



Issue Date: 19 January 2021

OALJ Case No.: 2021-TLC-00048
ETA Case No.: H-300-20281-864354

In the Matter of:

ZABLOTNEY FARM,

Employer.

Certifying Officer: John Rottterman,
Chicago National Processing Center

Appearances:

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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.¹ 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

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

may seek administrative review or a de novo hearing before the Office of Administrative Law Judges.²

STATEMENT OF THE CASE

On October 12, 2020, Zabloutney Farm (“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, 790 A, and Addendums, (4) Statement of Temporary Need, (5) Workers Compensation Insurance Documentation, (6) Agent Agreement, and (7) Cover Letter to Chicago NPC Including Emergency Request Letter.³ Employer requested certification for two Farm Equipment Mechanics,⁴ from December 16, 2020 to February 28, 2021, based on an alleged seasonal need during that period.⁵

The CO issued a Notice of Acceptance (“NOA”) on October 15, 2020, and directed Employer to begin conducting recruitment in accordance with the regulations.⁶ By letter dated October 28, 2020, Employer filed its recruitment report with the CO.⁷ On November 5, 2020, the CO issued a Notice of Required Modifications (“NRM”) stating that per 20 C.F.R. § 655.103(d), based on the dates of need for Agricultural Equipment Operators in two previous claims, Employer had failed to establish that the work was seasonal, stating that it did not appear that the job duties for the two positions were distinct, requiring that Employer provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature. It required the response 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 (d) where claims are made as to required maintenance intervals, employer must provide documentation to substantiate said claims including equipment models and manufacturer maintenance schedules;
2. A statement regarding why the employer's need should be considered seasonal when the duties outlined in its application can be performed by its temporary Agricultural Equipment Operators from March into December. This statement should include complete maintenance records from prior years;
3. A statement describing the employer's use of mechanics in the past and provide detail regarding the requirements, knowledge and experience of the mechanics that the employer has employed in the past;
4. Summarized monthly payroll reports for a minimum of three previous calendar years that identify, for each month and separately

² 20 C.F.R. § 655.171.

³ AF 554-575. In this Decision and Order, “AF” refers to the Administrative File.

⁴ SOC (O*Net/OES) occupation title “Farm Equipment Mechanics and Service Technicians” and occupation code 49-3041.00. AF 560-562.

⁵ AF 554, 562.

⁶ AF 544-548.

⁷ AF 541-542.

for full-time permanent and temporary employment in the requested occupation *Agricultural Equipment Operators and Farm Equipment Mechanics*, the total number of workers or staff employed, total hours worked, and total earnings received. Such documentation must be signed by the employer...;

5. If contractors or other entities, e.g., repair shop were used by the employer to address the need described in this application, three years of contracts/receipts detailing the services provided and dates of said services must be provided. If family members or other individuals not directly employed by the employer were used, signed affidavits attesting to their work schedule and duties must be provided.

6. 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.⁸

The CO also required that Employer explain why it was offering the two positions the same wage rate when, under 20 CFR § 655.122(l), nothing prohibited it from offering a higher rate to the more highly skilled position, and found that under § 655.122(b) “[e]ach job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops[,]” and that the SOC Code 49-3041 (Farm Equipment Mechanics and Service Technicians) is a type of position that usually requires greater experience and training than required by Employer, meaning that its qualifications were inconsistent with the SOC code 49-3041. The CO required that Employer either withdraw its application, or submit documentation which establishes that the requirements as they appear in the application are normal and accepted among non H-2A employers in the same or comparable occupation or crops.⁹

Employer submitted a response to the NRM on November 18, 2020. Addressing the first required modification, Employer included a three year payroll summary for agricultural equipment operators and for farm equipment mechanics and asserted that the CO had used an improper method for determining temporary need as it failed to examine the need for the work to be performed rather than the job duties themselves. It stated that the actual job duties do not overlap as the CO found and that the need for the requested time period was for repairing machinery and not for planting, cultivating, and harvesting crops as it was when agricultural equipment operators were requested. It stated that it needed farm equipment mechanics to do maintenance, which may

⁸ AF 538-539.

⁹ AF 539.

require them to disassemble, clean, and reassemble the engines, putting them out of commission, during the winter months when the equipment would not be used for farming and that farm equipment operators are not needed during the winter months requested.¹⁰ Employer attached a history of the farm, describing the farm's expansion, the commodities produced, and noting that having become time-stretched, it had fallen behind on major equipment rebuilds required seasonally, and it attached a schedule of operations, breaking down the job duties performed by "Crop-Farming H-2A workers[,] "Mechanic H-2A Workers[,] and by the family operating the farm.¹¹ Employer provided a statement stating that it does not keep complete records of all maintenance performed on its equipment, but that it creates decals that are placed in machines or on filters that indicate last date of routine service, and that "each machine is inspected in the winter season for repair and rebuild requirements found that cannot simply be anticipated by an operators manual schedule of maintenance since all machines are not used under exactly all the same conditions, circumstances and operators."¹² It also stated that:

Past mechanical services have been completed by the farm owners Travis and Richard Zabloutney or an equipment or truck dealer - in the last number of years primarily Northern Plains Equipment. - Again, I will provide repair orders. We have had no other employees either full time or temporary so have had no specific worker requirements for knowledge or experience. Basic mechanical skills and willingness to use available resources are required.¹³

Employer attached service records dated October 12, 2020, September 1, 3 and 21, 2020, August 12 and 24, 2020, July 7, 2020, June 10, 2020, May 23 and 30, 2020, April 8 and 24, 2020, March 6, 2020, February 4, 12, and 14, 2020, January 7, 2020, November 18, 2019, October 28, 2019, September 6, 17, 19, and 25, 2019, August 19 and 29, 2019, July 9, 2019, June 11, 2019, April 1, 2019, March 4 and 20, 2019, January 4, 2019, October 18, 2018, September 28, 2018, August 17 and 31, 2018, July 21, 2018, June 11 and 21, 2018, May 13, 22, and 24, 2018, April 16, 2018, and January 18, 2018.¹⁴ Employer also attached maintenance and assembly instructions for its equipment.¹⁵

Addressing the second required modification, Employer stated that it was offering a rate of pay of \$14.99 per hour for both the Farm Equipment Mechanic and Agricultural Equipment Operator positions because it is the minimum rate required and it is not required to pay a higher rate. It also noted that the application stated that the wage rate for this position may be higher for a person with verifiable experience.¹⁶

Addressing the third required modification, Employer stated that it is "not required to construct applications for temporary Labor Certification based on O*Net statistics" and that job requirements are up to the discretion of the employer. It stated that the qualifications listed on the

¹⁰ AF 23-27.

¹¹ AF 28-30.

¹² AF 31.

¹³ AF 31.

¹⁴ AF 32-122.

¹⁵ AF 123-532.

¹⁶ AF 27.

application were sufficient to complete the required tasks as the workers will be supervised by an experienced mechanic. Employer stated that “higher qualifications would unnecessarily limit domestic worker access to the job.”¹⁷

On December 11, 2020, the CO issued a Final Determination denying the application. It based the denial on a finding that per 20 C.F.R. § 655.122(b), a job offer’s qualifications and requirements must be “bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops” and that Employer’s response to the NRM offered no evidence that its chosen requirements should be viewed as normal and accepted under the regulations. The CO stated that it is Employer’s burden to establish the job qualifications and requirements are normal and accepted, but that it “made no attempt to establish the requirements are normal or accepted, either by comparison to the O*NET description, or any other means.” The CO found that Employer’s statement that higher qualifications would limit domestic worker access was an acknowledgment that the qualifications and requirements for its Farm Equipment Mechanics and Service Technicians opportunities are abnormally low.¹⁸ The CO also noted that although Employer noted that it was not required to pay a higher wage for the Farm Equipment Mechanics, payment of the exact same wage for positions alleged to contain different qualifications and requirements calls into question the bona fide nature of the qualifications and requirements.¹⁹

The CO also based its denial on a finding that under 20 C.F.R. § 655.103(d), Employer had failed to establish that the work was seasonal in nature based on a finding that although Employer had submitted applications under two different job titles, it did not appear that the need for labor was distinct and that “combined filings and job descriptions for similar duties suggest that it possesses a year-round need for a general farmhand/mechanic.”²⁰

The duties in the current application for a Farm Equipment Mechanic include inspection, maintenance and winterization of farm equipment, replace/repair battery, brake components, filters, hydraulics, implements/attachments, oil, fluids/lubricants, seals, wheels/tires and weld parts. The duties listed in the application for the Agricultural Equipment Operator job opportunity in 2019 also included duties relating to “general lubrication, service, and incidental repair of farm machinery.” Notably, the O*NET description for Agricultural Equipment Operator similarly includes mechanic-related tasks, such as “[a]djust, repair and service farm machinery and notify supervisors when machinery malfunctions.”²¹

The CO noted that Employer’s 2019 application indicated its Agricultural Equipment Operators would perform maintenance work and stated that although the 2020 application for

¹⁷ AF 27.

¹⁸ AF 16-17.

¹⁹ AF 17.

²⁰ AF 17-18.

²¹ AF 18.

Agricultural Equipment Operators omitted maintenance work, “such maintenance tasks are typically performed by Agricultural Equipment Operators according to the O*NET description. In this context, the employer’s admitted lower-than-normal qualifications and...coupled with its payment of the same wage across the allegedly distinct jobs, all call into question the employer’s assertion that it possesses a seasonal need for labor.” The CO found that it suggested that Employer requires lower skilled, permanent farmhands/mechanics for year-round work.²² The CO also found that the service records submitted by Employer, which were dated throughout the year, showed that Employer’s maintenance and repair need was not tied to a particular time of year, and that the payroll records show a general need for low-skilled workers throughout the year.²³

On December 17, 2019, Employer submitted a request for a de novo hearing based on the argument that the Farm Equipment Mechanic position was a separate position from the Agricultural Equipment Operator position.²⁴

The Office of Administrative Law Judges received the Administrative File on January 4, 2021. The parties agreed to consolidate this claim with 2021-TLC-00046, *USA Farm Labor*, and to participate in a telephonic hearing on January 8, 2021. At the time of the hearing, because Employer’s witness was unavailable, the parties agreed to reach a decision on the record based on the appeal file and the additional exhibit submitted by the solicitor, while maintaining the review standard of a de novo hearing. The CO and Employer each filed a brief on January 14, 2021.

The issues before me are whether the position was seasonal in nature under 20 C.F.R. § 655.103(d), and whether the job offer’s qualifications and requirements were “bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops” under § 655.122(b).

ARGUMENTS OF THE PARTIES

The CO argues that Employer has failed to establish that there was a seasonal need for Farm Equipment mechanics as repair orders submitted by Employer demonstrate a need for these duties to be performed year round, noting that not only do the records show that the work is not tied to a certain time of year, but they show that more work was performed outside of the requested season than within it. The CO also asserted that the fact that Employer has requested an extension for its 2019 agricultural equipment operators has called the seasonal nature into question, since part of Employer’s argument that the work is seasonal was based upon the lack of use for the equipment during winter months, and that Employer has not demonstrated that it “requires labor levels far above those necessary for ongoing operations” from December through February as the payroll records show a need for one to two workers every month. The CO also found that Employer failed to demonstrate that its position required normal and accepted qualifications and requirements under § 655.122(b) as it did not provide documentation that the requirements were normal and accepted among non-H-2A employers and seemed to acknowledge that its requirements were lower than usual.²⁵

²² AF 19.

²³ AF 20-21.

²⁴ AF 1-2.

²⁵ *CO. Post-Hg. Bf.*

Employer has argued that it has established a temporary seasonal need based on its explanation that during crop farming season it hires workers for planting, cultivating, and harvesting crops, and, during the winter, it needs to hire additional mechanics to ensure the equipment is ready for the following season. It argued that it established that it only needs Farm Equipment Mechanics when the equipment is not being used for farming. It argues that the positions of Agricultural Equipment Operator and Farm Equipment Mechanic have different duties and do not overlap, meaning that Employer’s need was seasonal.²⁶ Employer argued that its job requirements were consistent with normal and accepted qualifications based on a previous court’s finding that “it is not unreasonable that temporary farm mechanics working for only four months at a farm are supervised by the full-time mechanics, who work with the farm’s equipment year round. The fact that the H-2A mechanics are supervised does not negate the fact they have to be skilled mechanics to perform the position.”²⁷

DISCUSSION AND APPLICABLE LAW

Pursuant to 20 C.F.R. § 655.171(b) and the agreement of the parties, I will independently examine the evidence to determine Employer’s eligibility for temporary labor certification.²⁸ The burden remains with the Employer throughout the process.²⁹

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.”³⁰ 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.³¹

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

²⁶ *Emp. Post-Hg. Bf.*

²⁷ *Emp. Post-Hg. Bf.* citing *In the Matter of Koopman Dairies*, No. 2021-TLC-00001.

²⁸ *David Stock*, 2016-TLC-00040 (May 6, 2016).

²⁹ *Garrison Bay Honey, LLC*, 2011-TLC-00054 (Dec. 2, 2011).

³⁰ § 655.161(a).

³¹ § 655.103(d).

performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year.³²

Employer submitted service that show that Employer had maintenance and repairs done on its equipment multiple times throughout the year between January 2018 and October 2020. As the CO has pointed out, these records not only show that Employer had repairs and maintenance performed out of season, but that the great majority of those repairs, 37 out of 43, were performed outside of the requested season.³³ Outside of its bare assertion that these repairs must be done during the winter months, Employer has submitted no evidence that this work is seasonal and the evidence shows that the repairs actually performed over the last three years took place largely outside of the requested months. Based on this, I find that Employer has failed to establish that its need is seasonal in nature under § 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.³⁴ 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

³² *William Staley*, 2009-TLC-00060 (Aug. 28, 2009).

³³ AF 32-122.

³⁴ *See Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (Dec. 2, 2010).