

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 February 2012

OALJ Case No.: 2012-TLC-00045

ETA Case No.: C-12012-31614

In the Matter of

TRADER'S REST FARM, INC.,
Employer

BEFORE: KENNETH A. KRANTZ
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

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 February 8, 2012, Trader’s Rest Farm (“Employer”) filed a request for administrative review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §1184(c)(1); 20 C.F.R. §655.171(a). The Administrative File (“AF”) was received at the Office of Administrative Law Judges on February 22, 2012.

Procedural History

On January 12, 2012, the United States Department of Labor’s Employment and Training Administration received an application from Employer for temporary labor certification for five farm workers (AF 40). On January 19, 2012, the National Processing Center issued a Notice of Deficiency (“NOD”) (AF 18). On January 26, 2012, the Employer submitted a response to the

NOD (AF 11). On February 2, 2012, the Certifying Officer (“CO”) issued a Denial Letter (AF 8).

On February 8, 2012, the Employer submitted a request for administrative review of the denial to the Office of Administrative Law Judges. This office received the AF on February 22, 2012. On February 23, 2012, the parties were offered the opportunity to submit briefs to supplement the materials in the AF.

Positions of the Parties

The CO denied the application on the ground that the materials submitted by the Employer failed to demonstrate that the job opportunity was “on a seasonal or other temporary basis” (AF 10) as required under the Act. The regulations define such employment as follows:

For the purposes of this subpart, 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).

The Employer’s January 12, 2012 application (AF 40) requested certification for five General Farm Hands with the occupation title “Farmworker- Farm & Ranch Animals.” The period of intended employment was indicated as February 15, 2012 to December 15, 2013. The description of job duties to be performed (AF 42) included “grooming horses, cleaning stables, repairing and building fences and maintaining farm land.”

The NOD issued on January 19, 2012 noted that the period of employment on the application was 22 months, and that the duties of grooming horses and cleaning stables “are presumed to occur on a year-round basis.” The job opportunity as described on the application was thus neither temporary nor seasonal within the meaning of the regulation. The NOD stated that to correct the deficiency:

The employer must provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature.

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Because the employer failed to establish a temporary need as required by 20 CFR sec. 655.103(d), it is now required to provide supporting evidence that a temporary need exists. The employer must submit a written explanation which documents the temporary need for H-2A workers.

Supporting evidence in the form of summarized payroll reports is required to substantiate the employer's temporary need for the H-2A worker(s) in the case. The employer is required to submit summarized payroll reports for a minimum of one previous calendar year (2010) for General Farm Hand-Farmworkers, Farm and Ranch Animals. These payroll reports must be a summary of the employer's individual payroll records by month, and, at a minimum, identify the total number of workers, total hours worked, and total earnings received **separately for permanent and temporary employment** in the designated occupation.

AF 21-22 [emphasis in original].

The Employer's January 26, 2012 response to the NOD addressed the issue of permanency by reducing the period of intended employment to the period of February 26, 2012 until December 15, 2012 (AF 14). In addition, the Employer provided a table summarizing payroll information by month from November 2010 to December 2011. This table showed the number of employees, the dollar amount of the payroll, and the number of hours worked by all of the employees. It showed three employees on the payroll in November 2010 and again from March until June of 2011 and two employees during the other months. The lowest number of hours worked was 266 in February, 2011 and the highest was 440 hours in November 2010.

The Employer's response did not differentiate between permanent and temporary employment. Nor did it, as directed by the NOD, give an explanation of why the position involving care of horses was temporary or seasonal. In the Denial Letter the CO found (AF 10) that the payroll records indicated "that the employer held year round employment for the designated position. Furthermore, the employer's payroll records do not justify the need for the number of workers requested on the application."

On February 8, 2012, the Employer filed its request for administrative review (AF 2). In that request the Employer provided additional details on its payroll records:

One (1) permanent U.S. full time employee salary is \$2487.50 per month

The months of Nov. 2010, April 2011, May, 2011 & June 2011, we hire[d] a temporary U.S. worker.

Our need for temporary H2A workers [is] from late February through Mid-December.

AF 2.

Discussion

As noted above, 20 C.F.R. §655.103(d) provides 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.”

When determining whether employment 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 job duties may be relevant in determining whether the employer’s needs are seasonal because the care and feeding of animals are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. This presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis. For example, the employer in *Cowboy Chemical, Inc.*, 2011-TLC-211 (Feb. 10, 2011), a breeder of race horses, employed a full-time year round staff, which was augmented with H-2A workers during breeding season. In response to the NOD, the employer provided a detailed explanation of how its needs for care of pregnant and foaling mares increased during the approximately 10-month breeding season. The administrative law judge held that the employer had demonstrated the need for additional horse groomers during the season. *See also Gisi Pheasant Farm*, 2011-TLC-139 (Jan. 25, 2011) (poultry breeding season).

In the present case neither the Employer's response to the NOD nor its appeal letter have explained why the need for workers is "seasonal" within the meaning of the regulations. It has failed to rebut the presumption that the duties of caring for and grooming horses are needed year round.

ORDER

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

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/jcb
Newport News, Virginia