



Date: October 2, 1990
Case Nos. : 90-TLC-34
 : 90-TLC-35

In the Matter of

LIUZZA PRODUCE FARMS
SHILOH FARMS
Employers

on Behalf of

NI ZHOU QIANG, et al
WANG XING CHENG, et al
Aliens

Before: AARON SILVERMAN
Administrative Law Judge

DECISION AND ORDER

These cases arise under Part 655 of Title 20 of the Code of Federal Regulations (20 C.F.R. §655 et al) covering the labor certification process for the temporary employment of aliens in the United States.

The Department of Labor Regional Administrator's (R-A) basis for denial in both cases is that the Employers have failed to comply with positive recruitment efforts specified at 20 C.F.R. §§655.105(a),(d) and 655.106. From the onset, the Employers' agent, Frank James, Esq., and the RA have handled these cases simultaneously. Because the issue contested and the recruitment efforts are common to both cases, they have been consolidated for decision.

Employers timely requested administrative-judicial review of the September 12, 1990 decisions of the RA to deny H-2A temporary labor certification for a total of sixty job opportunities.¹ Review of the denial is based on the record upon which the denial was made, together with the request for administrative-judicial review, as contained in the Appeal File (AF), and any written arguments of the parties.

Statement of the Case

¹ Each application contained 30 job opportunities.

On June 25, 1990, Jack Liuzza, owner of Shiloh Farms, and on July 13, 1990, Anthony Liuzza, owner of Liuzza Produce Farms, Employers, herein, filed applications to hire sixty (60) Chinese Alien workers as farm laborers for the anticipated periods of employment from September 1, 1990, until July 15, 1991 and September 15, 1990, until July 15, 1991 respectfully. The Aliens would plant, weed and harvest cucumbers, squash, cabbage, bell peppers and strawberries. (AF-129; AF-98).

The RA advised the Employers that their applications did not meet the applicable regulatory requirements, and that modification was needed. Modifications were timely and by July 25th and 27th both applications were accepted. Both applications were denied on September 12, 1990.

The RA found that the requirements set forth at 20 C.F.R. §655.106 had not been fully satisfied, specifically, that the Employers had not complied with the positive recruitment requirements at 20 C.F.R. §§655.105(a) and (d). The Employers were denied alien certification because they failed to document referrals, interviews, and results of the applicants referred by the State Employment Service offices as required in letters from the RA when accepting the applications. (AF-109-112; AF-81-84). The RA stated that the documentation concerning the recruitment results was inadequate for determining if the U.S. Workers were rejected for lawful job-related reasons. (AF-19-20; AF-19-20).

Furthermore, the RA found that additional requirements were imposed upon U.S. Workers by the Employers when interviews were conducted at the local job service offices in Eagle Pass and Del Rio, Texas. The Employers required the applicants to complete an application and provide references which the RA determined was not a part of the original order.

On appeal, the Employers argue that the denial of H-2A temporary labor certification should be reversed. Employers assert that a minimum thirty (30) days experience for the job is required. This requirement presupposes that the Employer be provided information to verify previous experience. Therefore, requiring applicants to provide references is implicit in the job order.

The RA, through its attorney, responds that, [n]o job offer may impose on the U.S. workers any restrictions or obligations which will not be imposed on the employer's H-2A workers. See §655.102(a). The RA asserts that domestic workers were required to meet criteria for employment which was not imposed on the alien workers and were not in the application for labor certification. The Chinese workers were an unknown quantity and not required to provide references but the domestic workers were required to provide references even though they were referred by the local job service.

Employers further assert that it did engage in positive recruitment efforts. First, it cooperated with the State Employment Service on site recruitment by sending its agent to the employment offices in Eagle Pass and Del Rio on August 17, 1990. Interviews were conducted at each location and documentation was provided stipulating the recruitment result for each of the

twenty applicants interviewed. Secondly, the Employers placed advertisements in the Hammond Daily Star and announcements with WHMD FM radio as required by the RA.

The RA argues that although the Employers did conduct on site recruitment it did not do so in good faith. In addition, the Employers did not sufficiently explain why it rejected workers referred by the State Employment Services.

Discussion

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 deny temporary alien labor certification was based.

The regulations provide that preferential treatment of aliens over domestic workers is prohibited. No job offer may impose on U.S. workers any restrictions or obligations which were not imposed on the employer's H-2A workers. 20 C.F.R. §655.102(a). In the instant case, the RA believes that requiring U.S. workers to provide references is an imposition required of the U.S. workers which is not required of the alien workers.

The argument offered by the Employers is valid. Implicit in an experience requirement is the presumption that an employer will ask for proof of the experience. Since the local job service does not provide reference checks the Employers have the right to check references for themselves. The issue is whether the same requirement is being required of the aliens. In a letter the Marketing Manager of Sensco, Ltd., states that Sensco can provide experienced farm workers from China, accustomed to the long hours and rigours associated with agriculture. (AF-134). This statement is a representation to the Employers from a purported reputable contracting party that the workers supplied have the experience to perform as required, upon which the Employers could rely in good faith. Therefore, it is determined and found that the reference requirement is inherent in the job opportunities and that the Employers are not requiring additional obligations from the U.S. applicants.

The RA is responsible for reviewing the contents of job offers and the applications ensuring compliance with the applicable regulations. Specifically, the RA must ensure that employment of H-2A workers will not have any adverse effect on the employment of available U.S. workers. Pursuant to 20 C.F.R. §655.106(b)(1), the RA must count as available any U.S. worker who applied to the Employer (or on whose behalf an application has been made), but who was rejected for other than lawful, job-related reasons. If the RA determines that enough able, willing and qualified U.S. workers have been identified as being available to fill job opportunities it shall not grant temporary alien agricultural labor certification.

A review of the cases shows that the same applicants were recommended by the State Employment job service to each Employer for all sixty jobs.² The RA argues that the Employers

² References to the Administrative File will be made to Shiloh Farms only since the
(continued...)

did not conduct the recruitment at Eagle Pass and Del Rio sites in good faith. Attention is brought to a memorandum from the Del Rio office which notes that the Employers' recruiters arrived at 2:30 p.m. and missed 15 individuals who were interested in the job opportunity because they were at the site at 8:00 a.m. (AF-37). First, of the eighteen interviews scheduled at the Del Rio office, seventeen had been previously set up at the Eagle Pass office. (AF-36 & 38). The files are devoid of information stating the time the Employers recruited at the Eagle Pass office but, it is clear that recruitment was conducted at both sites on August 17, 1990. Since eighteen applicants were interviewed at Eagle Pass and two were interviewed at Del Rio and seventeen were duplicative referrals, between the two offices, twenty of the available U.S. applicants supplied by the job service were actually interviewed. The Employers adequately documented the results of these interviews and have satisfied the regulatory requirements that they were rejected for lawful job-related reasons.

The same result cannot be reached with regard to the applicants referred by the job service. It referred applicants to the Employers on two separate occasions, sixty (AF-9-12) and fifty (AF-30-32) were supplied of which forty-five were not duplicative. The Employer stated that only four individuals who were interviewed identified themselves as referrals from the State Employment Service. They were rejected because they had no farm work experience and in fact they were in search of non-farm employment.(AF-48 Liuzza File). Although they were rejected for good reasons why only four out of a pool of forty-five potential workers were interviewed is unexplained. Therefore, it is determined that the Employer failed to meet its burden to document why the remaining forty-one U.S. workers were rejected.

The State Employment Services provided a pool of sixty-five U.S. workers. The Employers documented lawful job-related reasons for rejecting twenty-four U.S. workers. Since the Employers requested sixty workers and the RA was only able to supply forty-one available U.S. workers, denial of temporary alien labor certification for nineteen workers is unsubstantiated by the record in these cases.

ORDER

Upon consideration of the evidence in this case, the decision of the Regional Administrator denying the application for labor certification is, hereby, REVERSED with respect to nineteen aliens.

AARON SILVERMAN
Administrative Law Judge

Washington, D.C.
AS/lr

²(...continued)
same applicants appear in both files.