



DATED: FEBRUARY 8, 1988
CASE NOS: 88-TLC 2
88-TLC-3
88-TLC-4

IN THE MATTER OF

85 MEMBERS OF THE SNAKE RIVER
FARMERS' ASSOCIATION, INC.,

ORDER OF DISMISSAL

This matter arises pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1101 et seq. Regulations promulgated thereunder by the Secretary of Labor relating to the processing of temporary labor certification applications are set forth at 20 C.F.R. §655 et seq.

Petitioners timely requested an administrative-judicial review of the decisions of three Department of Labor Regional Administrators to not accept for consideration the temporary labor certification applications of 85 members of the Snake River Farmers' Association, Inc. Pursuant to Petitioners' request, and finding that substantially similar issues are involved in each of the above-captioned cases, the three cases are hereby consolidated for purposes of the instant review.

Under the Act, a petitioner for H-2A workers must apply to the Secretary of Labor for certification that (1) 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 (2) the employment of the temporary worker will not adversely affect the wages and working conditions of workers in the United States similarly employed. 20 C.F.R. §655.90(b)(A) and (B). An employer who intends to employ an alien temporarily must submit, as part of his application, documentation which clearly satisfies the requirements of 20 C.F.R. §§655.101-103. Full compliance with these requirements is the minimum necessary to demonstrate that an employer has by reasonable means made a good faith effort to test the availability of U.S. workers, and to recruit U.S. workers who are willing to work at the prevailing wages offered and accept the working conditions of the job opportunity.

In the three cases consolidated herein for review, the Regional Administrators found that the requirements set forth at 20 C.F.R. §§655.101-103 had not been fully satisfied. In all of the cases, the Regional Administrators required that modifications of the applications be made to reflect the 1987 H-2A Adverse Effect Wage Rate, (AEWR) in accordance with 20 C.F.R. §655.107, and that that AEWR be promised workers for the period covered by the job offer, or until such time as a different AEWR was formally adopted by the DOL and published in the Federal Register. The Regional Administrators asserted that because wages were being offered workers which were inconsistent with those prevailing at the time the applications were

submitted, and because the benefits and working conditions did not satisfy the specific criteria set forth in the regulations, they could not accurately determine the availability and proper recruitment of U.S. workers. Based upon the foregoing, the Regional Administrators refused to accept for consideration Petitioners' applications for temporary alien labor certification.

In their appeal, Petitioners argue that the wages included in their job offers are in accordance with the AEWL that will be in effect at the time the contract will be performed, and that they are therefore in substantial compliance with the requirements of 20 C.F.R. §655.102(b)(9)(i). They assert that the United States Department of Agriculture has recently published its wage survey and that the DOL will soon publish its newly-calculated AEWL for 1988 in the Federal Register. It would be detrimental to workers' morale and a mere adherence to form over substance, they argue, to insist that the higher 1987 AEWL be advertised when the lower AEWL, which will be in effect during the contract period, is already known. Petitioners also point out that in their job offers they promised to pay whatever AEWL was in effect during the contract period, whether higher or lower than the wage offered, Petitioners argue that the Regional Administrators' refusal of their applications was therefore arbitrary, capricious and not in accordance with law, and they request that such determinations be reversed.

Pursuant to 20 C.F.R. §656.112(a), the instant review consists solely of a consideration of the legal sufficiency of the record upon which the decision to not accept for consideration the applications for temporary alien labor certification was based. In the instant matter, I find that the Regional Administrators acted totally within their discretion and in accordance with law in deciding not to accept for consideration Petitioners' applications for temporary alien labor certification.

Regional administrators are responsible for reviewing the contents of job offers and the applications for certification and ensuring that such comply with the applicable regulations. In part, the regional administrators are responsible for seeing that the prevailing wage is offered all workers. 20 C.F.R. §655.102. When determining whether the applications for certification satisfy the requirements set forth at 20 C.F.R. §655, regional administrators need not attempt to anticipate or speculate as to possible future changes in the AEWL. Rather, they must focus on determining whether the wage set forth in the job offers coincides with the wage prevailing in the area of intended employment at the time the application is reviewed. It is reasonable and necessary for the regional administrator to rely on and utilize information and data at his disposal at the time of the application review, and not to base his determinations on AEWL's which possibly, or even probably, will be adopted at a future date.

Employers cannot recruit workers based on what they expect the AEWL to be at the time the contract is performed rather than the AEWL in effect at the time they apply for alien labor certification. However, pursuant to 20 C.F.R. §655.102(b)(i), the employer is responsible for paying the workers at least the AEWL in effect at the time the contract is performed. This rule accounts for the possibility that a fluctuation in the AEWL might occur between the time when the application is reviewed and the contract is performed. Although offering workers one AEWL and then paying a lower AEWL when the contract is performed might, as Petitioners contend, have a detrimental effect on worker morale, this consideration does not justify allowing

employers to advertise wages not in effect at the time of the job advertisement. Nor do such considerations outweigh the need for regional administrators to be able to expeditiously and efficiently determine the sufficiency of temporary alien labor certification applications, and specifically, the appropriateness of the wage offered.

To require regional administrators, at the initial stages of application review, to take into consideration possible or probable changes in the AEW, would severely hamper their ability to review applications expeditiously, efficiently and uniformly. I find, therefore, that the Regional Administrators, in determining not to accept for consideration the applications for temporary alien labor certification of the 85 members of the Snake River Farmers' Association, Inc., did not act arbitrarily or capriciously, but totally in accordance with the application regulations.

ORDER

Accordingly, and in view of the foregoing, it is hereby ORDERED that the decision of the Regional Administrators to not accept for consideration Petitioners' applications for temporary labor certification be and hereby is AFFIRMED.

JOHN M. VITTON
Deputy Chief Judge