

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 October 2012

OALJ Case No.: 2012-TLC-00098

ETA Case No.: C-12249-35536

In the Matter of:

J-SIX ENTERPRISES LLC,

Employer,

Appearances: Heleen van Tonder
Golden Opportunities International LLC
214 Eagle Drive
McGregor, Iowa 52157
For the Employer

Gary M. Buff , Associate Solicitor
Stephen Jones, Attorney
Office of the Solicitor
Division of Employment and Training
Legal Services
Washington, D.C.
For the Certifying Officer

Before: KENNETH A. KRANTZ
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) (“the Act”), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On September 26, 2012, J-Six Enterprises LLC (“Employer”) filed a request for administrative review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. (AF 2-3) *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171.

Procedural History

On September 5, 2012, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Employer for temporary labor certification for ten farmworkers, farm and ranch animals. (AF 91-104). On September 12, 2012 the Certifying Officer ("the CO") issued a Notice of Deficiency ("NOD"), finding one relevant deficiency. (AF 72-75). The CO asserted that the Employer did not demonstrate the seasonality of the job opportunity, as required by 20 C.F.R. § 655.103(d). The CO indicated that the job opportunity described on ETA Form 9142, Section B items 5 and 6, and ETA Form 790, item 6, coupled with the employer's filing history, indicated that the employer's dates of need extended from January 1, 2012 to July 30, 2013. (AF 74). The CO stated that the Employer "must provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature." (AF 74). In addition, the CO directed the Employer to submit summarized payroll reports to demonstrate that the Employer needed H-2A workers on a seasonal basis. (AF 74). On September 18, 2012, Employer submitted 2011 payroll information. (AF 57-69). On September 21, 2012, the CO denied the application, stating that the deficiency had not been successfully addressed. (AF 50-51) Employer appealed the denial on September 26, 2012, requesting administrative review. (AF 2-3).

On October 5, 2012, the Office of Administrative Law Judges ("OALJ") received the Appeal File ("AF") from the CO. When a party requests an administrative review, the administrative law judge ("ALJ") has five business days after receipt of the AF to "review the record for legal sufficiency" and issue a decision. § 655.115(a). On the basis of the AF, the ALJ must affirm, reverse, or modify the CO's determination, or remand to the CO for further action. 20 C.F.R. §655.171(a). The ALJ may not consider any new evidence submitted on appeal if the employer has requested administrative review.

Position of the Parties

The CO denied the application on the basis that Employer had not demonstrated that the job was seasonal or temporary as required by 20 C.F.R. § 655.103(d). The CO combined the period of need for Fairview Mills-John Kramer and J-Six Enterprises- John Kramer. When the CO combined the period of need for the two entities, it extended from January 1, 2012 to July

30, 2013. The CO indicated that this eighteen month and thirty day period demonstrates a non-seasonal and non-temporary need. (AF 50). The CO noted that Mr. John Kramer owns both Fairview Mills and J-Six Enterprises and that the worksites for the entities are only fourteen miles apart. In addition, workers at both sites were to perform the identical job duties of receiving new breeding stock, doing vaccinations, detecting estrus cycles, keeping records, artificial insemination, feeding, and cleaning. (AF 50).

Employer contended that Fairview Mills and J-Six Enterprises are two separate entities with separate tax numbers and working addresses. (AF 2-3). In addition, Employer contended that the only commonality between Fairview Mills and J-Six Enterprises is that they are owned by Mr. John Kramer. Fairview Mills has a season from January until October, and J-Six Enterprises has a season from October until July. (AF 2-3). Employer explained that “different enterprises have different seasons to make sure there is enough production as needed to cover client requirements.” (AF 8). Employer argued that Fairview Mills and J-Six Enterprises should be treated separately, resulting in a seasonal need for J-Six Enterprises.

Discussion

To qualify for the H-2A program, the employer must demonstrate that it has “agricultural services or labor to be performed on a temporary or seasonal basis.” 20 C.F.R. § 655.161(a), *See Altendorf Transport, Inc.*, 2011-TLC-158 (Feb. 15, 2011). An “employer’s need is considered temporary if justified to the Secretary as either a one-time occurrence, seasonal need. . . or an intermittent need, as defined by the Department of Homeland Security. 8 CFR § 214.2(h)(6)(ii)(B).” 20 CFR § 655.6. On its application, Employer characterized its need as seasonal. (AF 96). Seasonal need is “traditionally tied to a season of the year by an event or pattern and is of a recurring nature.” 8 CFR § 214.2(h)(6)(ii)(B). The regulation further provides that “[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.” 8 CFR § 214.2 (h)(5)(iv). An employer’s ability to manipulate its “season” in order fit the criteria of the temporary labor certification reveals that its need for labor is not, in fact, tied to the weather or any particular annual pattern, and therefore, its need for temporary labor is not seasonal according to the

definition established at 20 C.F.R. § 655.103(d). *Salt Wells Cattle Company, LLC*, 2011-TLC-185 (Feb. 8, 2011).

When determining the seasonality of the job opportunity, it is appropriate “to determine if the employer’s needs are seasonal.” *Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). Employer suggested that the seasonal workers were needed for a “breeding season” from October 2012 to July 2013. (AF 8). However, when Mr. Kramer’s Fairview Mills and J-Six Enterprises applications and histories are combined, it is clear that Mr. Kramer has a year round need for workers to perform the tasks of receiving new breeding stock, performing vaccinations, detecting estrus cycles, record keeping, artificial insemination, feeding, and cleaning. Mr. Kramer does not have a need for workers based on a “time of year” which “requires labor levels far above those necessary for ongoing operations.” 8 CFR § 214.2 (h)(5)(iv). When J-Six Enterprises and Fairview Mills are considered together, there is no season at which Mr. Kramer needs workers at levels far above normal operations. The year-round nature of the request further indicates that Mr. Kramer’s need for workers to assist in the artificial insemination breeding season is not tied to the weather or any particular annual pattern as described in the definition of seasonal need.

By dividing hog production operations between two geographically close entities, Mr. Kramer seeks to hire H-2A seasonal livestock workers to perform identical hog production tasks year round and within one area of intended employment. Mr. Kramer’s ability to separate his livestock production between two closely located entities does not enable him to hire temporary H-2A workers to fulfill his permanent farmworker needs in one geographically small area of employment. 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). Based on the foregoing, I find that denial of certification is proper.

ORDER

Accordingly, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

KENNETH A. KRANTZ
Administrative Law Judge

KAK/ECD/mrc