In the Matter of:

RICO PRODUCE, INC.,
Employer.

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION
AND DIRECTING GRANT OF PARTIAL CERTIFICATION


On November 24, 2021, Rico Produce, Inc. (“Employer”) requested expedited administrative review of the Certifying Officer’s (“CO”) November 17, 2021, denial of its H-2A application. Administrative File (“AF”) 1-10. In expedited administrative review cases, an administrative law judge has five business days after receiving the AF to issue a decision on the basis of the written record, with no new evidence submitted on appeal. 20 C.F.R. § 655.171(a). This matter was assigned to me on December 1, 2021, and on December 2, 2021, I issued a Notice of Docketing and Order Setting Briefing Schedule in which I gave the parties three business days after receipt of the Administrative File to submit briefs. The Board of Alien Labor Certification Appeals received the AF on December 1, 2021. Neither the CO nor Employer filed an appellate brief.

BACKGROUND

On October 28, 2021, Employer filed an H-2A Application for Temporary Employment Certification, ETA Form 9142A. AF 54-70. In this application, Employer requested temporary labor certification for six workers whose job title is “Farmworkers and Laborers, Crop,” SOC code 45-2092.02, with a period of need from December 6, 2021, to September 24, 2022. AF 60, 62, 70. Employer stated these six workers would have the following job duties:

Clean and prepare land; operate and service farm machinery and tools; plant seeds; irrigate farm soil and maintain ditches or pipes and pumps; apply fertilizer and/or pesticide; harvest and inspect crops by hand; clean and package final
products; place crops in cold storage unit; perform final pre-delivery inspection; planting watermelon, honeydew melon, and green peppers.

AF 62. On its application, Employer indicated the employment is seasonal in nature. AF 54.

On October 29, 2021, the CO issued a Notice of Deficiency (“NOD”), listing two deficiencies with Employer’s application. AF 42-48. One of the identified deficiencies (and the sole basis for the denial of certification in this case) was that Employer did not establish a temporary or seasonal need for these workers, as required by 20 C.F.R. § 655.103(d). AF 5-10. The CO stated that:

Based on the [E]mployer’s requested dates of need in its current H-2A application and its previously requested dates of need in its H-2A application filing history at the same worksite as the current H-2A application, the [E]mployer has not established how this job opportunity is seasonal or temporary, rather than permanent, in nature.

ETA Form 9142A, Section A.3 has been completed to indicate the nature of the employer’s need as seasonal. The [E]mployer is requesting six Farmworkers and Laborers, Crop from December 6, 2021 through September 24, 2022 at PR-3 KM 153.5 Salinas, Puerto Rico. However, the [E]mployer previously requested six workers from October 10, 2021 through August 10, 2022 at the same worksite location.

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AF 6.

The CO summarized how the applications were for the same SOC code, and required the same experience/training.1 See AF 6-7. The CO thus concluded the following:

Therefore, based on the [E]mployer’s currently requested dates of need and its previously requested dates of need for the same worksite as the previous application, it is unclear how the positions presented in this application for H-2A workers are seasonal or temporary in nature. The need for labor does not appear to be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle. Nor does the [E]mployer’s need for this labor or services appear to be temporary, as defined at 20 C.F.R. § 655.103(d). As discussed above, the [E]mployer’s application appears to

1 The applications required applicants to have three months of experience, and one month of training. AF 6.
request certification to fulfill what appears to be—in full or in part—an ongoing, year-round (i.e. permanent) need for the labor at the Employer’s worksite.

AF 7.

The CO requested that Employer submit documentation to support the statement that the job opportunity is seasonal rather than permanent in nature. AF 7. Employer stated “we have a need for 20-26 full-time employees and request for 6 experienced laborers to come and help initiate our project.”2 AF 22 (emphasis added). Employer was unable to provide previous payroll reports because this “will be the first time we are going to plant on this farmland.” AF 22. Employer stated that the permanent workers are needed “ongoing throughout the year.” AF 22. Employer also stated “we have three growing seasons annually, each approximately 3-4 months long (Nov-Feb, Mar-Jun, and July-Oct).” AF 8, 22. Employer hoped to use the additional workers to “provide support for two crop cycles.” AF 2.

Employer stated “our previous application request for employees with the start date of 10/10/2021 was set so we could have those people in Puerto Rico a month before our planting season began in order to help train the local inexperienced employees and assist in preparing the land. Since the application was denied on the basis of abandonment of one of the Deficiency Notifications, we had to reapply and readjust . . . the dates set in the current application.” AF 22.

The CO’s Final Determination stated that Employer indicated it “experiences three seasons that combine for year round use of agricultural labor.” AF 18. The CO stated “in assessing the Employer’s need, it is the nature of the need and not the different crops which must be examined. Here, although the specific crops being harvested may change throughout the course of the year, the Employer has a year round need for the same type of underlying labor.” AF 18. The CO stated that by amending the end date of the application from August 10, 2022, to September 24, 2022, “the Employer has demonstrated its job opportunity as outlined in this application can be performed in every month of the year. Therefore, its need is not seasonal.” AF 18. The CO also stated that the rest of Employer’s response did nothing to support Employer’s assertion that its need is seasonal or temporary in nature. See AF 18. As a result, the CO denied Employer’s application pursuant to 20 C.F.R. § 655.103(d). AF 19.

DISCUSSION

An employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program. 20 C.F.R. § 655.161(a). The regulation states:

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

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2 Employer at one point clarified that the requested foreign labor will “train [Employer’s] local employees.” AF 22. At another point, Employer stated that the additional workers will not be required to have prior training, but presumably still require three months of experience. AF 23.
fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

*Id.* § 655.103(d).

Employer indicated a “seasonal” need on its application. AF 54 (responding to the question “Nature of Temporary Need,” with “seasonal” rather than “other temporary need” in Section A.3 of the application). As noted above, “seasonal” work is tied to a “certain time of year by an event or pattern.” 20 C.F.R. § 655.103(d). However, Employer stated the additional workers are actually needed to train the local employees, and help initiate Employer’s operations. AF 22. Therefore, Employer’s has not established a seasonal need.3

Employer’s stated need for temporary workers does not last longer than 1 year. Despite the CO’s conclusions, I find that Employer clearly stated its need for additional workers is shorter than a year. I find that the CO interpreted Employer’s response to the NOD as though Employer needs additional workers for every growing season. AF 9. However, I find that Employer was clear that Employer needs permanent workers year round, but it only needs the additional workers sought by this application only during the initial phase of operations to train local employees. AF 22.

However, I find that Employer’s application failed to show that the Employer needs additional foreign labor for more than three months (December 6, 2021 – March 6, 2021).4 Employer stated the purpose of requesting the additional foreign labor is to train local employees. AF 22. Employer stated that the application can be modified so that the requested additional workers will not be required to have prior training. AF 23. If the additional workers are not required to have prior training, the only feature setting the foreign workers apart from Employer’s local employees is the three month experience requirement. If three months of experience is sufficient to train local employees, and Employer’s sole reason for requesting foreign workers is to acquire help to train local employees, then Employer has no need for foreign workers beyond three months. In fact, Employer explicitly stated the foreign workers’ “support is needed for the first 3 months of planting a crop and will be permitted to go home for a month while the full-time workers harvest, clean, and package the produce.” AF 1-2. Therefore, Employer has failed to establish a need for agricultural services or labor on a temporary basis beyond three months.

**ORDER**

In light of the foregoing, it is hereby ordered that the Certifying Officer’s denial of certification in this matter is **REVERSED** and this case is **REMANDED** to the CO with direction to **GRANT PARTIAL CERTIFICATION** consistent with the amount of time

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3 The CO concluded that certification must be denied because Employer failed to establish a seasonal or temporary need. AF 10.

4 As a reminder, Employer requested additional foreign workers for December 6, 2021, to September 24, 2022. AF 62.
established by Employer (i.e. a partial certification of three months from December 6, 2021 – March 6, 2021).

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge