UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, D.C.

Issue Date: 25 September 2023

OALJ Case No.: 2023-TLC-00056
ETA Case No.: H-300-23074-850093

In the Matter of:

WILD HOPE FARM, LLC,
Employer.

Certifying Officer: Marcella Campbell

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), 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.

Within ten business days of the Certifying Officer's ("CO") Final Determination, Wild Hope Farm, LLC ("Employer"), filed a request for administrative review in the above-captioned H-2A temporary alien labor certification application. I received the Administrative File ("AF") from the Employment and Training Administration ("ETA") on September 22, 2023. Under 20 C.F.R. § 655.171(d)(4), this decision and order is based on the written record and is issued within seven calendar days of the receipt of the AF. The Chief Administrative Law Judge has designated me to decide the appeal on behalf of the Board of Alien Labor Certification Appeals ("BALCA") under 20 C.F.R. section 655.171(c).

Under 20 C.F.R. section 655.171(a)(7) and (e), I must decide this appeal based only on the evidence that was before the CO at the time of her determination. I 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 law." 20 C.F.R. section 655.171(d)(2) and (e).

STATEMENT OF FACTS

In this case, the Employer seeks to extend a previously-granted certification. As shown at AF[1] pp. 65 *et seq*., Employer received a Temporary Labor Certification to hire two H-2A workers from May 15, 2023, through September 30, 2023, based on Employer's "seasonal" need (*see* AF, p. 67; *see also* AF, pp. 48-52).

Then, on August 11, 2023, Employer applied for an extension of the certification to November 30, 2023 (AF, pp. 32-24). The reason for the extension was that Employer wished to have the H-2A workers install four "high tunnels" to cover one half-acre for covered vegetable production (AF, p. 34). Employer explained,

> When setting the contract for Jose Guadalupe Rodriguez and Jose Tovar Rodriguez last winter, we did not intend to build these high tunnels so we thought that a Sept. 30th 2023 departure date would work with our projected workload but since our production plans have changed, we ask for a visa extension for Jose Guadalupe and Jose Tovarto ensure *[sic]* we can get the necessary work done considering this expansion. Our production expansion will enable us to increase our customer base throughout the winter season and retain more domestic employees through the winter months when our workload is normally smaller.
>
> We have attached a proof of purchase for the 4 Haygrove high tunnels to confirm that this work plan is already underway. If we are able to extend the visas for Jose and Samuel, we would like for them to stay through the end of November.

(*Id*.)

The CO denied the request, stating

> A request to extend the application must be related to weather conditions or other factors beyond the control of the employer. In this instance, the employer is seeking the extension to install tunnels to expand production. As such, the reason is not related to weather conditions, nor is it related to unforeseen changes in market conditions. The decision to install the tunnels is a business decision to expand production and increase its customer base and is within the employer's control. Therefore, the request to extend the application is denied.

(AF, p. 29.)

[1] "Appeal File."

Discussion

Before any domestic employer can hire any temporary foreign worker, the Secretary of Labor must determine 1) that there are not sufficient able, willing, and qualified domestic workers available to perform the agricultural labor or services *of a temporary or seasonal nature* to perform the work in question; and 2) that the employment of temporary foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. 20 C.F.R. section 655.100(a).

With respect to Employer's *original* Temporary Labor Certification, the Secretary's designee, the Certifying Officer, determined both those conditions were met, based on the Employer's demonstrated *seasonal* need. Under the regulations,

> . . . employment is of a seasonal nature when 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.

(20 C.F.R. section 655.103(d).) The foreign workers would work exclusively "in production of agricultural crops," including arugula, basil, blackberries, beets, cabbage, carrots, collard green, corn, eggplant, fennel, cut flowers, garlic, hibiscus, kale, lettuce, melons, onions, okra, peppers, potatoes, squash, sweet potato, radish, tomato, zucchini, ginger, and cucumbers, in addition to "general farm work" (AF pp. 86, 82-84).[2]

Thus, the CO reasonably concluded that Employer's request to extend the Temporary Labor Certification did *not* result from the unanticipated continuance of the same "seasonal" need the Employer had originally demonstrated. Weather conditions, for example, had not extended the growing season for any of the specified crops beyond September 30. Instead, Employer had decided to modify its operation in order to attract more customers and to offset losses. As set forth above, when Employer first requested the extension, it acknowledged its intention to "increase [its] customer base throughout the winter season" – an expansion of its existing business which was not within the scope of its Temporary Employment Certification. As Employer itself acknowledged in a letter dated August 21, 2023:

> The reason for filing an extension was to fill critical labor needs during the fall when we are building 4 new high tunnels due to unforeseen market conditions and extreme weather conditions.

[2] Additional details about the job duties of the temporary foreign workers is set forth at AF, p. 88.

> *We have experienced crop failures for crops that we contract to grow for our wholesale partners. To make up for this financial hardship, we are growing extra plantings in the fall that we can sell at the farmers market for our retail channels*. The high tunnels will provide protected growing space where the crops are guaranteed to perform well. . . .

(AF, p. 4.)

From a business standpoint, this is a perfectly sensible thing for Employer to do. It may even be a business necessity.

But the CO's job is *not* to help Employer operate its business sensibly, or even to help Employer meet business necessity. The CO's job is to ensure 1) that domestic workers are not available to do the proposed work and 2) that the employment of foreign workers to do the proposed work will not adversely affect the wages or working conditions of U.S. workers. And with respect to the proposed installation of high tunnels, the CO has had no opportunity to make the necessary determination. If the scope of the proposed work were fairly within the scope of the original Temporary Labor Certification, that might be different. But the record before me does not show Employer had any thought, when it filed the original application in March, 2023, of installing high tunnels.[3] That thought may well have occurred to Employer sometime during the period of temporary employment. It may even have been prompted by Employer's experiences and losses occurring during the period of temporary employment. But it did not occur by reason of an unanticipated prolonging of the original seasonal need. Thus, the record does not establish the CO's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Employer, by the same token, is free to hire as many *domestic* temporary workers as it likes, for whatever purposes it may choose, without involving a Certifying Officer in any way.

[3] On the contrary, Employer admittedly had no intention of installing high tunnels at the time of the original application (AF, p. 13, second paragraph).

The CO's decision denying extension of the Temporary Labor Certification is affirmed.

SO ORDERED.

For the Board:

CHRISTOPHER LARSEN
Administrative Law Judge