



Issue Date: 06 December 2011

OALJ Case No.: 2012-TLC-00007

ETA Case No.: C-11291-30269

In the Matter of

ROLLING MEADOWS FARM, LLC,
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 November 22, 2011, Rolling Meadows Farm, LLC (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On November 30, 2011, 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 October 18, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for four “Winter Grounds Maintenance Workers.” AF 71-80.¹ The Employer stated

¹ Citations to the 102-page Administrative File will be abbreviated “AF” followed by the page number.

that it had a temporary seasonal need for the farm workers from November 30, 2011 to March 31, 2012. AF 71. In its statement of temporary need, the Employer stated, in relevant part:

This position is temporary/seasonal directly tied to our Winter Maintenance needs. Pursuant to DOL regulations, Rolling Meadows Farm is unable to use H-2A program for milking duties at our facilities. Because of this limitation, we must use all available US workers to meet our milking needs during winter months, leaving insufficient workers to fill our Winter Grounds/Maintenance positions at Rolling Meadows Farm. We are seeking to supplement our workforce with additional H-2A workers to help meet this need.

AF 71. The Employer listed the occupation title as “farmworkers and laborers” and the SOC/O*Net code as 45-2092.02. AF 71. The job duties for the position include:

Perform general winter maintenance. Snow removal from pathways/roadways/roofs. De-ice/repair manure/water pipes/bunker silos. Repair and maintain equipment (plows, skidsteers, tractors, feeder trucks, parlor equipment). Work in all weather conditions. Random drug testing may be required at employer expense post-hire for safety of workers due to operation of dangerous equipment.

AF 73. On October 25, 2011, 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).² AF 49-52. The CO noted that while the Employer’s dates of need are November 30, 2011 through March 31, 2012, the Employer’s previous two certifications were April 6, 2009 through November 30, 2009 and May 5, 2011 through November 30, 2011, respectively. AF 51. The CO found that the Employer had requested workers at the same work location for similar job duties, including the maintenance of farm equipment, for a different period of the year. The CO also noted that both the Employer’s current application and its certified application from May 2, 2011 to November 30, 2011 require general farm maintenance, which seems to be a duty that would be required during the normal operation of a farm, regardless of the season. AF 51-52. Accordingly, the CO required the Employer to provide a detailed explanation of why the Employer’s dates of need have significantly changed from its established season of May through November to its current request of November through March, and explain why the job opportunity is seasonal or temporary. AF 52. The CO required the Employer to submit supporting evidence in the form of summarized payroll reports for a minimum of one previous calendar year, and required the

² The CO also found one other deficiency, which is not at issue on appeal.

reports to identify the total number of workers, total hours worked, and total earnings received separately for permanent and temporary employment in the designated occupation. AF 52.

On October 31, 2011, the Employer responded to the NOD. AF 15-47. The Employer argued that the job opportunity in this application is separate and distinct from the farmworker – diversified crop position for which it was certified from May to November. AF 24-25. The Employer stated that the May-November farmworker – diversified crop position drives tractors and trucks and performs a variety of crop raising duties, including plowing, harrowing, planting, fertilizing, cultivating, spraying, and harvesting using a variety of farm machinery. AF 25. Additionally, the Employer stated that the May to November farmworkers maintain and repair farm implements, mechanical equipment, and storage barns, in addition to loading and transporting harvested crops from the field to storage. *Id.* The Employer argued that these duties are only needed during the growing season, and not the winter months. *Id.* According to the Employer, the winter grounds/maintenance worker position performs general winter maintenance on the farm, including snow removal from pathways, roadways, and roofs. Additionally, this position involves de-icing and repairing water pipes and bunker silos, and repairing and maintaining equipment. *Id.* The Employer noted that the majority of the equipment to be maintained during the winter months is equipment adapted and used for winter purposes, including snow removal and de-icing. Therefore, the Employer argued that the maintenance required is different from and additional to the maintenance program required during the growing and cropping season. *Id.*

In addition, the Employer argues that it is unable to utilize the H-2A program for milking duties at the farm, and therefore must use all available U.S. workers to meet its milking needs during the winter months, leaving insufficient workers to fill the maintenance positions during the winter season. *Id.* The Employer submitted a summarized payroll report from 2010, but noted that it did not hire any H-2A workers in 2010. The Employer stated that the only employees in 2010 were family members, but that the Employer's sons are unavailable to assist in the 2011-2012 season. AF 26. The Employer's payroll reports show that Tom and Howie Gabel were the Employer's only two workers from January 2010-December 2010. AF 27-30. The payroll records do not include the number of hours that Tom and Howie Gabel worked each week; instead, the Employer included a statement that they are each salaried employees who work 60 plus hours a week, up to as much as 90 hours. AF 27. The Employer's records show

that Howie Gabel earns \$1,192 biweekly and Tom Gabel earns \$2,000 biweekly. AF 28-30. The Employer stated that Tom Gabel's duties include repairing and maintaining buildings and maintenance, feeding cows, driving tractors, spreading manure, raking hay, and hauling hay. AF 27. The Employer stated that Howie Gabel's duties include feeding the cows, repairing and maintaining machinery, plowing, spreading manure, planting seed, oats, and corn, hauling hay, corn, and oats, and ordering supplies. *Id.*

On November 16, 2011, the CO denied certification, finding that the Employer failed to establish a temporary need for the requested workers. AF 10-14. The CO rejected the Employer's argument that its previous and current applications present different positions, noting that it did not show that the two positions are tied to a season. AF 12. The CO found that both applications require workers to maintain farm equipment, and that duties listed in the current application appear to have been required on the previous application as well, creating a year-round need. AF 13. Regarding the Employer's 2010 payroll records, the CO found that although there was a seasonal element to some of the job duties, that the positions were the same, and the Employer's two workers were employed for the duration of the entire year. AF 13. The CO found that this conclusively demonstrates that the Employer has a year-round need for the duties to be performed. *Id.*

On November 22, 2011, the Employer appealed the denial. The Employer and counsel for the CO filed briefs on December 2, 2011. In its brief, the CO argues that the Employer's payroll records and description of duties performed by the Employer's two sons demonstrate that the Employer has a year-round need. The CO argues that the Employer's attempt to create an artificial delineation between the work that is performed in the spring and the winter months fails to overcome the fact that the underlying work that is performed is the same. The Employer argues that the position is seasonal because snow-related maintenance is not needed in the spring and summer.

DISCUSSION

The applicable 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." 20 C.F.R. § 655.103(d). "It 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).

In this case, the Employer has failed to demonstrate that its need for maintenance workers is seasonal. The Employer’s 2010 payroll records show that the Employer had two workers performing maintenance duties all year long. Although the Employer requests four maintenance workers from November 30, 2011 to March 31, 2012, the Employer has not demonstrated that it needs any more maintenance workers during this time period than it does from April to November. A season requires “labor levels far above those necessary for ongoing operations.” The only fact that the Employer’s payroll records demonstrate, however, is that it needs maintenance work performed year-round. The fact that the maintenance operations are being conducted in wintertime does not render the Employer’s maintenance needs a “seasonal need.” The Employer has not demonstrated that it needs any more maintenance workers during the winter months than it does during the rest of the year.

Based on the foregoing, I find that the Employer has not demonstrated that it has a seasonal 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