



Issue Date: 02 March 2006

Case No.: **2006-TLC-00005**

In the Matter of:

CHANTILLY TURF FARMS, INC.,
Employer.

Before: **PAMELA LAKES WOOD**
Administrative Law Judge

DECISION AND ORDER MODIFYING DENIAL DETERMINATION

The instant case, which 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) and its implementing regulations found at 20 C.F.R. Part 655 Subpart B, has been assigned to the undersigned administrative law judge for the issuance of a decision. The case involves a February 21, 2006 request for a review of the Department of Labor's February 15, 2006 denial of a temporary alien agricultural labor certification (H-2A) application filed by Chantilly Turf Farms, Inc. ("Chantilly Turf"). See 20 C.F.R. §655.112(b). The case file was transmitted by the Certifying Officer of the Employment and Training Administration ("ETA") in Atlanta, Georgia on February 27, 2006 and was received by the Office of Administrative Law Judges on February 28, 2006.¹ Although the request asks for a "Review of Hearing" and does not specify whether an expedited judicial review or a de novo hearing is being requested, I find that the request constitutes a request for review upon the record and is therefore covered by the provisions relating to expedited review.²

The regulations relating to administrative review of temporary labor certification (H-2A) determinations appear at 20 C.F.R. §655.112(a), which directs the administrative law judge to review the record "for legal sufficiency" and render a decision within five working days after receipt of the case file. Under 20 C.F.R. §655.112(a)(1), the administrative law judge may not receive additional evidence or remand the matter in the course of this review. On the basis of the written record and after due consideration of any written submissions, the administrative law

¹ The administrative case file relating to this appeal is paginated and consists of 68 numbered pages preceded by a Table of Contents. The pages of the appeal file will be referenced herein as "AF" followed by the page number.

² The time frames pertinent to temporary labor certification hearings before administrative law judges appear in 20 C.F.R. § 655.112, with subsection (a) relating to administrative (expedited) review cases and subsection (b) relating to de novo hearings.

judge is required to “either affirm, reverse, or modify the RA’s [Regional Administrator’s] denial by written decision.”³ 20 C.F.R. §655.112(a)(2).

For the reasons set forth below, I hereby modify the RA’s denial of the application to the extent that it pertains to 12 of the employees for which certification has been sought and reverse the denial of the application with respect to those 12 workers.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Chantilly Turf filed an application for alien employment certification dated December 20, 2005, which sought the employment of unnamed workers to be employed under the job title of “Horticultural Worker II” at its Sod Farm in Loudoun County, Virginia. (AF 48-68). A Form ETA 790 (Agricultural and Food Processing Clearance Order) bearing the certification of William R. Weekly, the Owner/President of Chantilly Turf, indicated that there would be 26 workers (the number “15” was crossed out and “26” was handwritten and initialed) and that they would be employed from March 1, 2006 until December 31, 2006. (AF 52). The section of the form relating to “Location and Description of Housing” (Item 14) stated that “Workers will be housed without charge in housing provided by employer” and “Employer assures the availability of no cost or public housing which meets the full set of applicable standards.” *Id.* Attachment 1 to the ETA 790 included additional information relating to numbered items on the form. (AF 53-57). Item 14, Housing, indicated that housing would be provided at no cost to those workers who were not reasonably able to return to their place of residence. (AF 55). The application was amended on December 27, 2005 to delete Item 8 (relating to documentation of workers). (AF 45-47). Accompanying the application was an “Application for Conditional Review” that indicated that Chantilly Turf would comply with 20 C.F.R. § 655.103 and §653.501 and stated the following:

I hereby request permission for conditional entry into the intrastate/interstate clearance system so that my job order can be transmitted to the labor supply states in a timely manner to facilitate the recruitment of supply workers. My housing because of disuse, cannot meet applicable standards at this time.

As condition to placing my order into clearance, I, **Chantilly Turf Farms Inc.** certify that 30 days prior to occupancy, my housing will meet standards of the US Department of Labor.

I also authorize representatives of the State Employment Service, the State Health Department and/or the US Employment and Training Administration to inspect the housing that I am offering such workers at any reasonable time to verify its condition.

I expect my housing to be occupied by **March 1, 2006.**

³ The determination was actually made by the Certifying Officer but the term “RA” will be used herein to track the regulatory provision and will be deemed to include the Certifying Officer and ETA staff.

(AF 59) The Application for Conditional Entry was signed by Mr. Weekly as owner and by an “E.S. Representative.” *Id.* Under the signatures, a separate paragraph indicated that the expected number of workers was “15”, all of whom were to be H-2A workers, but that number was crossed out and “26” was handwritten over the entry. *Id.* The application included two forms entitled “Employer Furnished Housing and Facilities” (ETA 338) that described two labor camps at Chantilly Turf’s premises in Sterling, Virginia (with respective capacities of 13 and 5), and Mr. Weekly asserted that the housing meets OSHA standards and noted “Capacity indicated is the Virginia Department of Health’s stated capacity on the Labor Camp Permit.” (AF 60, 61).

By letter of December 28, 2005, ETA advised Chantilly Turf of required actions, including advertising for (and recruiting) U.S. workers and submitting evidence of workers’ compensation coverage. (AF 42-44). In the same letter, ETA advised:

You are authorized conditional entry into the interstate clearance system based upon your written request and assurances that your housing will meet Department of Labor standards by at least January 30, 2006, which is thirty (30) calendar days before the housing is to be occupied.

(AF 42-44). In compliance with ETA’s direction, Chantilly Turf placed advertisements for U.S. workers in daily local newspapers but reported that it was still having difficulty finding workers. (AF 23, 26-27, 29-31).

In response to a January 30, 2006 inquiry from Mr. Booker at ETA, an email message from Ms. Castellow at the Virginia Employment Commission (VEC) dated February 1, 2006 advised that “Chantilly Turf has not passed yet, but the Health Department is out now as I am writing this. No referrals.” (AF 28). Reports indicating that water samples were taken on February 2, 2006 at two residences on Evergreen Mills Road (the same street as Chantilly Turf but at different addresses) appear in the file. (AF 24, 25). In response to a February 8, 2006 inquiry from ETA, Ms. Castellow advised that VEC was “trying to assist the grower with the issues he is having with the Health department” and that she would let him know “if there is any resolution” once they conferred with the health department official in Richmond. (AF 22). Attached to Ms. Castellow’s response was a statement to the effect that they had water samples for the houses but that “no migrant camp permit will be issued by Loudoun County Health Department” and the lack of a permit would be a “show stopper, unless Gary Hagey can work some magic.” *Id.*

The Loudoun County, Virginia Department of Building and Development (through T. Keith Fairfax, Enforcement Program Manager) sent a letter to Mr. Weekly dated February 8, 2006 that addressed the two residences on Evergreen Mills Road and an additional residence on Arcola Road. (AF 16-18, 19-21). That letter indicated that under the Revised 1993 Zoning Ordinance, a tenant dwelling or boardinghouse was not a permitted or special exception use in any of the zoning districts where those single family dwellings were located but that there were no regulations prohibiting entering into lease agreements with individuals who lived in the dwelling units, provided that no more than four unrelated adults resided in each unit. (AF 16, 19). Attached to the letter was the definition of “family” in the ordinance. (AF 18, 21). The letter further advised that Loudoun County also enforces provisions of the Virginia Maintenance

Code, which also limited the number of occupants lawfully permitted to occupy single family dwellings based upon square footage, and that based upon those restrictions, the residences could house 15 occupants, 5 occupants, and 11 occupants, respectively. (AF 16-17, 19-20).

By email of February 13, 2006, Mr. Booker advised Ms. Castellow that anytime he received “an email recommending application denial because the employer[’]s housing did not pass the initial or five day follow-up inspection it will be done” but that he could not react to the letter from the Zoning Department. (AF 13, 14). He asked for “an email recommending denial of Chantilly Turf due to unsatisfactory housing.” *Id.* On February 15, he emailed Ms. Castellow again, indicating that he was still waiting to hear from her on the status of Chantilly Turf housing. *Id.* In a response of February 15, 2006, Ms. Castellow stated the following:

As of this date, the housing issue has not been resolved. Therefore, we recommend denial due to the inability of the employer to obtain a labor camp permit and/or his failure to rectify the situation.

(AF 13).

On February 15, 2006, Floyd Goodman, Certifying Officer, ETA issued the letter denying the application for temporary alien certification for 26 job opportunities (Case No. A-05355-00287). (AF 11-12). That letter stated the following, in pertinent part:

. . . Pursuant to 20 C.F.R. 655.106, it has been determined:

The SWA Representative recommended denial of this application as [a] result of you not being able to obtain a Labor Camp Permit for housing listed in application and failure to rectify the situation.

We are, therefore, denying certification for 26 job opportunities. We cannot determine and certify that the employment of H-2A temporary alien agricultural workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(AF 11). Chantilly Turf was advised of its appeal rights. *Id.*

A copy of the attachments to the appeal filed in this case was also sent by facsimile to ETA and is incorporated in the Appeal File. (AF 1-7). One of those attachments is a February 21, 2006 letter from the Loudoun County, Virginia Department of Building and Development (signed by John P. Javelle, Enforcement Program Inspector) addressing the same three residential properties. (AF 6-7). That letter sought to clarify the previous (February 8, 2006) letter, by stating the following:

The details you have provided us as to the occupancy load and use you are planning for these properties is in fact, in compliance with all relevant provisions of the Zoning Ordinance and the Virginia Maintenance Code.

(AF 6). The letter listed the employees who would be housed at each of the three residences, with five at the first residence, three at the second, and four at the third. (AF 7). It further stated that the three properties “were inspected by staff” on February 8, 2006, that no zoning violations were found to exist, that the property maintenance issues had been resolved to their satisfaction, and that they had no objections to the named individuals being housed at those properties. *Id.*

An e-mail dated February 24, 2006 from Mr. Turner at the Virginia Employment Commission to Mr. Booker stated that he had just hung up with Gill Rodriguez, Loudoun County (VA) Health Department and was advised that there was no Health Department permit for a Migrant Labor Camp for Chantilly Turf, that the Loudoun County Health Department had tried to educate Mr. Weekly about the occupancy rules governing the property he wants to use but has had little success, that the county zoning laws limit to four the number of unrelated individuals that may live together which overrides the Health Department Rules, and that to date, no one in the County Health Department, back almost twenty years, knows of a migrant labor camp being permitted in the county. (AF 10). He concluded:

BOTTOM LINE: THE EMPLOYER, MR. WEEKLY, DOES NOT HAVE COUNTY PERMISSION TO HOUSE MIGRANT FARM WORKERS.

Id. In an email sent to Mr. Booker later the same day, Mr. Turner cited the zoning provision in question that defined a family and stated that what Mr. Weekly had sent him was from the zoning department, which has now found the way that he listed workers acceptable to the zoning commission, but that the County Health Department issues Migrant Labor Camp permits and “ZONING OVER RIDES HEALTH.” (AF 8). He suggested that Mr. Weekly take the zoning letter to the health department and request a migrant labor camp inspection but that he was told by the Health Department that the facility will not pass the state migrant labor camp regulations. *Id.* He concluded:

LONG STORY SHORT: HE IS GOOD TO HOUSE BY ZONING (WHICH DOES NOT CARE ABOUT MIGRANT WORKERS), BUT HE WILL HIT THE WALL WITH THE COUNTY HEALTH DEPT (WHICH ENFORCES MIGRANT LABOR CAMP REGULATIONS).

(AF 8-9).

In its February 21, 2006 appeal letter, Chantilly Farms asserted that the Loudoun County Department of Building and Development had clarified a misunderstanding generated by its earlier letter and had specifically stated that Chantilly Farms was in compliance with all dwelling occupancy provisions of the county, including the reason for the denial of the application (i.e., that a tenant dwelling or boardinghouse was not a permitted or special exception use in any of the zoning districts where the residences were located and that no more than four unrelated adults could reside in any single unit.) In the attachments, the number “26” was crossed out and “11” was substituted as referencing to the number of job opportunities.

DISCUSSION

Based upon my review of the record for legal sufficiency, I find that the Regional Administrator (RA) has not set forth a legally sufficient basis for denying the application for temporary alien agricultural labor certification (for H-2A workers) for 12 of the workers and that, based upon the record before me, Chantilly Farms has asserted a legally sufficient basis for the application to be granted for up to 12 out of the 26 workers. However, the RA has set forth a legally sufficient basis for denying the remaining applications and the RA's determination is affirmed to that extent. Accordingly, the RA's denial of labor certification is being modified.

The Immigration and Nationality Act allows the importation of aliens into the country to perform temporary agricultural work if the Secretary of Labor has certified that there are not sufficient workers who are able, willing, qualified and available at the time and place the labor is needed and the employment of the aliens will not adversely affect the wages and working conditions of workers in the United States who are similarly employed. 8 U.S.C. §1188(a)(1)(A), (B). An employer who wishes to hire temporary agricultural workers who are aliens must file an application with the Regional Administrator (RA) for the appropriate geographical area indicating the number of aliens and other pertinent information, and the employer must otherwise comply with the requirements set forth in 20 C.F.R. Part 655, Subpart B. *See* 20 C.F.R. §655.90, 655.100, 655.101, 655.102.

Under 20 C.F.R. §655.102(b)(1), an employer is required to provide housing without charge to workers who are unable to return to their residences within the same day. The regulation also requires that the housing meet Department of Labor standards, consisting of the standards set forth at 20 C.F.R. §§654.404 to 654.417 (relating to housing standards for agricultural workers) or the OSHA regulations appearing at 29 C.F.R. § 1910.142 (relating to temporary labor camps). It also provides that rental, public accommodation, or other substantially similar classes of habitation must meet local standards for such housing (or state standards, if there are no local standards). 20 C.F.R. §655.102(b)(1)(iii).

The sole articulated basis for denial of the application for employment of the 26 workers was the failure by Chantilly Turf to obtain a Labor Camp Permit for the housing listed in the application and its failure to rectify the situation. Denial of certification was premised upon 20 C.F.R. §655.106 and the RA has asserted that a certification could not be made that the employment of the H-2A temporary alien agricultural workers would not adversely affect the wages and working conditions of workers in the United States similarly employed. Such a blanket citation is insufficient to comply with the regulatory requirement that the denial "state all reasons" for the denial "citing the relevant regulatory standards." *See Karl Hausner Farms, LLC*, 2006-TLC-3 (ALJ, January 3, 2006). *Cf. E & V Contract Farms*, 2000-TLC-12 (ALJ June 5, 2000) (noting that respondent was prejudiced by the certifying officer's failure to list a ground for denial of an application and refusing to affirm the denial on the basis of information not disclosed to the respondent prior to denial.)

Given the lack of reference to any particular deficiency in the housing provided, the sole issue is whether the failure by Chantilly Turf to obtain a labor camp permit was a sufficient basis for denial of the application.

As noted above, Chantilly Turf initially sought employment of 26 alien workers but has only appealed the denial with respect to 11 or 12 workers. In this regard, the number “26” was crossed out and replaced with “11” on the appeal letter. However, 12 individuals were listed as the number to be housed in the letter from the Loudoun County, Virginia Department of Building and Development (also referred to herein as the Zoning Department).

After an inspection conducted by its staff, the Zoning Department found the housing (in the three single family dwellings) to be adequate for the named individuals based upon the requirements of the Zoning Ordinance and the Virginia Maintenance Code. Specifically, the Zoning Department found that the twelve individuals to be housed in the three single family dwellings were in compliance with the zoning definitions of “family” (which required that no more than four unrelated individuals could constitute a “family”). It also found that the square footage of the three residences was more than adequate for the number of workers to be housed, and in fact was sufficient to support a larger number of individuals. As the dwellings were in compliance with both the Zoning Ordinance and the Virginia Maintenance Code, there was no need for a special permit or variance to be issued.

That does not end the matter, however, as the RA is asserting that a labor camp permit (issued by the Health Department) is required. In this regard, based upon an informal consultation with the Health Department, the Virginia Employment Commission advised ETA that approval of the housing by the Health Department, based upon a migrant labor camp inspection, was required, and the Health Department was unlikely to grant such approval. The only rationale provided for that statement is that Loudoun county has not permitted a labor camp in the county for the past 20 years.

The State Board of Health regulations, as amended effective January 1, 2006, define migrant labor camps as follows:⁴

“Migrant labor camp” or “camp” means one or more structures, buildings, tents, barracks, trailers, vehicles, converted buildings, and unconventional enclosures of living space, reasonably contiguous, together with the land appertaining thereto, established, operated or used as living quarters for one or more persons, one or more of whom is a migrant worker engaged in agricultural or fishing activities, including related food processing. “Migrant labor camp” does not include (i) a summer camp, campground or hotel as defined in § 35.1-1 of the Code of Virginia, (ii) housing that, in the ordinary course of business, is regularly offered to the general public on a commercial basis and is provided to any migrant worker on the same or comparable terms and conditions as provided to the general public, or (iii) small

⁴ The 1997 version of the regulations defined a migrant labor camp or camp as one or more structures, etc. and adjacent land, reasonably contiguous, used as living quarters for more than 10 persons, one or more of whom was a migrant agricultural worker.

businesses that are exempt under federal law as provided in the Fair Labor Standards Act (29 USC § 201 et seq.) and the Migrant and Seasonal Worker Protection Act (29 USC § 1801 et seq.). [Emphasis added].

12 VAC 5-501-10.⁵ Thus, housing for any group of migrant agricultural workers may constitute a migrant labor camp, unless it qualifies under one of the exceptions, including the exception for housing regularly offered to the public on a commercial basis. Under 12 VAC 5-501, no person may operate a migrant labor camp unless a permit has been issued. The permit is issued by the local health director after an inspection, and if the permit is denied, a written explanation is provided within ten days. 12 VAC 5-501-190, 12 VAC 501-200, 12 VAC 5-501-210.

It is unclear from the record before me whether the pronouncement of the Zoning Department would be sufficient to satisfy the Health Department, and it is also unclear whether the three single family dwellings would constitute housing that does not fall within the definition of migrant labor camp. If the dwellings do not fall within that definition, there is no need for application to be made for a labor camp permit. However, the second hand reports in the file concerning what the Health Department officials advised do not indicate whether they even addressed the issue of the need for a labor camp permit when three, noncontiguous single family dwellings, in full compliance with zoning and occupancy restrictions, were involved. It is also unclear what factors the Health Department would consider (apart from its reluctance to grant migrant labor camp permits) in determining whether to grant or deny an application for a labor camp permit in the instant case. These are matters that I would want to have developed if this matter were to proceed to a hearing.

Based upon the record before me, I find that the RA has not stated a legally sufficient basis for denial of the application with respect to 12 of the individuals covered by the petition, as the housing for that number of individuals has been deemed to be in compliance with Loudoun county zoning and occupancy requirements. I will therefore reverse the RA's determination with respect to 12 of the 26 individuals covered by the initial petition and affirm it with respect to the remaining individuals. The determination is therefore modified to that extent.

In so holding, I have only resolved the issues relating to the issuance of the temporary alien agricultural labor certification (H-2A) permits. My ruling does not in any way usurp the jurisdiction of the Health Department or any other State or local entity, nor does it relieve Chantilly Farms from its compliance with State and local health or other requirements, as well as pertinent Federal statutory and regulatory requirements. Accordingly,

⁵ The regulations appear at <http://legis.state.va.us/codecomm/register/vol22/iss03/fl12v5500.doc>

ORDER

IT IS HEREBY ORDERED that the determination by the Regional Administrator in the above-captioned matter is **MODIFIED** and the denial of temporary alien labor certification is **REVERSED** as to 12 of the 26 workers for which H-2A permits were sought, and temporary alien agricultural labor certification shall be **GRANTED** to such workers, and the denial of temporary alien labor certification for the remaining workers is **AFFIRMED**.

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.