



Issue Date: 02 December 2020

OALJ Case No.: 2021-TLC-00025  
ETA Case No.: H-300-20282-873992

*In the Matter of:*

**BIDART LIVESTOCK, INC.,**  
*Employer.*

Certifying Officer: Lynette Wills,  
Chicago National Processing Center

Appearances:

Christopher J. Schulte, Esquire  
Smith, Gambrell, & Russel, LLP  
Washington, D.C.  
*For the Employer*

Katherine Zhao, Esquire  
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U.S. Department of Labor  
Washington, DC  
*For the Certifying Officer*

Before: Steven D. Bell  
Administrative Law Judge

**DECISION AND ORDER AFFIRMING DENIAL OF TEMPORARY LABOR  
CERTIFICATION**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1) and 1188, and the implementing regulations at 20 C.F.R. Part 655, Subpart B. The H-2A program allows employers to hire foreign workers to perform agricultural work within the United States (“U.S.”) 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 (“Department”).<sup>1</sup> A Certifying Officer (“CO”) in the Office of Foreign Labor Certification of the Employment and Training Administration reviews applications for temporary labor certification. If the CO denies certification, an employer may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.<sup>2</sup>

<sup>1</sup> 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

<sup>2</sup> 20 C.F.R. § 655.171.

## STATEMENT OF THE CASE

On October 13, 2020, Bidart Livestock, Inc. (“Employer”) filed (1) Form ETA 9142A, *H-2A Application for Temporary Employment Certification* (“Application”); (2) Appendix A to Form ETA 9142; (3) Form ETA 790 and Addendums, (4) Statement of Temporary Need, (5) Workers Compensation Insurance Documentation, (6) Housing Documentation, and (7) Agent Agreement.<sup>3</sup> Employer requested certification for one Cattle Herder,<sup>4</sup> from December 7, 2020 until September 30, 2021, based on an alleged seasonal need during that period.<sup>5</sup>

The California State Workforce Agency issued a Notice of Deficiency on October 14, 2020, based on a failure to indicate on the application that the tools, supplies, and equipment to be provided would be provided at no cost or require a deposit, a failure to indicate that subsistence costs will be reimbursed with or without a receipt, and based on the requirement that workers perform hand weeding or hoeing without the required written justification.<sup>6</sup> The CO issued a Notice of Deficiency (“NOD”) dated October 19, 2020, stating that Employer had failed to establish temporary need under 20 C.F.R. § 655.103(d) based on the fact that Employer’s previous certifications went from June 30-November 30, 2020, which combined with the current application lasted one year and three months, with only a weeklong period that was not covered, and that although the job duties slightly varied among the applications, the work location, number of months experience and lifting requirement were identical. The CO required that Employer explain why its job opportunity is seasonal or temporary, providing in detail an explanation why its dates had changed from its established season, and required that Employer provide payroll reports and any other documentation to support its seasonal need.<sup>7</sup>

On October 19, 2020, Employer responded to the NOD by email, stating that:

The original application was submitted for an emergency labor cert due to Covid19. This was submitted mid-season for cattle herding. The rancher’s seasons are December 1 through September 30 for cattle herding and October 1 through November 30 for range calving.

The first labor cert application submitted was for the first H2A worker request. Bidart Livestock Inc. has not employed an H2A worker in previous years, therefore there are no payroll reports.<sup>8</sup>

On November 2, 2020, the CO issued a Denial Letter continuing to find that Employer had failed to establish seasonal need. The CO found that Employer had failed to submit any payroll records, and that Employer’s response “indicates that it has two cattle seasons that span from December

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<sup>3</sup> AF 33-58. In this Decision and Order, “AF” refers to the Administrative File.

<sup>4</sup> SOC (O\*Net/OES) occupation title “Farmworker, Farm, Ranch, and Aquacultural Animals” and occupation code 45-2093. AF 39-41.

<sup>5</sup> AF 33, 41, 53.

<sup>6</sup> AF 25-26.

<sup>7</sup> AF 18-21.

<sup>8</sup> AF 16.

1st through November 30th, which is a 364 day period of need. Therefore it remains unclear as to how the employer's need for cattle work is tied to a particular time of year as required by the regulations."<sup>9</sup>

On November 9, 2020, pursuant to 20 C.F.R. § 655.171(b), Employer appealed the CO's denial and requested a *de novo* administrative hearing.<sup>10</sup> Employer alleges that the position of Cattle Herder requested in this application is different from the position of Range Calver requested for the period of October 1 through November 30, 2020, and therefore is a separate seasonal position.<sup>11</sup>

The Office of Administrative Law Judges received the Administrative File on November 18, 2020. The parties agreed to participate in a telephonic hearing on November 23, 2020. At the hearing, I admitted Employer's Exhibits ("EX") 1-4 and CO's Exhibits ("CO") 1-3 into the record. Two witnesses testified during the hearing: Mr. Dean Thompson, the manager of the cattle department at Bidart Livestock, and Ms. Lynette Wells, the CO in this matter. Employer and the CO filed post-hearing briefs, and the record is now closed.

The only issue before me is whether the Employer established a temporary or seasonal need for the positions listed in its application, as defined by 20 C.F.R. § 655.103(d). This decision is based on the administrative file, the arguments of the parties, the testimony and evidence presented at the hearing, and the applicable laws and regulations. This decision is issued within ten business calendar days of the hearing, as required by 20 C.F.R. § 655.171(b)(1)(iii).

### **ARGUMENTS OF THE PARTIES**

The CO asserts that the Employer has failed to establish a temporary or seasonal need for H-2A workers. It acknowledges that there is some variation between the job duties of the two positions, but finds that there is sufficient overlap between the two positions to show that Employer's need is not seasonal as it continues throughout the entire year covered by the current application and its previous application for Range Calver.<sup>12</sup>

The Employer asserts that its need is seasonal in nature and that the payroll records provided by Bidart for the past two years in EX 3 and Dean Thompson's testimony at the hearing both show the need for temporary labor in excess of the full-time permanent workforce employed by Bidart. Employer argues that its need for labor:

is driven by two intertwined and recurring life cycles: (1) the growing cycle grass/forage plants; and (2) the reproductive of cattle. Thus, the specific job duties involved here are unavoidably "tied to certain times of year" by that pattern.<sup>13</sup>

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<sup>9</sup> AF 10-14.

<sup>10</sup> AF 1-8.

<sup>11</sup> AF 2-3.

<sup>12</sup> *CO. Post-Hg. Bf.*

<sup>13</sup> *Emp. Post-Hg. Bf.* at 2-3.

## DISCUSSION AND APPLICABLE LAW

I held a *de novo* hearing in this matter pursuant to 20 C.F.R. § 655.171(b). Therefore, I will independently examine the evidence and testimony to determine the Employer's eligibility for temporary labor certification.<sup>14</sup> The burden remains with the Employer throughout the process.<sup>15</sup>

To succeed on an H-2A application, the Employer must establish "the need for the agricultural services or labor to be performed on a temporary or seasonal basis."<sup>16</sup> The regulations specifically provide:

[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.<sup>17</sup>

Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either:

- (1) that an employer's need to have the job duties performed is "temporary"—of a set duration and not anticipated to be recurring in nature; or
- (2) that the employment is seasonal in nature—that is, employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.<sup>18</sup>

When determining whether an employer's need is seasonal, it is appropriate "to determine if the employer's needs are seasonal, not whether the duties are seasonal."<sup>19</sup> Duties are relevant inasmuch as the duties involve the care and feeding of livestock, which are presumed to occur on a year-round basis and therefore reflect a year-round need for workers.<sup>20</sup> However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis.<sup>21</sup>

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<sup>14</sup> *David Stock*, 2016-TLC-00040 (May 6, 2016).

<sup>15</sup> *Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).

<sup>16</sup> § 655.161(a).

<sup>17</sup> § 655.103(d).

<sup>18</sup> *William Staley*, 2009-TLC-00060 (Aug. 28, 2009).

<sup>19</sup> *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999).

<sup>20</sup> *Cowboy Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011).

<sup>21</sup> *See Gisi Pheasant Farm*, 2011-TLC-00139 (Jan. 25, 2011) (employer overcame presumption by explaining that although it needed temporary workers from March to December to hatch, maintain, and raise the poultry, it does not

As stated above, Claimant has here requested certification for a Cattle Herder for the time period from December 7, 2020 through September 30, 2021. Employer has previously obtained certification for a Range Calver from October 1 through November 30, 2020.<sup>22</sup>

In this case, nearly all of the duties listed in the job description for Cattle Herder are also listed in the job description for Range Calver including herding and moving cattle, protecting cattle from predators, assisting with branding castrating, vaccinating, and tagging, providing livestock with water, riding and caring for horses, weed control, supplemental feeding, and observing cattle for illness or injury.<sup>23</sup>

Mr. Thompson testified that the herding of cattle happens year round as the pasture runs out of feed and the cattle need to be moved to another field. He also testified that although there is a focus on repairing fences and weeding in the spring, such repairs and the removal of noxious weeds occurs as needed year round. Likewise, although predators are worse during calving season from September through November, they must be watched for year round. He testified that supplemental feeding generally occurs in September and October as well as December through as late as February.<sup>24</sup> He did state that branding and vaccination does not occur during calving season; he testified that branding and vaccinating only occurs from December through February, and that revaccination takes place in June.<sup>25</sup>

He testified that he has a full time employee and part time employee who are employed throughout the year and perform both jobs and that the part time workers would not typically be hired to check cows like Range Calvers.<sup>26</sup> The payroll records show that multiple part time workers have been employed throughout the entire year.<sup>27</sup>

Unlike in *Matter of Vermillion Ranch Limited Partnership*,<sup>28</sup> where the court found a seasonal need for a winter cattle herder position which was the employer's most difficult and specialized position, requiring among other things the ability to prevent the cow herd from drifting in front of winter storms, the cattle herder position here is the less specialized of the two positions with Employer,<sup>29</sup> and the majority of the duties required by the position are performed throughout the year, not just during the requested months. In *Vermillion*, the court noted that although the issue was not before the court, looking at the more generalized and entry level nature of a livestock position, it "may be argued that that position involves only skills necessary for 'ongoing operations' as that term is used in 20 CFR ~ 655.103(d)."

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need workers in January and February because by December, it has slaughtered or sold its poultry and shuts down production during the winter).

<sup>22</sup> AF 65.

<sup>23</sup> CO 3, AF 50, 114.

<sup>24</sup> Tr. 32-36. In this Decision, Tr. refers to the hearing transcript.

<sup>25</sup> Tr. 20, 33.

<sup>26</sup> Tr. 28-31, 41.

<sup>27</sup> EX 3.

<sup>28</sup> 2014-TLC-00002 (Dec. 5, 2013)

<sup>29</sup> In his testimony, Mr. Thompson stated that the herding position does not require an intense knowledge of cows, but range calvers need to know about the birthing process and ways to save a cow's life if it is in distress. Tr. 24-25.

Although Employer has demonstrated that the Range Calver position, which requires specialized knowledge and skill, is only needed during calving season, it has failed to show that the more general Cattle Herder position is only required outside of the calving season given the fact that nearly all of its job duties are listed in the calver position, it is established as a less skilled position, the fact that part time workers continue to work during the calving season which is outside the requested period of need, and the fact that Mr. Thompson has testified to the year round need for many of the job duties, including herding itself. Although the branding and vaccination only occurs during the requested months, the issue is whether Employer's needs are seasonal, not whether the duties are seasonal.<sup>30</sup> I find that Employer has failed to establish that the need for the Cattle Herder position is not present year round.<sup>31</sup>

The CO thus accurately concluded that Employer failed to sufficiently establish that Employer has a temporary or seasonal need for workers under 20 C.F.R. § 655.103(d).

Because Employer has failed to establish that its need for labor was temporary or seasonal under 20 C.F.R. § 655.103(d), it has not met its burden of establishing it is entitled to labor certification.<sup>32</sup> Accordingly, the CO's denial of certification is hereby affirmed.

### **ORDER**

It is hereby **ORDERED** that the CO's decision denying temporary labor certification be, and hereby is, **AFFIRMED**.

Steven D. Bell  
Administrative Law Judge

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<sup>30</sup> *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999).

<sup>31</sup> *Cowboy Chemical, Inc.*, 2011-TLC-00211 (Feb. 10, 2011). The email from Walt Mandeville, DVM, MS regarding a general assessment that calving and caring for new calves could require additional labor on a large ranch operation, EX 2, does not aid Employer in establishing its position as it does not address Employer's particular needs. Nor does the cattle inventory, EX 4, given that Employer has not based its assertion of seasonal need on the number of cattle at any given time.

<sup>32</sup> *See Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (Dec. 2, 2010).