



Date Issued: OCT 30 1981

Case No. 88-TLC-1

In the Matter of

PENASCO RIVER RANCH,
Employer

on behalf of

ALFREDO GOMEZ
Alien

Occupation: Shepherd
DOT Code: 410.687-022

Mr. James T. Jennings
Pro Se

Before: DAVID A. CLARKE, JR.
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 an application for a temporary labor certification which the Employer submitted on behalf of the above-named Alien, pursuant to the Immigration and Nationality Act, 8 U.S.C. 1101 et seq. (hereinafter the Act).

Under the Act an alien seeking to enter the United States for the purpose of performing temporary agricultural and logging 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 such 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. §655.202-203 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 an Appeal File (hereinafter AF), and any written arguments of the parties. 20 C.F.R. §§655.204(d), 655.212(b).

STATEMENT OF THE CASE

Employer's amended application for temporary alien labor certification was accepted for processing by the United States Department of Labor on May 11, 1987 (AF 32). Employer sought to fill two positions of shepherd, requirements being three months of experience in the job offered (AF 32).

The Regional Administrator (RA) denied certification of the application on September 17, 1987 because able, willing and qualified U.S. applicants were rejected for non-job-related reasons in violation of 20 C.F.R. §655.206.

POSITION OF THE PARTIES

The Employer requested administrative-judicial review by letter dated October 8, 1987 (AF 1). Employer contends that the U.S. applicants were rejected for lawful, job-related reasons. The Regional Administrator did not file a brief.

DISCUSSION

Administrative-judicial review of the denial of a temporary labor certification is based on the record upon which the denial was made, and on due consideration of any written memoranda of law submitted. 20 C.F.R. §655.212(b). The denial of labor certification may be affirmed, reversed, or modified, but not remanded. 20 C.F.R. §655.212(a), (b).

The threshold procedural determination is whether Employer filed its appeal with this Office in a timely fashion. Pursuant to 20 C.F.R. §655.204(d)(2), Employer must appeal the denial of certification within five days of the date of the notice of denial. Failure to do so results in a forfeit of the right to expedited administrative-judicial review of the denial. 20 C.F.R. §655.204(d)(3)(ii). Employer did not file its appeal within the prescribed time, but claims that unjustified actions by the RA prevented compliance with the time limits.

Specifically, Employer contends that the denial was mailed to the rural route address of the ranch itself, rather than to the business address of Employer which is given on all of Employer's correspondence in the letterhead and to which previous mail from the RA had been sent. Employer asserts that it did not receive the denial until October 1 or 2, although it was post-marked September 18 and dated September 17, thus missing the deadline for appeal, because rural route delivery takes a long time.

The record supports Employer's contentions and I agree that Employer was unfairly deprived of its timely appeal to this Office. I am particularly influenced by the fact that an initial denial of certification (based on an improper application for certification) was mailed by the RA to the Employer's business address rather than to the rural route (AF 46). It is evident that correspondence should be mailed in a manner calculated to reach the recipient quickly, especially when statutory time limits are involved. Because Employer was deprived of the ability to timely appeal the denial through no fault of its own, I accept Employer's appeal as timely.

The substantive issue is whether Employer rejected the U.S. applicants for lawful, job-related reasons. Two applicants, M. Wood and W. Wilson, were interviewed for the position of shepherd. Employer contends that neither was qualified and that both required housing for their families which Employer could not offer. I disagree with Employer and must affirm the denial.

As defined in the Dictionary of Occupational Titles, a shepherd is one who, "[a]ttends sheep flock grazing on range: Herds sheep and rounds up strays using trained dogs. Beds down sheep near evening campsite. Guards flock from predatory animals and from eating poisonous plants. Drenches sheep. May assist in lambing, docking, and shearing. May feed sheep supplementary feed." DOT Code 410.687-022. Mr. Wood's resume shows that he had sheep ranch experience rounding up, marking, shearing, and shipping sheep (AF 15). Mr. Wilson's resume also shows ranch experience rounding up cattle and sheep, breaking horses for leading and riding, and feeding and doctoring livestock (AF 15). As the RA found, both men are qualified to fulfill the duties of a shepherd and should have been offered the position. While it is true that either or both men may have turned down the offer because they needed housing for their families (Mr. Wood is married and Mr. Wilson was thinking of marrying a woman with children), that is not a valid reason to reject them. Rather, the position should have been offered to the qualified U.S. applicants and they of course could have refused the offer if necessary.

ORDER

Accordingly, it is ORDERED that the denial of temporary labor certification by the Regional Administrator be and hereby is affirmed.

DAVID A. CLARKE
Administrative Law Judge

Dated: Oct. 30, 1987
Washington, D.C.