



In the Matter of

PETROCCO FARMS

Employer

Case No. 85-TLC-3

Before: GLENN ROBERT LAWRENCE
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), of the determination of a U.S. Department of Labor Regional Administrator in denial of an application for labor certification. The application was submitted by the employer on behalf of 12 unnamed aliens 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 or 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 such immigrant labor certifications may be applied for, and granted or denied, are set forth in 20 C.F.R. §655, as amended. An employer who desires to employ an alien on a temporary basis must demonstrate that the requirements of 20 C.F.R. §655.203 have been met. These requirements include the assurances of the employer to recruit U.S. workers at the prevailing wage, under prevailing working conditions through the public employment service, and by other reasonable means to make a good faith test of U.S. worker availability during a period for which temporary labor is needed.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (hereinafter AF)I and any written arguments of the parties pursuant to 20 C.F.R. §656.212(b) as received in this office on April 15, 1985.

Statement of the Case

This case was initiated on February 11, 1985 when the Employer, an agricultural grower, filed an application for alien employment certification (AF-42), to enable Aliens to fill the temporary positions of farmworkers for vegetable crops (Occupational Code 402.687.010).

The positions in issue required the aliens to work from May 1 through November 10, 1985 in preharvest and the actual harvest of Employer's crops. Weeding, thinning, transplanting, cutting, picking, packing, loading and stacking these crops is also outlined for these 40 to 60 hours per week, Monday through Saturday positions. Employer offers \$3.93 per hour in wages (AF-44). Applicants need one (1) month experience and must be at least 17 years old. Transportation and housing will be provided by the Employer (AF-26).

The State agency transferred the application for labor certification on February 13, 1985 (AF-45). Thereafter, Employer was notified on March 5, 1985 that his application was timely and would not adversely affect U.S. workers similarly employed (AF-38). The letter also informed Employer of the requirements of working with the Employment Service system throughout Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming, New Mexico and Texas; documentation, contacts, advertising and cooperation with the local employment office were also stressed. Specifically, the Recruitment Officer (hereinafter " RA " 1 directed Employer to "[I]nterview all U.S. workers, including crew leaders, referred by E. S. Contact workers, family heads, or crew leaders by telephone or in person upon the request of the Employment Service. If you are unable to participate in this essential part of the recruitment process, every U.S. worker found qualified and available by the E. S. shall be counted as available in determining the supply of U.S. workers for your job offer." (AF-38)

Further, the RA indicated in Item 2 that "[I]n order to make the determination on whether to grant or deny the certifications by April 10, 1985, or 20 days before the stated date of need, you must write and let me know by April 5, 1985, which is 25 days before the above-listed certification date, the results of your efforts to satisfy the above requirements" (AF-38). The Colorado Division of Employment & Training was also notified on the next day of the RA's suggestions in Item 2 and the April 5, 1985 report date deadline (AF-35). The RA attached a list of crew leaders currently registered in Colorado and copied the Employer by letter dated March 6, 1985 (AF-34).

In his April 1, 1985 letter, Employer recounted that Henry Chiquita, a crewleader, was interviewed and told Employer that he had 12 workers available but could not guarantee that those workers would complete the season due to the expected availability of "contract work", preferable to Employer's hourly paid positions (AF 6). Additionally, Employer stated that Mr. Chiquita's reputation is poor among growers in the Brighton area (over the last three years) because he withholds wages after being paid by the growers. Furthermore, Employer states:

"[w]ith only one qualified worker hired for Job Order #254090 and 35 vacancies remaining, I need labor certification for temporary workers from Mexico to fulfill my job order needs for 1995. These jobs are stoop labor, thinning, weeding, hand harvesting, hand loading, split hours, weekends, holidays, and working in weather extremes, that are in competition with warehouse, piece rate (contract), construction, and other more attractive jobs. It is virtually impossible to fulfill these jobs with American workers with any degree of success.

In previous years, late efforts to recruit labor by the U.S.D.O.L. were imposed upon us. In the spring of 1984, after the date of need had expired we were encouraged by the U.S.D.O.L. to recruit workers from Texas. Shortly after the workers arrived most of them skipped out or quit. Only one remained the entire season and I hired him again to work in 1985. This recruitment effort staggered the beginning of my 1984 season. Some of the early lettuce went to seed and was lost prior to harvest, thinning and weeding of leaf lettuce fell behind schedule, and the pepper transplanting had to be delayed because of a labor shortage. I received H-2 workers July 5, 1984, and at that point a recovery began.

My needs for labor and the other area vegetable growers are similar. I chose to follow the legal guidelines to fulfill my labor needs. Several years ago, this means of legality was advised by the Colorado D.O.L. and Federal D.O.L. In 1984 this philosophy reversed. My needs have not changed.

I do understand that the U.S. workers have preference to my job order. It must be made clear that our onion harvest is completed by a crew of American workers (50-70 workers). A delivery person, four warehouse people, two cultivation and irrigators, and one field worker will be employed. Approximately 60-65% of my work force is American Workers. The void to be filled is my current Job Order for field workers that must work split hours, stoop labor, work in muddy conditions, temperature extremes, weekends, and simultaneously during more appealing harvests of contract labor periods (onion, pickle, green beans, cucumber piece rate harvests).

It would be greatly appreciated if you would grant permission for me to hire thirty-five (35) H-2 workers for the 1985 season." (AF-7)

On April 10, 1985 the RA notified Employer of the Certification of 22 workers, approved under 20 C.F.R. §655.206(b) and subject to (d) thereof (AF-3). The further denial of the additional 14 workers requested by Employer was based on the rejection of the Henry Chiquita crew of 12 and the indication by Employer in his April 1, 1985 letter that 2 previous 1984 workers would be available to return in the 1985 season (AF-6). "Under 20 C.F.R. §656.206(a), the Regional Administrator shall count as available any U.S. Worker who has applied to the employer (or on whose behalf an application has been made) but who was rejected by the

employer for other than lawful, job related reasons."

POSITION OF THE EMPLOYER

An appeal dated April 12, 1985 was sent to the RA and transmitted to this office, receipt thereof on April 25, 1985. Employer argued once again that Mr. Chiquita's crew as well as the man himself is questionable (AF-1). "Names of the farmers involved and details of the problems can be verified. Henry Chiquita also does not have a valid drivers license to transport workers." Employer requests the certification of 12 additional workers (AF-1).

Discussion

Labor certification must be denied and the RA's decision affirmed.

The requirements of the regulations provide guidelines for RA direction and assistance in the recruitment process. 20 C.F.R. §655.205(a). If the Employer fails to meet the assurances contained in 20 C.F.R. §655.203 with respect to recruitment of U.S. workers, certification must be denied.

Here, Employer asserts allegations as to the integrity of a crew leader who has represented the availability of 12 U.S. Workers. After the decision of the RA, Employer claims verification availability through the farmers involved in past incidences over the last three years (AF-1). Furthermore, the Employer asserts transportation difficulties on the part of this crew leader.

Under the regulations, this office does not have the authority to remand for further evidence nor to consider evidence which the RA did not have the opportunity to weigh. 20 C.F.R. §655.212(a). Therefore, certification denial must be affirmed due to the mere allegations which seem to question the firmness of the commitment to work by Mr. Chiquita for these 12 workers as contemplated by the regulations at 20 C.F.R. §655.206(a). Without verification of all of the mere allegations which Employer has submitted, the RA had no other legal position than to deny certification for these 12 positions requested.

ORDER

In view of the foregoing, the determination of the Certifying Officer denying the Employer's application for labor certification is AFFIRMED. This is the Final Decision of the Department of Labor in this matter. Further review may be obtained by filing a Petition with the District Director, Immigration and Naturalization service in your Geographical area pursuant to 8 C.F.R. 214.2(h)(3)(i).

GLENN ROBERT LAWRENCE
Administrative Law Judge

Dated: [May 1985]
Washington, D.C.

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