

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 04 December 2019

OALJ Case No.: 2020-TLC-00013
ETA Case No.: H-300-19253-367950

In the Matter of

MAPLEVIEW DAIRY, LLC,
Employer

Appearance: Leonard J. D'Arrigo, Esquire
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For the Employer

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U.S. Department of Labor
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For the Certifying Officer

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the U.S. Department of Labor (DOL).¹ Such applications are reviewed by a Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration (ETA).

On November 12, 2019, Mapleview Dairy (“the Employer”) filed a request for expedited administrative review of the Final Determination issued by the CO in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on November 26, 2019. The CO thereafter submitted a brief on December 2, 2019. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

¹ 8 C.F.R. § 214.2(h)(6)(iii).

STATEMENT OF THE CASE

The Administrative File

On September 19, 2019, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (“Application”). (AF 156). The Employer’s Application requested certification for four Winter Grounds/Maintenance Workers for the period beginning November 30, 2019, and ending March 31, 2020, and the workers would fill a seasonal need. (AF 156). For experience requirements, the Employer stated that an applicant must have a minimum of three months experience in performing work related to agricultural equipment operations. (AF 159). In addition, the Employer stated that the applicant must be capable of performing physical tasks and willing to work in all weather conditions (AF 159). The Employer listed the following as tasks of the job; perform snow removal from pathways/roadways and roofs de-ice and repair manure/water pipes and bunker silos, repair/maintain equipment (plows, skidsteers, tractors, feeder trucks, parlor equipment). (AF 159).

On September 24, 2019, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”). (AF 146). The CO noted that the Employer had previously filed an H-2A application on January 30, 2019, for four Farmworkers from April 11, 2019 to November 30, 2019. (AF 148). The CO noted that “[t]he applications also request the same number of workers, which suggests continuity of the same need for ongoing operations and not labor levels far above as is required by the claimed seasonal need.” (AF 149) When stating what modification would be required, the CO stated, “[g]iven the absence of special skills or requirements present in this filing, and the overlapping duties [of the two applications], the employer must explain why this filing should be viewed as a separate occupation and representative of a distinct need.” (AF 149). Further, the CO requested summarized payroll reports from three calendar years of prior work performed by Farmworkers/General Winter Maintenance Workers. (AF 149).

On October 3, 2019, the Employer filed its response to the Notice of Deficiency. (AF 110). The Employer argued that in order to determine whether a position is temporary, an analysis should be done based on each separate position and not by looking at the broader need of the Employer. (AF 111). The Employer asserted “that the question of whether an employer’s need is temporary/seasonal is position-based under the current regulations.” (*Id.*, emphasis in original) The Employer argued that the position of Farmworker and Winter Grounds/Maintenance Worker are both distinct. (AF 112). The Employer elaborated by providing the different job postings for each position, which showed different experience and lifting requirements. The Employer also disagreed with “CNPC’s inclusion of equipment maintenance duties within the Farmworker (Crop) position as there was not mention of equipment maintenance in the job description. Mapleview Dairy has an established maintenance program where they repair and maintain equipment at the growing season during the Winter months when much of the equipment is not in use.” (AF 113-114) Further, the Employer cited to a prior ALJ decision to support its argument that positions must be considered independent of

the general need of the Employer.² (AF 111, 112). The Employer also complied with the CO's request for a summary of relevant payroll reports. (AF 117-120).

On October 31, 2019, the CO denied the Employer's application. (AF 101 - 106). The CO stated that the Application was denied because, "[t]he job opportunity ... coupled with the employer's recent filing history, indicates the employer's dates of need are from April 11, 2019 through March 31, 2020; a need lasting 11 months and 20 days." The CO further stated that "[b]ased on the employer's requested dates of need and its previously established dates of need, the employer has not established how this job opportunity is seasonal, rather than permanent and full-time, in nature." (AF 103). Specifically, the CO found that because the position of Farmworker and Winter Grounds/Maintenance Worker contained overlapping duties related to general year round operations common to a dairy farm, the Employer was essentially extending its initial application from April 11, 2019, to March 31, 2020. Significantly, the CO noted that "the requirements for the position at issue here do not demonstrate a substantive difference in required skills and would draw from the same applicant pool when recruiting workers to fill these roles. The fact that the same workers, with essentially the same skills sets could do both of these jobs further demonstrates the employer has a year round need for general farmworkers." (AF 106). The CO noted that the Employer's response to the NOD focused on the positions described in its two applications as distinct because they occur at different times of the year and require different equipment. (AF 106). The CO further noted that the Employer's payroll records showed that Employer maintains between two and six permanent "staffers on a year round bases, independent of job title, to perform its farmworkers tasks. While the payroll shows the employer has not employed temporary farmworkers in the winter months, it did demonstrate, through its permanent staffing levels, that the farm requires year round farmworker maintenance." AF (106). Ultimately, based on his review, the CO determined that the "Employer did not establish a temporary or seasonal need as required by" regulation and denied its application.

On November 12, 2019, the Employer requested an expedited administrative review of this matter. (AF 1). The Employer maintained that the job responsibilities of each position are not identical because they are required at different times of the year based on the Employer's needs, involve different duties, and have distinct Standard Occupational Classification ("SOC") codes. The Employer again referenced the two job postings to show that there are separate and distinct needs being filled by each position. (AF 3). The Employer also argues that their case is similar to the employer in *In re Mammoser Farms*, where an ALJ found that Farmworker and Winter Grounds/Maintenance Worker were distinct positions that reflected a temporary seasonal need. (AF 4). Finally, the Employer argued that BALCA has found that year-round employers can still qualify for temporary seasonal positions because of market conditions.³

APPLICABLE LAW

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only render a decision "on the basis of the

² *In re Mammoser Farms, Inc.*, 2017-TLC-00001 (Nov. 22, 2016).

³ *In re WMF. Puckett, Inc.* 2020-TLC-00002 (Oct. 28, 2019); *In re Hillenmayer Landscape Services, LLC*, 2019-TLC-00047 (May 3, 2019); *In re Mock Anthony Mock*, 2015-TLC-00008 (Dec. 30, 2014)

written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae.”⁴ A Certifying Officer’s denial of certification must be upheld unless shown by the employer to be arbitrary or capricious, or otherwise not in compliance with law. *J and V Farms, LLC*, 2016-TLC-00022, at 3 (March 4, 2016) (H-2A); *Brook Ledge, Inc.*, 2016-TLN-00033, at 5 (May 10, 2016) (“BALCA reviews decisions under an arbitrary and capricious standard.”) (H-2B). Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO.

As an initial matter, it is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *See, e.g., Garber Farms*, 2001-TLC-00006 (ALJ May 31, 2001) *citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures).

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 only issue before me is whether the Employer has established a seasonal need for the positions requested in its application. The Department’s H-2A regulations provide:

Definition of a temporary or seasonal nature. For purposes of this subpart, 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.

8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d). In 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. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011). Accordingly, I must consider whether the Employer’s need for labor or services during its specified “season” differs from its need for such labor or services during other times of the year.

DISCUSSION

In the NOD, the Employer had to demonstrate that the position of Farmworker and Winter Grounds/Maintenance Worker were distinct and separate positions. The Employer was also asked to provide summaries of payroll information. The Employer provided the necessary documentation and argued that the positions applied for are distinct because the duties to be performed are different and they occur in different seasons. In the end, the CO found that the difference in duties between the two positions was minimal, and therefore, the Employer was attempting to staff its farm with temporary workers when it had a permanent need.

⁴ Section 655.171 affords ALJs the ability to “either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action.”

I find that the Employer's argument that the position of Winter Grounds/Maintenance Worker is separate and distinct from that of a Farmworker is unpersuasive. It has already been stated that the proper inquiry is whether or not the need for labor or services differs from other times of the year. Looking to the facts at hand, it appears that the Employer is attempting to hire the same number of unskilled laborers for year round labor. Both of the job descriptions would place the worker under the umbrella of unskilled labor pursuant to the Job Zone classification system.⁵ The CO in their brief noted that the Employer was requesting the same number of individuals to work at the same location with essentially the same job duties and qualifications. *See Certifying Officer's brief* at 6.

The Employer heavily relies on the decision of *In re Mammoser Farms* to establish that the two positions are distinct. However, in that case the positions applied for were viewed independently, and the need for services at other times of the year was not considered. Additionally, the ALJ in that decision relied in part on *Rolling Meadows Farm, 2012-TLC-00007*. The ALJ noted that an important distinction was whether the requested labor was an attempt to supplement a current permanent workforce.⁶ Here, the Employer provided information that over the past three years, they have maintained a permanent workforce varying from three to six individuals. If they were permitted to bring on four additional unskilled laborers, they would essentially be doubling the workforce as opposed to supplementing it, which is distinguishable from the *Mammoser Farms* case where 10 workers were to be added to a permanent staff of 35.⁷

The Employer has not met its burden of showing that it is entitled to temporary labor certification for its requested Winter Grounds/Maintenance Workers. After reviewing the evidence considered by the CO and all legal arguments, I agree that the Employer has not provided sufficient information to overcome the deficiencies listed in the NOD. Further, I find that the Employer has not demonstrated that the decision of the CO was arbitrary or capricious. Accordingly, for the foregoing reasons, I find that the Denial issued by the CO was proper. Therefore, the denial is **AFFIRMED**.

ORDER

Wherefore, the Denial of Temporary Labor Certification issued by the Certifying Officer in this matter is **AFFIRMED**.

SO ORDERED.

For the Board:

⁵ <https://www.onetonline.org/help/online/zones>

⁶ *In re Mammoser Farms, Inc.*, at 8 n.3.

⁷ *Id.*

CARRIE BLAND
Administrative Law Judge

Washington, D.C.