

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 December 2012

OALJ Case No.: 2013-TLC-00011
ETA Case No.: C-12303-35879

In the Matter of:

REBECCA HOLSTI,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

On November 21, 2012, Rebecca Holsti 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. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655. On November 28, 2012, the Office of Administrative Law Judges received the Administrative File ("AF") from the Certifying Officer ("CO"). In administrative review cases, the administrative law judge has five working days after receiving the file to "review the record for legal sufficiency" and issue a decision. § 655.171.

BACKGROUND

On October 29, 2012, the Employment and Training Administration ("ETA") received an *Application for Temporary Employment Certification* (ETA Form 9142) from Rebecca Holsti ("Employer") for one farm worker position. AF 45. The application listed a period of intended employment beginning on January 1, 2013, and ending on October 1, 2013. AF 45.

On November 5, 2012, the CO issued a Notice of Deficiency ("NOD") requesting supporting documentation and a written explanation as to how the Employer's need for a farm worker qualified as temporary under 20 C.F.R. 655.103(d). AF 19-25. The CO asserted that the Employer's job opportunity must be based on a seasonal or other temporary need, and noted that the job duties the Employer listed in the Employer's application included the care and feeding of livestock, which are presumed to occur on a year-round basis. AF 22. To remedy this deficiency, the CO directed the Employer to provide evidence that a temporary need exists, including a written explanation documenting her temporary need for H-2A workers. *Id.*

The Employer responded to the NOD by email dated November 19, 2012. AF 9-18. She updated her ETA Form 9142 to select a seasonal temporary need, and provided the following explanation:

I run a very busy farm operation with 300 cows, 200 sheep and 12 horses. The animals keep me busy year round, but primarily between the months of June through September. October through December slows down substantially for me because I don't have to do projects that require a helper and can handle the work by myself. I prefer to have a temporary worker because if I don't have to keep an employee on for the last two months of the year, I would prefer not to from a financial aspect. I can handle the workload on my own and I would rather save my money during the last part of the year if at all possible.

AF 13.

Upon reviewing the Employer's response, the CO found that the Employer did not sufficiently explain how the position for which she requested certification qualified as seasonal or temporary in nature under 20 C.F.R. § 655.103(d). AF 7. In particular, the CO noted:

The employer has indicated that substantial livestock activity occurs even during the period after its requested end date of need of October 1, 2013. Therefore, the response to the Notice of Deficiency has failed to demonstrate that the primary job duties of livestock handling and crop production take place on a seasonal or temporary basis only.

Id. Based on this finding, the CO issued a *Final Determination* on November 19, 2012, denying the Employer's application. AF 4-8. The Employer's appeal followed.

DISCUSSION

The only issue on appeal is whether the Employer established a seasonal temporary need for a farm worker from January 1, 2013, through October 1, 2013. 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." 20 C.F.R. § 655.103(d). When determining whether an employer's need for labor is seasonal, it is necessary to establish when the employer's season occurs and how the employer's 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). Denial is appropriate where the employer has not put forth any evidence that it needs more workers in certain months than other months of the year. *Lodoen Cattle Company*, 2011-TLC-109 (citing *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

The record before me does not contain any evidence to corroborate the Employer's purported seasonal need for a farm worker from January through September. Notably, the Employer did not provide any evidence indicating that her need for labor was tied to a certain time of year by an event or pattern. In her response to the NOD, the Employer merely maintains that her work "slows down substantially" during October, November, and December because she does not "have to do projects that require a helper and can handle the work by [her]self." AF 13. She did not explain why her work "slows down substantially" or how exactly her need for labor during the alleged busy season (January through September) differs from her need in October, November and December. Ultimately, the Employer bears the burden to prove that labor certification is appropriate. The CO was not required to accept the Employer's bare assertions of temporary seasonal need when, as here, the Employer failed to provide a detailed explanation or evidence to corroborate those assertions. Based on my review of the record, I find the CO reasonably concluded that the Employer failed to establish a seasonal temporary need.

In light of the foregoing, I find that the CO's denial of the Employer's H-2A application was consistent with the INA and its implementing regulations. Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of temporary labor certification in this matter is **AFFIRMED**.

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge