



Issue Date: 03 March 2020

OALJ Case No.: 2020-TLC-00041

ETA Case No.: H-300-20013-248816

In the Matter of

SAMUELS FARM,
Employer.

Before: Monica Markley
Administrative Law Judge

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) (the Act), and the implementing regulations at 20 C.F.R. Part 655, Subpart B (H-2A Temporary Labor Certification). By letter received on February 21, 2020, Samuels Farm (Employer) requested expedited administrative review of the Certifying Officer's (CO) denial in the above-captioned temporary agricultural labor certification matter. (AF¹ 2-6). I issued a briefing schedule that permitted the parties to file briefs by 5:00 p.m. within two days of receipt of the Administrative File. Employer filed a letter with three enclosures on March 2, 2020; the CO did not file a brief. In administrative review cases, the administrative law judge must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, after due consideration of the written record and written submissions 20 C.F.R. § 655.171(a).

BACKGROUND

The Employer, Mona Samuels doing business as Samuels Farm, operates a Poultry Breeder Egg Farm in Arkansas. (AF 2). The farm receives chickens from Foster Farms on a cyclical basis. Employer owns two poultry houses, and Foster Farms contracts with Employer (and other similar farms) to take care of a flock of chickens for a period of time while the chickens lay eggs. Foster Farms pays for the fertile hatch eggs produced by the chickens, and when egg production wanes, the company takes back the chickens. Ms. Samuels is the only full-time employee at Samuels Farm. Samuels Farm receives chickens when they are approximately 20-21 weeks of age, and the chickens start producing eggs at 23 weeks of age, "at a dramatically

¹ Citations to the Administrative File will be abbreviated AF followed by the page number.

increasing rate.”² During the first few weeks of egg production, Ms. Samuels trains the chickens to lay the eggs in the nests, which requires her to walk through the poultry houses several times a day. Foster Farms requires the eggs it purchases to be a certain size, so the eggs produced by the chickens must be weighed and sorted until they are a uniform size, which takes about three weeks to reach. The chickens reach peak production by 28 weeks of age, and will stay at peak for about four to six weeks, after which they will gradually decrease production of eggs. The company decides when it will deliver chickens and when it will take them back; however, each flock of chickens is typically at Samuels Farm for approximately 9-10 months.

During peak egg production, Ms. Samuels cannot meet the work demands of the farm alone. She first applied for temporary labor certification for two Grader/Sorter positions in March 2019. She listed job duties to include “gather, sort and pack eggs from a conveyor belt” and “walk inside several times a day to pick up floor eggs, dead chickens, and check for repairs if needed,” and listed dates of need of April 25, 2019 through February 25, 2020. (AF 212-14). In processing that application, the CO issued a notice of deficiency that identified, among other things, an insufficient explanation of why the job opportunity was temporary. (AF 201-03). The CO noted the job duties including gathering and collecting eggs, and stated: “These duties are presumed to occur on a year-round basis.” (AF 203). The CO requested documentation to support Employer’s temporary need. Employer responded with an explanation of her business, stating: “I have chickens for 45 weeks at a time; 42-43 of those weeks will be in egg production. When I don’t have chickens and when they are not in egg production, I am the only full time worker.... The time in between contract flocks of chickens varies, but the average is usually 7-8 weeks, but it can be longer than that. The first 2-3 weeks of the flock I do all the work myself.... The need for temporary workers starts when the chickens start laying eggs.... Since the time varies in between flocks and length of the contract I have a seasonal temporary need for workers at different times of the year.” (AF 194). Employer also submitted an Egg Production Worksheet showing daily egg production numbers from April 3, 2017 through January 29, 2018. Employer’s application was accepted for processing (AF 113), and ultimately certified for two Graders and Sorters. (AF 82).

On January 27, 2020, Employer filed a second application for temporary labor certification. Employer again sought two Farmworkers to gather, sort, and pack eggs. (AF 63-79). Employer provided a very similar statement of temporary need, again explaining that she receives chickens from Foster Farms that she has for 45-48 weeks at a time, during which the chickens will be in egg production for 42-45 weeks. (AF 79). Employer stated that the time in

² Employer provided the following example:

23 weeks of age = total eggs 12 per day
25 weeks of age = total eggs 2538 per day
28 weeks of age = total eggs 17,345 per day
32 weeks of age = total eggs 21,468 per day
36 weeks of age = total eggs 18,521 per day
[egg production gradually decreased to about 16,00 per day through 48 weeks of age, then to 10,873 per day by 63 weeks of age]
65 weeks of age = total eggs 8345 per day

Employer stated the total egg production for a flock over its time at Samuels Farm is approximately 4 million eggs. The two poultry houses at Samuels Farm house 12,000 hens and 1,100 roosters.

between contract flocks varies, but the average is 7-8 weeks. Employer performs all of the work for the first 2-3 weeks of the flock. Employer again stated: Since the time varies in between flocks and length of the contract I have a seasonal temporary need for workers at different times of the year.” (AF 79).

The CO issued a Notice of Deficiency on February 3, 2020. (AF 55). The NOD stated that the job opportunity, “coupled with the employer’s recent filing history, indicates the employer’s dates of need are from April 25, 2019 – January 25, 2021; a one year, 9 month period of need.” (AF 57). That is, the CO stated that the dates of need from Employer’s first (certified) application—April 25, 2019 through February 25, 2020—combined with the dates of need stated in the instant application—March 25, 2020 through January 25, 2021—failed to demonstrate that employer’s need was temporary in nature rather than permanent and full-time. The CO stated that the “previous application was accepted with the impression that dates of need (April-February) would be adhered to moving forward.” (AF 57). The CO stated that “the new dates of need requested show a continuous, permanent need for workers.” (AF 57). The CO required Employer to provide a detailed explanation as to why the job opportunity is seasonal or temporary rather than permanent in nature. (AF 57).

Employer filed a response to the Notice of Deficiency on February 4, 2020. (AF 52-53). Employer stated that her “need for temporary workers is for 9-10 months at a time at different times of the year.” (AF 52). Employer explained that the “chicken flock dates vary because I may only keep them until they are 58 weeks old instead of 65 weeks old. The company decides when I get chickens and when they leave.” (AF 52). The time in between flocks also varies. Employer provided the start and end dates for her last 10 flocks. The dates demonstrated that the flocks remained with Employer for approximately 10 months from 2011 to mid-2015, and had remained with Employer for approximately 9 months from mid-2015 through January 2019. The time in between flocks ranged from 26 to 42 days from 2011 through mid-2015, and from 58 days to three months from mid-2015 through the present.

With regard to her current flock (for which temporary labor certification had been granted), she explained that the chickens would be leaving soon, possibly a couple of weeks before the February 25, 2020 end date she had listed on her prior application, according to Foster Farms. She further stated that “the company has told me that I may be out less than 5 weeks,” if new houses being built by other farms were not ready. Employer explained that the time in between flocks was typically longer, as demonstrated by her last 10 flock dates, and “[i]f the new houses are ready then I won’t get chickens until the middle of April.” However, based on the company’s suggestion that she may receive her next flock sooner than usual, she requested a start date of March 25, 2020 for this application.

On February 14, 2020, the CO issued a Denial letter. The Denial letter is not included in the Administrative File compiled and submitted by the CO in this matter. After receiving the Administrative File, Employer submitted a copy of the Denial letter to this tribunal with her March 2, 2020 submission.

The Denial letter explained that Employer’s application for temporary labor certification had been denied because Employer “did not sufficiently address the Temporary Need

deficiency.” The Denial letter recounted the language of the Notice of Deficiency and Employer’s response, and stated: The employer provided dates of need for the previous seasons’ operations to explain the current requested dates of need. However, these dates provided establishes [sic] that the duties are permanent and year round. The need is not tied to a specific time of year by a certain event or pattern. Therefore, the employer has not shown there is a separate and distinct season.” In conclusion, the CO stated “[t]he employer’s filing history showed a year round need.” Because the employer did not establish a temporary need, the application was denied.

Employer timely requested expedited administrative review. (AF 2-6). Employer argued she had a temporary need for workers, not a permanent need, and the H-2A program does not require that the temporary need be for the exact same months as the previous application. Employer reiterated that her operations create a temporary need for 9-10 months of the year, during egg production, and that she does not have a need for additional workers during the 6-12 weeks in between flocks or during the first 2-3 weeks with a new flock. Employer stated that her requested dates of need in both applications reflected her best estimate of when peak egg production would occur, as it is up to Foster Farms to decide when she receives a flock and when the flock leaves her farm. Employer asserted a peak load need for temporary workers during egg production periods, and requested approval of her application.

DISCUSSION

The critical issue in this administrative review is whether the Employer established a temporary or seasonal need for H-2A workers. An H-2A worker must “perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.” 20 C.F.R. § 655.103(b). Federal regulations define seasonal and temporary work:

[E]mployment 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).

The CO denied Employer’s application after concluding that Employer had not shown that the job opportunity is seasonal or temporary rather than permanent in nature. The CO reasoned that Employer had not “adhered to” the dates of need of April—February, and that the new dates of need, combined with the dates of need in the previous application, established “a continuous, permanent need for workers.” (AF 57; Denial letter (the dates provided establish “that the duties are permanent and year round”). Both premises are flawed.

First, Employer never represented that her need would always be from April through February. On the contrary, in Employer’s first application for labor certification, Employer explained that each flock is with her for approximately 45 weeks; that she requires additional

labor for only 42-43 of those weeks; that the time in between flocks varies but is usually 7-8 weeks; and that Foster Farms decides when she gets a flock, when it leaves, and when the next flock arrives. Based on this operation schedule, Employer stated: “Since the time varies in between flocks and length of the contract I have a seasonal temporary need for workers *at different times of the year.*” (AF 194 (emphasis added)). Thus, there is no basis in the record to support the CO’s statement that the previous application created the impression “that dates of need (April-February) would be adhered to moving forward.”

When Employer’s dates of need shifted slightly in her second application (March-January), she explained why: Foster Farms informed her it would likely take back the current flock a couple of weeks early, and it would likely bring the next flock significantly earlier³ than anticipated because other poultry houses weren’t ready yet. Employer provided a complete explanation of the adjustment of her dates of need, which did not conflict with the representations made in the previous application. In fact, Employer explanation of her business operations has been consistent throughout all her filings.

Second, Employer’s applications and her filings in support of those applications do not demonstrate a year-round need for Graders/Sorters. The record shows there is always a period of time between flocks, usually lasting two months or more, when there is no need for Graders/Sorters of eggs. Additionally, Employer consistently explained that she performs all of the labor for the first two to three weeks with a new flock, when egg production numbers are low and she is training the chickens to lay eggs in their nests. Taken together, there is a two and a half to three month period in every cycle in which the need for this job opportunity does not exist. There is no support in the record for concluding there is a year-round need for this job opportunity. Rather, as Employer stated in her application, the need exists for about 9 months of each flock’s stay at the farm, with two to three months in between each period of need.

As Employer has demonstrated that her need for Graders/Sorters lasts approximately 9 months, followed by approximately 2-3 months when there is no need for this position, Employer has demonstrated a temporary need that accords with the H-2A program requirements. Consequently, the CO erred in determining that Employer had not demonstrated a temporary need and denying the application on that basis. The CO’s denial of the application for temporary labor certification will be reversed.

³ Foster Farms had not provided a new flock within only 5 weeks since 2014. Instead, for the last three years, the time in between flocks had been two to three months. (AF 52).

ORDER

IT IS HEREBY ORDERED that the Certifying Officer's Denial of the Application for H-2A Labor Certification in H-300-20013-248816 is **REVERSED**, and this matter is **REMANDED** to the CO to issue a NOTICE OF ACCEPTANCE and for further processing.

MONICA MARKLEY
Administrative Law Judge