U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 19 October 2023

BALCA Case No.: 2023-TLC-00058
ETA Case No.: H-300-23240-299282

In the Matter of:

INDIANA BERRY AND PLANT CO. LLC,
Employer.

Before: Jerry R. DeMaio
Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF EMPLOYER'S H2A APPLICATION

This case arises from a request by Indiana Berry and Plant Co., LLC ("Employer") for review under provisions of the Immigration and Nationality Act ("INA") concerning temporary employment of non-immigrant agricultural workers (H-2A workers). Employer is appealing the denial of its application for an H-2A temporary labor certification by a Certifying Officer ("CO") with the Employment and Training Administration ("ETA"). *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, & 1188; 20 C.F.R. Part 655, Subpart B. For the reasons set forth below, the CO's denial of temporary labor certification in this matter is affirmed.

STATEMENT OF THE CASE

On August 28, 2023, Employer filed an application for H-2A labor certification with the ETA. AF 44-65.[1] The application sought authorization to hire seven farmworkers and laborers, nursery and greenhouse workers, from November 10, 2023, to September 9, 2024. AF 51-52. On August 30, 2023, the CO issued a Notice of Deficiency based on Employer's failure to prove seasonal need under 20 C.F.R. § 655.103(d). AF 31-37. On August 31, 2023, Employer responded and submitted a letter to the CO. AF 30. On September 6, 2023, the CO issued a Final Determination denying the application based upon Employer's continued failure to support its seasonal need. AF 16-25.

On September 14, 2023, Employer filed a request for an expedited administrative review. AF 1-15. On September 20, 2023, the Court sent an email to the parties notifying them this case had been assigned. The Appeal File was uploaded on October 6, 2023,[2] and the Court issued a

[1] Citations to the Appeal File are referred to herein as "AF" followed by the page number.
[2] Although there is no explicit time deadline, the Appeal File in this case was submitted noticeably later than would be expected for a case in which the Board has a matter of days to enter a decision, despite the Board following up

Notice of Docketing and Expedited Briefing Schedule on October 10, 2023. The Solicitor did not file a brief in this matter.

DISCUSSION

Under 20 C.F.R. § 655.103(d), temporary or seasonal nature is defined as follows:

> [E]mployment is of a seasonal nature where it is tied to a certain time of the 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).

Although Employer states that it has a seasonal and temporary need for additional labor, it fails to provide adequate evidence to demonstrate this seasonal need as defined under 20 C.F.R. § 655.103(d). Employer claims a seasonal need from November 10, 2023, to September 9, 2024 (AF 51-52), yet fails to demonstrate a seasonal need for these months. As noted by the CO in the Final Determination, Employer has filed three previous applications for certification. AF 20, 66-199. In comparing these three applications with the one being assessed here, Employer has applied for H-2A workers every month of the year. AF 20. All of the workers are listed under the same job standard and share similar job duties, including the cultivation of plants and crops, and similar three-month experience requirements. AF 20-21. As the CO noted, based on Employer's filing history and current application, Employer's need is not temporary or seasonal in nature. Rather, it is permanent.

In its response to the NOD, Employer argues that its withdrawn application, H-300-22207-375545, should not be considered in analyzing this current application, however, this is incorrect. AF 22-23. Even disregarding this withdrawn application, Employer, while not consecutively, has still requested workers for every month of the year across the remaining two applications and this current request for certification. AF 24.

Finally, as noted by the CO, the Notice of Deficiency gave Employer the opportunity to provide documentation that it deems appropriate to support its dates of need. Instead, Employer simply submitted a brief letter to the CO, with no support or evidence to back up its narrative. AF 30. In its request for administrative review, Employer submitted another letter and a news article, however, on appeal, this Tribunal may only consider evidence that was before the CO at the time of the CO's Final Decision, along with any legal arguments contained in the written submissions on appeal. 20 C.F.R. § 655.171(d)(3). On appeal, the Court "must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 20 C.F.R. § 655.171(d)(2). The burden of proof to establish eligibility for a temporary alien labor certification is squarely on the petitioning employer. 8 U.S.C. § 1361.

twice with the Solicitor's office to inquire about the status. The Solicitor and CO are reminded that these matters are expedited, and the Appeal File is expected to be uploaded promptly.

Taken as a whole, the record shows that Employer has failed to establish a seasonal need and the CO correctly denied the application.

ORDER

Because Employer failed to establish that the farmworkers and laborers, nursery and greenhouse workers are on a seasonal or other temporary basis in accordance with 20 C.F.R. § 655.103(d), it is hereby **ORDERED** that the Certifying Officer's decision denying Employer's H-2A Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts