

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 18 January 2013

BALCA Case No.: 2013-TLC-00017¹
ETA Case No.: C-12324-36096

In the Matter of:

The Fingerling Company,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

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

DECISION AND ORDER

This proceeding 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 United States Department of Labor (“the Department”) at 20 C.F.R. Part 655. The Employer timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification. 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

The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the United States Department of Labor (“the Department”). 8 U.S.C. 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

¹ This matter was initially docketed with the BALCA Case No: 2013-TLN-00023. Once the Board learned that this matter arose under the H-2A program, however, it was re-docketed as BALCA Case No. 2013-TLC-00017.

On November 19, 2012, the Department's Employment and Training Administration ("ETA") received an *Application for Temporary Employment Certification* from The Fingerling Company ("Employer"). AF 36-44.² In this application, the Employer requested temporary labor certification for 15 "Farm Worker[s], aquaculture" from January 7, 2013 through November 3, 2013, based on a temporary seasonal need. AF 36. The Employer's statement of temporary need provided:

The Fingerling Company needs 15 temporary fish hatchery workers to assist Farm Manager and current employees to tend brooding ponds, harvest spawn, tend fry nursery tanks, care for the fingerling rearing ponds and tend stock fish holding ponds. The reproductive cycle in catfish is controlled by the seasonal changes in water temperature, i.e., exposure to water temperatures below 50°F for a month or longer stimulates egg production, spawning is initiated when the water temperature rises to 68° to 77°F. These temporary workers are essential to The Fingerling Company to care for the brood ponds, monitor the water quality and feed the brood fish in the months before spawning to insure successful spawning—a 25 to 60% fingerling survival rate assures the farm will have a reliable source of fingerlings.

Catfish begin to spawn when the water temperature reaches 75° in mid-April and continue spawning through mid-July. During the spawning period, these additional workers are needed to check the nesting containers and to collect and transport the eggs to the hatchery tanks, transfer hatched fry to fry rearing tanks in the hatchery, feed 12- 18 times a day and transfer fingerlings to fingerling rearing ponds.

At the end of the spawning period, brood fish are moved from the spawning ponds back to holding ponds. During the summer months, workers are needed to monitor water temperature and oxygen levels in the holding and fingerling ponds; to feed the fingerlings and brood stock fish; to maintain pond areas by removing weeds, grass, etc. By November, late fall-early winter, the water temperature cools down, the ponds require less maintenance, the fish feed less, and the fish enter a semi-dormant stage and require less care.

AF 36.

Upon review of the Employer's application, the Certifying Officer ("CO") noticed that the Employer listed the same worksite address, phone number, email address, mailing address, and farm manager (Andy Jones) as another employer, Bear Creek Fisheries, that had applied for and received labor certification under the H-2A program. AF 24-25. In fact, the Department had recently certified Bear Creek Fisheries application for six farm workers at the same location, with a period of need beginning on October 29, 2012 and ending on August 26, 2012. AF 24-25. According to the CO, the job duties that Bear Creek Fisheries listed in this application are almost identical to the job duties described in the Employer's current application. *Id.* The CO believed

² Citations to the Administrative File will be abbreviated "AF" followed by the page number.

these similarities “imply that the job opportunity for which the current application has been filed is permanent and full-time in nature, rather than temporary.” AF 25. Consequently, on November 23, 2012, the CO issued a Notice of Deficiency (“NOD”) informing the Employer that its application failed to establish a seasonal temporary need, and thus failed to meet the criteria for certification. AF 21-29. To remedy this deficiency, the CO instructed the Employer to provide “a detailed explanation as to why this job opportunity is seasonal or temporary in nature,” and submit “supporting evidence in the form of summarized payroll reports” to substantiate its explanation. *Id.*

The Employer responded to the NOD on November 28, 2012, submitting a cover letter and signed summarized report of its payroll thus far in 2012. AF 18-20. The summarized payroll report provided the following information:

Year 2012 Month	Permanent Employees			Temporary Employees		
	Number	Hours	Earnings	Number	Hours	Earnings
January	1	266.93	2,936.23	5	103.28	960.52
February	1	269.13	2,981.17	7	1421.69	13,221.75
March	1	345.11	3,835.77	7	2,306.80	21,477.68
April	2	293.54	3,346.72	8	1,946.33	18,100.89
May	2	306.92	3,376.12	8	2,253.10	20,953.84
June	2	380.52	4,470.50	8	2,127.61	19,758.89
July	1	291.11	3,943.05	8	1,390.13	12,928.24
August	1	284.71	3,609.71	8	1,877.24	16,700.35
September	1	286.49	3,454.81	7	1,651.88	15,362.49
October	1	286.33	3,289.89	7	1,648.22	15,328.47
November	1	294.35	3,296.91	7	1,409.20	13,105.58
December						

AF 18. The Employer confirmed that it employs the same Farm Manager as Bear Creek Fisheries, Andy Jones, and that both companies share office space, a phone number, the same P.O. Box address, and the same point-of-contact e-mail address. AF 17. As the Employer explained, it has a “longstanding relationship” with Bear Creek Fisheries “because of the proximity of our farm ponds.” Nevertheless, the Employer maintained that The Fingerling Company and Bear Creek Fisheries Inc. are “distinct and separate companies” with “[d]ifferent FEIN numbers and different seasonal needs; separate payroll records, Workers Comp insurance, bank accounts, and they own different ponds, etc.” AF 18. In response to the CO’s concern about the similar job duties listed in both companies’ applications, the Employer stated:

Your deficiency explanation lists all the job duties that are general in nature. The Fingerling Company produces catfish fingerlings (fish grown from spawn to fingerling size) for sale. Bear Creek Fisheries produces food fish (adult fish grown from fingerlings which we purchase). Work duties, by the nature of the business, are going to be very similar. The pond areas and levees must be maintained in both. However, the care and raising of fingerlings as opposed to food fish are quite different. The fingerling production- collection of spawn, transfer to the hatchery, care of the fry, transfer to grow out ponds, feeding at all stages, monitoring oxygen levels all require more attention and care than do the food fish, for example fry and fingerlings are fed multiple times per day while food fish are fed only once.

AF 17. And in response to the CO's request for "a detailed explanation as to why this job opportunity is seasonal or temporary in nature," the Employer cited the temporary need statement provided in its original application, but bolded the word "seasonal changes." AF 18.

On December 20, 2012, the CO denied the Employer's application, citing the Employer's failure to sufficiently explain how its job opportunity was seasonal, rather than permanent in nature. AF 8-12. In particular, the CO found that the Fingerling Company and Bear Creek Fisheries were using separate corporate structures "as a proxy" to establish a seasonal, temporary need:

The fact remains that the two companies are filling the same need on a year round basis. Both companies engage in feeding and maintaining ponds and levees for the growth of catfish. By dividing catfish production operations between two separate, but closely related entities, the two companies seek to hire H-2A seasonal workers for the same job opportunity, year round, within one area of intended employment. Therefore, [TFC] has failed to prove they have a temporary need.

AF 12. The CO additionally noted that the Employer's payroll report "identified the occupation as farm workers, farm ranch and Aquacultural animals . . . [and] indicate[d] that these activities take place all year round. Furthermore, the [E]mployer indicated it hired temporary workers year round." *Id.*

On December 26, 2012, the Employer appealed the CO's denial to the Office of Administrative Law Judges (OALJ). The Employer's request for review did not specify whether the appeal arose under the H-2A or H-2B program, and this matter was initially docketed as an appeal under the H-2B temporary labor certification program. OALJ issued a Notice of Docketing on December 31, 2012, erroneously stating that this appeal arose under the H-2B non-immigrant program. Counsel to the CO informed OALJ of this error on January 7, 2013, and the matter was re-docketed as an H-2A appeal. An OALJ staff member informed the Employer's representative of this error via telephone on January 8, 2013, at which time the Employer's representative specified that the Employer desired administrative review pursuant to section 655.171(a). Both the Employer and the CO filed briefs in this matter.

DISCUSSION

Scope of Review

When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge (ALJ) may only render a decision "on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae." Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO. Here, the Employer's appeal letter cited a chart that was not included in its initial application or response to the NOD. As this new evidence was not a part of the record before the CO, I am unable to consider it in my review.

Temporary Need

To qualify for the H-2A program, 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 seasonal need for the positions requested in its application. The Department’s H-2A 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.

8 C.F.R. § 214.2(h)(5)(iv); 20 C.F.R. § 655.103(d). In determining whether 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). Accordingly, I must consider whether the Employer’s need for labor or services during its specified “season” (January 7, 2013 through November 3, 2013) differs from its need for such labor or services during other times of the year.

Upon review of the record, I find that the Employer failed to establish a seasonal need for agricultural services or labor. The Employer claims that it experiences an increased seasonal need for labor beginning in January and continuing until the very beginning of November. Notably, this “season” spans ten months (as well as all four seasons of the year), and does not appear to be “tied to a certain time of year.” In attempting to explain why its “season” differs from that of its neighbor, Bear Creek Fisheries, the Employer asserts that its work caring and raising catfish fingerlings is quite different from the work involved in its neighbor’s work raising catfish for food. But the Employer only explained why raising catfish fingerlings is more work-intensive; it never addressed how its differences could lead to a differing seasonal need for labor.

Significantly, the Employer’s payroll records do not confirm that the Employer experiences “labor levels far above those necessary for ongoing operations” during its specified “season,” or that the Employer’s need for increased labor is “tied to a certain time of year.” For instance, at the beginning of its alleged season of need in January 2012, the Employer only employed five temporary employees for a total of 103.28 hours. Yet in November 2012, the only month it provided data for in its supposed offseason, the Employer employed seven temporary employees for a total of 1409.20 hours. While the Employer did consistently employ seven or eight temporary employees during the remaining months of its purported season of need (from February 2012 through October 2012), the hours that these temporary employees actually worked varied significantly. The Employer’s payroll report thus fails to demonstrate that the Employer actually experiences the seasonal need described in its application and NOD response. There is no other probative evidence of record. Consequently, even if the Fingerling Company

and Bear Creek Fisheries are completely separate operations, as the Employer contends, the Employer nevertheless failed to demonstrate that it has a seasonal need for H-2A workers under 20 C.F.R. § 655.103(d). Since 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 denying the above-captioned H-2A temporary labor certification matter is **AFFIRMED**.

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge