



DATE: June 21, 1994

CASE NO.: 94-TLC-3

In the Matter of:

W.A. MALTSBERGER, d.b.a. MALTSBERGER RANCH

Employer

**ORDER DENYING REGIONAL ADMINISTRATOR'S
MOTION FOR RECONSIDERATION**

On June 6, 1994, a Decision and Order was issued finding that W.A. Maltzberger's application for temporary agricultural alien labor certification was for seasonal and temporary labor and that the Certifying Officer (hereinafter "CO") shall process the application in accordance with the regulations. (D&O at 10.)

On June 8, 1994, the Solicitor submitted a Motion for Reconsideration on behalf of the Regional Administrator, asserting (I) that Mr. Maltzberger's job order did not properly describe the job opportunity; (II) that the Maltzberger Ranch has a need for a core of permanent workers; (III) that the Maltzberger Ranch had not demonstrated extraordinary circumstances, as contemplated by 20 C.F.R. § 655.101(g); and (IV) that the Certifying Officer's position was consistent with the position taken in *Vito Volpe Landscaping*. Mr. Maltzberger responded by letter on June 10, 1994.

The Solicitor's arguments are not persuasive. Mr. Maltzberger faces extraordinary circumstances and has a need for workers at his cattle ranch. To date there have been no U.S. workers available and willing to fill the need. His decision to seek temporary rather than permanent certification for alien laborers appears to be a responsible choice, since aliens who are granted permanent status are likely to leave the Maltzberger Ranch for more lucrative work elsewhere in the U.S., displacing U.S. workers in other jobs. (July 2, 1993 D&O at 6.) For this reason, temporary certification is also in the best interest of U.S. workers.

In the Motion for Reconsideration, the Solicitor argues that the job order did not accurately reflect the periods of time workers will be employed, in violation of 20 C.F.R. §§ 653.501(d), 655.101(b), in that item 10 of the application provides that workers are on-call 365 days a year, 24 hours a day. (SOL Br. at 1-2.) The June 6, 1994 Decision and Order stated that the CO's concern on this issue "should be addressed during the recruitment phase, at which time Mr. Maltzberger should correct the 'material terms and conditions' of the job notice to the extent necessary" (D&O at 3, fn. 3.) The Solicitor contends that the approach suggested in the Decision and Order is not feasible, in that the job order is the recruitment document. (SOL Br. at 2.)

The regulations require that the Regional Administrator (hereinafter "RA") must promptly review an application for temporary alien labor certification to determine whether the application is acceptable for consideration under the timeliness and adverse effect criteria of sections 655.101 through 655.103. 20 C.F.R. § 655.104(b). If the RA determines that an application does not meet the adverse effect criteria, then it is not possible for the RA to test the availability of U.S. workers. § 655.104(b). Therefore, the RA must notify the applicant that the application has not been accepted for consideration, and the applicant is afforded an opportunity to correct deficiencies and resubmit the application or request an administrative review of the RA's determination. §§ 655.104(c), 655.101(c) (2). Once an application is accepted, the RA must notify the employer and the local office of the specific efforts to be carried out in recruiting U.S. workers. § 655.105(a). Recruitment occurs when the application is accepted for consideration and meets the regulatory standards, except that the local employment office begins recruiting on the date the application is first received. §§ 655.100(a) (4) (i), 655.101(c) (2).

In Mr. Maltsberger's case, the CO deviated from these procedures by denying Mr. Maltsberger's application, rather than not accepting it for consideration, without having afforded him the opportunity to amend item 10 of the application. To rectify this situation, the CO may review Mr. Maltsberger's application for deficiencies under the criteria of sections 653.501(d) and 655.101(b) and promptly notify him to modify item 10 so as to fully describe the material terms and conditions of employment. Once appropriate language has been included in the application to accurately describe the jobs, the CO may then test the availability of U.S. workers. Thereafter, the CO should continue to process the application, including making a determination to grant or deny the application, in whole or in part, by twenty calendar days before the date of need. 20 C.F.R. § 655.100(a) (4) (i). If there are not a sufficient number of qualified U.S. workers able and willing to work at the Maltsberger Ranch, then temporary certification of alien laborers should be granted.

Accordingly, the Certifying Officer's Motion for Reconsideration is DENIED, and the Certifying Officer shall proceed to process the application accordingly.

DAVID A. CLARKE, JR.
Administrative Law Judge

Washington, D.C.
DAC/cal