In the Matter of:
US CATFISH FARMS, LLC
Employer,

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (the “DOL” or the “Department”) at 20 C.F.R. Part 655. The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); see also 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

STATEMENT OF THE CASE

Employer submitted an application requesting H-2A temporary labor certification for four 45-2093.00 “Farmworkers, Farm, Ranch, and Aquacultural Animals” job opportunities on July 21, 2021. (AF 81.) The application listed the nature of temporary need as seasonal and the period of intended employment as September 20, 2021 to March 28, 2022. (AF 92.) The Chicago NPC issued a Notice of Deficiency (“NOD”) on August 4, 2021. (AF 72.) The NOD directed Employer to submit the following:

The employer must explain why its job opportunity is seasonal. This explanation must provide in detail as to why its dates of need have significantly changed from its previously requested season of June through February to its current request of September to March.

The employer’s response must include:

1. A statement describing the employer's (a) business history, (b) activities (i.e. primary products or services), and (c) schedule of operations throughout the entire year;
2. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately for full-time permanent and temporary employment in the requested occupation the total number of workers or staff employed, total hours worked, and total earnings received. Such

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1 For purposes of this opinion, “AF” stands for “Appeal File.”
documentation must be signed by the employer attesting that the information being presented was compiled from the employer’s actual accounting records or system; and

3. Other evidence and documentation that similarly serves to justify the dates of need being requested for certification. In the event that the employer is a new business, without an established business history and activities, or otherwise does not have the specific information and documents itemized above, the employer is not exempt from providing evidence in response to this Notice of Deficiency. In lieu of the documents requested, the employer must submit any other evidence and documentation relating to the employer’s current business activities and the trade industry that similarly serves to justify the dates of need being requested for certification.

(AF 76.) Employer responded to the NOD on August 12, 2021. (AF 54.) Employer explained that in 2021 they increased their ponds acreage from 580 acres to 645 acres and Employer decided to perform temperature and oxygen checking in house, rather than outsourcing it; both changes required additional supervision at the farm level. (Id.) Employer further explained that the change in the temporary period of need reflected the fact that they “were late in getting application ready to submit this year” so the application delayed the start date to September 20, 2021. (AF 59.) Employer also noted that in future years, the seasonal need for H-2A employees would run from June through March. (Id.) Employer accompanied their explanation with a description of tasks performed each month, (AF 6), and a chart showing a clear increase in the amount of feed purchased in the months of June, July, August, and September (AF 2). They also included information regarding the role temperature plays in the raising of catfish.

Temperature is a major factor in catfish production. Fish survive better when harvested during cooler weather. We begin harvesting fish in October and try to complete harvest by February 1. We begin restocking in February and complete restocking by the end of March. Catfish enter their “growth phase” during the warmer months June – September and require more care. (AF 65.)

The chart listing tasks performed monthly clearly establishes an increase in the work performed in June, July, August, and September, when fish are fed twice a day. (AF 6). The tasks done from October through January differ because it includes harvesting fish and preparing the ponds for restocking. February and March tasks include restocking the ponds, and April and May, they begin feeding the fish. (Id.)

Another chart shows the number of permanent and temporary workers in 2020 by month. While the number of permanent workers compared to temporary workers varies (with an increase in temporary workers from July through November), the total number of employees generally ranges from eleven to thirteen, with no discernable pattern, with the exception of December when Employer had only eight employees (six permanent, two temporary). (AF 15.)

The Chicago NPC issued a Notice of Denial on August 27, 2021. (AF 28-39.) The denial letter stated that Employer failed to establish a temporary or seasonal need as is required by 20 C.F.R. § 655.103(d). (AF 30.) Employer submitted its request for administrative review on
September 27, 2021. (AF 1.) On Wednesday, October 20, 2021, the undersigned held a conference call with the parties in which Employer advised that they were not seeking a hearing and counsel for the Department advised that they would not be filing a brief.

SCOPE OF REVIEW

Where the employer has requested administrative review, within five business days after receipt of the ETA administrative file the ALJ will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO’s decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery. The ALJ’s decision is the final decision of the Secretary. 20 C.F.R. § 655.171(a).

DISCUSSION

I. HAS EMPLOYER ESTABLISHED A SEASONAL NEED?

According to the regulations, “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.” 20 C.F.R. § 655.103(d).

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.” In the Matter of Sneed Farm, 1999-TLC-00007 (Sept. 27, 1999). In order to determine if the employer’s need for labor is seasonal, it is necessary to establish when the employer’s season occurs and how the need for labor or services during this time of the year differs from other times of the year. In the Matter of Altendorf Transport, 2011-TLC-00158, slip op. at 11 (Feb. 15, 2011).

As explained in their response to the NOD, Employer maintains ponds in which they grow catfish harvested as food. (AF at 5.) The cycle of growing catfish can essentially be divided into three periods – restocking the ponds with fingerling fish, feeding and growing the fish, and harvesting the fish and preparing the ponds to be restocked. Although in the current application, Employer seeks H-2A workers from September 2021 through March 2022, Employer asserts that its seasonal need actually runs from June through March and that it plans to seek temporary workers for that period in 2022. Employer argues that it needs temporary workers from the time it begins double feeding the fish in June, through the harvest and restocking times in the fall and winter.

The undersigned acknowledges that this decision is issued outside the five day period, as there was some miscommunication regarding the date the Appeal File was forwarded to OALJ.

Had the CO’s only objection to Employer’s application been the difference between the June start date and the September start date in the application, the undersigned would have reversed the CO’s decision, as Employer adequately explained the delay in start date was directly attributable to the difficulty in filing the application.
However, as the CO noted in its Denial,

The employer also states that it has been instituting some changes in its production process, and therefore wants its dates of need to be June 1st to March 30th each year, which implies that the employer is able to manipulate the dates of need rather than aligning its dates of need according to a certain time of year dictated by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle.

(AF 31.) Other data in Employer’s response that suggests that it does not have a truly seasonal need is the chart that shows the number of permanent and temporary workers in 2020 by month. While the number of permanent workers compared to temporary workers varies over the months, the total number of employees stays relatively constant. (AF 15.) Employer states that the seasonal nature of the work is based on temperature, but only provided data for the month of June, which does not establish that temperatures fluctuate throughout the year to a degree that would determine the optimal season for growing and harvesting the catfish. (AF 65.)

Based on the foregoing, the undersigned finds that Employer has not established a seasonal need. As the regulation states, a seasonal need occurs where it is tied to a certain time of year by an event or pattern and requires labor levels far above those necessary for ongoing operations. 20 C.F.R. § 655.103. Employer’s response to the Notice of Deficiency did not establish a seasonal need, but rather, showed that its employment needs remain relatively constant throughout the year and that Employer can manipulate its growing season.

ORDER

In light of the foregoing, it is hereby ORDERED that the Certifying Officer’s Final Determination denying Employer’s ETA Form 9142, H-2A Application for Temporary Employment Certification is AFFIRMED.

For the Board:

THERESA C. TIMLIN

Cherry Hill- District Office