

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 November 2012

BALCA Case No.: 2013-TLC-00005
ETA Case No.: C-12277-35705

In the Matter of:

DS FARMS GP,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief 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), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration, and the written submissions of the parties.

BACKGROUND

On October 3, 2012, the Employer, DS Farms GP (“DSF” or “the Employer”), filed an *Application for Temporary Employment Certification* with the U.S. Department of Labor (“the Department”), Employment and Training Administration (“ETA”). AF 46-54. In this application, the Employer requested H-2A temporary labor certification for ten “Farm Workers, Diversified Crops” from December 10, 2012 to October 10, 2013, based on a purported seasonal temporary need. AF 46. The job duties listed in the application include the cultivation and harvest of “crawfish, rice, and Wheat [*sic*],” as well as minor maintenance and operation of farm equipment, and farm field sanitation duties. AF 48.

The Employer's application was reviewed by the above-captioned Certifying Officer ("CO"), who upon reviewing the application, discovered that the Employer's owner, Duane Smith, owned and operated another entity at the same address. AF 34. The CO learned that this second entity, Five S Farms ("FSF"), applied for and received H-2A temporary labor certification for ten farm workers from February 1, 2012 through December 1, 2012. *Id.* The farm worker positions described in FSF's certification are nearly identical to the positions described in the Employer's current application, and both entities share the same worksite address. *Id.* Because FSF's H-2A workers performed job duties similar to those described in the Employer's current application, at a time other than the Employer's purported seasonal need, the CO found reason to believe that Mr. Smith was "attempting to fill the same need year round." AF 34. Accordingly, on October 10, 2012, the CO issued a Notice of Deficiency ("NOD") informing the Employer that its application failed to meet the criteria for certification. AF 32-35. In the NOD, the CO identified his concerns with the Employer's application and directed the Employer submit an explanation as to why its need for the requested farm worker positions was seasonal or temporary in nature. The CO further instructed the Employer to submit a detailed description explaining "why its dates of need have significantly changed from its established season of February through December to its current request of December through October." AF 35.

The Employer replied to the NOD via email on October 12, 2012. AF 25-28. The email, which was sent by the Employer's agent, Ms. Linda White, confirms that Duane Smith "runs" both DSF and FSF, and provides a copy of the 2011 tax returns filed by each entity. AF 24. Both returns list the same corporate address. *Id.* According to Ms. White, this address contains two thousand acres of farm land, leaving "room for 2 different companies" to operate. *Id.* She further alleges that "[t]here are different workers for each company and no worker crosses over and does work for either farm." *Id.* However, she did not provide any explanation regarding the Employer's purported temporary seasonal need for farm worker positions.

After reviewing the Employer's response to the NOD, the CO found that the Employer failed to sufficiently explain how the positions in its application were seasonal, rather than permanent in nature. AF 23. Specifically, the CO observed that the Employer's application and FSF's current certification both involved positions for farm workers performing similar duties at the same location, and for the same corporate owner, Duane Smith. *Id.* To the CO, these similarities indicated that the Employer had a permanent, year-round need for farm workers. *Id.* After finding that the Employer's reply to the NOD did not "sufficiently explain how the job is temporary or seasonal in nature," the CO determined that the Employer "failed to establish how its job opportunity is temporary or seasonal rather than permanent in nature." Accordingly, on October 22, 2012, the CO issued a decision denying the Employer's application for H-2A labor certification. AF 20-23.

On October 26, 2012, the Employer's agent submitted a letter to ETA's Chicago National Processing Center ("CNPC") requesting that the CO's denial be overturned. AF 1-2. The CNPC interpreted this letter as a request for review before the Office of Administrative Law Judges ("OALJ"), and forwarded the letter and Appeal File to OALJ on November 1, 2012. Because the Employer's appeal letter did not explicitly request either an administrative review or *de novo* hearing, on November 1, 2012, an OALJ staff member contacted Ms. White via telephone to

clarify the desired appeal. At that time, Ms. White informed the OALJ staff member that the Employer was seeking expedited administrative review pursuant to 20 C.F.R. § 655.171(a).¹

DISCUSSION

In order to be eligible for H-2A temporary labor certification, an employer must establish that it has a need for agricultural services or labor to be performed on a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The only issue before me is whether the Employer has established a temporary or seasonal need for the positions requested in its application. The Department's applicable regulations provide:

Definition of a temporary or seasonal nature. For 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). In determining whether a job opportunity is temporary, "[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.*, 1982 WL 1190706 (BIA Nov. 24, 1982); *see also William Staley*, 2009-TLC-9, slip op. at 4 (Aug. 28, 2009). Accordingly, in deciding whether the CO erred in determining that the Employer failed to establish a seasonal temporary need, I must consider whether the record establishes that the Employer's need for labor or services during its specified period of need differs from its need for such labor or services during other times of the year.

Notably, the Employer's *Application For Temporary Employment Certification* fails to provide a statement of temporary need explaining the basis of the Employer's purported seasonal need for farm workers. The CO issued a NOD instructing the Employer to explain why its need for farm workers was temporary or seasonal, rather than permanent, in nature. Despite the CO's explicit instructions, the Employer's agent submitted a non-responsive reply that failed to address why the Employer's need for farm workers was seasonal in nature. Even if the Employer and FSF are completely separate operations, the Employer failed to explain why its purported seasonal need for farm workers varied so drastically from the labor needs of FSF, the farm right next door, even though the job duties described in the Employer's current application are almost identical to the duties performed by the H-2B workers under FSF's current certification. Accordingly, the CO reasonably concluded that the Employer failed to demonstrate a temporary need for agricultural labor or services, as required by 20 C.F.R. § 655.103(d). Since

¹ In the appeal letter, Ms. White cites information that was not included in DSF's filings before the CO (*i.e.*, DSF's application or NOD response materials). However, DSF seeks expedited administrative review pursuant to 20 C.F.R. § 655.171(a), which precludes the consideration of evidence that was not included in the written record before the CO. Accordingly, any evidence referenced in the appeal letter, but not included in DSF's submissions before the CO, will not be considered in the adjudication of this appeal.

it is the Employer's burden to establish eligibility for the H-2A program, and the Employer failed to do so, I find that the CO properly denied certification.

ORDER

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

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge