

U.S. Department of Labor

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Issue Date: 08 February 2013

OALJ Case No.: **2013-TLC-00019**

ETA Case No.: **H-300-12345-520370**

In the Matter of:

MILK HARVEST DAIRY,
Employer.

Appearances:

Elaine Flaming, Agri Placements
For the Employer

Jonathan Hammer, Esq., Office of the Solicitor
For the Certifying Officer, U.S. Department of Labor

Before: Pamela J. Lakes
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On January 17, 2013, Milk Harvest Dairy (“Employer”) filed a request for a *de novo* administrative hearing to review the Certifying Officer’s denial of its H-2A application.

STATEMENT OF THE CASE

On December 10, 2012, Employer filed an application for temporary labor certification for 30 farm workers from February 15, 2013 through December 15, 2013 with the Department of Labor’s Employment and Training Administration (“ETA”). (AF 72-80)¹. The application specified that their duties would be as follows:

¹ Citations to the Administrative File will appear as “AF” followed by the pertinent page number. As used in this decision, “DOL” refers to the Department of Labor’s Exhibits; “E” refers to Employer’s Exhibits. Although the Administrative File was admitted as DOL 1, I will refer to it as “AF” followed by the pertinent page number.

assisting with calving season, vaccinating, ear tagging and feeding supplements to baby calves Feb – Dec; operating large farm equipment for tilling, planting, fertilizing, harvesting, transporting grain, corn and silage Feb – July; operating haying equipment for swathing, raking, baling and transporting hay August – December; driving pickup to obtain parts and supplies; maintenance to equipment, buildings, and fences.

(AF 74).

On December 17, 2012, the Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”), finding that Employer failed to demonstrate how this job opportunity was temporary or seasonal in nature, as is required under 20 C.F.R. § 655.103(d). (AF 59-63). Specifically, the CO found that Employer also owned two other farms in the Amherst, Texas area—Five Star Farms and Five Star Dairy—which shared the same point of contact and the same Federal Employer Identification Number. Together, the filing history for these three farms reflected a permanent need:

Employer Name	Status	Beginning Date of Need	Ending Date of Need
Five Star Dairy, TX	Certified – Full	10/13/2010	08/13/2011
Milk Harvest Dairy	Certified – Full	02/15/2011	12/15/2011
Five Star Farms	Certified – Full	09/01/2011	07/01/2012
Milk Harvest Dairy	Certified – Full	02/15/2012	12/15/2012
Milk Harvest Dairy	Received	02/15/2013	12/15/2013

(AF 61).²

The CO required Employer to provide a detailed explanation as to why this job opportunity was seasonal or temporary in nature and required Employer to submit payroll records for a minimum of one year. (AF 62).

Employer responded to the NOD on December 20, 2012 with the following explanation:

We begin our spring calving season in February which lasts about 2-3 weeks. Our seasonal need is to assist with the calving for the survival of the baby calves, vaccinating, feeding supplements and ear tagging. Also in February we begin tilling our farm ground to raise our grain crops by cultivating, fertilizing, planting and then harvesting our grain crops, corn and silage in July. During our haying season we swath, rake, bale and haul the hay from August to December. The seasonal crops are raised for feed for our livestock. By mid December, all of our crops have been harvested and do not need any labor until we start our calving season.

(AF 53). Employer also submitted payroll records for Milk Harvest Dairy from 2012; the records did not note their employees’ names but reflected that wages were not paid in January

² An application for Five Star Dairy relating to the period from 10/30/2012 to 08/30/2013 was withdrawn according to an ETA printout. (AF 70).

and February of that year. (AF 55-57). Employer explained that the February wages were paid in March. (AF 57).

On January 16, 2013, the CO denied Employer's application. (AF 44). Specifically, the CO found that Employer did not clarify the prior filing history for Milk Harvest Dairy, Five Star Farms, and Five Star Dairy. (AF 47). The CO noted that all three entities conduct business in Amherst, Texas, all have Piertsje Venderlei as their point of contact, and all share the same Federal Employer Identification Number. *Id.* Furthermore, the CO noted that the job duties enumerated in each company's applications contained the same duties, i.e. assisting livestock with calving, vaccinating, ear tagging, and feeding supplements to baby calves. *Id.* In addition, all applications noted that employees would be operating farm equipment for tilling, cultivating, fertilizing, and harvesting crops. *Id.* The CO also noted that the phone number listed in all applications was the same and that the worker's compensation policy indicated the name of Kees & Piertsje Vanderlei dba Five Star Dairy TX/Milk Harvest Dairy/Five Star Farms. (AF 48). Employer failed to submit payroll records from Five Star Farms and Five Star Dairy, and absent a complete picture of Employer's labor usage, the CO found that the evidence did not support a showing of temporary need. *Id.*

Employer filed a request for a *de novo* hearing on January 17, 2013. (AF 1). The Office of Administrative Law Judges received the Administrative File on January 24, 2013, and a telephone hearing was held on January 31, 2013. At the hearing, the Administrative File was admitted as CO 1. (Tr. 5). In addition, the CO submitted an application for Five Star Dairy, TX for 26 farmworkers from October 13, 2010 through August 13, 2011, which was admitted as CO 2. (Tr. 6). The CO also submitted an application for Milk Harvest Dairy for 14 farm laborers from February 15, 2011 through December 15, 2011, which was admitted as CO 3. *Id.* Employer submitted a letter from Piertsje Vanderlei (Employer's owner), which was admitted as E 1 (Tr. 7).

The CO filed its brief electronically on February 5, 2013. Employer declined to submit a brief.

DISCUSSION

An "H-2A" worker is an alien having residence in a foreign county "who is coming temporarily to the United States to perform agricultural labor or services. . . of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). To be eligible for H-2A temporary labor certification, an employer must establish a need for agricultural services or labor to be performed on a temporary or seasonal basis. 20 C.F.R. § 655.161(a). The pertinent regulations define temporary or seasonal 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). Although the regulation references “less than one year,” ten months is typically the threshold used to determine whether a need is temporary; however, an employer exceeding that threshold may nevertheless establish that its need is, in fact, of a temporary or seasonal nature. *Grandview Dairy Farm*, 2009-TLC-00002 (ALJ, November 3, 2008). *See also Vito Volpe Landscaping*, 1991-INA-300 (Board of Alien Labor Cert. Appeals, Sept. 29, 1993) (en banc) (permanent labor certification case). In evaluating 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.*, 18 I. & N. Dec. 366 (1982), 1982 WL 190706 (BIA Nov. 24, 1982). *See also William Staley*, 2009-TLC-60 (ALJ, Aug. 28, 2009)(discussing regulatory history of prior regulation codified at 20 C.F.R. Part 655). As Chief Administrative Law Judge John Vittone noted in *William Staley*:

The regulatory history does not closely examine the meaning of the word “seasonal.” It indicates, however, that the meaning ascribed to the word “temporary” “will not be a problem for much of agriculture, which uses workers on a seasonal basis.” 52 Fed. Reg. 20,497 [interim final rule, June 1, 1987]. The regulatory history also notes, “Of course, with respect to truly ‘seasonal’ employment, it is appropriate and should raise no issue for an employer to apply to DOL each year for temporary alien agricultural labor certification for job opportunities recurring annually in the same occupation.” *Id.* at 20,498.

Hence, a temporary agricultural labor certification application must be accompanied by a statement establishing either: (1) that an employer’s need to have the job duties performed is “temporary”—of a set duration and not anticipated to be recurring in nature; or (2) that the employment is seasonal in nature—that is, employment that ordinarily pertains to or is of the kind exclusively performed at certain seasons or periods of the year and that, from its nature, may not be continuous or carried on throughout the year. [Citation to former regulation omitted].

William Staley, slip op. at 5. The regulation defining temporary or seasonal, quoted above, was adopted in its existing form on February 12, 2010. In the preamble to the regulation, in response to comments, the Department stated that the amendment was not intended to create any substantive change in the way the Department handled the program. 75 Fed. Reg. 6883, 6890 (Feb. 12, 2010).³

The application at issue requested farmworkers under an SOC Code of 45-2092, Farmworker; however, it was changed to read 45-2091, which correlates to an Agricultural Equipment Operator. (AF 24). The previous application for Milk Harvest Dairy from February 15, 2011 through December 15, 2011 also requested farmworkers under 45-2092, (CO 3), while

³ In the preamble, the Department declined the suggestion that the dairy industry receive special treatment and, noting that the majority of activities in the dairy industry were year-round, stated that “whether a particular dairy activity is eligible for an H-2A certification rests on a finding that the duration of the activity and the need for that activity is temporary or seasonal.” 75 Fed. Reg. 6890-91.

the application for Five Star Dairy, TX from October 13, 2010 through August 13, 2011 initially read 45-2092 but was changed to 45-2093, Farmworkers, Farm, Ranch, and Aquacultural Animals. (CO 2).

The statement of Employer's owner (E1) read, in pertinent part:

In the past we filed under three different entities stated above (Five Star Dairy TX, Five Star Farms, Milk Harvest) in which [sic] the US Dept of Labor had approved. At that time we were totally unaware that filing in the different entities was considered "full time or permanent employment," as they were approved.

The job descriptions are similar as that is what West Texas farming consists of is crop land for raising crops such as corn, silage, wheat and feed grains...

We filed for H2A workers for Milk Harvest and explained our seasonal need. We submitted the requested payroll for Milk Harvest 2012. Our workers for the past season of 2/15/2012 – 12/15/2012 returned home in December 2012. Therefore, we have been without workers as we do not have the need until we begin the next season 2/15/2013 – 12/15/2013.

We will not be filing for Five Star Farms or Five Star Dairy TX as our own family members will be fulfilling all the duties for those entities...

(E 1).

At the hearing, the Certifying Officer, John Rotterman, testified that the job descriptions contained in these applications were essentially the same despite Employer using different SOC codes. (Tr. 14). Indeed, the job descriptions are substantially similar; the application at issue lists the H-2A workers' duties as follows:

assisting with calving season, vaccinating, ear tagging and feeding supplements to baby calves Feb – Dec; operating large farm equipment for tilling, planting, fertilizing, harvesting, transporting grain, corn and silage Feb – July; operating haying equipment for swathing, raking, baling and transporting hay August – December; driving pickup to obtain parts and supplies; maintenance to equipment, buildings, and fences

(AF 26), while the duties listed in Five Star Dairy's application were:

operating farm equipment for harvesting grain and corn October through December; transporting grain and corn December through March; assisting with livestock with calving, vaccinating, ear tagging and feeding supplements to baby calves, artificial insemination in February & March; operating farm equipment for cultivating, tilling, fertilizing and planting of grain and oilseed crops February through May; swathing, raking, baling, stacking and transporting hay April through August; driving pickup to obtain parts and supplies; repairs and maintenance to equipment, buildings and fences.

(CO 2). Employer conceded this in its letter, noting, “[t]he job descriptions are similar as that is what West Texas farming consists of is crop land for raising crops such as corn, silage, hay, wheat and feed grain.” (E 1). The main difference between the descriptions is that Five Star Dairy uses the H-2A workers to transport grain and corn from December through March while Milk Harvest does not employ H-2A workers in January and early February. As Employer’s owner did not testify (although she made a statement on the record stressing the unique circumstances in West Texas and the dire need for the workers, Tr. 19-20), I must rely upon the Employer’s written submissions.

In response to the Notice of Deficiency, Employer made a showing as to the seasonal nature of the work, explaining that the spring calving season and tilling begin in February, that the calves and crops are cared for thereafter, that the crops are harvested in July, that the hay is processed from August through December, and that by mid December “all of our crops have been harvested and do not need any labor until we start our calving season.” (Tr. 53). That explanation would arguably be sufficient were it not for the involvement of Employer’s two other entities, which call into question both the temporary nature and the seasonal nature of the employment.

In the statement submitted, Employer has not presented any additional evidence establishing that its need is temporary or seasonal; rather, it has simply stated that, in the future, it will only file applications for Milk Harvest Dairy and will use its own family members to staff Five Star Farms and Five Star Dairy TX. (E 1). By dividing cattle rearing and harvesting operations between three geographically close entities, Employer has, in the past, sought to hire H-2A workers to perform substantially similar tasks year-round within one area of intended employment. As noted by the CO, 10 months is typically the permissible threshold for establishing a temporary need, and together, Employer has continuously staffed its farms with H-2A nonimmigrants for over three years. (Tr. 15). While some of the employment may have been seasonal, the continuous nature of the employment for the three entities suggests that all of it was not. Employer has provided no explanation for these discrepancies, instead indicating that its alien workers returned home in December 2012, that in the future it will only hire H-2A workers for Milk Harvest Dairy for a 10-month period (from February to December), and that it will use family members to perform any tasks required by the other entities. Such a general statement is insufficient to explain why employment that in the past was apparently continuous is now temporary or seasonal. Accordingly, denial of certification was proper.

As a final matter, I note that my decision is based on the evidence before me. Employer’s need may well be seasonal in nature and Employer may be able to make a showing of recurring seasonal need for these workers in the future. In that regard, the Employer could provide additional information to support that the need is temporary or seasonal, despite the apparently continuous employment of those workers in the past, and Employer could provide more detail concerning the three entities involved, that could lead to a grant of this or a future application. To that end, I asked the parties to consider settlement. In his letter brief, the CO indicated that he had told the Employer that he would be willing to review additional information and the Employer had agreed to submit additional information but had not done so at the time the brief was submitted. The parties are, of course, free to pursue this matter further. On the record before me, however, I have no alternative but to affirm the CO’s denial.

CONCLUSION

In reviewing the evidence *de novo*, I find that Employer has failed to demonstrate that its need for H-2A workers is temporary or seasonal, as is required under 20 C.F.R. § 655.103(d). Accordingly, I find that the CO's denial should be affirmed.

ORDER

It is **ORDERED** that the Certifying Officer's denial of temporary alien labor certification be, and hereby is, **AFFIRMED**.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.