



Date: **August 30, 1999**

Case No.: **1999-TLC-6**

ETA Case: **10393**
10395

In the Matter of:

STRATHMEYER FORESTS, INC.

Respondent

BEFORE: John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and its implementing regulations, found at 20 C.F.R. Part 655.¹ This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2).

Statement of the Case

Strathmeyer Forests, Inc. ("Respondent") filed its first H-2A application (ETA Case No. 10385). with the Region III Regional Administrator ("RA") of the U.S. Department of Labor, Employment and Training Administration on July 9, 1999. (AF 103-22). In this application, Respondent sought to fill thirteen positions which it described as "Experienced Nursery Workers," or "Horticultural Worker I" pursuant to the definition in the Dictionary of Occupational Titles ("DOT"), 405.684-014. The RA reviewed this original application, and denied it for a number of reasons on July 16, 1999.² (AF 67-69). As to the experience requirement, the denial stated "based on a prevailing practice survey conducted by the Pennsylvania Bureau of Employer and Career Services, it is not the normal or common practice to require occupational qualifications." (AF 68). Further, the RA stated that the position was more properly classified as "Horticultural Worker II." (DOT 405.687-014).

¹Unless otherwise noted, all regulations cited in this decision are in Title 20.

²The reasons included rate of pay, the amount of experience required, the lack of proof of workers compensation, and lack of recruitment efforts. (AF 67-69).

Respondent did not appeal this denial. Instead, Respondent chose to re-file its application modifying the application as requested by the denial, which it did on July 30, 1999 (ETA Case No. 10393). (AF 37-61). Prior to receiving a decision on this application, Respondent filed a second application for additional workers in the same positions (ETA Case No. 10395). (AF 7-26).³ These applications were denied on August 5, 1999, and August 12, 1999, respectively. (AF 35-36; 4-6). Both applications were denied for requiring one month of experience in order to qualify for the position. (AF 6 & 36). Specifically, the RA stated in the August 5, 1999 denial:

This occupation is a position which is low skilled in nature and should not require much in the way of special skills, training, or experience on the part of the workers. You have submitted no documentation to support your requirement and to show that it is consistent with normal and accepted qualifications required by other employers. As this office must weigh your beliefs against a survey conducted by the Commonwealth of Pennsylvania, this office must side with documented evidence from the State.

(AF 36).

In the second denial, the RA reiterated this statement:

This occupation is a position which is low skilled in nature and should not require much in the way of special skills, training, or experience on the part of the workers. You have submitted no documentation to support your requirement and to show that it is consistent with normal and accepted qualifications required by other employers.

(AF 6).

Respondent has requested an expedited review of both applications pursuant to § 655.112(a), and, as the issues and applications were identical, requested that these appeals be consolidated. (AF 1-4; 27-34). The request for consolidation was granted, and the combined appellate file was received on Monday, August 23, 1999. The parties were given until noon on August 26, 1999 to file any briefs or position papers and were informed that no additional evidence would be accepted with those briefs pursuant to the regulations. § 655.112(a)(2). Respondent's and the RA's brief were timely received on August 26, 1999.

It is also noted that an *amicus curiae* brief was proffered by "Friends of Farmworkers, Inc., Legal Services for Farmworkers" on behalf of its client, the Comite de Apolo a los Trajadores Agricolas ("Amicus"). First, it is noted that the brief did not comport with the Rules of Practice and Procedure applicable before this Office. *See* 29 C.F.R. Part 18. These rules provide specific

³These two applications were, in all relevant aspects, identical.

requirements for the filing of *amicus curiae* briefs, none of which were met by this request.⁴ Specifically, it is noted that this brief was not served upon Respondent. It is also noteworthy that the majority of the brief addresses a number of issues that are not before this office, as the only reason these applications are before this Office is that the RA deemed the one month experience requirement to be contrary to the prevailing practice in the industry. However, due to the expedited nature of these proceedings and in the interest of fully addressing the relevant issues during the amount of time allotted, Amicus' brief is received into the record, but only as to the issue that has been presented for appeal.

Discussion

As stated above, only one reason was presented for denial: that the occupational experience requirement was against the prevailing practices of the occupation. The regulations provide that the occupational qualifications as required by the applicant must "be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops." § 655.102(c). In order to determine the "prevailing practices," a survey was conducted by the Commonwealth of Pennsylvania. (AF 70-91). In fact, this survey is the sole reason for the denials. (AF 6; 36). Where, as here, an expedited review has been requested, the standard of review is "for legal sufficiency" of the record. § 655.112(a)(1). In reviewing the relied upon survey under this standard, it is impossible to determine how anyone could rationally rely on its contents to establish that the requirement of one month of experience is contrary to prevailing practices.

In conducting the survey, only two employers were contacted, both of whom were from Adams County Pennsylvania. These employers employed a grand total of fourteen employees. In reviewing the survey, only one page addresses the experience requirement. (AF 88). What follows, while not in the exact format, is a verbatim recitation of the relevant portions of that page:

NUMBER OF NON-H-2A EMPLOYERS **REQUIRING** OCCUPATIONAL QUALIFICATIONS: 2

TYPE OF QUALIFICATIONS REQUIRED: Able to lift, climb tree, heavy laboring

NUMBER OF U.S. WORKERS EMPLOYED: 14

NUMBER OF NON-H-2A EMPLOYERS **NOT REQUIRING** OCCUPATIONAL QUALIFICATIONS: 0

⁴29 C.F.R. § 18.12 provides in relevant part:

A brief of an *amicus curiae* may be filed only with the written consent of all parties, or by leave of the administrative law judge granted upon motion, or on the request of the administrative law judge, [.]

NUMBER OF U.S. WORKERS EMPLOYED: 0

DETERMINATION:

It is not the normal or common practice for non-H-2A employers to require occupational qualifications. 2 employers hiring 14 laborers/workers were surveyed for the 1999 Prevailing Practice/Wage Survey. 0 employers with 0 workers require experience and require that a worker can lift, climb trees, and do heavy laboring duties. 2 employers with 14 workers do not require occupational qualifications. It is not the normal or common practice to require occupational qualifications.

(AF 88) (emphasis added).

The determination reverses the data listed in the supporting information section. From the face of this report it is impossible to accurately determine which section is correct. This report is internally inconsistent, and is thus worthless for use as evidence for any purpose.

Under other circumstances, this case would either be remanded back to the RA to clarify the meaning of this report, or the record would be re-opened in order to receive evidence identifying which portion of this report is incorrect. However, these methods are specifically precluded where, as here, the Respondent has requested an expedited review. § 655.112(a)(1). I may only affirm, reverse, or modify the RA's decision. § 655.112(a)(2). Accordingly, having rejected the prevailing practices survey, I must now turn to the evidence remaining in the record to determine if the one month experience requirement is supported by a "legal sufficiency." § 655.112(a)(1).

As has been held previously, the DOT listing for a specific position is probative evidence regarding whether an occupational requirement is a normal and accepted qualification. *Tougas Farm*, 1998-TLC-10 (May 8, 1998). In this case, Respondent originally asserted that this position is "Horticultural Worker I" with an SVP rating of 3 (up to and including 3 months of experience and education), and that the one month of experience sought was well within that rating. (AF 103-4). The RA felt that these positions were more properly classified as "Horticultural Worker II" which has an SVP rating of 1 (up to and including 1 month of experience and education). Respondent's experience requirement is thus still within the DOT's SVP rating. Accordingly, this is probative evidence that Employer's requirement is a normal and accepted qualification.

The only relevant evidence probative to this determination is the evidence regarding Employer's willingness to train employees. Respondent had stated in the original application that it had invested a number of years in employees that it had believed were legal workers, who had since been deported. In response, Respondent was prepared to hire entry level domestic workers which, after developing experience this season, would be available for the more experienced positions. "However, to successfully complete this season, Strathmeyer considers it essential to have workers with the requested experience for the H-2A jobs." (AF 104).

In the original denial, which is not the subject of the instant appeal but is contained in the appellate file, the RA noted:

[B]ased on your letter, in the past you have trained workers for these positions. There is no reason that you could not continue to provide training for U.S. applicants/workers.

It appears that you have hired and trained foreign nationals to qualify for these positions and now that you must recruit U.S. workers you are not willing to provide similar training.

(AF 68).

Respondent clarified this position when it filed its modified application on July 30, 1999. Respondent replied directly to the RA's contention by stating:

This ignores the reality of the normal progression with an employer. An employer does not normally hire a worker with no background in an occupation and train the worker for a higher level position. Inexperienced workers are hired for the lower level positions. Those workers who demonstrate good work habits and show an affinity for the occupation are then selected for training for the higher level positions. The employer remains willing to train such domestic workers for any of the three higher level positions. However, it is unrealistic to expect an employer to hire inexperienced and untrained workers for all levels of its workforce.

(AF 38).

In the denial of this application, and in the denial of the supplemental application containing almost identical language, the RA did not refer to the willingness to train issue, and did not deny the application based on that issue. However, as stated in *Zera Farms*, "to recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible." *Zera Farms*, 1998-TLC-8 (April 13, 1998), citing *Elton Orchards v. Brennan*, 50 F.2d 493, 500 (1st Cir. 1974). The RA thus argues that, because the survey establishes that no experience is required, all of the positions are untrained positions, and thus there is no rationale for the distinction made by employer. As stated above, the internally inconsistent prevailing practices survey establishes nothing in regards to occupational requirement, leaving this contention baseless. There is no reason, at this time, to find that this situation is anything other than that described by Respondent: a "stop-gap" procedure, with Respondent using the temporary certification procedure during this season only to obtain skilled employees until the unskilled domestic workers recruited this year are able to fill these skilled positions the following year. Finally, the RA did not deny the modified applications, the only ones at issue here, for failure to provide training, seemingly indicating that the modified applications cured this defect. Accordingly, the training issue mentioned in the RA's brief provides little probative weight.

As the only viable evidence in the record as presented, the DOT provides a legally sufficient rationale supporting Respondent's assertion that its occupational requirement is valid. It is noted that the RA warns of "setting a dangerous precedent" in placing controlling weight on the DOT over

prevailing practice surveys.⁵ In the present case, the only reliable evidence available is the DOT. There is no credible countervailing evidence. Further, the ETA Handbook specifically requires that “the RA should examine” the DOT in addition to obtaining a survey of the prevailing practices, indicating its role, albeit not a controlling role, in the temporary labor certification procedure. *ETA Handbook, No. 398*, § B(1)(o). In cases where a prevailing practices survey accurately provides the information sought, and the DOT somewhat contradicts this survey, the survey will most likely be credited, as it provides the most reliable information as to the usual and customary requirements. *See* § 655.102(c). In this case, the provided prevailing practices survey is contradictory on its face and worthless. The DOT is thus the only remaining evidence available to determine the usual and customary requirements of these positions and it is thus entirely proper to rely on its definitions for such determinations.

Conclusion

Under the particular circumstances of this particular application, and considering that the prevailing practices survey is utterly incomprehensible as to the issue at bar, the RA’s denial is legally insufficient. Considering the remaining evidence under these circumstances, Respondent’s justification for the one month experience requirement is legally sufficient.

Accordingly, the following Order shall enter.

ORDER

The Regional Administrators’ denial of temporary alien agricultural labor certifications is hereby **REVERSED**.

at Washington, DC

JOHN M. VITTON
Chief Administrative Law Judge

JMV/jcg

⁵The RA bases this contention on an interpretation of *Hoyt Adair*, suggesting it stands for the proposition that the DOT is controlling as to job qualifications. This interpretation of *Hoyt Adair* is not completely accurate. In that case, other factors supported application of the DOT and, as here, the survey was found to not be probative as it left “open as many questions as it answers” and did not “provide sufficient definitive information.”