

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 19 October 2012

OALJ Case No.: 2012-TLC-00099

ETA Case No.: C-11306-30390

In the Matter of

D & G FREY CRAWFISH LLC,

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

APPEARANCES: Dana Frey
6676 Harmon Road
Iota, Louisiana 70543
For the Employer

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, D & G Frey Crawfish (“Employer”) filed a request for administrative review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. (AF) See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171.

Procedural History

On August 29, 2012, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Employer for temporary labor certification for forty “Farm workers and Laborers, crop.” (AF 131-139). On September 4, 2012 the Certifying Officer (“the CO”) issued a Notice of Deficiency (“NOD”), finding numerous relevant deficiencies. (AF 113-119). The CO asserted that the Employer did not demonstrate that the job opportunity was seasonal or temporary in nature, as required by 20 C.F.R. §

655.103(d). In addition, Employer did not provide the correct daily amount for transportation and subsistence pay. (AF 116). The CO indicated that Employer must amend the number of workers to be consistent between the forms, fill in the section regarding education requirements, alter the job description in ETA Form 9142 to match the job description in ETA Form 790, provide information regarding attorney representation, and include the name of the Louisiana Workforce Commission. Furthermore, Employer failed to affirmatively state that it would abide by the obligations of 20 C.F.R. § 655.122(o). On September 21, 2012, the CO denied Employer's temporary labor certification. (AF 5-9). The CO stated that Employer had failed to demonstrate that the job was seasonal. The CO explained that "[b]ased on a review of the employer's applications, D & G Frey Crawfish, LLC and Gerard Frey Farms, it appears there is a year round need for this type of labor." (AF 7). On September 26, 2012, Employer appealed the denial, requesting administrative review. (AF 2).

On October 5, 2012, the Office of Administrative Law Judges ("OALJ") received the Appeal File ("AF") from the CO.¹ On October 12, Employer filed a brief in support of its position. 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. 20 C.F.R. § 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.

Positions of the Parties

The CO argued that Employer has not met its burden to demonstrate that the job opportunity is seasonal in nature. The CO asserted that seasonal employment 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." (AF 3). The CO noted that a review of the applications from D & G Frey Crawfish, LLC, and Gerard Frey Farms demonstrated a year round need for crawfish labor at the worksite. (AF 3). The CO further noted that D&G Frey Crawfish and Gerard Frey Farms have the same owner, mailing address, and worksite location. Furthermore, the CO noted that D & G Frey Crawfish and Gerard Frey Farms needed workers to perform the same job duties. When combined, the employers requested workers for over one year and six months, thus violating the seasonality requirement.

Employer argued that the D&G Frey Crawfish and Gerard Frey Farms positions involve different job duties. In its request for appeal, Employer contended that the D & G Frey Crawfish jobs include "flood ponds, make levees, and build traps," while the Gerard Frey Farms job includes "maintain levees, maintain traps, and build ponds." (AF 2). Furthermore, Employer stated that different employees work for the two different businesses. Employer argued that the jobs overlapped by almost two months.

¹ Citations to the 173-page Appeal File will be abbreviated "AF" followed by the page number.

Employer stated that: this job is temporary in nature because is just need people to get the stuff ready for the upcoming crawfish season. Then I get a different set of people to do the actual crawfishing and such. Sometimes the jobs last longer than expected because of weather, like we were affected this year by Hurricane Issac so that throws the dates off from years past.

(AF 108).

DISCUSSION

In the Application for Temporary Employment Certification, Employer selected seasonal as the nature of temporary need. (AF 131). Employer described the job duties as “walk levees, put in pipes with shovels, flood ponds, put out traps (AF 101). When determining whether an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” *Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). 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 Department of Labor’s regulation at 20 C.F.R. § 655.6 provides that “the employer’s need is considered temporary if justified to the CO as one of the following: *H-2B Registration Application for Temporary Employment Certification* The Department of Homeland Security provides that 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 C.F.R. § 214.2 (h)(5)(iv). BALCA has held that a seasonal need is tied to the weather or a certain event. *Southside Nursery*, 2010-TLC-157 (Oct. 15, 2010).

Ms. Dana Frey hires H-2A workers to perform crawfish activities at her worksite. A variety of these H-2A workers work for D & G Frey Crawfish, whereas others work for Gerard Frey Farms. When the work periods from these two entities are combined, it is clear that the worksite requires full time workers.

Prior and Current Filings:

Case Number	Employer Name	Status	Beginning of Need	Ending Date of Need
C-10203-24779	D & G Frey Crawfish	Certified-Full	9/5/2010	2/25/2011
C-120309-25405	Gerard Frey Farms	Certified-Full	1/3/2011	8/30/2011
C-11158-29498	D & G Frey Crawfish	Certified-Full	8/15/2011	2/25/2012
C-11306-30390	Gerard Frey Farms	Certified -Full	1/1/2012	9/15/2012
C-11306-30390	D & G Frey Crawfish	Modification	10/15/2012	7/15/2013

When D & G Frey Crawfish’s numbers are combined with Gerard Frey Farms numbers, it is clear that Ms. Dana Frey employed temporary workers performing crawfish farming year round at the same work site. Ms. Frey submitted a brief explaining her need for workers. She indicated that she starts to prepare the fields for crawfish in October. She then explained that the crawfishing season could start in November and end in August. Regarding delegation of duties, Ms. Frey stated that one set of workers performs preparation activities while another set of workers fish for the crawfish. She emphasized that one set of workers performs such tasks as making levees, putting in pipes, building traps, and flooding the fields, while another group of workers performs fishing activities. Therefore, she emphasized that the two groups of workers perform different duties.

When determining whether an employer’s need is seasonal, it is appropriate “to determine if the employer’s needs are seasonal, not whether the duties are seasonal.” *Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999). It has been held that seasonal work is “from its nature. . . not continuous or carried on throughout the year.” *Kentucky Tennessee Growers Assoc., Inc.*, 1998-TLC-1 and 2 (Dec. 16, 1997). Ms. Frey asserted that she needs temporary workers to work at the same worksite year-round. She further asserted that the work is seasonal because she employs one set of workers to prepare for the crawfishing season and another set of workers to engage in crawfishing. However, it is the employer’s need and not the nature of the duties that controls. *Sneed Farm*, 1999-TLC-7, slip op at 4 (Sept. 27, 1999) Ms. Frey’s applications and filing history indicate that she has a need for crawfishing workers on a single work-site year-round. Ms. Frey 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).

By dividing crawfishing into two entities working at one job site, Ms. Frey seeks to hire H-2A seasonal livestock workers to perform crawfishing tasks year round and within one area of intended employment. Ms. Frey’s ability to separate her operation into two entities does not enable her to hire temporary H-2A workers to fulfill her permanent need for “Farm workers and Laborers.” 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