



In the Matter of

KAY-ARMOND ENTERPRISES, INC.
Claimant

Case No. 85-TLC-1

on behalf of

EUGGENIO H. SANCHEZ
Alien

Before: ANASTASIA T. DUNAU
Administrative Law Judge

DECISION AND ORDER

This proceeding was initiated by the above-named Employer who requested administrative-judicial review, pursuant to 20 C.F.R. §655.204(d), from the determination of a Regional Administrator of the U.S. Department of Labor denying application for temporary labor certification which the Employer submitted on behalf of the above-named Alien, pursuant to Section 212(a) (14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a) (14) (hereinafter "the Act").

Under Section 212(a)(14) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures whereby temporary immigrant labor certifications may be applied for, and granted or denied, are set forth in 20 C.F.R. Part 655. An employer who desires to employ an alien on a temporary basis must demonstrate that the requirements of 20 C.F.R. 655.201-203 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of temporary labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the case file, and any written arguments of the parties. 20 C.F.R Section 655.212 (b).

Statement of the Case

The record contains an Application for Alien Employment Certification filed on behalf of the Alien by the Employer, a Texas winery owner, as a prerequisite to the temporary employment of the Alien as a viticulturist. The application was signed and dated October 29, 1984 by the Employer. It contained no date of receipt by the U.S. Department of Labor. On January 14, 1985, a Department of Labor Regional Administrator (hereinafter "RA") denied certification on the following grounds:

(1) The RA did not receive the application until January 9, 1985, so that there was insufficient time to adequately test the availability of U.S. workers, thereby constituting a violation of 20 C.F.R. 655.201.

(2) The Employer's assurances failed to mention the three-quarter guarantee or the offering of meals by the Employer, as required by 20 C.F.R. 655.203(d)(2).

(3) The job order failed to provide for specific transportation arrangements, as required by 20 C.F.R. 655.203(b)(5)(i).

(4) Directions to the work site were not sufficiently explicit nor clear.

(5) Specific tasks to be performed for each job, including the equipment to be used, were not described adequately in the job description.

(6) The job order failed to provide for compensation to be provided by the employer for injury or disease arising out of and in the course of the worker's employment, in violation of 20 C.F.R. 655.202(b)(2)(i)(ii).

A request for administrative-judicial review was submitted by telegram on January 18, 1985. The telegram also contained rebuttal to the findings of the RA, including new facts and assurances not previously presented before the RA. The case file was received by the undersigned on January 24, 1985, and contained a letter from the Department of Agriculture for the State of Texas, which elaborated on the growth of the Texas wine industry and the corresponding shortage of skilled laborers.

Discussion

The RA's assertion that the temporary certification application was not received until January 9, 1985 is not supported by the record. The copy of the application contained in the

record shows no date of receipt, although space is provided for such information. In rebuttal, the Employer maintains that the application was mailed on October 30, 1984 and received by the RA's office on November 9, 1984. This assertion supported by the fact that the Employer signed and dated the application on October 29, 1984. The Employer thus has made a prima facie case that its application was timely submitted. Such a prima facie case cannot be rebutted by a mere allegation, unsupported by any objective evidence, that the application was received on January 9. Accordingly, I find that the application for temporary labor certification was timely filed.

The remaining deficiencies in the application noted by the RA warrant the denial of temporary certification.¹ The RA's denial on these grounds is rational and wholly supported by the record. The Employer's subsequent presentation of the assurances and facts which were absent from the application cannot constitute grounds for reversal of that decision. Pursuant to 20 C.F.R. 655.212, I am unable to receive and consider additional evidence. I view those facts and assurances provided by the Employer subsequent to the RA's decision as "additional evidence", and therefore am precluded from considering them here.

Section 655.212 states that "[a]ny countervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 C.F.R. 214.2(h)(3)(i)." Accordingly, although further review by the Department of Labor is prohibited, the Employer has the opportunity to submit the evidence to the Immigration and Naturalization Services to rebut the basis of the RA's determination.

The denial by the RA of the Employer's application for temporary labor certification is hereby AFFIRMED.

ANASTASIA T. DUNAU
Administrative Law Judge

Dated: JAN 29 1985
Washington, D.C.

ATD:pas

¹ The third deficiency noted, the insufficiency of the directions to the work site, is, standing alone, a dubious basis for denying certification.