



Issue Date: 17 April 2009

OALJ Case No.: 2009-TLC-00041
ETA Case No.: C-09048-17959

In the Matter of

DEVINE FARMS,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On March 16, 2009, Devine Farms (“Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“CO”) March 12, 2009, denial of its application for temporary alien labor certification. The regulations relating to expedited administrative review of H-2A determinations direct the administrative law judge (“the ALJ”) to review the record “for legal sufficiency” and render a decision within five working days after receipt of the case file. 20 C.F.R. § 655.115(a).¹ Under § 655.115(a)(1), the ALJ 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 ALJ must “either affirm, reverse, or modify the [CO’s] denial by written decision.” § 655.115(a)(2). The Administrative File was received by this office on April 9, 2009.

Statement of the Case

On February 17, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification for three farm worker positions. (AF 41).² Following the CO’s request for

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). Because the Employer filed its application after the new regulations took effect, I will cite to the amended regulatory provisions as they would have appeared when codified.

² Citations to the Administrative File will be abbreviated as “AF” followed by the page number.

and the Employer's submission of modifications to the application, the CO accepted the Employer's modified application for processing on March 6, 2009. (AF 15). Pursuant to § 655.102(d), the CO directed the Employer to recruit for the positions. *Id.*

On March, 2009, ETA received the Employer's initial recruitment report. (AF 8). The report identified three U.S. workers who had been hired to fill the positions, and it further identified three additional U.S. workers who were not contacted. *Id.* However, the Employer stated: "We have already hired 3 applicants, but based on our past experiences when applicants do not show up, I am requesting to keep my order for 3 H-2A workers." *Id.* On March 12, 2009, the CO denied the Employer's application. (AF 4-5). In his denial letter, the CO explained that he determined that "a sufficient number of able, willing and qualified U.S. workers have been identified as being available at the time and place needed to fill all of the job opportunities for which certification has been requested." (AF 4); *see* § 655.109(e)(2). The CO noted that three U.S. workers had been hired to fill the positions, and three other applicants "were not hired due to the employer's reason 'already hired someone.'" (AF 4). The CO stated that, because the Employer was only seeking labor certification for three job opportunities and was able to fill the positions with U.S. workers, he could not "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." *Id.* The Employer's appeal followed. (AF 1).

Discussion

Section 218 of the Immigration and Nationality Act provides that, for all employers seeking to hire aliens under the United States under the H-2A program, the Secretary of Labor must first certify that "there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition," and "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1). Three U.S. workers were identified as being available and qualified to perform the services for which the Employer now seeks certification. The names of three alternate workers were forwarded to the Employer by the State Workforce Agency. Nothing in the record suggests that the three hired workers made qualified or deficient commitments to be available at the time and place needed and to perform the labor involved in the Employer's petition. Accordingly, I find that the CO had a legally sufficient basis for denying the Employer's application for temporary labor certification.

The Employer has suggested that labor certification is appropriate in this case because, in the past, workers have abandoned the job during the dates of service. However, the Employer has provided no documentation to support this assertion. Indeed, even if it had, previous unreliability of former workers is not a sufficient basis on which to justify foreign labor certification; this is especially true, as here, when the positions have already been filled and three alternate U.S. workers have been referred. The regulations provide a specific outlet for employers that are denied labor certification

based upon the availability of U.S. workers who later become unavailable or unwilling.³ *See* 20 C.F.R. § 655.110(e). If the Employer's fears are realized, it may avail itself of these regulatory provisions and seek expedited labor certification. Until then, it would be inappropriate to grant labor certification for positions that can be – and indeed already have been – filled by U.S. workers. Accordingly, **IT IS ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

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JOHN M. VITTON
Chief Administrative Law Judge

³ Specifically, 20 C.F.R. § 655.110(e) states that:

If a temporary labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary labor certification determination from the CO.”

20 C.F.R. § 655.110(e). The regulations provide for an expeditious decision (within 72 hours of receipt of the request) to minimize delay. *See id.*