



**Issue Date: 08 May 2012**

**OALJ Case No.: 2012-TLC-00065**

**ETA Case No.: C-12103-34072**

*In the Matter of*

**AGRICULTURAL ADVANCEMENTS, 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 April 27, 2012, Agricultural Advancements, LLC (“the Employer”) filed a request for administrative review of the Certifying Officer’s (“CO’s”) determination in the above-captioned temporary agricultural labor certification matter.<sup>1</sup> See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On May 1, 2012, the Office of Administrative Law Judges (“OALJ”) received the Administrative File from 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).

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<sup>1</sup> The Employer sent its request for administrative review to the Employment and Training Administration, Office of Foreign Labor Certification in Chicago, Illinois rather than to the Office of Administrative Law Judges (“OALJ”). OALJ first learned of the Employer’s appeal on May 1, 2012, when it received the administrative file from ETA.

## STATEMENT OF THE CASE

On April 12, 2012, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for five agricultural equipment operators. AF 59-67.<sup>2</sup> The Employer stated that it had a temporary seasonal need for the workers from June 1, 2012 to January 5, 2013. AF 59. The Employer's statement of temporary need provided:

Agricultural Advancement is in need of temporary workers during this time of the year as this is the time of the year that the sugar cane fields are prepared for planting, [and] the crop is planted and harvested for the raw sugar process. Agricultural Advancement is in need of temporary workers to assist with the land to ensure that the land is prepared and the crop is planted in time for the harvesting season. These workers are extremely important to the sugar cane farming process as without the proper labor during this time of the year, harvest would be a loss.

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

To operate farm equipment; planting of sugarcane by hand and shovel work in the fields; farm, field and shed sanitation duties; operation and performing minor repairs and maintenance of farm vehicles and equipment. Able to work in hot, humid weather, bending or stooping to reach ground level crops and able to stand on feet for long periods of time.

AF 61. On April 16, 2012, the CO issued a Notice of Deficiency ("NOD") informing the Employer that its job order, ETA Form 790, was deficient because it did not include the Employer's three-month experience requirement. AF 34-35. Additionally, the CO determined that it was not clear whether the Employer meets the definition of a "fixed-site employer." AF 35. On April 16, 2012, the Employer granted the CO permission to add the three-month experience requirement to the ETA Form 790, and clarified that the Employer is a fixed-site employer. *Id.*

On April 17, 2012, the CO notified the Employer that its application had been accepted for processing ("Notice of Acceptance" or "NOA"). AF 15-20. The CO instructed the Employer to conduct its domestic recruitment and submit a written recruitment report to the CO by April 24, 2012.<sup>3</sup> Subsequently, on April 23, 2012, the CO notified the Employer that upon further

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<sup>2</sup> Citations to the 85-page Administrative File will be abbreviated "AF" followed by the page number.

<sup>3</sup> The Employer submitted its recruitment report on April 27, 2012, stating that it did not hire the U.S. applicant because he does not possess the amount of experience required. AF 9.

review of the Employer's application, the CO determined that the Employer's application fails to meet the criteria for certification. AF 11-13. Specifically, the CO found that the job opportunity in the Employer's application is not seasonal or temporary in nature, as defined by 20 C.F.R. § 655.103(d). AF 11. The CO determined that the job opportunity in the Employer's application, coupled with the Employer's recent H-2A filing history, indicates that the Employer's dates of need are year-round. The CO determined that the Agricultural Advancements, LLC is the same company as Advanced Agricultural, Inc., a company that recently received a denial of certification because it had not established that its need for agricultural equipment operators was temporary or seasonal in nature. AF 12. The CO required the Employer to provide a detailed explanation as to why its job opportunity is seasonal or temporary rather than permanent in nature. *Id.*

Rather than responding to the CO's NOD, the Employer requested administrative review. AF 1-8. In its request, the Employer contended that it grows sugar cane from March through October, and in August, it begins to plant its crop for the following year's harvesting season. AF 5. The Employers noted that planting generally takes about 90 days. *Id.* The Employer stated that in October, the existing matured crop is harvested and sent to the sugar mills, and that the harvesting begins in mid-September and lasts through the end of December or mid-January. *Id.* The Employer explained that the newly-planted crop becomes dormant in the winter months and begins to spout in early spring, and noted that there is usually a freeze between January through March, during which no harvesting occurs. *Id.* The Employer stated that the harvesting of sugar cane only occurs once a year in Louisiana. *Id.*

The Employer acknowledged that Agricultural Advancement, LLC is a "sister company" to Advanced Agricultural, Inc., and that the two companies "work together to farm and produce the sugar cane crop in the fields that they own." *Id.* The Employer added that in the past, Advanced Agricultural received H-2A certification from March 22, 2010 through November 30, 2012, and that during this time, the H-2A workers assisted with the preparation of the land for the planting that began in July and assisted with the harvesting of the crop through the end of November. *Id.* The Employer stated that in 2011, Advanced Agricultural acquired additional farm land and needed additional temporary workers to prepare the newly-acquired land for the

season, and therefore filed and received certification for temporary workers from July 1, 2011 to April 30, 2012. *Id.* Additionally, the Employer stated:

At this time, the employer [Advanced Agricultural, Inc.] decided that the sister company [Agricultural Advancement, LLC] would file for the 2012 temporary workers and establish a [recurring] time of need for the company as the land is now established and there should be no need for additional assistance at other times in the year. The workers were requested from 6/1/2012 through 1/5/2012. This period of time would allow the employer the time needed to prepare the existing land for the planting of the new crop, and the assistance needed for the planting that begins July through October and assist with the harvesting of the crop from October through January. This will be a [recurring] need with the same time frame each year from this year forward.

*Id.* The Employer also sent a letter of support from the René Simon from the Louisiana Department of Agriculture and Forestry, who stated that the Louisiana sugar cane season begins in June and lasts until mid-January. AF 8.

The CO forwarded this matter to OALJ on May 1, 2012. On May 4, 2012, the Employer submitted additional information about the sugar cane planting and harvesting season. The CO filed a brief statement contending that the new evidence submitted by the Employer in its request for review and in its brief could not be considered on appeal pursuant to 20 C.F.R. § 655.171(a).

## **DISCUSSION**

### *Timeliness of CO's Notice of Deficiency*

On April 16, 2012, the CO issued an NOD, which was corrected by the Employer on April 17, 2012. AF 35. On April 17, 2012, the CO issued an NOA, instructing the Employer to submit its recruitment documentation. AF 15-20. On April 23, 2012, the CO again issued an NOD.<sup>4</sup> AF 11-13.

The H-2A regulations provide that if the CO determines that an employer's application for temporary labor certification contains errors or inaccuracies, the CO will notify the employer within seven calendar days of the CO's receipt of the employer's application. 20 C.F.R. § 655.141(a). In this case, the CO issued its second NOD more than seven days after the Employer

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<sup>4</sup> The CO cited 20 C.F.R. § 655.121(e)(1) as the regulatory basis of the NOD. However, Section 655.121(e)(1) relates to the CO's ability to require an employer to modify the job order. As the CO was requiring the Employer to provide evidence demonstrating its seasonal or temporary need, rather than requiring the Employer to change its job order, the proper regulatory basis for the CO's action is Section 655.141.

filed its application, and after the CO had already issued an NOA. Consequently, I find that the CO's April 23, 2012 NOD is not timely.

Nevertheless, neither the regulations nor the regulatory history indicate that the CO's failure to comply with a timeliness requirement triggers any type of procedural or substantive rights or remedies for aggrieved employers. *See Frey Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*, 2011-TLC-403 and 404, slip op. at 5-6 (June 3, 2011). Thus, even though the CO's identification of the issue on appeal was not timely raised, the Employer is not entitled to any type of equitable relief from the CO's noncompliance with Section 655.141(a). As such, I will review the substantive basis of the CO's April 23, 2012 NOD.

#### *Scope of Review*

The H-2A regulations permit an employer to request expedited administrative review of a Notice of Deficiency, but provide that an employer may not include any new evidence before the ALJ. 20 C.F.R. § 655.171(a). Here, the Employer requested administrative review, but included additional evidence regarding the nature of its sugar cane harvest season with its request. This is new evidence that was not part of the record, and therefore, I am unable to consider any of this evidence in my review.<sup>5</sup>

#### *Seasonal or Temporary Need*

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*

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<sup>5</sup> I note that had the Employer submitted all of the documentation to the CO in response to the NOD rather than requesting administrative review, the CO would have had the opportunity to review the evidence, and it would have become part of the administrative record. As a result, even if the CO had found the evidence insufficient to establish a seasonal or temporary need, I would have been able to consider the evidence on appeal.

*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).

Although the Employer has submitted evidence in support of its position that its sugar cane season begins in July and continues to January, none of this evidence was presented to or reviewed by the CO. Accordingly, it is all new evidence within the meaning of Section 655.171(a), and I am not permitted to consider any of it on appeal. As a result, the record before me is devoid of any evidence in support of the Employer's argument, and 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**.

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge