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Issue Date: 07 January 2021

OALJ Case No.: 2021-TLC-00051

ETA Case No.: H-300-20324-919670

In the Matter of

DeFisher Fruit Farm and Rosario Brothers LLC,
Employer.

Before: Monica Markley
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On December 30, 2020, the Office of Administrative Law Judges received a letter from the owner of DeFisher Fruit Farm (“Employer”) requesting expedited administrative review of the Denial Letter issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification matter. I received the Administrative File (“AF”) from the Employment and Training Administration (“ETA”) on December 30, 2020. Employer filed its arguments with its request for review and did not file a brief; the CO waived its right to file a brief and relied on the reasoning stated in the Denial Letter. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five calendar days of the receipt of the AF.

BACKGROUND

On November 30, 2020, the Employer filed an *H-2A Application for Temporary Employment Certification* on ETA Form 9142 (“Application”). (AF 36-60). The Employer’s Application requested certification for 10 Farmworkers and Laborers for the period beginning February 1, 2021 and ending November 20, 2021. (AF 47). The Application was filed on behalf of the joint employers, DeFisher Fruit Farm and Rosario Brothers LLC (the “joint employers” or “Employer”). (AF 36, 55). Employer indicated a seasonal need (AF 36), and marked on the

form that a statement of temporary need was attached to the Application, but no such statement appears in the Administrative File.

On December 3, 2020, the CO issued a Notice of Deficiency. (AF 24-28). The Notice of Deficiency (NOD) identified two deficiencies in the Application and the modifications needed for consideration of the Application. First, the CO noted that the job opportunity in this Application listed dates of need of February 1, 2021 through November 20, 2021, but the joint employers had requested previous certification for August 5 – December 25, 2020, and had a history of filings with dates of need from May 2017 to November 2017, June 2018 to March 2019, June 2019 to March 2020, and May 2020 to December 2020. (AF 27). The CO stated: “Based on the current joint employer’s requested dates of need and its previously established dates of need, it is unclear how this job opportunity is temporary or seasonal in nature.” (AF 27). The NOD stated:

Seasonal or temporary is defined as “employment [that] 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.”

(AF 27). The CO required Employer to “explain why its job opportunity is seasonal or temporary. This explanation must provide in detail as to why its dates of need have significantly changed from its established season of June through March to its current request of February through November.” (AF 27-28). The CO further required Employer to submit “[s]upporting evidence in the form of summarized payroll reports” for a minimum of two previous years (2019 and 2020) to substantiate its temporary need. “These payroll reports must be a summary of the joint employer’s individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation” of Farm Worker. (AF 28). Further: “The summarized payroll reports must be signed by the joint employers (DeFisher Fruit Farm & Rosario Brothers LLC) with the following statement attesting that the information was compiled from the employer’s accounting records or system: I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by DeFisher Fruit Farm & Rosario Brothers LLC for Calendar Years 2019 & 2020.” (AF 28). The Employer could also submit other documentation to support its claim of a seasonal need.

Second, the CO noted that David DeFisher signed the ETA Form 790A on behalf of DeFisher Fruit Farm, but “the additional joint employer, Sergio Rosario, failed to provide a copy of its signature for the ETA Form 790A on behalf of Rosario Brothers LLC.” The CO required Sergio Rosario to submit a signed form. (AF 28).

The Employer filed a response to the NOD on December 9, 2020. (AF 11-23). The Employer stated in its email:

In response to your Notice of Deficiency I have attached DeFisher payroll from 2019 & 2020 and below is attached the Rosario Brothers for 2019 & 2020. You will notice we have many employees coming and going making it very hard to run the farm efficiently. This is why we have turned to the H2A program as our need is from February to November. Please let me know if there is anything else you need from us.

(AF 11). Attached to the email were two reports entitled “Employee Detail,” the first covering the dates January 1 – December 11, 2019, and the second covering the dates January 1 – December 11, 2020. (AF 12-17, 18-23). Handwritten notes in the margins designated four employees in 2019 as “full time,” and three employees in 2020 as “full time.” The 2019 report listed a total of 35 employees, and for each employee, listed the total hours and gross and net pay by month. It also included a summary of the total hours worked by all employees, and total pay for all employees, for each month in the year. (AF 17). The 2020 report listed a total of 46 employees, and similarly listed the total hours and gross and net pay for each employee by month. It also included a summary of the total hours worked by all employees, and total pay for all employees, for each month in the year. (AF 23).

On December 18, 2020, the CO issued a Final Determination. (AF 3-10). The letter stated that the Employer’s Application for temporary labor certification under the H-2A program was denied. (AF 4). It stated that “the employer failed to establish a seasonal need as required by 20 CFR 655.103(d). Therefore, this application is denied for 10 Farm Worker job opportunities.” (AF 6). The CO explained that the Employer had indicated dates of need from February 1, 2021 through November 20, 2021, and “[w]ith its previous applications, the joint employer has now requested workers in every month of the year.” (AF 6). The CO noted that the Employer’s previous applications had listed the same SOC code and occupation (Farm Workers), at the same worksite location, with the same or similar experience and lifting requirements, and the same or similar job duties. The CO stated: “As both applications list operating fruit pressing and sorting machines while simultaneously requesting workers in every month of the year, the employer’s need does not appear to be seasonal in nature.” (AF 7). The CO found that the Employer’s response to the NOD did not explain why its job opportunity was seasonal in nature, especially where the dates had changed from previous applications and the Employer had requested “seasonal” workers for every month of the year over the course of its applications. The CO also found that the submitted payroll reports did not demonstrate a seasonal need. The CO noted that the submitted reports “did not clearly differentiate the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation,” as had been directed in the NOD, and that “the payroll reports submitted do not support the requested need.” (AF 8-10). “Specifically, in 2019 and 2020 the non-seasonal month of January had more hours worked than the requested seasonal months of March through August.” (AF 10). In sum, the CO found: “The employer’s response and payroll fail to support that the employer has a seasonal need that is tied to a certain time of year by an event or pattern as the employer has requested workers for the same need in every month of the year.” (AF 10). The CO therefore denied the Application.

The Employer requested expedited administrative review by letter dated December 18, 2020. (AF 2). The Employer stated that “maybe [he] did not explain well enough” to the CO.

(AF 2). The Employer noted that the CO listed its past applications, and “all of those workers have gone home and this is the first application where we have asked for workers for 2021.” He stated:

Being unsure how to do the applications and exactly what was going to work for our farm we had put in many different applications with different time periods. We now realize and can make it work best for our farm if we get some workers from February to November and a 2nd contract from Late July or August to late November or early December. I did submit the payroll records broken down by each employee showing the hours for each month they worked, which would show who is permanent and who is temporary. We do have 3 fulltime workers that are all family members. I did mark that on the report before I sent it to Chicago. It has been increasingly hard to get and keep domestic workers as you will notice in the graph Chicago put in their denial report of the comings and goings of workers.

Now that we have an understanding of how the H2A program will work for our farm I am hoping I have been able to explain it well enough to you.

(AF 2).

The Administrative File (“AF”) was received on December 30, 2020. Employer relied on the arguments in its request for review, and did not file a brief. The CO relied on the reasons stated in the Denial Letter, and did not file a brief.

DISCUSSION

Administrative review in H-2A cases is set forth in 20 C.F.R. § 655.171(a): “Where the employer has requested administrative review, within 5 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 H-2A nonimmigrant visa program permits employers to hire foreign workers “to perform agricultural labor or services, as defined by the Secretary of Labor in regulations” within the United States on a temporary basis. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The regulations define a temporary or seasonal need as follows:

For the purposes of this subpart, 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.

20 C.F.R. § 655.103(d).

It is an employer's burden to show that certification is appropriate. 20 C.F.R. § 655.161(a). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361.

The issue in this case is whether the Employer has established a temporary, seasonal need for the 10 Farm Workers requested, from February 1, 2021 to November 20, 2021. Upon consideration of the record before me, I find that Employer has not carried its burden to demonstrate that its need for the requested Farm Workers is seasonal as defined under 20 C.F.R. § 655.103(d).

First, I note that Employer did not adequately explain why its dates of need had changed from previous applications, as it was directed to do in the NOD. Employer simply responded that "we have many employees coming and going making it very hard to run the farm efficiently. This is why we have turned to the H2A program as our need is from February to November." Merely stating that it has been hard to run the farm efficiently with employees coming and going, and that its need is from February to November, does not satisfy the requirement in the NOD to explain in detail why the dates of need had changed. The NOD required the Employer to submit an explanation that "must provide in detail as to why its dates of need have significantly changed from its established season of June through March to its current request of February through November." The Employer did not do so.

The Employer also did not explain why the need for the 10 Farm Workers was seasonal; that is, how 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." Again, Employer stated only that it was hard to run the farm with employees coming and going. This explanation suggests a need for more permanent staff, but does not tie the Employer's need to a certain time of year that requires far greater labor levels than those necessary for ongoing operations.

The Employer's submitted payroll reports did not comply with the CO's directions in the NOD. They were not organized as directed by the CO; they were not summarized "by month" (but rather, by employee), and while they did indicate the total hours worked and total earnings received for each employee (with the few full-time employees designated by hand-written notes), they did not indicate which of the employees worked in the designated occupation of Farm Worker. Additionally, the payroll reports were not signed by the joint employers with the attestation required by the NOD.

Moreover, the payroll reports did not demonstrate a seasonal need from February 1 through November 20. As the CO noted, the payroll reports showed that the month of January—which would be the "off season" of the purported "seasonal" need from February through November—had a greater number of hours worked (2122 hours in 2019, 1852 hours in 2020) than the alleged "seasonal" months of February through August in both 2019 and 2020. The CO included a chart in the Denial Letter setting forth the total hours worked by all employees for each month in 2019 and 2020, and the chart abundantly demonstrates that the Employer does not

“require[] labor levels far above those necessary for ongoing operations”—i.e., have a seasonal need—beginning February 1 and running through November 20. Indeed, in April through June 2019, the Employer’s employees worked a fraction of the hours worked in January 2019, and similarly, in March through May of 2020, the total employee hours are a fraction of the hours worked in January 2020. Overall, the Employer’s payroll records do not substantiate its asserted seasonal need from February 1 through November 20, and thus they do not satisfy the regulations for the period requested in the Application.

Because the Employer has not satisfied its burden of establishing a seasonal need for temporary workers for the dates requested in the Application, I find that the CO’s determination should be affirmed.

ORDER

For the foregoing reasons, it is hereby ORDERED that the Certifying Officer’s denial of the Employer’s application for H-2A temporary labor certification is AFFIRMED.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA