of approved applications, followed by the denial of three applications that were essentially identical to the dozen-or-so previously approved applications is, admittedly, troubling, and the Court is sympathetic to JBO on this point. However, the “fact that the CO may have approved similar applications in the past is not grounds for reversal of the denial.” *ATP Agri-Services*, 2019-TLC-00050, slip op. at 9 (May 17, 2019); *Wickstrum Harvesting*, 2018-TLC-00018, slip op. at 8 (May 3, 2018) (finding that the certification of prior applications “is irrelevant to the present proceeding”); *G.H. Daniels III & Assocs.*, 2012-TLN-00037, slip op. at 5 (June 18, 2012) (“[T]he fact that ETA may have let deficiencies slip through in the past should not stop the CO denying certification on a legally sufficient basis.”). Essentially, we must look at the current denial on its own, without regard to the past certifications.

In its brief, JBO references *Everglades Harvesting & Hauling*, No. 19-3291, (D.D.C. Dec. 16, 2019), where there was a change in DOL standards and cases where the new standard was applied without notice were remanded for reevaluation. *Everglades Harvesting* differs from the case at bar because no DOL standard or interpretation has been changed. The standard for seasonal or temporary need has been the same since 2018.

In looking at the current application on its own merits, then, the Court finds that it was properly denied based on a failure to prove seasonal need. Barajas testified that JBO is a farm labor contractor, where he brings laborers to fixed-site employers. Tr. 11. His contracts overlap at times when the H-2A workers are at more than one farm simultaneously. Tr. 12. Through reviewing JBO’s previous applications, it is clear that there is a year round need. Although this specific application does not exceed 10 months, when looking at it in connection to other applications, JBO’s need is clearly year-round, and not a seasonal one. AF 32. The fact-finder must determine “if the *employer’s needs* are seasonal, not whether the particular job at issue is

seasonal.” *Ag Labor LLC*, 2020-TLC-00107 & -108, slip op. at 4 (Aug. 31, 2020) (emphasis added) (citing *Pleasantville Farms LLC*, 2015-TLC-00053, slip op. at 3 (June 8, 2015)).

The CO asked for an explanation as to how Employer’s need was seasonal and requested payroll records. AF 25-26. JBO responded and explained: “The temporary need requested date for the September 24th, 2020 date is because Windmill Nurseries, Inc. has already accepted many orders to be shipped out in a timely manner to Home Depot, Walmart, and Lowes and their permanent staff cannot fill the backlog of these orders in addition to their daily duties.” AF 19. Employer’s explanation does not ground this application for H-2A workers to a seasonal need. Instead, Employer relates its need to contracts at Home Depot, Walmart, and Lowes. AF 19. This is insufficient.

Employer also provided payroll summaries for 2018, 2019, and January and August 2020. AF 16. However they, even independently, fail to establish a seasonal need. In 2018, JBO had H-2A workers every month except July and August. AF 16. For the entirety of 2019, until August 2020, JBO had H-2A workers on the payroll. AF 16. The payroll records support a year-round need. Taken as a whole, the record shows that Employer has failed to establish a seasonal need and the CO correctly denied the application.

In sum, the combined need requested across all of its filings show that Employer does not have a seasonal need, even if its contracts might individually show some seasonality. Given the filings as a whole, the Court findings as to a lack of established seasonal need, and Employer’s arguments, the Court affirms the decision of the CO.

ORDER

Because Employer failed to establish that the nursery 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

Boston, Massachusetts