



**Issue Date: 13 July 2020**

BALCA CASE NO.: 2020-TLC-00087

ETA CASE NO.: C-300-20122-534310

*In the Matter of:*

**W.S.C., LLC,**  
Employer.

### **DECISION AND ORDER AFFIRMING THE DECISION OF THE CERTIFYING OFFICER**

This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

W.S.C., LLC (“WSC” or “Employer”) applied for authorization to hire fifty temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification denied the application. Accordingly, WSC appealed the decision and requested review by an administrative law judge (“ALJ”). The matter is now properly before the Board of Alien Labor Certification Appeals (“the Board”) pursuant to Section 655.171 for review of the Certifying Officer’s denial.<sup>1</sup> Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer.

#### **I. Procedural and Factual Background<sup>2</sup>**

WSC is a Minnesota company that assembles and installs iron and sheet metal, as well as bolting and tightening storage tanks on farms. (Appeal File “AF”), at 135, 159.) Tosh Farms, LLC (“Tosh Farms”) is a pork and grain producer located in Henry, Tennessee. (AF, at 159, 92.) Tosh Farms tends over 18,000 acres of land, where they grow corn, soybeans, milo, wheat, canola, and barley. (*Id.*) The pork production is handled by Tosh Pork, LLC (“Tosh Pork”).

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<sup>1</sup> The Chief ALJ may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.171. Here, the Chief ALJ designated a single member of the Board to hear this appeal.

<sup>2</sup> The Appeal File contains a number of duplicate records. Where duplicate documents exist, the undersigned has only cited to one of the documents contained in the record.

(AF, at 93.) Tosh Pork uses corn grown by Tosh Farms, and other local farmers, in its feed mill to provide feed for its pigs. (AF 93.)

Tosh Farms contracted with WSC to install a steel grain and fertilizer tank in Henry, Tennessee. (AF, at 152, 159.) These tanks will be used by Tosh Farms in their ranch operations. (AF, at 159.)

Specifically, WSC contracted to construct one 135 foot diameter grain tank. (AF, at 154.) The tank will be constructed on a flat concrete slab with anchor bolts in the concrete. (Id.) The work was set to begin on May 2020. (Id.) Per the terms of the contract, Tosh Farms would install the aeration flooring prior to WSC arriving on site to install the tank. (Id.)

On May 6, 2020, WSC submitted an H-2A Application for Temporary Employment Certification with the United States Department of Labor seeking certification for fifty seasonal “Farmworkers and Laborers, Crop.” (AF 135-36, 143, 150.) The listed occupational code was 45-2092.02. (AF, at 136.) The listed job title was Ranch Worker, with job duties of assembling and bolting steel storage tanks. (AF, at 143.) WSC listed the period of seasonal need as May 15, 2020, through November 15, 2020. (Id.)

The listed wage in the application was \$12.40 an hour. (Id.) The application also noted that the position required no minimum education, one month of work experience, no prior training, and the ability to lift fifty pounds. (AF, at 144.)

In support of its application for seasonal workers, the President of WSC, Jeff Wieber, submitted a letter. (AF, at 159-60.) President Wieber stated that the period of need is seasonal because the growing season dictates when the farm will need to use the storage tank. (AF, at 159.) In addition, he contends that the storage tank cannot be installed when the temperatures are below freezing. (Id.) According to President Wieber, WSC has does not have any employees working from December through April. (AF, at 160.)

On May 8, 2020, the Office of Foreign Labor Certification issued a Notice of Deficiency. (AF, at 121.) The Notice of Deficiency cited four deficiencies. (AF, at 123-27.) The first deficiency addressed the stated temporary need, noting that the requested position of assembling and bolting steel grain storage tanks presumably occurs on a year round basis. (AF, at 123-24.) The Certifying Officer requested four categories of additional information to support WSC’s statement of temporary need. (Id.)

The second deficiency addressed whether WSC is an H-2A Labor Contractor, and requested clarification as to whether it is acting as such. (AF, at 124-25.) The Certifying Officer also requested specific information depending on whether WSC was acting as a labor contractor or a fixed-site agricultural grower. (Id.) The third deficiency addressed the Federal Employer Identification Number. (AF, at 125-26.) The fourth deficiency addressed the surety bond and set forth the requested modification. (AF, at 126-27.)

WSC responded to the Notice Deficiency on May 11, 2020. (AF, at 80.) In response to the first deficiency, WSC noted that building in the winter is not realistic because of the moisture, freezing temperatures, and the danger to workers due to the winter weather. (AF, at 80-81.) WSC attached an additional statement from President Wieber as an exhibit. (AF, at 81, 84-86.) In his letter, President Wieber stated that:

Our period of need is defined by weather patterns both because the growing season dictates when the farm will need to use the storage tanks but also because the tanks cannot be installed when the temperatures drop below freezing. Concrete doesn't set/cure below freezing and the silos have to be putted [sic] on concrete. Also the sealant that prevents water from coming in the silo will not set up when temperatures goes [sic] down. The seasonal need period constitutes our main revenue producing cycle and without proper staffing we cannot earn the revenues in this term.

(AF, at 84.) The letter goes on to describe the properties of concrete and the curing process that concrete must undergo to set. (AF, at 85.)

In addition to the letter, WSC attached an article and a statement from the U.S. Pork Industry. (AF, at 87-91.) The article address the impact of COVID-19 on meat packing plants in South Dakota and elsewhere. (AF, at 87-89.) The publication from the U.S. Pork Industry addressed the decline in hog values and the financial threat that COVID-19 poses to hog farmers. (AF, at 90-91.)

As to the second deficiency, WSC granted the Office of Foreign Labor Certification permission to amend its application to indicate that it is a labor contractor, and submitted two documents in support. (AF, at 81, 92-109.) WSC addressed the third and fourth deficiency by submitting a Department of Treasury Form SS-4 and a W.S.C. surety bond letter. (AF, at 81, 110-115.) Finally, WSC submitted its contract with Tosh Farms to address the Certifying Officer's concerns with the application. (AF, at 81-82, 117.)

Approximately a week later, WSC submitted an additional article from the United States Department of Agriculture regarding the temporary amendments to the H-2A requirements during the COVID-19 emergency. (AF, at 74-77.) The Office of Foreign Labor Certification subsequently notified WSC that the article was not a valid response to the Notice of Deficiency. (AF, at 58.) WSC then resubmitted its entire response to the Notice of Deficiency. (AF, at 16-17.)

On June 9, 2020, the Certifying Officer denied the application. (AF, at 10-15.) The Certifying Officer found that WSC failed to establish a temporary need for fifty workers because the positions of assembling and bolting steel grain storage tanks are year round positions. (AF, at 13.) The Certifying Officer went on to note that WSC failed to submit the requested documents set forth in the Notice of Deficiency to support its contention that the work was seasonal. (AF, at 13-14.) For example, WSC failed to submit summarized monthly payroll reports. (AF, at 14.) The Certifying Officer specifically found that the articles submitted by WSC were not a valid response to the deficiency. (AF, at 14.) The Certifying Officer noted that

the stated seasonal need related to the curing of concrete in the winter was not relevant to the job duties set forth in the application. (AF, at 15.)

WSC appealed the decision to the Chief Administrative Law Judge. (AF, at 1.) Because it was unclear from the request for review whether Employer sought a *de novo* hearing under 20 C.F.R. § 655.171(b) or an administrative review under 20 C.F.R. § 655.171(a), the undersigned entered an Order stating that it would construe the request as one for a *de novo* hearing. The undersigned instructed Employer to notice the Office of Administrative Law Judges if Employer did not intend to request a *de novo* hearing. WSC subsequently notified the undersigned that it did not want a hearing and sought only a request for administrative review.

The undersigned received the administrative file in this matter on July 7, 2020. Pursuant to 20 C.F.R. § 655.171(a), the undersigned has reviewed the entirety of the administrative file and issued this decision within five business days of receipt of the administrative file.

## **II. Legal Standard**

Where an employer requests administrative review of the certifying officer's decision, the administrative law judge shall make his or her decision based on the written record, including any new submissions by the parties. 20 C.F.R. § 655.171(a). After review, the ALJ may affirm, reverse, or modify the decision of the certifying officer, or remand the matter to the certifying officer for further action. *Id.* The ALJ must specify the reasons for his or her determination in a written decision, which must be issued within five business days of receipt of the ALJ's receipt of the administrative file. *Id.*

## **III. Analysis**

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform "agricultural labor or services, as defined by the Secretary of Labor . . . ." 8 U.S.C. § 1101(a)(15)(H). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work needed. 20 C.F.R. § 655.103(a). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a).

An employer seeking certification for workers under the H-2A program must establish that the need for agricultural labor or services is of a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The regulations define both temporary and seasonal. 20 C.F.R. § 655.103(d). Section 655.103(d) provides:

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.

Id.

WSC has failed to satisfy its burden of demonstrating that its need for fifty Ranch Workers to perform assembling and bolting steel storage tanks is temporary. (AF, at 143.) As an initial matter, the articles in the record and documents addressing the impact of COVID-19 do not address the issue of why the work of assembling and bolting steel storage tanks is seasonal, especially in light of the fact that WSC does not limit its farm construction work to Minnesota. While the undersigned is certainly sympathetic to the plight of the agricultural community during COVID-19, including the significant impact on hog producers, this does not alter the fact that the regulations require WSC to demonstrate that its need for the fifty workers is seasonal. As the Certifying Officer found, WSC has failed to satisfy this burden.

The record does not demonstrate how bolting and assembling steel storage tanks is seasonal work. The fact that Tosh Farms has a specific growing season that may dictate when it uses the tank is not relevant to this application. WSC is not involved in the business of growing and harvesting crops. Rather, the pertinent question is whether WSC's need for fifty workers performing bolting and assembling of steel is seasonal.

WSC focuses on the difficulty of pouring and setting concrete during the winter, in support of its position that the fifty requested workers would be performing seasonal labor. However, the fifty laborers would not be pouring concrete. Per the terms of the contract, Tosh Farms would install the aeration flooring before WSC's workers even arrived on site to install the tank. (AF, at 154.) Again, the application was not for workers to pour concrete, but to bolt and assemble steel storage tanks. WSC has not explained why the work of bolting of assembling steel is seasonal work. In fact, from the record before the undersigned, it appears that this type of work could be performed year round by permanent U.S. workers.

While President Wieber contends that WSC does not have any employees working from December through April (AF, at 160), WSC failed to submit any of the documentation requested by the Certifying Officer in the Notice of Deficiency that would support such a contention. For example, WSC failed to submit the requested payroll records that might support WSC's contention that the work is of a temporary nature. Because WSC failed to demonstrate that its need for labor is on a seasonal basis as required by Section 655.161(a), the denial of the application was proper. The undersigned **AFFIRMS** the decision of the Certifying Officer's denying the application for H-2A workers.

**IV. Conclusion**

The undersigned **AFFIRMS** the decision of the Certifying Officer's denying the application for H-2A filed by WSC.

**SO ORDERED.**

STEWART F. ALFORD  
Administrative Law Judge