



Issue Date: 06 January 2020

BALCA Case No.: 2020-TLC-00024
ETA Case No.: H-300-19296-105262

In the Matter of:

SOUTHEASTERN GROWERS, INC.,
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 for review under provisions of the Immigration and Nationality Act government temporary agricultural employment of non-immigrant works (H-2A workers) 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"). *See* 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 November 7, 2019, Southeastern Growers, Inc. ("Employer") filed an application for H-2A labor certification with the ETA. (AF 35-57).¹ The application sought authorization to hire 32 seasonal nursery workers from January 6, 2020 to October 31, 2020. (AF 43.) On November 14, 2019, the CO issued a Notice of Deficiency based on Employer's deficiency in proving seasonal need, pursuant to 20 C.F.R. § 655.103(d). (AF 28-29). Employer responded and submitted payroll records, an explanation of need, average temperatures for Watkinsville, GA, sunrise and sunset times in Watkinsville, GA and letters of support. (AF 3-24). On December 3, 2019, the CO issued a Notice of Denial of the application based upon Employer's continued failure to support its seasonal need. (AF 4-10). The CO based this denial on the temperatures experienced in the area of intended employment and unsupportive payroll records. (AF 7-9.)

On December 4, 2019, Employer requested an expedited administrative review. (AF 1-3). This case was assigned to me and on December 23, 2019, the Court issued a Notice of Docketing and Expedited Briefing Schedule, after the Appeal File was uploaded on December

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

20, 2019. On December 30, 2019, Employer filed a brief (“Emp. Brief”) in this matter. The CO did not file an appellate brief.

DISCUSSION

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

[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).

Although Employer states that it has a seasonal and 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 seasonal need from January 6, 2019 to October 31, 2019. (AF 43), yet fails to demonstrate a seasonal need for these months, which include all but November and December, based on its submission of payroll records. (AF 17-18).

Employer argues that the CO failed to properly consider the payroll records provided by Employer. (Er. Brief at 7.) However, Employer’s requested seasonal period is not established by the 2017 payroll records. The records are from 2017, when no temporary workers were used. They show between 44 and 51 workers over the year, with the highest earning months to be June and December. (AF 17), and show the lowest earnings in January, February, May and October, which are all during Employer’s requested seasonal period. Furthermore, December, a supposed non-seasonal month, is one of the highest earning months of 2017. This goes directly against the claim of Employer. The 2018 payroll records likewise do not support Employer’s stated seasonal need. In 2018, Employer used 15 temporary workers in August, September and October, yet November, during the non-seasonal period without temporary workers, was the highest earning month. (AF 17). Additionally, the lowest earning months were the seasonal months of January and May. (AF 17). The payroll records are incomplete for 2019, as they do not include the non-seasonal month of December. (AF 18). The 2019 payroll records are, thus, unhelpful, as they cannot be evaluated to compare season to non-season. In sum, the payroll records do not establish the seasonal need claimed by Employer under 20 C.F.R. § 655.103(d).

The CO also found that the local temperatures did not support seasonality and found the varying dates problematic (specifically, from January 6, 2020 to October 31, 2020, in this application and January 1, 2019 to October 31, 2019, in a prior application). (AF 7-8). Employer argues that local temperatures are not exclusively determinative of seasonality and that the requested change in Employer’s dates of need is de minimis and irrespective of seasonality. (Er. Brief at 5, 9). While, these discrepancies are problematic, the payroll records are clearly unsupportive of a seasonal need, and the additional arguments need not be addressed.

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