

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 03 July 2008

Case No.: 2008-TLC-00038

In the Matter of

JAY R. DEBADTS & SONS FRUIT FARM,
Employer.

Appearances: Douglas D. DeBadts, Member, Jay R. DeBadts & Sons Fruit Farm
For the Employer

William L. Carlson, Certifying Officer
Stephen Jones, Esquire
For the Respondent, Department of Labor (“DOL”)

Before: John M. Vittone
Chief Administrative Law Judge

PARTIAL DECISION AND ORDER

This matter arises under the temporary agricultural labor or service provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii) (“Act”), as implemented by 20 C.F.R. Part 655. This case involves a June 23, 2008, request for a review of the Department of Labor’s June 16, 2008, denial of a temporary alien agricultural labor certification (H-2A) application filed by the Employer. As requested by the Employer, I have conducted a review of the record under 20 C.F.R. § 655.112(a). My decision is based upon the administrative file forwarded by the Certifying Officer (“CO”) of the Department of Labor’s Employment and Training Administration (“ETA”) and the subsequent written submissions of the parties.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On June 9, 2008, Jay R. Debadts & Sons Fruit Farm submitted an application for an H-2A temporary alien labor certification for 30 alien workers for employment as Orchard Specialists, for a total of 40 hours of work per week between September 8, 2008, to November 14, 2008. *Administrative File (“AF”) 35-46*. The job duties were described as follows:

Drives and operates a variety of farm machines and equipment, such as trucks, forklifts, and sprayers to plant, harvest fruit, prune, thin or spray trees such as apple, pear, cherry and plum. Maintains and performs preventative maintenance

on machinery and equipment. Selects insecticide, herbicide or pesticide specific to type and stage of insect or disease to fruit trees. Mixes pesticide ingredients to formulate solution following manufacturer's specifications and EPA standards. Sprays fruit trees following DEC guidelines. Prune trees seasonally to promote optimum growth of tree and fruit. Gathers pruned branches from area for disposal. Performs light summer pruning and suckering by cutting terminal growth and water sprouts from inside of tree using hand pruner. Thins trees from orchard to eliminate diseased or nonproductive trees using chain saw. Pick apples for fresh market and/or processing. Productivity must be at least **60** boxes per day of fresh market fruit and **80** boxes per day of processing fruit. *Workers referred against this order must have a minimum of 6 months experience in performing tasks described in this order.

AF 35 (emphasis in original). The hourly wage was listed as \$9.70 per hour and the piece rates were listed as \$0.75 per 1 1/8 Bushel Box of fresh apples, \$0.50 per 1 1/8 Bushel box of process apples, and \$0.50 per 1 1/8 Bushel Box of drop apples. *AF 38*.

On June 16, 2008, the Certifying Officer (CO) for the ETA informed the Employer that his application had not been accepted and advised that the Employer could submit a modified application (Modification Letter). *AF 22*. The CO advised that the application was not accepted because the H-2A application was deficient in three areas. *AF 24-5*. The first area consisted of two deficiencies related to the wage rate portion of the application. The CO has conceded that the first of the two issues – the proper piece rate for process apples – was resolved when the Employer submitted a supplemental ETA Form 795 to amend the piece rates so that they were at the prevailing wage. *AF 28; Brief of CO at 2*. The second deficiency relating to the wage rate portion of the application was that the Employer had failed to list the piece rate at Item 12 of the ETA Form 750. *Id.* The CO required that the application be modified to include the piece rate at Item 12 of ETA Form 750. *Id.*

Second, the CO rejected the application due to a restrictive job requirement. *AF 24*. The CO noted that the regulations at 20 C.F.R. § 655.102(c) permit the employer to require qualifications for the specified job opportunity that are consistent with the normal and accepted qualifications required by non-H-2A employers with comparable occupations. The CO stated that the prevailing practice among apple growers in the Western Region of New York is to require no experience for the job duties described. *Id.* The CO instructed the Employer to remove the six month experience requirement from Item 14 of the ETA Form 750 in accordance with the 2007 Prevailing Practice Survey¹ (Survey) conducted by the New York SWA. *Id.*

Third, the CO rejected the Employer's application because it was incomplete. *AF 24-5*. More specifically, the CO stated that the application must correctly describe the job offer and conditions on the forms prescribed by the ETA. *AF 25*. The CO required that

[a]s stated in the Instructions for Completing ETA Form 790, an Employer must include as much detail as possible into the space allotted for each item. If more room is needed, then indicate the attachment were [sic] the remaining details for

¹ A copy of the Survey is in the Administrative File at page 31.

the specific item can be found in the space provided as well. [Employer] must amend Item 12 of the Form ETA 790. *Id.*

AF 25.

On June 23, 2008, the Employer submitted a letter to the undersigned, requesting an expedited review of the rejected H-2A application. *AF 1.* In regards to the prevailing wage issue, the Employer noted that the local SWA representative filed an ETA Form 795 indicating that the Employer changed the piece rate to match the prevailing wage. *AF 1.* The ETA Form 795 is located in the Administrative File at page 28 and 16 and is dated June 10, 2008.

In regards to the second issue concerning the level of experience required, the Employer argues

During apple harvest season there is a need for our workers to do more than just pick fruit. They are required to load and unload bin trailers with forklifts and position the trailers in the narrow orchard aisles using tractors. We requested the six months experience because we need workers to be familiar with tractor operations in order t[o] have a safe and efficient harvest.

AF 1. The Employer also enclosed a copy of the “N.Y. Fruit Harvest and Farm Labor Experience Requirements” compiled by Cornell Cooperative Extension to detail the tasks performed during the apple harvest season.² *AF 1, 14.*

In response to the last deficiency listed by the CO – which stated that the Employer must amend Item 12 of the ETA Form 790 – the Employer stated that the CO’s request was unclear because attachments were numerated and noted in Item 12 of the ETA Form 790.

DISCUSSION

The Act allows an employer to apply for importation of aliens into the country to perform temporary agricultural work if the Secretary of Labor has certified that there are not sufficient U.S. 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 condition of workers in the United States who are similarly employed. 8 U.S.C. § 1188(a)(1)(A), (B); 20 C.F.R. §655.100(a)(4)(ii). Once the RA accepts the application for consideration, the employer is required to carry out the assurances contained in Section 655.103 with respect to the recruitment of U.S. workers. 20 C.F.R. § 655.105(a).³ If the RA determines that certification

² The Cornell document cannot be considered because it was not in the record before CO at the time of the Modification Letter. 20 C.F.R. § 655.112(a)(1). Additionally, the July 3, 2008, letter from the Farm Bureau of New York that was submitted by the Employer with his brief cannot be considered for the same reason.

³ Twenty C.F.R. § 655.105(a) states, in relevant part:

If the RA determines that the H-2A application meets the requirements of Secs. 655.101-655.103 of this part, the RA shall promptly notify the employer (by means normally assuring next-day delivery) in writing with copies to the State agency. The notice shall inform the employer and the

should be denied, the employer may request an administrative review before an administrative law judge.

The regulations relating to administrative review of H-2A certification 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. Legal sufficiency is not defined by the regulations. In *85 Members of The Snake River Farmers' Association, Inc.*, 1988-TLC 2, 1988-TLC-3, 1988-TLC-4 (ALJ Feb. 8, 1988), I found, while applying the “legally sufficient” standard, that the CO had exercised his discretion in a manner that was not arbitrary, capricious or not in accordance with law. In the absence of any other definition of legal sufficiency, I find that the arbitrary and capricious standard is the appropriate measure of the CO’s actions in a section 655.112(a) appeal.

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. The judge’s decision is the final decision of the Secretary and no further review shall be given to the temporary agricultural labor certification application. 20 C.F.R. § 655.112(a)(2). The burden of proof in the labor certification process remains with the employer. *Garber Farms*, Case No. 2001-TLC-5 (ALJ May 30, 2001); *Giaquinto Family Restaurant*, Case No. 1996- INA-64 (May 15, 1997); *Marsh Edelman*, Case No. 1994-INA-537 (Mar. 1, 1996).

The primary issue in this matter is the Employer’s requirement that applicants have six months of experience for the Orchard Specialist position. The CO’s denial was based on the argument that the requirement that the applicant must have six months experience is in excess of the prevailing practice among apple growers in the Western Region of New York. *AF 24*. In support of his argument, the CO provided the Survey which consists of a list of nine questions answered by 33 apple growers in the Hudson Valley area, two questions answered by 10 apple growers in the North Country, and four questions answered by 62 apple growers in the Western Region. *AF 31-34*. In response to the question “Did you require workers to have previous experience,” 14 of the 33 apple growers in the Hudson Valley, one out of 10 in the North Country, and 19 out of 43 in the Western Region answered “Yes.” *Id.* Of the 34 apple growers who affirmatively answered the question, 13 required that the workers have six months of experience.⁴ *Id.* The Survey does not indicate the titles or job descriptions for the workers in question.

State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in Sec. 655.103 with respect to the recruitment of U.S. workers . . . In determining what positive recruitment shall be required, the RA will ascertain the normal recruitment practices of non-H-2A agricultural employers in the area and the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers. The RA shall ensure that the effort, including the location(s) of the positive recruitment required of the potential H-2A employer, during the period after filing the application and before the date the H-2A workers depart their prior location to come to the place of employment, shall be no less than: (1) The recruitment efforts of non-H-2A agricultural employers of comparable or smaller size in the area of employment; and (2) the kind and degree of recruitment efforts which the potential H-2A employer made to obtain H-2A workers.

⁴ An additional seven of the apple growers surveyed required *more than* six months experience. *AF 31-34*.

I have carefully considered the Survey and, although it provides some evidence of prevailing practice, it is simply too vague and broad to be a legally sufficient basis for the CO's rejection of the application. The Survey contains vague generalities and offers no details about the types of tasks the workers perform. There is simply nothing in the Survey or in the CO's explanation to indicate that experience is not necessary for the "Orchard Specialist" description in the Employer's application. On the other hand, I find compelling the Employer's argument that the job duties described are potentially dangerous, making it necessary to hire people with experience. As a result, I must conclude that the CO's determination that the application should be denied because of a restrictive job requirement is arbitrary and capricious and, thus, is not a legally sufficient reason for denial.

The remaining two issues concern technical deficiencies with the Employer's application. First, the CO determined that the Employer's application was incomplete because of the format of the Employer's answer to Item 12 of ETA Form 790, which asks the Employer to explain transportation arrangements for the alien workers. *AF 38*. The CO instructed the Employer to correct the answer to Item 12 of the Form ETA 790 by providing "as much detail as possible into the space allotted for each item," indicating that there is an attachment if additional space is needed. *AF 24*. In his brief, the CO notes that the "Step-by-Step Instructions for Completing Form ETA-790"⁵ instruct employers to "try and include as much detail as possible on the face of the form itself. Even if attachments are necessary, the essential terms and conditions must be spelled out on the face of this form." *Brief of CO at 3*.

A review of the record reveals that the Employer typed "See Attachments/Vea Anexos #4 & #6" in the 1.5 centimeter answer space for Item 12 of the Form ETA 790. *AF 38*. Attached were supporting documents – titled "Attachment #4" and "Attachment #6" – detailing the answer to Item 12 of the Form ETA 790. *AF 42-5*. At Attachments #4 is a heading labeled "Item #12" followed by several paragraphs addressing the transportation arrangements made by the Employer. *AF 42*. Attachment #6 also contains a description of the transportation arrangements made by the Employer. *AF 44*. The Employer's response to Item 12 of the Form ETA 790 is clearly marked, complete and in the administrative file. Although I recognize that the website instructions ask employers to begin their answer in the space at Item 12 of the Form ETA 790, I note that the form provides very little space for any meaningful response to the question. By attaching several paragraphs addressing transportation arrangements, the Employer has more than substantially complied by providing the requested information. As a result, I find that the CO's reasoning that the Employer's answer to Item 12 of the Form ETA 790 was incomplete is not a legally sufficient reason to reject the application.

The second technical reason for the CO's rejection of the Employer's application was that the Employer failed to list the piece rate at Item 12 of ETA Form 750. The CO has accepted the Employer's ETA Form 795 for the purposes of amending the piece rates and those rates are now in the record. As a result, I will exercise judicial discretion and withhold ruling on this subsidiary issue, giving the Employer until **5:00 p.m., Eastern Time, on Tuesday, July 8, 2008**, to submit an amended ETA Form 750 so that Item 12 contains the piece rates that are in the record at ETA Form 795. A copy of the amended ETA Form 795 must be submitted by that time to the CO, the undersigned, and to Mr. Stephen Jones, who represents the CO. I will withhold

⁵ I take administrative notice of the instructions, located at <http://www.foreignlaborcert.doleta.gov/790inst.cfm>.

my opinion on this issue until 4:00 p.m. on Wednesday, July 9, 2008, once the CO has indicated whether the amended Item 12 of ETA Form 750 is adequate.

CONCLUSION AND ORDER

Based on the facts of the case and the record before me, I find that the Employer is permitted to require that applicants have six months experience for the job description provided and that the CO's rejection of the application on this basis is not legally sufficient. I also find that the Employer has provided a complete answer to Item 12 of ETA Form 790 and that the CO's rejection of the application on this basis is not legally sufficient. I have withheld ruling on the third issue – the Employer's failure to submit piece rates at Item 12 of ETA Form 750 and hereby **ORDER** the Employer to submit an amended ETA Form 750 so that Item 12 contains the piece rates that are in the record at ETA Form 795 **by 5:00 p.m., Eastern Time, on Tuesday, July 8, 2008**. A copy of the amended ETA Form 795 must be submitted by that time to the CO, the undersigned, and to Mr. Stephen Jones. I will withhold my opinion on this issue until 4:00 p.m. on Wednesday, July 9, 2008, once the CO has indicated whether the amended Item 12 of ETA Form 795 is adequate. **SO ORDERED.**

A

JOHN M. VITTONI
Chief Administrative Law Judge