U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 July 2013

BALCA Case No.: 2013-TLC-00041
ETA Case No.: H-300-13112-900682

In the Matter of:

CAROL RHODES,
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **C. RICHARD AVERY**
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 June 19, 2013, Carol Rhodes ("Employer") filed a request for administrative review of the Certifying Officer's ("the CO") 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).

STATEMENT OF THE CASE

On April 22, 2013, 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 Employer. (AF 206-227). In this Application, the Employer requested H-2A labor certification for one "Dangerous Horse Trainer Assistant" position from March 22, 2013, to January 22, 2014. The Employer represented that the "Nature of Temporary Need" was a "One-Time Occurrence" in Section B, Item 8 of the Application. (AF 206). In Section B, Item 9 of the Application, Employer went on to note that:

> Employer has expertise training dangerous horses. She has recently been approached by customers who need her training expertise for a larger than usual number of horses, and she cannot train that number of horses alone. In order to be able to accept the work she requires an [sic] dangerous horse trainer assistant, for the training period of approximately nine months, no more than one year.

(AF 206).

On April 29, 2013, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD") to Employer outlining several deficiencies in Employer's application.[1] (AF 169-185). 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 opportunity, described on ETA Form 9142, Section F(a) Item 5 and ETA Form 790 Item 15, indicate the job duties for the requested position include the training, care and feeding of horses. These duties are presumed to occur on a year-round basis. Documentation to establish and support the employer's temporary need for workers was not provided as part of this H-2A application.

(AF 173). To remedy this deficiency, the CO instructed the Employer to provide supporting evidence that a temporary need exists and a written explanation documenting the temporary need for H-2A workers. Specifically, the CO indicated:

> Supporting evidence in the form of summarized payroll reports is required to substantiate the employer's temporary need for the H-2A worker(s) in this case. The employer is required to submit summarized payroll reports for a minimum of one previous calendar year (2012) for Horse Trainer. These payroll reports must be a summary of the employer's 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).

[1] While several deficiencies were outlined in the NOD, the following discussion has been limited to the two deficiencies which were ultimately cited to support the CO's denial in this matter.

> The summarized payroll reports must be signed by the employer with the following statement attesting that the information was compiled from the employer's accounting records or system: I certify that the information contained on this monthly payroll report is accurate and based upon the individual payroll records maintained by Carol Rhodes for Calendar Year 2012.

(AF 173-174).

With respect to the Employer's failure to establish that the position is one for agricultural labor or services, as required by 20 C.F.R. § 655.103(c), the CO stated "[t]he described job opportunity contains activities involving horse training on a location other than a farm. These activities alone do not meet the definition of agricultural labor or services." (AF 173). To remedy this deficiency, the CO instructed the Employer to "provide a written statement describing how the activities are agricultural labor or services; or withdraw this application and file an application using the H-2B program." (AF 173).

On May 14, 2013, the CO denied Employer's application because Employer failed to respond to the NOD within 12 calendar days. However, Employer's response to the NOD was received on May 16, 2013. (AF 92-166). The Employer appealed the denial to the Office of Administrative Law Judges ("OALJ" or "Office") on May 22, 2013, and requested administrative review pursuant to 20 C.F.R. § 655.171(a). Subsequently, on June 4, 2013, counsel for the CO notified this Office that the CO agreed to review the NOD response and would continue processing the H-2A Application. Therefore, the Solicitor requested that the matter be remanded to the Certifying Officer for further processing. This matter was remanded to the CO on June 4, 2013.

In the NOD response, with regard to the agricultural nature of the position, Employer argues that:

> The business facility which is seeking a temporary agricultural worker is a facility which houses and raises, as well as trains, horses. The facility is used primarily for the purposes of raising and preparing horses, which are agricultural livestock, for the use of their owners on farms, ranches, and other uses which the owner may see fit. Therefore, because the horses are agricultural livestock and the business in question is a facility dedicated to raising and training them to be used as such, the labor of a Dangerous Horse Trainer is agricultural labor.

(AF 93).

In the NOD response cover letter, Employer also indicated that the temporary need for an assistant "arises due to a recent increase in demand for the Trainer's services." (AF 93). Employer's NOD response also included a letter signed by Carol Rentschler Rhodes and dated May 4, 2013, in which Employer explains that she owns and manages a "horse operation" where she breeds, houses, and trains horses. (AF 136). While she has employed "helpers" in the past, Employer noted her business has not required a salaried or full time employee. The Employer goes on to say:

> With the poor economic state of the horse industry…horse people are looking for ways to dispose of unusable horses. I have only allowed these horses to come into training when I have had additional time available to deal with them…My need for an assistant is to guard my, and the animals [sic] safety. This is a temporary demand and is not actually seasonal. This temporary demand can run any number of consecutive months as it is a supply/demand situation. I can fill any number of training "slots" determined by the help I have available. I have been searching for 2 years unsuccessfully in Tucson and surrounding areas.

(AF 136).

As supporting evidence, the Employer provided copies of calendar pages from March 2012 through April 2013 with handwritten notations such as first names, check marks, and arrows on various date blocks. (AF 138-151). Also included were copies of Employer's "Master Task List" ledger sheets from March 2012 through April 2013. (AF 152-165). These lists included handwritten notations that seem to indicate dates and shifts worked by certain employees, although the notations are not explained. In the letter from May 4, 2013, Employer indicated that she had attached "copies of my payouts (for the three people who have helped me for the last twelve months)". (AF 136).

The CO denied Employer's Application on June 12, 2013. The CO found that the job opportunity is non-agricultural. (AF 4-10). The CO asserted that Employer noted although Employer houses, raises, and trains horses for the use of owners on their farms or ranches, Employer's worksite is a business facility and not a farm location. (AF 9). Additionally, the CO noted that there was no mention of the breeding of horses in the listed dangerous horse trainer assistant job duties. (AF 9).

In denying Employer's application, the CO also found Employer failed to demonstrate temporary need for a dangerous horse trainer assistant. (AF 9). It was noted that the job opportunity included training, care, and feeding of horses, which "are presumed to occur on a year-round basis." The requested payroll records were not provided by Employer. Additionally, the CO found that the Employer's response indicates a one-time need for additional labor, but the explanation failed to indicate how the increase in customer demand is temporary and tied to a certain season by a seasonal event or pattern. (AF 10).

Employer filed a request for expedited administrative review on June 19, 2013. (AF 1-3). On July 2, 2013, the Solicitor filed a brief on behalf of the CO, and Employer filed a brief to support her application.

DISCUSSION

I. SCOPE OF REVIEW

The scope of the Board's review is limited to the written record and any written submissions of the parties; no new evidence may be submitted to the Board on Administrative Review. 20 C.F.R. § 655.171(a).

II. 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-00060, slip op. at 4 (Aug. 28, 2009).

In defining a need "of a temporary or seasonal nature," the H-2A regulations adopt the meaning of "on a seasonal or other temporary basis" as used by the Employment Standards Administration's Wage and Hour Division ("WHD") under the Migrant and Seasonal Agricultural Worker Protection Act. § 655.100(d)(3)(i). The WHD defines the phrase as follows:

> (1) Labor is performed on a seasonal basis where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
>
> (2) A worker is employed on other temporary basis where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

> (3) On a seasonal or other temporary basis does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

29 C.F.R. § 500.20(s) (2009).

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 (Nov. 3, 2008). *See also Vito Volpe Landscaping*, 1991-INA-300 (Board of Alien Labor Cert. Appeals, Sept. 29, 1993) (en banc) (regarding permanent labor certification).

In this instance, the record before me does not contain enough evidence to corroborate the Employer's purported seasonal or temporary need for a dangerous horse trainer assistant. First of all, the CO requested the Employer submit detailed payroll records. The documentation provided by Employer does not include the information required by the CO. From these records it is not clear what the workers' duties were or what wage they received for their work. These records do not indicate whether Employer had a previous need for a dangerous horse trainer assistant. Due to the lack of detail in the records, it has not been clearly established that there is an increased need for a dangerous horse trainer assistant during a particular period of the year based on an event or pattern.

Furthermore, while Employer asserts she has never employed a full-time assistant in the past, this is not the distinction that the H-2A program contemplates. Labor certification under this program does not depend on full time or part time status of an employee, but whether the need for hiring the foreign worker is for a temporary span of time. There has been no evidence presented showing that there is a particular period during which the Employer requires more assistance with horse training than during other times of the year.

In the NOD response and Employer's brief filed on Administrative Review, Employer stated that the need for hiring a dangerous horse trainer assistant is based on an increased demand in training services precipitated by the closing of slaughterhouses across the nation. While Employer's initial application notes that the need is for nine months, Employer goes on to say in subsequent correspondence that the need is not seasonal. It is further indicated by Employer that, "[t]his temporary demand can run any number of consecutive months as it is a supply/demand situation." Rather than defining a temporary or seasonal need, Employer seems to indicate that this need could be continuous as long as there are clients in need of Employer's horse training services. As the regulatory definitions of "seasonal" and "temporary" indicate, employment which will continue indefinitely is not temporary. 29 C.F.R. § 500.20(s). 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).

As the CO notes in the brief filed on Administrative Review, Employer has previously stated she has been searching unsuccessfully for an employee to fill this position for two years. (AF 57). This indicates that the need has been ongoing for at least two years already. Employer urges in her brief that her level of business "will return to a normal level of activity and [her] need for an assistant will end" when slaughterhouses are legislated to reopen. However, there is no evidence of record clarifying a timeline for when this will occur or exactly how long Employer's increased business will continue. Employer has not shown that the need will not extend past a year. *See* 20 C.F.R. § 655.103(d).

Based on the foregoing, I find that the CO properly denied certification because the Employer did not demonstrate that the need for employment is seasonal or temporary in nature as required under 20 C.F.R. § 655.103(d) and therefore failed to meet its burden of establishing that it is entitled to labor certification. [2] *See Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (December 2, 2010).

ORDER

In light of the foregoing, I find that the CO's denial of the Employer's H-2A application was appropriate. Accordingly, it is hereby **ORDERED** that the Certifying Officer's denial of temporary labor certification in this matter is **AFFIRMED.**[3]

For the Board:

Digitally signed by C. Richard Avery
DN: CN=C. Richard Avery, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

C. RICHARD AVERY
Administrative Law Judge

[2] As denial was found appropriate regarding failure to show temporary need, a finding regarding the agricultural nature of the work is not made here.

[3] Despite the denial in this matter, Employer is not precluded from seeking labor certification for the foreign worker under another program, such as the H-2B (8 U.S.C. § 1101(a)(15)(H)(ii)(b); 20 C.F.R. Part 655, Subpart A) or Permanent Labor Certification (20 C.F.R. Part 656) programs.