U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 26 November 2012

BALCA Case No.: 2013-TLC-00007
ETA Case No.: C-12293-35824

In the Matter of:

CRESSLER RANCH TRUCKING LLC,

Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Before: **CLEMENT J. KENNINGTON**
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.[1]

BACKGROUND

On October 19, 2012, the Employer, Cressler Ranch Trucking LLC ("Cressler Ranch" or "Employer"), filed an *Application for Temporary Certification* with the U.S. Department of Labor ("Department"), Employment and Training Administration ("ETA"). AF 61-69. In this application, the Employer requested H-2A temporary labor certification for one "Farm Machine Operator" from December 15, 2012 to June 1, 2013, based on a purported seasonal temporary need. AF 61. The job duties listed in the application include the hauling of harvested corn, soybean and milo to grain bins and elevators as well as the preparation of equipment and fields in the spring for planting. The need included routine maintenance on equipment. AF 61.

[1] Employer filed a "Response to Facsimile Transmission Dated November 20, 2012" on November 20, 2012. The undersigned's Order Setting Briefing Schedule issued on November 16, 2012 did not allow for responses to be filed. Accordingly, Employer's response and the arguments contained therein will not be considered.

The Employer's application was reviewed by the above-captioned Certifying Officer ("CO"), who upon review, discovered that the Employer's owner, Herbert Cressler, owned and operated another entity at an address that represented the same geographic location. AF 41. The CO learned that this second entity, Herbert Cressler, applied for and received H-2A temporary labor certification for two farm machine operators from June 1, 2012 through December 15, 2012. *Id.* Because of the Employer's requested dates of need and Herbert Cressler's previously established dates of need, the CO found that the Employer has not established how this job opportunity is temporary, rather that permanent and full-time, in nature. *Id.* Accordingly, on October 24, 2012, the CO issued a Notice of Deficiency ("NOD") informing the Employer that its application failed to meet the criteria for certification. AF 39-42. In the NOD, the CO identified his concerns with the Employer's application and directed the Employer to submit a detailed explanation as to why the job opportunity is seasonal or temporary rather than permanent in nature. AF 42. The CO further instructed the Employer to submit supporting evidence in the form of summarized payroll reports in order to substantiate the Employer's temporary need for the H-2A worker. *Id.*

The Employer replied to the NOD via facsimile and email on October 28, 2012. AF 12-37. The response, which was sent by Employer's agent, Heleen van Tonder, contends that the CO was mistaken in stating that the temporary need expressed by Herbert Cressler in its approved application and Cressler Ranch in its current application was the same. Employer notes that the application for Herbert Cressler was for the harvesting of crops only whereas the application for Cressler Ranch expressed a need in hauling harvested crops as well as preparing equipment and fields for spring planting and planting of the spring crop. Further, Employer asserts that these employers are two separate entities, not related in any way, kept separate for all business purposes, and requiring temporary help at different times. Employer submitted with its reply, the payroll records requested by the CO. AF 18.

After reviewing the Employer's response to the NOD, the CO found that the Employer failed to sufficiently explain how the positions in its applications were seasonal, rather than permanent in nature. AF 6. Specifically, the CO observed that the Employer cited the respective ETA Form 9142 Section F(a) Item 5 as evidence of the distinction between the applications. AF 7. However, the CO determined that separate Statements of Temporary Need attached to the two applications were identical and read as follows:

> We need help hauling harvested corn, soybean and milo to grain bins and elevators. Employee will need to prepare the equipment for planting season and prepare the fields in the spring, plant, and apply fertilizer to crops. Employee will also be required to do routine maintenance on equipment.

AF 35, 77. The CO concluded that notwithstanding the differences between the job descriptions found in the current and previous applications' ETA Form 9142s, the job duties articulated in the Statements of Temporary Need were the same. AF 7. Accordingly, on November 2, 2012, the CO issued a decision denying the Employer's application for H-2A labor certification. AF 4-8.

On November 5, 2012, the Employer's agent submitted an email and attached letter to ETA's Chicago National Processing Center ("CNPC") requesting expedited review before the Office of Administrative Law Judges ("OALJ"). AF 1-2. This letter and Appeal File was sent to the OALJ on November 9, 2012.

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 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. 12, 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, while the current and previous ETA Forms of Cressler Ranch and Herbert Cressler respectively contain different job descriptions, the "Statements of Temporary Need" for both applications are identical. This was specifically noted by the CO and formed the basis for the determination that the position was neither seasonal nor temporary. Additionally, the consecutive nature of the current and previous application periods taken with the Employer's statements of need demonstrates that the Employer's need does not differ from period to period in order to establish a temporary need. Employer's need is year-round. The Employer only disguises this need through subsequent applications from a separate entity with the same owner and slight alterations in the wording of the ETA Form 9142. 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 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, the Certifying Officer's decision is hereby **AFFIRMED.**

SO ORDERED.

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

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE