

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 27 December 2012

OALJ Case No.: 2013-TLC-00013
ETA Case No.: C-12314-36017

In the Matter of:

4-C AG,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **RICHARD K. MALAMPHY**
Administrative Law Judge

DECISION AND ORDER

On December 17, 2012, 4-C AG (“Employer”) filed a request for 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), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009). On December 20, 2012, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the 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. § 655.115(a).

Statement of the Case

On November 9, 2012, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Employer for temporary labor certification. AF 44-52.¹ In particular, Employer requested certification for 5 “Farm Worker – Grain 1” positions between January 5, 2013 and October 31, 2013. AF 44. The Employer noted on its application that the nature of its temporary need was seasonal. *Id.* In explanation of its need, the Employer provided that it was “an annual recurrent need for farm labor during the early spring and summer and fall season for our rice farm. Last year when we applied we applied very late in the season and utilized the program in an emergency fashion to solve our labor crisis.” AF 65.

¹ Citations to the 89-page Administrative File will be abbreviated “AF” followed by the page number.

On November 15, 2012, the CO sent a Notice of Deficiency (“NOD”), which identified two deficiencies. AF 31-35. Employer responded on November 26, 2012. AF 11-30. On December 4, 2012, the CO denied the Employer’s application for temporary labor certification. AF 6-10. Citing to 20 C.F.R. 655.103(d), the CO found that the Employer had failed to demonstrate that the job opportunity was temporary and seasonal. AF 3. Therefore, the CO denied certification. Employer’s appeal followed. The CO filed an appellate brief on December 21, 2012, urging affirmance. Employer did not submit a brief.

Discussion

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.

(4) On a seasonal or other temporary basis does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

29 C.F.R. § 500.20(s) (2009). 20 C.F.R. § 655.100(d)(3)(iii) further explains that a temporary opportunity 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.

Accordingly, when determining whether an Employer's need is temporary, "it is the nature of the need, not the nature of the duties, that is controlling. *William Staley*, 2009-TLC-00009, slip op. at 4 (August 28, 2009).

Employer received certification for temporary workers for the same job duties, at the same worksite, and for the same crop from March 1, 2012 to December 31, 2012. The current application would begin on January 1, 2013 and runs through October 31, 2013. Employer states that it was unfamiliar with the H-2A process when it requested certification for the 2012 period and was not able to apply early enough to receive workers for the beginning of its season and so simply requested the longest period available. Employer argues that it was not aware that it would be held to its previously stated seasonal need.

In this case, Employer had not explained how the delay in acquiring workers in the previous period caused a change in its seasonal requirements. Although a crop may suffer from such a delay, it is unclear how the seasonality of the crop would be affected. Employer has failed to explain how it employed its H-2A workers from October through December of 2012, or why it no longer needs temporary workers during that time in 2013 for the same crop. Accordingly, Employer has failed to demonstrate a seasonal need and certification was properly denied.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/jrs
Newport News, Virginia