



DATE: AUGUST 15, 1994

CASE NO.: 94-TLC-6

In the Matter of:

PERI & SONS FARMS, INC.
Employer

Appearances:

Robert E. Williams, Esq., for the Employer

Annaliese Impink, Esq., for the U.S. Department of Labor

BEFORE: LAWRENCE BRENNER
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER

This is an expedited review requested by Peri & Sons Farms, Inc., ("Employer"), of the decision by a U.S. Department of Labor Certifying Officer ("CO") denying Employer's application for temporary alien agricultural labor.

This case arises under the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 100 Stat. 3411, 3416 (1986), and its implementing regulations, found at 29 C.F.R. Part 655. This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and is made after consideration of written submissions from the parties. 20 C.F.R. § 655.112(a)(2).

Statement of the Case

On June 13, 1994, Employer filed an application of temporary alien labor certification for certification of 162 temporary alien workers to fill the position of Hand Harvest Onion Laborer for the period August 19, 1994 to October 20, 1994. [AF 143]. On June 17, 1994, the CO notified Employer that specific portions of its application were deficient, requiring clarification and response. [AF 114-120]. In relevant part, the CO specified that Employer expand its designated hours of availability for receipt of applicant referrals to encompass normal business hours, 8:00 a.m to 12:00 noon and 1:00 p.m. to 4:00 p.m. Employer was advised that if it is unavailable during any part of the normal business day, it must delegate one of its other employees who has hiring authority to be available. [AF 120]. Employer modified its

application in compliance with the instructions required in the CO's June 17, 1994 letter. [AF 134]. By notice dated June 29, 1994, the CO accepted Employer's application and instructed Employer on the referral/recruitment process. [AF 102-104].

Over the course of the next month, applicant referrals were made to Employer by the California Employment Development Department local offices ("EDD"). A total of 42 U.S. applicants were referred. [AF 28-29]. Employer hired 14 of these applicants and rejected 26 as not qualified, able or willing to perform the job. [AF 31-34].¹

On July 30, 1994, the CO issued a determination letter denying Employer's application for temporary labor certification in its entirety. Pursuant to 20 C.F.R. § 655.106, the CO determined that a sufficient number of able, willing and qualified U.S. workers were identified as being available at the time and place needed to fill all of the job opportunities for which certification was requested. The CO also found that Employer failed to comply with the positive recruitment requirements specified at 20 C.F.R. §§ 655.105(a) & (d). [AF 13].

The CO based that determination on various "referral activity reports" originating from the local EDD office concerning Employer's unavailability during the agreed-upon time for referral, 8:00 a.m to noon and 1:00 p.m. to 4:00 p.m. [AF 14]. The CO referred generally to July 15, 1994, July 20 and 21, 1994, and July 25 and July 26, 1994. On each date, the CO maintained, EDD's attempt to contact Employer was met with an explanation by one of Employer's staff that Employer, Mr. Butch Peri, was unavailable and that it was not known when he would return. The one specific example provided involved July 25, 1994. The CO recounted that on that date a teleconference interview scheduled for 9:00 a.m. did not take place until 11:30, by which time only five of 12 referrals remained for the interviews. [Id.].

In addition to such delays, the CO noted that EDD was requested by Employer's staff to have referrals complete a questionnaire prior to interview. The CO states he did not know about that questionnaire until July 15, 1994 and because it was not reviewed and approved of, the CO considered it an unacceptable requirement. [Id.].

Finally, the CO added that Employer failed to document lawful job related reasons for rejecting five U.S. workers. The CO listed Gabriel Gomez, Samuel Magana, Jose Cardenas, Juan Cabral and Jose Diaz Garcia. [Id.].

Because the CO relies on the incidents of July 15, 1994, July 20 and July 21, 1994, and July 25 and 26, 1994, as the basis for denying temporary labor certification for all 162 workers, it is necessary to review each incident in detail.

July 15, 1994

¹ Employer admits that it omitted the names of two U.S. applicants referred from the EDD's Indio office in its recruitment report dated July 28, 1994. Employer's Proposed Findings and Conclusions, p. 3.

An EDD staff person contacted Employer and spoke with Ms. Charlene Lopez regarding an appointment to interview one applicant. Ms. Lopez requested that the applicant first complete a questionnaire form. That form was to be faxed or mailed to Employer when completed and an appointment for interview would then be made. [AF 79]. There is no evidence that a qualified applicant was actually waiting to be interviewed at that time or that a specific applicant was dissuaded by the events as related.

Regarding the questionnaire form, by letter dated July 20, 1994, the CO instructed Ms. Esperanza Slaughter, AG Clearance Coordinator for EDD, that the questionnaire was not submitted to the Regional Office for approval. The CO reiterated that Employer was expected to be available during the agreed-upon times and that any deviation evidences a lack of good faith. However, the CO then indicated that the questionnaire was to continue being used as requested by Employer pending further instructions from the National office. [AF 81].

July 20, and July 21, 1994

On July 18, 1994, EDD contacted Ms. Charlene Lopez to confirm scheduling of on-site applicant interviews for July 25, 1994, at EDD's Calexico, California office. Mr. Butch Peri was not in the office at that time. Ms. Lopez indicated that she would have Mr. Peri contact EDD to confirm the interview schedule. In response to Ms. Lopez's question of the number of applicant referrals, EDD personnel indicated that no applicants had as yet been scheduled. [AF 67].

At 10:15 a.m., on July 20, 1994, Ms. Ramona Arzaga with EDD called Employer. Ms. Lopez indicated that Mr. Butch Peri was not in the office at the time. Ms. Lopez had no information regarding the upcoming interview. Mr. Peri returned Ms. Arzaga's telephone call at 4:03 p.m., but by that time Ms. Arzaga had left for the day, understandably since she had been recruiting farmworkers since 3:30 a.m. [AF 38, 70].

On July 21, 1994, Ms. Arzaga returned Employer's telephone call. Employer indicated that at this late date Mr. Peri was unable to schedule a flight for July 25, 1994, but that he would be at the Calexico office on July 26, 1994. [AF 38, 62]. By July 22, 1994, it was agreed that the interviews would take place by teleconference on July 25, 1994. [AF 38, 58].

July 25 and July 26, 1994

Twenty applicants were scheduled to be interviewed on July 25, 1994. Two of these applicants had conflicting work arrangements and were unavailable for employment with Employer. Four of the applicants did not show for scheduled interviews. Accordingly, a total of 14 available applicants were to be interviewed on July 25, 1994.²

² There are minor discrepancies in the record regarding the actual number of applicants scheduled for July 25, 1994. The CO's Determination indicates that 12 applicants arrived for interviews, but only three waited for the interviews to begin; all three were hired. [AF 14]. A memo from Ms. Esperanza Slaughter, AG Clearance Coordinator, indicates that 12 of the
(continued...)

At approximately 9:15 a.m., Employer's designated agent, Ms. Pat Linson, called EDD/Calexico and indicated that Mr. Butch Peri was unable to begin interviewing because Employer was experiencing unspecified electrical problems. Ms. Linson requested that the Calexico office call back at 9:45 a.m. By 9:45 a.m., however, no one at the Calexico office was able to call back because "they were attempting to fax all the questionnaires" as requested by Employer. [AF 38]. The teleconference did not take place until 11:30 a.m. by which time only four applicants remained to be interviewed. [AF 14, 38, 39]. All four were hired.

On July 26, 1994, a second teleconference was held. Although the CO's Determination is based in part on the events on this date, nothing in the record evidences any questionable occurrence on this date. [AF 45-47].

Discussion and Conclusion

The CO correctly notes that pursuant to 20 C.F.R. § 655.103(d), an employer is required to engage in positive recruitment until the foreign workers have departed for the place of employment. It is also true that the primary purpose of the statute and regulations at issue is the protection of domestic workers. Certifying Officer's Proposed Findings of Fact and Conclusions of Law ("CO's Findings"), at p. 9. That is not to say, however, that the employer's needs for sufficient number of able, willing, qualified and available workers are to be taken lightly. See Flech v. Quiros, 567 F.2d 1154, 1155 (1st Cir. 1977)(while Congressional policy dictates preference for domestic workers, it is also necessary to consider would-be employers). In this case, the record simply does not evidence the availability of sufficient U.S. workers to justify a denial of all 162 temporary labor certification applications. Neither does the record indicate a pattern of bad faith in Employer's recruitment efforts to justify such a denial.

Employer requires the services of 162 workers. Since initiation of the recruitment process on June 29, 1994, EDD has been able to refer a total of 42 U.S. applicants to Employer. Employer hired 14 and rejected 26. Employer agrees that the number of certifications is properly reduced by the number of applicants hired. The CO goes further, however, stating that "it is impossible to determine how many U.S. workers may have applied for [Employer's] job opportunity if [Employer] had been available to interview potential applicants." CO's Findings, at p. 11. The CO provides no record reference, or other basis, for this point.

Instead, the CO's speculates that "the EDD offices may have stopped referring qualified applicants to the employer because they were unable to reach him when the applicants came to their offices for work", CO's Findings, at p. 12. In fact, the record indicates that EDD performed a commendable job of seeking out applicant referrals until the date of the CO's Determination

²(...continued)

20 scheduled referrals reported to the Calexico office for interview. [AF 33]. A more complete E-mail printout from Ms. Ramona Arzaga to Ms. Slaughter indicates that 20 applicants arrived for the interviews, two were unwilling or unable to accept the job, 10 were unwilling to wait for the interviews to begin, and four remained for interview and were hired. [AF 39]. The numbers referred to in this Decision and Order refer to Ms. Arzaga's more specific numerical breakdown.

denying certification. For example, activity reports of July 27, July 28, and July 29, 1994 all indicate that the EDD continued to actively seek specific applicants for referral. [AF 23-27]. Accordingly, I cannot agree that there is evidence of sufficient number of workers to fill all 162 available positions.

Based on the limited record before me, I also cannot find that Employer's actions indicate a pattern of bad faith justifying a complete denial. Initially, I note my concern over the fact that while Employer agreed that someone would be available during normal business hours to interview prospective applicants, at various times described above this was not the case. Nonetheless, there is no evidence, aside from the events on July 25, 1994, that qualified applicants were actually waiting to be interviewed but were dissuaded by Employer's absence.

The telephone calls made by EDD on July 15, July 20 and July 21, 1994 all involved future scheduling of applicant interviews. Considering the fluid nature of temporary migrant farmworker availability, the local EDD officials were understandably frustrated over any delays in scheduling referral interviews. At the same time, however, it is not at all clear what negative effect Mr. Peri's immediate unavailability on July 15, July 20, and July 21, 1994 had since a telephone conference call was in fact scheduled for July 25, 1994. If EDD had called on those dates with ready applicant referrals and Employer was unavailable for interview, the CO's argument of bad faith would be more persuasive. However, that was not the case and I cannot base a finding of bad faith on the events as documented in the record.

Regarding the events of July 25, 1994, I am similarly not persuaded that Employer engaged in bad faith. It is unfortunate that Mr. Peri was not immediately available for the teleconference. Yet, Employer did request that EDD recontact it within one-half hour, which EDD did not do.

Moreover, EDD's proffered justification for failing to call Employer back, that it was faxing questionnaire's to Employer as requested, is not entirely persuasive since presumably there was more than one EDD employee on duty at that time. Concomitantly, Employer cannot be held responsible for EDD's poor judgment in continuing to fax the questionnaire's instead of recontacting Employer while applicant referrals were preparing to, or in the process of leaving.³ Considering these circumstances, I cannot find Employer responsible for the delay in interviewing the applicants. In fact, insofar as ten applicants were unwilling to wait two and one-half hours to interview for a job lasting approximately two months, I find that these workers cannot reasonably be considered willing and available.

³ While the questionnaire was later determined to be an invalid requirement by the National office, as of the July 25, 1994 teleconference, the Regional office specifically told the local EDD offices to continue utilizing the questionnaire as requested. Once notified not to use the questionnaire, Employer immediately ceased utilizing it. Accordingly, Employer cannot be found to have engaged in bad faith recruitment due to use of the questionnaire.

While denial of temporary labor certification is not proper for all 162 positions, the number of certifications must be reduced based on: 1) the number of U.S. workers hired by Employer, and 2) the number of U.S. applicant referrals improperly not hired by Employer.

The parties agree that from June 29, 1994, the beginning of the recruitment period, through July 30, 1994, Employer hired 14 U.S. workers. [AF 13, 30-34]. Accordingly, the number of temporary labor certifications is reduced to 148. Moreover, an additional reduction in the number of certifications granted reflecting the number of any U.S. workers hired since July 30, 1994 is required.⁴

In addition to U.S. worker actually hired by Employer, there are five persons named in the CO's denial as qualified U.S. applicants whom the Employer improperly did not hire. It is not clear from the sparse record on this aspect of the case whether all of these five applicants were interviewed by the Employer, or considered only on the basis of the written questionnaire and possibly other information provided by the California EDD offices making the referrals. [AF 33, 36].

The two applicants referred by the Indio, California EDD office on July 19, 1994, Juan Cabral and Jose Diaz Garcia, were not mentioned in the Employer's July 28, 1994 report of recruitment. [AF 31-34, 36]. The nature of this expedited review on the basis of the written record before the CO does not permit me to consider additional information filed for the first time as part of the Employer's appeal. Accordingly, the CO may, if he still wishes to do so, reduce the number of positions to be certified by these two rejected workers.⁵

The other three U.S. applicants named in the CO's denial were referred on July 18, 1994, by the Merced, California EDD field office [AF 36]. The CO's brief (at p. 16) incorrectly states that the Employer rejected all three due to lack of experience. In fact, the Employer's recruitment

⁴ During a conference call with both attorneys of record, I inquired as to whether EDD was continuing to refer U.S. applicants. Although neither party was certain, it may be that all referrals had ceased since the July 30, 1994 denial of temporary certification. The parties were directed at that time to resume utilizing the referral system as it would be unfortunate to further extend the period during which Employer is unable to take advantage of EDD's commendable efforts at referring U.S. workers. As described in the Order, *infra.*, the number of certifications granted shall be reduced by the number of any able, willing, qualified and available U.S. workers so referred since July 30, 1994.

⁵ I see no reason why the CO, in his discretion, could not now consider the reasons the Employer may have for not hiring these two applicants. This would be consistent with my allowing the CO to reduce the certified number of positions by the number of any additional U.S. workers hired by Employer and any additional applicant referrals improperly rejected since the CO's July 30th denial. The parties and I recognize the fact that the period of recruitment, which continues even today, and will continue after certification, results in a dynamic evolving process. I also note that in the circumstances of this case, the Employer had no notice of its omission of these two workers from its July 28th report prior to the CO's denial issued just two days later.

report states it rejected one, Gabriel Gomez, because he was not interested in the job [AF 33]. Nothing in the record, including the EDD memorandum to the CO [AF 36] relied on by the CO's brief, refutes this assertion by the Employer. Therefore, I find that the Employer rejected Gabriel Gomez for a lawful reason.

The Employer's recruitment report states that it rejected the other two U. S. workers, Samuel Magana and Jose Reyes Cardenas, because they had no experience [AF 33]. The EDD's memo to the CO states that these applicants said that they had experience, and provided a verifiable Farm Labor Contractor reference, including his telephone number [AF 36]. There is no evidence that the Employer attempted to verify their experience. Nor is there any assertion by the Employer, let alone other evidence, that these U. S. applicants told the Employer, contrary to what EDD reports it was told by the applicants, that they lacked experience. Therefore, the Employer has not satisfied its burden to document job-related reasons for rejection of these two applicants, and the certification will be reduced by these two positions.

Taking into account the circumstances regarding the four named applicants whose rejection has not been documented as being based on lawful, job-related reasons, I do not find a pattern of bad faith justifying a denial of the entire request for temporary labor certification. These circumstances include: the sparseness of the record regarding their qualifications; the absence in the record of any indication that the Employer was put on notice prior to the July 30th denial, that the EDD or the CO disagreed with the Employer's actions on these applicants; and the fact that of all the workers actually referred to the Employer, many of whom the Employer hired, there are only four remaining in question (and two of these may be in question only due to Employer's failure to include them in its report). Accordingly,

ORDER

The CO's Determination denying temporary labor certification is **VACATED** and the CO is **ORDERED** to grant Employer's application for temporary labor certification on behalf of 144 alien workers. This represents the original request for 162 workers, less the 14 U.S. workers hired and the four workers named in the CO's denial whose rejection has not been established as proper.

This number is to be reduced by the number of any additional U.S. workers hired by Employer and any applicant referrals improperly rejected by Employer since the July 30, 1994 denial by the CO. In addition, the CO may increase the number of temporary labor certifications if he decides, in his discretion, to consider Employer's reasons for rejection of the two applicants referred to in footnote 5 of this Decision and Order.

LAWRENCE BRENNER
Administrative Law Judge