

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 November 2022

BALCA Case Nos: 2023-TLC-00001
ETA Case Nos: H-300-22230-424296

In the Matter of:

HERTEL RANCH,
Employer

Certifying Officer: Chicago National Processing Center

Appearances: Ruth Boedecker Smith
Peak Season AG, LLC
PO Box 844
Lewistown, MT 59457
For Employer

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Office of the Solicitor
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United States Department of Labor
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For the Certifying Officer

Before: Hon. Tracy A. Daly
Administrative Law Judge

DECISION AND ORDER

1. Nature of Appeal. 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), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis. The Certifying Officer (CO) in this matter denied Employer’s Employment and Training Administration (ETA) Forms 9142A and 790 applications for temporary labor certification for two Ranch Hand (Winter Cattle Feeder) workers.

Pursuant to 20 C.F.R. § 655.171(a) Employer appealed the denial and requested expedited review before an Administrative Law Judge (ALJ). Where the employer has requested administrative review, within 5 business days after receipt of the ETA administrative file the

ALJ will, 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, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action. The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the CO, the OFLC Administrator and DHS by means normally assuring next-day delivery. *Id.* Due to administrative processing delays and the undersigned's absence from work, the undersigned could not render a decision within that timeframe.

2. Procedural History and Findings of Fact.

a. Employer engages in the ranching, rearing, and sale of cattle. Employer also produces hay and grain. (AF p. 3)

b. On February 11, 2022, Employer filed Forms ETA-9142A, 790, 790A and Addendums as part of an application for temporary labor certification with the CO at the Chicago National Processing Center (CNPC) for two General Ranch Hand job opportunities beginning April 9, 2022, through November 15, 2022. The job duties described in the application required the worker to perform the following:

monitor care for and move livestock using 4-wheelers and side by sides to and from pastures for winter feeding while pastures are not producing feed; examine animals to detect diseases and injuries; place mineral blocks; vaccinate livestock, herd into corral and/or stall and manually restraining animals; apply medications to cuts and bruises; spray livestock with insecticide; assist with castration of livestock clip identifying notches or brands on animals; manually clean stalls/corrals. Must be able to make minor equipment repairs, and perform routine maintenance and cleaning of farm implements, and operate tractors and farm implements required to plant cultivate and harvest hay and other crops; must stack hay bales; pick rocks; repair/replace fence in rough terrain. Must be able to find and maintain bearings to grazing areas.

This application was certified on March 1, 2022. (AF pp. 91-128)

c. On August 24, 2022, Employer filed Forms ETA-9142A, 790, 790A and Addendums as part of an application for temporary labor certification with the CO at the CNPC for two Ranch Hand (Winter Cattle Feeder) job opportunities for a date of need beginning November 1, 2022 through April 15, 2023. The job duties described in the application require the worker to perform the following:

[d]rive trucks and other equipment to distribute feed to animals on the range; may need to do equipment and tire repair to keep the equipment operating. Lift and carry hay bales weighing up to 100 pounds; physically break ice with shovel and/or spud bar in order to keep water supply open for livestock; ride horse and/or 4-wheeler to move cows to various pastures; feed livestock supplementary rations and mineral blocks with feeding equipment. The workers will be required to operate tractor with blade to move snow in order to keep areas open for movement of workers

equipment and livestock. Operate ranch equipment and perform minor repairs and maintenance.

(AF pp. 69-90)

d. On August 30, 2022, the CO issued a Notice of Deficiency (NOD) stating that “[b]ased on the employer’s requested dates of need and its previously established dates of need, the employer has not established how this job opportunity is seasonal or temporary, rather than permanent and full-time, in nature.” (AF pp. 59-63)

e. To cure this deficiency, Employer was directed to “provide a detailed explanation as to why this job opportunity is seasonal or temporary rather than permanent in nature.” This response must include a statement describing the employer’s business history, its activities, and schedule of operations thorough the year; summarized monthly payroll reports for a minimum of three prior calendar years that parse out the full-time permanent and part-time employees; other evidence and documentation that support the seasonal need request; and three years of contracts/receipts if contractors or other entities used to supplement the workforce. (AF pp. 62-63)

f. Employer responded on September 6, 2022. In its response, Employer explained that it was seeking an additional two workers because its full-time staff of two ranch hands had recently left to pursue other job opportunities, and the remaining staff is comprised of local high school and college-aged workers who cannot commit to full-time hours. Additionally, Employer explained that during the fall and winter months, the snowfall shifts the feeding process from grazing to feeding. The work is made more difficult by the addition of calving, which Employer explained requires more advanced experience in animal husbandry such that the owner and the manager of the company take responsibility for the process. Employer further clarified that “[w]e have had our full time hired help night calf in the past so we would be able to feed the cattle but with all of our full time help leaving [we] are struggling to keep up with the calving with the two of us and therefore require some equipment operators during this time of year to solely operate the equipment used during the winter calving and feeding months.” (AF pp. 39-58)

g. On September 28, 2022, after reviewing Employer’s application, the CO issued a Final Determination letter and denied certification pursuant to 20 CFR § 655.103(d). The CO determined Employer had not overcome the first deficiency because it failed to establish that the care of livestock is seasonal in nature. Specifically, that the job duties do not appear to be seasonal to winter. The CO noted that “according to the filing history ... the employer has requested workers at the same work location with the same job duties and requirements for a total of 12 months of the year.” The CO further explained that a “[e]ven though weather during the employer’s requested date of need may shift feeding operations for the cattle, job duties during this period still include the care of livestock.” (AF pp. 29-35)

h. On September 28, 2022, Employer timely filed an appeal for review that included Employer’s appeal brief and supporting documentation. (AF pp. 1-28)

i. The administrative file was received on October 12, 2022. The undersigned was assigned this matter on October 21, 2022, and a Notice of Case Assignment and Briefing Order was issued on October 26, 2022. The CO declined to file a brief; Employer filed a timely brief on October 27, 2022.¹

3. Applicable Law and Analysis.

a. *H-2A Program.* The H-2A agricultural guest worker program, codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), allows U.S. employers to petition the government for permission to employ foreign workers to perform agricultural labor or services on a temporary basis. 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 (DOL). 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2(h)(5)(A).

b. *Burden of Proof and Standard of Review.* Throughout the labor certification process, the burden of proof in alien certification remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011); 20 C.F.R. § 655.161(a). The employer, therefore, must demonstrate that the CO’s determination was based on facts that are materially inaccurate, inconsistent, unreliable, or invalid, or based on conclusions that are inconsistent with the underlying established facts and/or legally impermissible. *See Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014).

In cases where an employer appeals a denial and requests an expedited administrative review by an ALJ, a CO’s denial of certification must be upheld unless shown by the employer to be arbitrary, capricious, or otherwise not in accordance with law. *J & V Farms, LLC*, 2016-TLC-00022, slip op. at 3 (Mar. 4, 2016); *Midwest Concrete & Redi-Mix, Inc.*, 2015-TLC-00038, slip op. at 2 (May 4, 2015).

c. *Temporary or Seasonal Nature.* The 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 CFR § 655.103(d). To determine whether an employer’s need is seasonal “it is appropriate ‘to determine if the employer’s needs are seasonal, not whether the duties are seasonal.’ Duties are relevant in as much as the duties involve the care and feeding of livestock, which are presumed to occur on a year-round basis and therefore reflect a year-round need for workers. However, this presumption can be overcome if the employer can sufficiently explain why it does not need workers on a year-round basis.” *Bidart Livestock, Inc.*, 2021-TLC-00025, 4 (Dec. 2, 2020), citing *Sneed Farm*, 1999-TLC-00007 (Sept. 27, 1999),

¹ Marked as EB.

Cowboy Chemical, Inc., 2011-TLC-00211 (Feb. 10, 2011) and *Gisi Pheasant Farm*, 2011-TLC-00139 (Jan. 25, 2011).

d. *Law and Analysis.* The CO denied the application on the grounds that the employment sought was not temporary or seasonal in nature pursuant to 20 CFR § 655.103(d) and that Employer's response did not overcome the deficiency outlined in the Notice of Deficiency and denied the application. Specifically, the CO denied Employer's application on the grounds that Employer could not establish the seasonality of the employment given the prior certification with a job description that included the care and feeding of livestock.

In its appeal, Employer responds that there is a "definite seasonal need during the winter months for the feeding of our cattle while we are focused on calving which runs from January through April." (AF p. 4) Employer attempts to distinguish the prior, certified application from the instant application. Employer contends the job duties focus of that position "deal[s] with the farming/crop side of the operation," and while "there is some overlap in the months of March and April regarding the feeding of cattle it in no way represents the majority of the job for this filing." (EB p. 2)

Winter Ranch Hands, the job opportunities subject of the instant appeal, must additionally "drive trucks and other equipment to distribute feed to animals on the range," lift 100-pound hay bales for feeding, break ice to ensure livestock has water to drink, and "feed livestock supplementary rations and mineral blocks with feeding equipment." (AF p. 77) Employer further explains that the focus on feeding "is a temporary and seasonal need as cattle will be turned out to pasture to graze and not require daily care once the grass begins to grow." (EB p. 4)

Although on appeal Employer asserts that the approved certification focuses on the "farming/crop side of the operation," its application details that most tasks include the care and feeding of livestock. Employer's appeal likewise focuses on the seasonality of the job duties, rather than the seasonality of its need for workers. Employer made no showing that the duties required for the Winter Ranch Hand require a level of skill and specialization distinguishable from the General Ranch Hand previously certified such that the season affects the quantity or skill of workers required; rather, Employer concedes that calving is the only seasonal activity which requires specialization, which the ranch owner and manager will undertake because the practice requires advanced experience in the field of animal husbandry. (AF pp. 4, 34, 39) As the CO noted in her denial, "[e]ven though the weather during the employer's requested date of need may shift feeding operations for the cattle, [the] job duties during this period still include the care of livestock. . . [thus] showing a year-round need for those job duties regardless of season." (AF p. 34)

Employer did not explain why it does *not* need workers on a year-round basis, and the job tasks listed in the applications bely its argument that the positions are distinguishable and its need for workers is seasonal. Therefore, the undersigned concludes the CO's decision was neither arbitrary and capricious, nor inconsistent with the underlying established facts. Consequently, the CO's decision to deny Employer's application was a reasonable exercise of her discretion given the facts of this case. As such, the CO's decision complies with the

applicable regulations, and Employer has not established grounds supporting reversal of the decision.

4. Order. Employer failed to carry its burden to establish its eligibility for seasonal H-2A labor certification. The CO's denial of Employer's Application for Temporary Employment Certification is hereby **AFFIRMED**.

For the Board:

TRACY A. DALY
Administrative Law Judge