

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)



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In the Matters of

BOLTON SPRING FARM,

OALJ Case No.: 2008-TLC-00028

ETA Case No.: A-08114-06729

and

BUSSA ORCHARDS,

OALJ Case No.: 2008-TLC-00031

ETA Case No.: A-08119-06754

Employers.

Certifying Officer: Renata Jones Adjibodou
Atlanta Processing Center

Appearances: Monte B. Lake, Esquire
Wendel V. Hall, Esquire
Siff & Lake, LLP
Washington, DC
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
R. Peter Nessen, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

BEFORE: **JOHN M. VITTON**
Chief Administrative Law Judge

DECISION AND ORDER
ON RECONSIDERATION

On May 6, 2008, the Office of Administrative Law Judges (OALJ) received Bolton Spring Farm's ("Bolton") request for expedited administrative review regarding the denial of its H-2A application for temporary alien labor certification in the above-referenced matter. *See* 20 C.F.R. Part 655, Subpart B. The ALJ has only five days from the receipt of the Administrative Record to render a decision. 20 C.F.R. § 655.112(a)(2). Thus, a compressed schedule for briefing this matter was established, giving the parties until noon on May 9, 2008 to file briefs.

A Decision and Order was issued shortly after noon on May 12, 2008. Because I was not aware, however, that Bolton had timely filed a brief in this matter on May 9, 2008, it is necessary to reconsider the Decision and Order.

As noted in the May 12, 2008 Decision and Order, the only issue on appeal is whether a petitioning employer is required to provide a Spanish translation of the job description on Form ETA 790, Item 10a. During a conference with the parties on May 15, 2008, it was agreed that a second appeal recently filed by Bussa Orchards, 2008-TLC-00031 ("Bussa"), presented the same issue and could be consolidated for decision with Case No. 2008-TLC-00028.

BACKGROUND

The May 12, 2008 Decision and Order

In the May 12, 2008 Decision and Order, I found that the regulation at 20 C.F.R. § 655.101(b) mandates that "[e]ach H-2A application shall be on a form or forms prescribed by ETA," and ETA Form 790 (Agricultural and Food Processing Clearance Order) is a form required for the positive recruitment supporting the labor certification application. I found that because the Employment and Training Administration ("ETA") published a "Proposed Information Request" notice in the Federal Register in order to obtain comments from the public and other government agencies and to obtain clearance from the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1995 ("PRA") for revision of the Form 790, and that notice introduced a bilingual English/Spanish format for the form, ETA had put the

public on notice in 2004 that it would be revising Form 790 in a bilingual format, and that the purpose of that revision would be to ensure that workers will receive a full disclosure of required terms and conditions of employment “in an appropriate language.” *See* 69 Fed. Reg. 21578 (Apr. 21, 2004). I also observed that the current version of Form 790 is bilingual in structure and very clearly instructs that the information from Box 10, which is a summary of the material job specifications, be repeated in Spanish in Box 10a.

In the May 12, 2008 Decision and Order, I rejected Bolton’s argument that its agent had years of prior applications approved without being required to provide a Spanish translation of job duties (thereby showing that ETA had abruptly changed established practice) because (1) the translation was not an element of the form until 2004, and (2) even if ETA had not enforced the translation requirement between 2004 and 2008, previously approved applications are not grounds to estop ETA from raising the omission as a defect in future applications. I also rejected Bolton’s argument that 20 C.F.R. § 653.501(h), makes translation the responsibility of the SWA because that regulation only requires a local job service to have staff that can aid agricultural workers to better understand the job offers, and because that regulation only applies to offices that have been designated as “significant MSFW” bilingual offices, and only places the burden on assisting workers “upon request.” I also rejected Bolton’s argument that it could not foresee all of the possible destinations of its job offer once it hits the interstate clearance system, and thus by implication the job offer might need to be in many different languages or dialects, as a non sequitur because Form 790 only requires a Spanish translation.

On this basis, I found that the CO’s decision to decline Bolton’s application for temporary alien labor certification was legally sufficient.

The Employer’s May 9, 2008 Brief

The May 12, 2008 Decision and Order was rendered based on the erroneous belief that Bolton had chosen to rely on the arguments made in its request for expedited administrative review. I was unaware when that Decision and Order was issued that Bolton had timely filed a

Brief on May 9, 2008 that more fully set forth its contentions. Consequently, I am now re-examining that Decision and Order.

In its May 9, 2008 brief, Bolton argues that ETA's refusal to consider Bolton's application for temporary alien agricultural labor based on the failure to provide a Spanish translation of job description on Form 790 had no basis in the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, the Wagner-Peysner Act, 29 U.S.C. § 49 *et seq.*, or any other statute within the responsibility of ETA, and was a *sub rosa* reversal of decades of agency practice. Bolton argues that its application complied with all of the substantive requirements set forth in the regulations at 20 C.F.R. Parts 653 and 655, and that ETA had no discretion to refuse to accept the application based on criteria other than that established by the regulations, citing *Raungswang v. Immigration and Naturalization Service*, 591 F.2d 39, 43 (9th Cir. 1978). Bolton argues that that ETA is not entitled to deference in interpreting its regulations in way that imposes obligations different from or greater than those imposed by Congress in the underlying statute. Bolton contends that ETA "exceeded the permissible scope of its administrative discretion by imposing a new requirement for acceptance of labor certification applications with[out] notice and comment rulemaking." Bolton's May 9, 2008 Brief at 5.

Bolton argues that the requirement of Spanish language translation is not in furtherance of ETA's responsibility to certify that the employment of an H-2A alien will not have an adverse effect on domestic workers under 8 U.S.C. § 1188(a)(1)(B). Nor is such an obligation supported by the Wagner-Peysner Act.¹ Bolton observed that neither 20 C.F.R. Part 653 nor Part 655 impose a mandatory translation requirement, and that the closest ETA had come to proving a statutory justification for the requirement was its statement in the 2004 information collection notice in the Federal Register revising Form 790. Bolton wrote:

According to the Federal Register notice, ETA added "a number of items required by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1800 *et seq.* ("MSPA") to the ETA Form 790. *Id.* Purportedly, ETA did this for the convenience of employers. ETA asserted that by producing the form in a new

¹ The Employer's brief at this point argues that the WPA imposes a requirement on the local job service to translate information contained in a job order into Spanish or other languages as appropriate, citing however, not the WPA, but the implementing regulation at 20 C.F.R. § 653.501(h).

“bilingual, English-Spanish format,” it would enable “agricultural employers [to] satisfy their disclosure requirements without having also” to complete a WH 516 form. *See Id.*

Bolton’s May 9, 2008 Brief at 9 (footnotes omitted).² Bolton correctly observed that the 2004 notice did not publish a copy of the new bilingual form, but only the old form. Thus, Bolton argues that the underlying premise of the mandatory Spanish translation requirement in Form 790 was to assist in enforcement of the MSPA. Bolton then argues that it is the Wage and Hour Division of the Employment Standards Administration, rather than ETA, that enforces and interprets MSPA requirements, and that DOL had been harshly criticized in the past in a different context over a regulatory cross-fire between ETA and ESA, citing *Chao v. North Carolina Growers Ass’n*, 280 F.Supp. 2d 500, 511 (W.D.N.C. 2003), *rev’d U.S. Dept. of Labor v. North Carolina Growers Ass’n*, 377 F.23d 345 (4th Cir. 2004). Bolton also argued that the ETA’s underlying premise was that the use of Form WH 516 is mandatory and that ETA Form 790 merely mimics the requirements of the Wage and Hour form. Bolton argued that this premise is wrong, pointing out that the use of Form WH 516 is optional, as noted by Wage and Hour in 72 Fed. Reg. 72760, 72761 (Dec. 21, 2007). Bolton wrote:

The ETA regulations in question and MSPA’s disclosure requirements both are intended to ensure that migrant farm workers understand the terms and conditions of employment before they accept and travel to a job. They are parallel in that respect; however, they are implemented in different manners because of the difference in the recruitment involved. Fewer than 2 percent of U.S. agricultural job opportunities are H-2A certified. Migrant and seasonal workers recruited for the H-2A program are protected by the ETA regulations ... that require local job service offices to translate the job order in the language of the recruited workers. Migrant workers who are recruited outside of the H-2A program context and do not necessarily have the protection of the ... interstate clearance system regulations, are protected by MSPA. MSPA’s language disclosure requirements are applicable to employers and farm labor contractors whose job orders are not required to be submitted to the interstate clearance system. The point is that while the ETA and ESA disclosure requirements are comparable in some respects, they are imposed by distinct statutes that generally relate to different recruitment contexts.

Employer’s May 9, 2008 Brief at 11-12 (footnotes omitted).

² In one footnote, Bolton observed that the correct citation for the MSPA is 29 U.S.C. § 1801 *et seq.*

Finally, Bolton argues that even if ETA had a statutory basis for imposing a Spanish translation requirement for Form 790, it must engage in notice and comment rulemaking to amend the current regulations.

The May 15, 2008 Conference

In order to render a full informed decision on reconsideration, I determined that several questions needed to be addressed by the parties. Thus, on May 15, 2008 the attorneys for the parties appeared before me to orally present their positions on questions that I had sent to them the previous day. Because of the time constraints imposed by the H-2A regulations, no party had much time to prepare for this conference, and I was impressed by the quality of the presentations given the short preparation time provided.

As noted above, a similar appeal was recently filed by Bussa Orchards. Bussa is represented by the same attorneys and the appeal presents the identical issue as the one presented in Bolton's appeal. At the conference counsel for the two petitioning Employer and counsel for ETA all agreed that the Bolton and Bussa appeals could be consolidated for decision. *See* 29 C.F.R. § 18.11 (consolidation of hearings).

DISCUSSION

Standard of Review

The standard of review in an expedited review appeal is legal sufficiency. 20 C.F.R. § 655.112(a). 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.³

Challenge to the Validity of Form 790's Translation Requirement

At its core, the Employers' argument is that the Spanish translation requirement of Box 10a in Form 790 is deficient because ETA did not promulgate this requirement in a manner to give the regulated community an adequate opportunity to challenge its validity.

Scope of ALJ's Authority to Consider Validity of an Agency Rule

At the conference, counsel for ETA argued that an ALJ review for legal sufficiency under 20 C.F.R. § 655.112(a) is the wrong forum to challenge a rule on the ground that it was invalid because of the way it was promulgated. Rather, the ALJ's role is solely to assess whether the rule was violated as written. The Board of Alien Labor Certification Appeals, which hears appeals of denials of applications for permanent alien employment, has held that an ALJ lacks inherent or express authority to rule on the validity of a regulation or to invalidate a regulation as written. *Dearborn Public Schools*, 1991-INA-222 (BALCA Dec. 7, 1993) (en banc), citing *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984). Thus, I concur with ETA that even if the Form 790 was a document that should have been published for Notice and Comment rulemaking, an ALJ does not have the authority to strike the form in whole or in part as invalid, any more than could an ALJ strike a regulation as invalid.

Nevertheless, assuming for purposes of argument that I have jurisdiction to consider the validity of the Form 790's requirements, I find that it passes muster under the Administrative Procedure Act ("APA").

³ The Employers' appeal is premised in part on the argument that the CO's denial of their applications was arbitrary and capricious.

Whether the rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A)

In *Fressola v. Manbeck*, 1995 WL 656874, at *4 n.7 (D.D.C. Mar. 30, 1995), the Plaintiff asked the United States District Court for the District of Columbia to review the rejection of its patent application based on a rule stated in the Patent and Trademark Office's Manual of Patent Examining Procedure (MPEP) which required that applicants state their claims in a single sentence. The Plaintiff argued that the Patent Office had violated the APA in various aspects. First, it argued that the one-sentence rule was incompatible with the Patent Office's underlying statutory directive, and therefore arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. 706(2)(A). The court recognized that less formal vehicles for rulemaking, such as manuals and guidance documents, are afforded greater scrutiny than rules produced by formal processes, but nonetheless applied the deferential standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to the MPEP. The court summarized the standard as "whether the rule or procedure is within the agency's statutory authority and is reasonably related to the purposes of the enabling legislation ... and does not violation to due process." *Fressola, supra*, quoting *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 606 (Fed. Cir. 1985)(citations omitted). Finding that the one-sentence rule presented no conflict with the Patent Office's statutory mission, the court rejected the Plaintiff's arbitrary and capricious (section 706(2)(A)) theory. The court found that the Patent Office's rule controlling the form of application did not interfere with the Plaintiff's ability to make his claim.

Similarly, in the case of the Form 790, I find that ETA's requirement that a Spanish translation of the job's duties is consistent with ETA's statutory mission. The INA requires that employers wishing to use non-immigrant workers for temporary agricultural employment under the H-2A visa classification apply to the ETA for a labor certification showing that there are not sufficient workers in the U.S. able, willing, qualified and available to do the work, and that employment of such non-immigrant workers will not adversely affect the wages and working conditions of workers in the U.S. Included within ETA's jurisdiction are such issues as whether

U.S. workers were available, whether positive recruitment was conducted, whether there was a strike or lockout, the methodology for establishing adverse effect and prevailing wage rates, whether workers' compensation insurance will be provided, and other similar matters. The relevant pool of workers is often migrant agricultural workers who are recruited for a specific harvest season. I recognize that not all migrant workers are Spanish speakers. Nonetheless, I find that requiring a petitioning employer to provide a Spanish translation of the terms and conditions of employment is well within the scope of ETA's statutory mission.⁴

Moreover, although Form 790, Box 10a does add a burden on petitioning employers to create a translation, it does not materially interfere with their ability to present their application. The Employer argued that its application complied in all material ways with 20 C.F.R. Parts 653 and 655 and would have been approved but for ETA's requirement of a Spanish translation in Box 10a. I do not find that requiring a Spanish translation of the employer's job requirements would materially interfere with a petitioning employer's ability to present its application.

Thus, I find that ETA's rule requiring that Form 790 include a Spanish translation is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of 5 U.S.C. 706(2)(A).

Whether the notice and comment rulemaking was required

Clearly, publication of the Form 790 in 2004 and 2006 in the Federal Register for purposes of OMB approval under the Paperwork Reduction Act was not the equivalent of Notice and Comment rulemaking.⁵ As counsel for the Employer argued at the conference, PRA notices have to do with paperwork burdens rather than the promulgation of substantive regulatory

⁴ Bolton forcefully argued that the Spanish translation requirement found in ETA Form 790, Box 10a was an improper attempt to replicate matters under the authority of the Wage and Hour Division's administration of the MSPA. Bolton's argument is based largely on the language used to introduce the bilingual form in the 2004 PRA notice. *See* 69 Fed. Reg. 21578 (Apr. 21, 2004). I have read that language closely, however, and concur with ETA argument at the May 15, 2008 conference that it was only offering its opinion that the bilingual form may eliminate the Employer's burden to complete a WH Form 516 as a side benefit.

⁵ The purpose of the Paperwork Reduction Act regulations is "to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government." 5 C.F.R. § 1320.1 (2008).

requirements. Nonetheless, I am not persuaded by the record before me that the rule was substantive. The APA exempts rules of “agency organization, procedure, or practice” from its requirements of notice and comment rulemaking. 5 U.S.C. § 553(b)(A). The test for whether a rule is procedural is “whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on any given type of behavior.” *Am Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987). That a rule implicates parties’ interests, or even has a minor impact on parties, does not make the rule substantive. Instead, a substantive rule is one that affects parties’ behavior and actually affects the rights of parties. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 326-27 (D.C. Cir. 1994) (concluding that a regulation was procedural because it did not change the substantive standards by which an agency evaluated applications).

In *Fressola*, the Plaintiff’s second attack on the Patent Office’s one-sentence rule was based on the contention that the Patent Office failed to engage in Notice and Comment rulemaking in creating the rule. The court rejected this contention based on the APA’s exclusion from Notice and Comment rules of agency organization, procedure or practice. Noting the two types of tests used to gauge whether a rule is substantive or procedural, the court first held that the rule was apparently not promulgated pursuant to any specific statutory directive, and therefore lacked the full force of law characteristic of substantive or legislative rules.

In the instant case, all parties agreed at the conference that the statutes and regulations administered by ETA do not explicitly require an employer petitioning for H-2A temporary labor certification to translate its application materials into Spanish. Thus, since the Spanish translation requirement for Box 10a of Form 790 is not implementing a specific statutory directive, it is not substantive rule under the first standard test for gauging whether a rule is procedural or substantive.

The court in *Fressola* then addressed the “substantive rights or interests” test. It wrote:

Because the rule only affects the technical form of a claim, it appears to be a prototypical “rule[] of agency organization, procedure or practice”: “[a] useful articulation of the [organization, procedure or practice] exemption’s critical feature is that it covers agency actions that do not themselves alter the rights or

interests of parties, although it may alter *the manner in which the parties present themselves or their viewpoints to the agency.*” *Batterton*, 648 F.2d at 707 (emphasis added). Indeed, courts regularly have labeled agency changes in application processes “procedural” under 553 when such changes do not affect the rights implicated by that process. *See, e.g., Kessler v. F.C.C.*, 326 F.2d 673, 681-82 (D.C. Cir. 1963); *Waste Management, Inc. v. United States Environmental Protection Agency*, 669 F. Supp. 536, 539-40 (D.D.C. 1987); *Pennsylvania v. United States*, 361 F. Supp. 208, 220 (M.D. Pa.), *aff’d*, 414 U.S. 1017 (1973).

Fressola, supra at *4.

In the instant case, the Spanish translation requirement implemented in 2004 did alter the manner in which a petitioning employer filed for H-2A temporary alien labor certification, but it did not alter the petitioner’s rights or interests.

The Employers also observed that ETA’s decision to make Form 790 a bilingual form in 2004 was preceded by many years of Form 790 being an English-only form. The Employers also suggest that ETA had not enforced the Box 10a translation comment until recently. As I noted in the May 12, 2008 Decision and Order, even if ETA did not uniformly enforce the translation requirement until recently, it’s failure to do so in the past does not now estop it from future enforcement. Moreover, I do not find that the change to a bilingual form was effected in a manner so as to offend procedural due process. The regulation at 20 C.F.R. § 655.101(b) states that “[e]ach H-2A application shall be on a form or forms prescribed by ETA.” Form 790 is a form prescribed by ETA that must be submitted in support of an H-2A temporary labor certification application. Form 790 was apparently first approved by OMB in 1981. It was revised with a bilingual English/Spanish format in 2004. This revision was published in the Federal Register for purpose of OMB approval under the Paperwork Reduction Act. Moreover, as counsel for ETA noted during the conference, the Form was published for PRA notice and commentary in both 2004 and 2006. I recognize that the 2004 version did not include a version of the new Form with Box 10a, but merely attached the old form. But clearly by 2006 the regulated community would have been aware that the Form was requiring a Spanish translation in Box 10a. Neither PRA notice resulted in public comments objecting to the burden of

providing a Spanish translation.⁶ While a PRA notice is not the equivalent of formal Notice and Comment rulemaking on a substantive rule, it certainly provided actual notice to the regulated community – not to mention that the form has now been in use since 2004.

Summary

In, sum I find that I do not have the jurisdiction to invalidate the Spanish translation requirement in ETA Form 790. Even if I had such authority, I find that ETA's imposing the burden on a petitioning employer of providing a Spanish translation in Box 10a of Form 790 does not create a substantive requirement that goes beyond ETA's reasonable administrative discretion in dictating the form and substance of a form used to apply for a labor certification. The requirement rationally bears on ETA's procedural administration of the H-2A program, and withstands the "legal sufficiency" standard of review.

It is undisputed that Bolton and Bussa did not complete Box 10a in the Form 790s they submitted in support of their H-2A labor certification applications. Thus, I find that the CO properly declined to accept the applications. In the denial letters, the Employers were afforded the opportunity to modify their applications to provide the Spanish translation or to appeal under 20 C.F.R. § 655.112 based on an expedited review or de novo hearing. They chose an expedited review. In an expedited review case, the ALJ's authority is to either, affirm, reverse or modify ETA's denial. In the conference with the parties, it was clear that the Employers and their agent had decided to appeal in order to test the validity of the translation requirement rather than based on mere negligence or error. I find that their appeals were clearly not frivolous and that fundamental fairness would not be served unless I provided the Employers a fresh opportunity to now supply the translations required by Form 790.

Accordingly, **IT IS ORDERED** that

⁶ www.reginfo.gov/public/do/PRViewICR?ref_nbr=200407-1205-004 (visited May 13, 2008).

(1) The CO's decision to decline the Employers' H-2A applications is hereby **AFFIRMED**.

(2) The Employers shall be afforded five business days from the date of issuance this Decision and Order on Reconsideration to provide to the Certifying Officer the required translations. If the translations are timely provided, the CO shall **GRANT** the certifications.

A

JOHN M. VITTON
Chief Administrative Law Judge