

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 July 2020

OALJ Case No.: 2020-TLC-00071

ETA Case No.: H-300-20034-293316

In the Matter of

PINAL FEEDING CO.,
Employer.

Appearance: Lynette Wills.
Chicago National Processing Center

Before: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act¹ and its implementing regulations.² 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.

The standard of review in H-2A expedited administrative review cases is limited. The CO's decision must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."³ When an employer requests administrative review under 20 C.F.R. § 655.171(a), the Administrative Law Judge may consider only the written record and any written submissions from the parties—and may not consider new evidence. The burden of proof to establish eligibility for a labor certification is on the petitioning employer.⁴

On 5 May 20 Employer filed a request for expedited administrative review of the Final Determination issued by the Certifying Officer (CO). I received the Administrative File (AF) from the Employment and Training Administration (ETA) on 20 May 20. The same day I issued a Notice of Docketing and Prehearing Order allowing both sides to file a brief in the matter. Neither Employer nor CO filed a brief. This decision and order is based on the Administrative File and Employer's request for review.

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188.

² 20 C.F.R. Part 655, Subpart B.

³ *Rosalba Gonzales*, 2017-TLC-00028 (Oct. 11, 2017); *J & V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2016).

⁴ 8 U.S.C. § 1361; *Salt Wells Cattle Co., LLC*, 2011-TLC-00185 (Feb. 8, 2011).

STATEMENT OF THE CASE

The Administrative File

On 23 Mar 20 Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (Application).⁵ Employer's Application requested certification for 4 Ranch Hands beginning 7 May 20 and ending 31 Jan 21.⁶

On 30 Mar 20 the CO issued a Notice of Deficiency⁷ informing Employer that its Application and/or job order failed to meet the criteria for acceptance for many reasons, all of which were satisfactorily addressed except for Employer's failure to show the job opportunity qualified as temporary need.

Because the employer failed to establish a temporary need as required by 20 CFR sec. 655.103(d), it is now required to provide supporting evidence that a temporary need exists. The employer must submit a written explanation which documents the temporary need for H-2A workers.

Supporting 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. The employer is required to submit summarized payroll reports for a minimum of one previous calendar year (2019) for Agriculture Equipment Operator. 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. [Emphasis in original.]

On 4 Apr 20 Employer responded, providing monthly payroll reports for each month in 2019⁸ and the following explanation: "The American labor force is not available to provide the required labor. We followed all requirements outlined in the regulations including advertising and physically posting the job advertisement and did not receive applications from qualified American workers."

On 14 Apr 20, the CO sent an email to Employer, requesting further information or documentation in regards to other identified deficiencies.

⁵ AF 58-76.

⁶ AF 66.

⁷ AF 43-51.

⁸ AF 16-42. The payroll reports did not identify separately any permanent and temporary employees, as requested, not did it provide an explanation why this requirement was not met.

On 20 Apr 20 Employer responded with satisfactory responses to the other identified deficiencies.

On 28 Apr 20, the CO issued a denial letter citing Employer's failure to establish a temporary need as required by 20 C.F.R. § 655.103(d).

The employer's NOD response states: "The American labor force is not available to provide the required labor. We followed all requirements outlined in the regulations including advertising and physically posting the job advertisement and did not receive applications from qualified American workers."

Though the employer indicated a need for extra help due to a lack of available domestic labor, the employer did not explain why its job opportunity is seasonal or temporary.

In addition, the employer was asked to provide supporting evidence in the form of summarized payroll reports for a minimum of one previous calendar year (2019) for Ranch Hand to substantiate the employer's temporary need for H-2A workers. These payroll reports were to 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. The submitted payroll records were not separated by permanent and temporary workers as requested.

Furthermore, the submitted documents show a year round need. The pay periods for the off-season months (February – March) show more workers than the employer's stated temporary peak season. (September – November). Therefore, the submitted payroll records indicate year round need.

Pay Period	Number of Workers
December (12/17/2018 to 01/13/2019)	11
January (01/14/2019 to 02/10/2019)	10
February (02/11/2019 to 03/24/2019)	10
March (03/25/2019 to 04/21/2019)	10
April (04/22/2019 to 05/19/2019)	10
May (05/20/2019 to 06/16/2019)	10
June (06/17/2019 to 07/14/2019)	13
July (07/15/2019 to 08/25/2019)	12
August (08/26/2019 to 09/30/2019)	10
September (09/23/2019 to 10/20/2019)	9
October (10/21/2019 to 11/17/2019)	7
November (11/18/2019 to 12/31/2019)	9

The employer provided payroll documentation clearly suggests that the job duties described in the ETA Form 790A may be performed year-round. The employer's

application and its response to the NOD letter presents evidence of a year round need for Farmworkers, Farm, Ranch, and Aquacultural Animals. Therefore, the employer has failed to demonstrate a temporary or seasonal need for Ranch Hands from May 07, 2020 through January 31, 2021.

Employer's Request for Administrative Review

On 5 May 20 Employer submitted a Notice of Appeal to the OALJ, arguing that

Specifically, the denial was premised on the employer's alleged failure to identify the seasonal need for H-2A workers. The original application set forth an explanation for the seasonal need, specifically that the ranching and feeding work experience ebbs and flows throughout the year. Notably, neither the Notice of Intent to Deny nor the two subsequent rounds of requests for further information received from the Department of Labor identified any shortcoming of Pinal's explanation of the seasonality requirement. Had any of these inquiries identified this as an area of concern, Pinal would have addressed it immediately.

The Notice of Denial also noted that the payroll records do not divide workers between permanent and temporary. This is because Pinal has never employed seasonal (temporary) workers and was specifically seeking to use the H-2A program to cover this seasonal need as opposed to overtaxing its existing year-round staff with the extra duties.

Law

In accordance with 20 C.F.R. § 655.103(d), the job opportunity must be on a seasonal or other temporary basis. Seasonal or temporary is defined as “employment [that] 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.”

Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than in other months of the year.⁹

⁹ *Lodoen Cattle Company*, 2011-TLC-00109 (citing *Carlos Uy III*, 1997-INA-00304 (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 was put on notice that temporary need was one of the deficiencies the CO was considering from the initial Notice of Deficiency. Employer's response failed to provide any evidence that it needs more workers in certain months than in other months of the year.

It is employer's burden to establish eligibility for labor certification. From the information provided to the CO, I cannot find the denial decision to be arbitrary, capricious, or otherwise not in accordance with law. I AFFIRM the CO's denial of the Application for 4 Ranch Hands.

PATRICK M. ROSENOW
Acting District Chief Administrative Law Judge

Covington, Louisiana