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Issue Date: 07 November 2012

BALCA Case No.: 2013-TLC-00004

ETA Case No.: C-12269-35662

In the Matter of:

CURL FARM,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Manuel Fick, P.L.U.T.O., Inc.
Jim Curl
For the Employer

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Washington, DC
For the Certifying Officer

Before: **PAUL C. JOHNSON, JR.**
Associate Chief 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 October 16, 2012, Curl Farm (“Employer”) filed a request for administrative review of the Certifying Officer’s denial of its application for temporary agricultural labor certification under the H-2A non-immigrant program. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work

within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis. Following the CO's denial of an application under 20 C.F.R. § 655.164, an employer may request administrative review by the Board of Alien Labor Certification Appeals ("BALCA" or "the Board"). 20 C.F.R. § 655.171(a). The scope of the Board's review is limited to the written record and any written submissions (which may not include any new evidence). 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On September 25, 2012, the United States Department of Labor (the "Department"), Employment and Training Administration ("ETA"), received an ETA Form 9142 *Application for Temporary Labor Certification* ("Application") from Curl Farm ("Employer"). AF 13-14, 48, 49-72.¹ In this Application, the Employer requested H-2A labor certification for two "Farm Worker – Live Stock" positions from November 2, 2012 to April 30, 2013. The Employer represented that the "Nature of Temporary Need" was "Seasonal" in Section B, Item 8 of ETA Form 9142). In Section F, Item 5, the Employer described the following job duties:

Performs any of the following tasks to attend to livestock, such as cattle on farm. Maintain heated watering system and operating snow removal equipment in order to operate feed wagons. Mixes feed and additives, fills feed troughs with feed and water for livestock and remove ice formed in water. Examines animals to detect diseases and injuries. Vaccinates animals by placing vaccine in drinking water or feed using syringes and hypodermic needles. Applies medications to cuts and bruises, spray livestock with insecticide. Confines livestock in stalls washes and clips them to prepare them for calving and assists veterinarian in delivery of offspring. Binds or clamps testes or surgically removes testes to castrate livestock. Clips identifying notches or symbols on animal, or brand animal, using branding iron, to indicate ownership. Cleans livestock stalls and sheds, using disinfectant solutions, brushes and shovels. Maintain buildings and equipment. Maintain breeding, feeding and costs records. Minimum three months experience. Basic literacy and arithmetic requirement. No minimum education required.

AF 51.

On October 2, 2012, the CO issued a *Notice of Deficiency* ("NOD"), notifying the Employer its application for temporary employment certification could not be accepted for consideration two deficiencies, and gave the Employer five business days to submit modifications to its application. The deficiencies identified by the CO were (1) failure to

¹ Citations to the 111-page appeal file will be abbreviated "AF" followed by the page number.

establish a temporary need for the H-2A workers, and (2) failure to demonstrate that the job requirement for basic literacy and arithmetic could be applied equally to U.S. workers and H-2A workers.²

With respect to the Employer's failure to establish that the nature of its need is temporary, as required by 20 C.F.R. § 655.103(d), the CO stated:

The job duty, described on ETA Form 9142, Section F(a) Item 5 and ETA Form 790 Item 15, indicate that the job duties include care and feeding of livestock including cattle. These duties are presumed to occur on a year-round basis. Documentation to establish and support the employers temporary need for workers was not provided as part of this H-2A application. [Emphasis in original.]

AF 26.

To remedy this deficiency, the CO instructed the Employer to provide certified payroll records for calendar year 2011 to substantiate the temporary nature of the need for H-2A workers. The records were to include a summary of 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." [Emphasis in original.]

The Employer responded to the NOD on October 3, 2012. AF 17-22. The response included the requested payroll records. In addition, the Employer submitted the following statement concerning the seasonal nature of its need for H-2A workers:

[The Employer] acknowledges that the operation and the care for livestock (200 head of cattle) is generally a 365 day a year operation. But like all industries **it has a busier, more challenging and demanding season** with a sure period where the workload increases and it is for this period and reason that our client is applying for this seasonal Foreign Labor Certification. [Emphasis in original.]

Accompanying this response, [the Employer] shows that the operation has had one (1) permanent employee that worked for the employer for the last 14 years.

The owner and the one employee has handled the 3000 acre operation with his son (presently enrolled in college) helping out when possible.

The employer's only American help has decided to move on to greener fields and resigned at the end of August. Our client has already been set back tremendously with the loss of this worker and realizes he will have to have help with the winter

² Because the CO ultimately denied certification only on the Employer's failure to demonstrate temporary need, the second basis of the NOD will not be discussed in this Decision and Order.

livestock task lying ahead since the workload is getting just too much to handle by himself.

[The Employer's] livestock operation actually requires additional workforce in the winter but our client hopes to just replace this winter his loss of his long time US worker and plans to hire an extra person to help. The reason for needing more hands is obvious and especially these winter months, November to the end of April, the need to feed and care for the 200 head of cattle, is growing.

On top of the direct winter challenges (snow, ice, fodder and health care) all livestock operations encounter, extra labor is especially used to alleviate the demand the workload brought about by the calving season with breeding preparations and care from January to end of April. During these periods somebody has to be available 24 hours a day to assist with the calving/birthing process and the special need that might arise.

When [the Employer] starts with calving, the livestock are under constant supervision so that if they have trouble during the birth process, someone is there to assist. After the cows calve we separate them from the herd so that the calves are not lost or injured by the remaining herd. We also vaccinate the calves and keep them under watch for any diseases.

The majority of the above mentioned calving task is left to the employer and his son when home from college, but that has the implication that all the general livestock care tasks overflow to the foreign worker and many after-hour assistance will be provided by the foreign worker.

During this time of year the employer is required to feed the cattle with hay and feed supplement. Just this process requires 6 or more hours per day. The feed lots and holding pens require daily cleaning as well as the water tanks. While the cattle are confined in this area they also require close inspection for diseases or injuries.

Many days we are required to plow snow before we can begin to feed and take care of the livestock.

This is a highly labor intensive period in our livestock operation. In April given the weather conditions, we take the livestock to our late spring and summer grazing feeding areas.

As can be seen from the job description there are many tasks (32 diverse tasks listed) to perform and just to take one of them – maintaining animal housing and containment areas e.g. remove manure and getting bales of hay to feed the cattle, alone is a 4 hour task per day.

On top of all the above tasks – the only time in the year that food (hay for the livestock) can be generated is in the spring (March April) planting, cultivating, spraying insecticide and weed k9iller and also chopping, baling, loading, moving and stacking bales November – before too much snow has fallen.

Being a farm operation [the Employer’s] business is like all agricultural operations of a seasonal nature. Every year they are delivered out to the elements of nature and especially the seasons. No one can predict how much snow will fall or how little rain and both those issue directly affects the physical labor needed to feed these animals.

Due to the fact that like the whole agricultural sector in the Midwest it is an unbelievable challenge to find available, willing and qualified farm labor, willing to take a seasonal position our client is forced to rely on this H2A program.

Due to the specialty of the tasks we need performed, as well as the fact that this is only a seasonal activity and [the Employer] can’t offer people a full time job doing this – they have an extra serious challenge finding people who have the appropriate knowledge and affinity for livestock willing to be employed for only a season – to perform the tasks stipulated below.

AF 19-20.

On October 15, 2012, the CO denied the Employer’s application. AF 13-14. The denial was based on the CO’s determination that the Employer failed to establish that the nature of its need was temporary, as required by 20 C.F.R. § 103(d). In particular, the CO found that the Employer’s payroll records failed to establish that the need was temporary, and that the Employer’s explanation of the allegedly seasonal tasks did not demonstrate that the need was temporary. Specifically, the CO explained:

In the response to the NOD, received 10/9/2012 the employer states that, [it] acknowledges that the operation and care of livestock (200 head of cattle) is generally a 365 day a year operation. But like all industries it has a busier more challenging and demanding season with a sure period where the workload increases.

The payroll report submitted shows no evidence of this busier more challenging and demanding season. The employers requested dates of need are November through the end of April. The payroll reports submitted do not support a need for an increase in labor during these months. Specifically, the payroll shows a very consistent pattern of one permanent worker U.S. worker year round. In addition, the hours that the worker worked do not indicate an increase in work during the required requested dates of need. Only two months during the requested dates of need have increased hours; however, it is a limited increase of twenty four hours from 192 hours worked to 216 hours worked. And even though the payroll shows

a slight increase in hours during two of the months requested by the employer, an increase in the same number of hours is seen in September and October, which are not part of the employers requested dates of need.

Furthermore, in its NOD response, the employer indicates that it had recently lost a long time permanent employee. It appears that the loss of this permanent, year round employee prompted the filing of this application for temporary labor.

The employers explanation failed to demonstrate a seasonal need. Its requested dates of need are not tied to a certain time of the year by an event or pattern. Therefore, this application for one Farmworker, Farm, Ranch & Aquacultural Animal is denied.

AF 10-11.

By letter dated October 16, 2012, the Employer requested review of the CO's denial. AF 1-11. In its letter, the Employer stated that it has "a sure seasonal need for a worker to assist [it] through the cold winter months with [its] livestock operation." The Employer indicated that it had resorted to the H-2A program out of desperation due to the lack of local U.S. workers. The Employer made additional evidentiary assertions in its request for review, and attached additional payroll records to it.

After this matter was docketed in this Office, the CO submitted additional briefing on the issue involved while the Employer did not do so.

DISCUSSION

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 duties associated with the positions it seeks to certify, and also included additional payroll records. 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.

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 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 explicitly acknowledged that its need for non-immigrant workers arose from the loss of one permanent full-time employee and the declining abilities of the Employer's owner to work full time as he had in the past. Those workers were permanent workers, and therefore the need that they represent is permanent in nature rather than seasonal. In addition, the payroll records submitted with the Employer's response to make it clear that the increase in job responsibilities are not "tied to a certain time of year by an event or pattern" and are therefore not seasonal. Although the Employer argued that the calving season required additional labor, the payroll records for 2011 do not show that to be the case. In sum, I find that the Employer's need is not seasonal, and accordingly I find that the CO properly denied certification.

ORDER

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

For the Board:

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge