



Issue Date: 19 March 2012

OALJ Case No.: 2012-TLC-00058

ETA Case No.: C-12027-32250

In the Matter of

ADVANCED AGRICULTURAL, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On February 16, 2012, Advanced Agricultural, Inc. (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter.¹ See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On March 12, 2012, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the administrative law judge has five business days after receiving the file to issue a decision on the basis of the written record. 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On January 27, 2012, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

¹ The Employer sent its request for administrative review to the Division of Foreign Labor Certification in Chicago, rather than to the Office of Administrative Law Judges (“OALJ”). OALJ first learned of the Employer’s appeal on March 12, 2012.

certification for five agricultural equipment operators. AF 85-93.² The Employer stated that it had a temporary seasonal need for the workers from April 1, 2012 to January 31, 2013. AF 85. In its statement of temporary need, the Employer stated:

These workers are needed during this time of the year because it is the time the fields are prepared for the planting, maintenance is given to the fields, and the crop is harvested.

Id. The Employer listed the job duties for the position as follows:

To operate tractors in the sugarcane fields for fertilizing, planting, maintenance and harvesting of the crop. Manual shovel work, cleaning drains, hoeing of weeds and general farm labor.

AF 87. On February 2, 2012, the CO issued a Notice of Deficiency (“NOD”), finding that the Employer had not established a temporary need for the labor to be performed, as required by 20 C.F.R. § 655.103(d).³ AF 53-56. The CO noted that while the Employer’s dates of need are April 1, 2012 through January 31, 2013, the Employer’s previous certification was for July 1, 2011 through April 30, 2012. AF 55. The CO required the Employer to explain why its job opportunity is seasonal or temporary, and required the Employer to detail why its dates of need have significantly changed from its established season of July through April to its current request of April through January. *Id.*

The Employer responded to the NOD on February 6, 2012. AF 39-49. The Employer stated that it needs workers from April through the end of January, and stated that in 2011, its beginning date of need was altered from the usual April need date because it filed its application late. AF 44. The Employer stated that the end date was extended because the Employer acquired additional land and the workers were needed to help prepare the land for planting and cultivating. *Id.*

On February 10, 2012, the CO contacted a representative from the Louisiana SWA to confirm the months for the sugarcane growing and harvesting season in southern Louisiana. AF 33-34. The SWA representative stated that it is possible to harvest sugarcane a few times each year, and that there is no distinct season for sugarcane planting and harvesting. AF 33. The

² Citations to the 113-page Administrative File will be abbreviated “AF” followed by the page number.

³ The CO also found two other deficiencies, which are not at issue on appeal.

SWA representative added that the extreme weather conditions benefitted the sugarcane crop during 2010. *Id.*

On February 14, 2012, the CO denied certification, finding that the Employer failed to establish a temporary need for the requested workers. AF 30-32. The CO found that the Employer did not establish how its need is seasonal or temporary rather than permanent in nature. The Employer requested expedited administrative review on February 16, 2012, arguing that it did not need workers during February and March, because those months are generally the coldest and do not allow for the planting or harvesting of sugarcane. AF 1-21. The CO filed a brief on March 15, 2012, arguing that certification was properly denied because the Employer's filing history suggests that the Employer has a need for workers on a year-round basis.

DISCUSSION

The H-2A regulations provide that "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 well-established that "[i]t is not the nature or the duties of the position which must be examined to determine the temporary need. It is the nature of the need for the duties to be performed which determines the temporariness of the position." *Matter of Artee Corp.*, 18 I. & N. Dec. 366, 367 (1982), 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009). 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. *Altendorf Transport*, 2011-TLC-158, slip op. at 11 (Feb. 15, 2011).

The Employer's response to the NOD contains a brief explanation why its dates of need had changed from last year's need dates of July 1, 2011 through April 30, 2012 to this year's need dates of April 1, 2012 through January 31, 2013. The Employer stated that it filed its application late last year, and that it needed workers between January and April to prepare the Employer's newly-acquired land for planting and cultivating.

The Employer's need for workers is not seasonal, as all of the evidence in the record suggests that its need is not tied to any particular time of year by an event or pattern. Notably, a Louisiana SWA representative explained that sugarcane does not have a distinct season, and that it is possible to harvest sugarcane a few times a year. While the Employer's request for review contains an additional explanation why it does not need workers during certain months of the year, this is new evidence that I cannot consider on appeal.⁴ 20 C.F.R. § 655.171(a).

The Employer has also failed to establish that it has a temporary need for workers. If the Employer's request for five workers were granted, the Employer would have "temporary" workers preparing the fields for planting, maintaining the fields, and harvesting the crop for 19 consecutive months. Such a continuous need for preparing the fields for planting, cultivating, and field work reveals that the Employer has a year-round, rather than temporary or seasonal, need for this work to be performed. Based on the foregoing, I find that the Employer has not demonstrated that it has a temporary need for H-2A workers under 20 C.F.R. § 655.103(d), and therefore, the CO's determination is affirmed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

⁴ Even if I could consider this information, it would be of limited probative value, as it is contradicted by the Employer's use of workers during the months that the Employer purports not to need workers.