

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 June 2013

OALJ Case No.: 2013-TLC-00039

ETA Case No.: H-300-13127-669243

In the Matter of:

STAN SWEENEY LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **DANIEL A. SARNO, JR.**
District Chief Administrative Law Judge

DECISION AND ORDER

On June 10, 2013, Stan Sweeney LLC. (“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 June 20, 2013, 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 May 7, 2013, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Employer for temporary labor certification. AF 46-54.¹ In particular, Employer requested certification for 6 “Farm Workers and Laborers, Crop” positions between June 23, 2013 and September 30, 2013. AF 44. The

¹ Citations to the 85-page Administrative File will be abbreviated “AF” followed by the page number.

Employer noted on its application that the nature of its temporary need was seasonal. *Id.* In explanation of its need, the Employer noted that it was “unable to gather a large enough crew of men to handle the the [sic] required volume of loading and unloading of square hay bales required for [its] operation. This work must be completed between June and September as the hay matures in each field with each field being cut a total of three times during the growing season.” Employer further noted that “waiting for the hay to mature and weather can cause significant downtime and make holding a crew together dedicated solely to hay handling difficult. I will be filling this downtime with fence building, fence maintenance, and final hand cleanup of some new acreage we are preparing for seeding as fields and pastures.” AF 46.

On May 14, 2013, the CO sent a Notice of Deficiency (“NOD”), which identified five deficiencies. AF 28-36. Employer responded on May 24, 2013. AF 10-27. On June 5, 2013, the CO denied the Employer’s application for temporary labor certification. AF 3-7. 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 6. Therefore, the CO denied certification. Employer’s appeal followed. The CO filed an appellate brief on June 24, 2013, 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 similar job duties, at the same worksite, and for the same crop from September 20, 2012 through May 30, 2013. The current application would begin on June 23, 2013 and runs through September 30, 2013. Employer states that the growing season for grasses is from March to September and that the previous application was for agricultural equipment operators rather than the ground workers requested in the instant application. Employer argued that the seeding and fencing operation required heavy machinery that could only be used when the ground was hard during the summer and early fall. Employer states that the primary reasons additional workers are required are for the new field cleanup and fencing projects, which Employer has admitted are not seasonal activities.

In this case, Employer has failed to explain the seasonality of its hay baling operations in light of the previously certified workers responsible for hay baling using heavy machinery. Although Employer argues that the growing season for grasses is only from March through September, Employer previously obtained certification for workers handling large hay bales for a period of September through May. Despite the use of different equipment, both of these tasks pertain to hay baling and Employer has not explained this apparent change in seasonality. Finally, Employer has admitted that the driving force behind its need for additional workers is the field clearing and fencing aspect of its application, duties that are admittedly not seasonal. 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**.

DANIEL A. SARNO, JR.
District Chief Administrative Law Judge

DAS, JR./JRS/jcb
Newport News, Virginia