



Issue Date: 20 March 2009

OALJ Case No.: 2009-TLC-00035
ETA Case No.: C-08358-16357

In the Matter of

PRATT'S LAWN AND LANDSCAPE,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On February 28, 2009, Pratt's Lawn and Landscape ("the Employer") filed a request for review of the Certifying Officer's ("the CO") February 23, 2009, determination in the above-captioned temporary alien labor certification matter. During a March 9, 2009, telephone call, the Employer's representative requested expedited administrative review of the Certifying Officer's decision. *See* 20 C.F.R. § 655.112 (2008) (describing the two types of review offered by this Office).¹ On March 13, 2009, this Office received the Administrative File from the Certifying Officer. In expedited administrative review cases, the administrative law judge has five working days after receiving the file to review the record for legal sufficiency and issue a decision. § 655.112(a)(2). The administrative law judge may not receive additional evidence or remand the matter to the CO. § 655.112(a)(1).

Statement of the Case

On December 23, 2008, the Department of Labor's Employment and Training Administration (ETA) received the Employer's application for temporary labor certification for seven nursery workers. *See* AF 31-40.² On December 30, 2009, the CO informed the Employer that he had accepted the application and directed the Employer to begin recruitment. AF 27-29. The CO's instructions contained the following:

Contact Former U.S. Workers: Establish contact with U.S. workers employed by you in the occupation at the place of employment during the previous season and solicit their return to the job this season. You should retain documentation on efforts to contact former U.S. workers as well as any responses received and be

¹ On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008). Since the Employer filed its application before the new regulations took effect, I will cite to and apply the regulatory provisions in effect at the time the Employer filed its application.

² Citations to the 40-page Administrative File will be abbreviated as "AF" followed by the page number.

prepared to submit such documentation only in response to a request from our office.

AF 28. On January 25, 2009, Employer prepared a “Final Recruitment Report.” AF 17. Therein, the Employer reported receiving no applications for the positions but promised to “continue a positive recruitment schedule.” AF 17. On February 11, 2009, the Employer prepared a second “Final Recruitment Report.” AF 15. Therein, the Employer explained that, after being contacted by the Employer, two U.S. workers who had previously worked for the Employer had agreed to return for the 2009 season. AF 15. In addition, the Employer reported that one other former employee had already begun working. AF 15. The Employer also reported receiving no phone calls or resumes from interested applicants and again listed the number of available positions as seven. AF 15.³

On February 23, 2009, the CO granted certification for only four job opportunities. AF 8. Regarding the other three opportunities, the CO wrote that “a sufficient number of able, willing and qualified U.S. workers have been identified as being available at the time and place needed.” AF 8 (citing 20 C.F.R. § 106(b)(1)(i)). Specifically, the CO relied on the Employer’s February 11, 2009, references to the three former employees who had agreed to return for the 2009 season. AF 9. Thereafter, when the Employer’s representative contacted ETA requesting an explanation for the partial certification, an ETA employee e-mailed the following response:

In the employer’s Final Recruitment Report 3 hires are reported out of 7 available positions. The employer’s application requests 7 H-2A workers in Item 18 of the ETA Form 750 and Item 7 of the ETA Form 790. In the H-2A Supplement Page 5 of the 790 Attachments under Number of Workers it states, “The employer expects the total number of workers to be used in this occupation to be 7, of which 7 will be H-2A workers for which certification is requested, and the balance will be domestic workers.” Because the total was listed as 7 in the H-2A Attachment we had to assume that there was no balance of workers. No credence could be given to the fact that those 3 are previous workers.

AF 5. The Employer’s appeal followed.

Discussion

The regulations governing administrative review of H-2A determinations direct the administrative law judge to review the record “for legal sufficiency.” § 655.112(a)(2). Since the regulations do not define “legal sufficiency,” I apply an arbitrary and capricious standard when conducting expedited administrative review under § 655.112(a)(2). *See Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (A.L.J. May 16, 2008). The regulations prohibit the CO from granting an application for temporary labor certification if he determines that “[e]nough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer’s job opportunities.” § 655.106(b)(1)(i). Available workers include those who have

³ The Administrative File also contains a document bearing the heading “Job Referral List.” AF 16. The document contains three individuals’ names with handwritten notations suggesting that the individuals either did not contact the Employer or failed to interview for the position. AF 16.

“made a firm commitment to work for the employer.” § 655.106(b)(1). In its written submissions to this Office, the Employer asserts that the CO mistakenly denied certification for three of its job opportunities because the Employer rehired the three former employees to work in the landscaping and lawn maintenance field and not as nursery workers. AF 1. The Employer explained that the February 11, 2009, report contained information about these individuals because the CO’s recruitment instructions were ambiguous. AF 1. Specifically, the Employer argues that, when instructed to contact former workers it had employed “in the occupation at the place of employment,” the Employer believed that the CO required contacting “previous workers in the general occupation.” AF 1. The Employer appears to contend that it read the CO’s instructions as requiring the Employer to contact all former employees regardless of their relation to the Employer’s temporary need. *See* AF 1.

Based on the record before the CO, however, I cannot find that the CO acted arbitrarily or capriciously in concluding that the February 11, 2009, report established that the Employer had filled three of the nursery openings for which the Employer seeks certification. Importantly, nothing in the document indicates that the Employer rehired the three U.S. workers to perform lawn and landscaping work. The fact that the Employer ambiguously wrote “7 positions available” was insufficient to put the CO on notice that the Employer had only filled otherwise unmentioned labor needs with these three rehires. Similarly, the fact that the Employer had received no outside interest in the positions was not inconsistent with the CO’s interpretation.

Situations like this case demonstrate the value of clear communication between employers and the CO. If the parties had clearly communicated, there may have been no need for the Employer to appeal the CO’s decision. While I might have decided this case differently were I able to consider the factual allegations made by the Employer in its submissions to this Office, the standard of review precludes me from considering information that the CO did not have when he made the certification determination. Accordingly, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

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JOHN M. VITTON
Chief Administrative Law Judge