

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 November 2007

Case No.: 2008-TLC-00001

In the Matter of

MARIN HARVESTING, INC.,
Employer.

Appearances: Mr. Pedro Marin, President of Marin Harvesting
Karla Renee Bennett, Agent
For the Employer

Ms. Renata Jones Adjibodou, Certifying Officer
Mr. Peter Nessen, Esquire
For the Respondent, Department of Labor ("DOL")

Before: Stephen L. Purcell
Associate Chief Administrative Law Judge

FINAL 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 November 8, 2007, request for a review of the Department of Labor's October 31, 2007, denial of a temporary alien agricultural labor certification (H-2A) application filed by the Employer. See 20 C.F.R. §655.112(b). The case file was transmitted by the Regional Administrator ("RA") of the Employment and Training Administration ("ETA") in Atlanta, Georgia on November 14, 2007, and was assigned to me on November 23, 2007. As requested by the Employer, I conducted an expedited administrative review under 20 C.F.R. § 655.112(a). My decision is based upon the administrative file forwarded by the Regional Administrator and the written submissions of the parties.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On August 15, 2007, Marin Harvesting submitted an application for an H-2A temporary alien labor certification for 50 alien workers for employment as "seasonal fruit pickers," harvesting oranges, tangerines, and grapefruit by hand and with tools (Case No. A-07218-04619). *Administrative File ("AF") 262-317*. On August 22, 2007, the RA informed the Employer that his application had not been accepted and advised that the Employer could submit

a modified application. *AF 255*. The Employer then filed a modified application on September 14, 2007. *AF 196-254*. On September 20, 2007, the RA informed the Employer that his first modified application had been rejected and specified the reasons for the rejection. *AF 192*.

On October 22, 2007, the Employer submitted a second modified application. *AF 106*. The application indicated that the laborers would be employed between November 1, 2007, and July 20, 2008, at various groves in Highlands County, Florida. *AF 107-109*. Hired laborers would be paid \$8.56 per hour for 35 hours per week of work. *AF 107*. The picking rates were listed as \$.90 per 90 pounds of Valencia oranges; \$.85 per 90 pounds of early/mid processing; \$.90 per 90 pounds of grapefruit; and \$1.25 per 95 pounds of tangerines. *AF 108*.

On October 22, 2007, the RA accepted the application for consideration and provided the Employer with instructions for recruitment. *AF 101*. The RA instructed the Employer to cooperate with the applicable State Workforce Agency (“SWA”) to prepare a job order and to accomplish certain recruitment steps according to 20 C.F.R. § 655.105(a).¹ *AF 101*. The RA then instructed that once the recruitment steps were completed, the Employer was to document his efforts and identify each U.S. worker who applied for the job and explain why that worker was not hired. *AF 98*.

¹ The recruitment steps required that the Employer place at least two (2) advertisements for the job opportunities in a newspaper of general circulation serving the area of intended employment. *AF 97*. The RA then listed the following requirements for the content of the advertisements:

- a. Identify the name of the employer and location(s) of work, or in the event that an association is serving the employer, a statement indicating that the name and location of each member of the association can be obtained through the SWA;
- b. Provide a description of the nature and anticipated duration of the job opportunity;
- c. Identify the wage rate required by law, or in the event that an association is serving as the employer, the range of applicable wages and a statement indicating that the rate applicable to each member can be obtained through the SWA;
- d. State the guarantee;
- e. If applicable, state that work tools, supplies, and equipment will be provided without cost to the worker;
- f. State that housing will be provided without cost to workers who cannot reasonably return to their permanent residence at the end of the work day;
- g. If applicable, state that expenses for subsistence and transportation to the worksite will be provided or paid for by the employer, with payment to be made no later than completion of 50% of the work contract; and
- h. Direct applicants to report or send resumes to the SWA for referral to you by using the following language in your advertisement: “*Apply for this job at the nearest [Florida Agency for Workforce Innovation] office using job listing number [FL9287459].*”

AF 98 (emphasis in original). The RA then instructed the Employer to contact former employees from the United States who had worked for the Employer in previous seasons and to document the efforts to contact those former employees. *AF 98*.

The Employer provided documentation of his recruitment efforts, which included the running of an advertisement in the *Tampa Tribune* that ran for 14 consecutive days. *AF 96*. The advertisement content was as follows:

Seasonal citrus fruit pickers needed during 11/01/07-07/20/08. The wage rate is \$.80 per 90 [pound] box of Tangerines and \$.60 per 80 [pound] box of grapefruit. The minimum hourly rate is \$8.56 per hour (adverse effect wage rate). Worker should be able to exert 20 to 50 pounds of force occasionally, and 10 to 25 pounds of force frequently, and greater than negligible up to 10 pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work and should also have the physical ability to endure long hours in sun, heat, and/or cold while maintaining a minimum production level. The employer guarantees to offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions. Tools and equipment are provided to the worker at no cost. Free housing is also provided to workers recruited from beyond the commuting area. Transportation and subsistence expenses to the worksite will be provided or paid by the employer upon completion of 50% of the work contract, or earlier. Any interested workers should contact their local Employment and Security office.

AF 96. The Employer also submitted a notation that a prospective employee contacted the Employer on September 30, 2007. *AF 95*. The Employer noted that “[i]t appeared he had heard about the job through *The Tampa Tribune Highlands Today* newspaper and then referred through Work force Innovation [sic].” *AF 95*. The Employer stated that he asked the individual to call back with a time to meet in person but that prospective employee did not make further contact and did not leave a name or number. *AF 95*.

On October 31, 2007, the RA determined that the Employer did not properly carry out the recruitment instructions provided in the October 22, 2007, acceptance letter. *AF 93*. Specifically, the RA noted that the Employer’s advertisement for the position did not

(a). provide the employer name and work location; (b). does not describe the work to be done; (c). does not provide the correct wages and/or piece rates for citrus to be harvested; (h). the advertisement did not provide the job order number, or provide the required referral instruction for potential U.S. workers to use if interested in the job opportunity.

AF 93 (emphasis in original). In addition, the RA determined that “the recruitment results provided by the employer only address a referral that contacted the employer on September 30, 2007, which was over a month before the employer’s application was accepted for consideration.” *AF 93*. Consequently, the RA denied certification for all 50 job opportunities. *AF 94*.

The Employer appealed the decision on November 8, 2007, and the matter was forwarded to this Office for administrative review. *AF 1*. The Employer explained that he had mistakenly submitted an advertisement that had been used for previously approved certification applications.

AF 1-2. The Employer admitted that the clerk who submitted the advertisement had failed to include the additional required information and that a new advertisement with the proper information was already running in the local newspaper. *AF 2.* The Employer noted that the new advertisement would cause a delay in the start date for the position and, as a result, the new dates for employment would be November 30, 2007, through July 20, 2008. *AF 2.* Additionally, the Employer made an appeal for undue hardship, noting that he is one of the few employers in the region to use the H2A certification process. *AF 2.* The Employer pleaded that denial of the application would place “undue hardship on the business because of loss of the investment already placed and an additional loss of business due to inability to fulfill the work contract with the grower.” *AF 2.* The Employer attached new materials to his appeal. *AF 3.* Under the regulations, the administrative law judge is not permitted to receive additional evidence outside of the ETA case file. 20 C.F.R. § 655.112(a)(1). Consequently, the exhibits that accompanied the Employer’s request for administrative review are excluded from the record.

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). If the RA determines that certification should be denied, the employer may request an administrative review before an administrative law judge.

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. 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).

In the present matter, the Employer argues that certification should be granted because the clerical errors in the advertisement that ran in the *Tampa Tribune* were corrected after the RA’s October 31, 2007, denial of certification. In the RA’s October 22, 2007, notice of acceptance of application for consideration, she set forth specific requirements for the recruitment of U.S. workers in accordance with 20 C.F.R. § 655.105(a), including specific criteria for a newspaper advertisement. As the Employer admitted in his letter requesting administrative review, the advertisement placed in the *Tampa Tribune* and submitted to the RA

was not in compliance with the requirements listed in the RA's October 22, 2007, letter. Specifically, the advertisement did not contain the name of the Employer, the work location, a description of the work to be completed, the job order number, or referral instructions for potential U.S. workers. Additionally, the advertisement indicated lower piece rates than those listed in the application for certification. Regardless of the subsequent efforts to correct the clerical errors and to comply with the October 22, 2007, instructions, the administrative file that was before the RA contains no evidence that the Employer complied with the advertising requirements.

Consequently, based upon my review of the record for legal sufficiency, I find that the RA has set forth a legally sufficient basis for denying the Employer's application for temporary alien agricultural labor certification for 50 H-2A workers. The RA's denial of temporary labor certification is affirmed.

ORDER

I hereby find that the Regional Administrator's determination to deny temporary alien labor certification in the instant case should be AFFIRMED and temporary labor certification is DENIED.

SO ORDERED.

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STEPHEN L. PURCELL
Associate Chief Administrative Law Judge