



**U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

DATE PREPARED 09-05-78

RE: NORTHERN ORCHARDS, CO., INC., EMPLOYER;
CASE NO. 78-TLC-145

THIS IS A DECISION IN RESPONSE TO THE REQUEST BY NORTHERN ORCHARDS CO., INC. (THE "EMPLOYER"), FOR EXPEDITED ADMINISTRATIVE-JUDICIAL REVIEW (PURSUANT TO 20 CFR 655.212) OF A DENIAL OF PART OF ITS APPLICATION FOR A TEMPORARY LABOR CERTIFICATION.

IN JUNE 1978, THE EMPLOYER FILED AN APPLICATION FOR A TEMPORARY LABOR CERTIFICATION FOR 20 ALIENS TO HELP HARVEST ITS 1978 APPLE CORP IN PERU, NEW YORK, DURING THE ESTIMATED PERIOD SEPTEMBER 11-OCTOBER 20, 1978. ON AUGUST 22, A U.S. DEPARTMENT OF LABOR CERTIFYING OFFICER SENT THE EMPLOYER A TEMPORARY LABOR CERTIFICATION FOR 5 ALIEN WORKERS, AND A DENIAL OF ITS REQUEST FOR SUCH CERTIFICATION FOR 15 ADDITIONAL ALIEN WORKERS SOUGHT -- ON THE GROUND THAT, "IN ACCORDANCE WITH 20 CFR 656.21(A)(1) OF THE REGULATIONS, CREW LEADER JAMES H. WEAREN AND A CREW OF 15 WORKERS WERE RECRUITED INTERSTATE".

APPEAL FILE DOCUMENTARY EVIDENCE OF THAT U.S. WORKER CREW RECRUITMENT CONSISTS OF: (1) A "RURAL MANPOWER MOBILITY PLAN," ISSUED BY AN EMPLOYMENT OFFICE IN FLORIDA ASSOCIATED WITH THIS DEPARTMENT, WHICH SETS FORTH A 1978 HARVESTING SCHEDULE FOR MR. WEAREN'S 20-MEMBER CREW, INCLUDING APPLE HARVESTING IN PERU, NEW YORK, FOR THE EMPLOYER HEREIN DURING SEPTEMBER 16-OCTOBER 20, AND CONTAINS THE ASSERTION, "GAVE AND EXPLAINED FEDERAL AND FLORIDA REGULATIONS"; (2) A "MONITORING GUIDE" REGARDING RECRUITMENT ACTIVITIES, DATED JULY 20, WITH AN INITIAL ENTRY INDICATING THAT WEAREN'S CREW MIGHT CONSIST OF 19 RATHER THAN 20 WORKERS, AND A LATER ENTRY INDICATING FURTHER DOUBTS 'AS TO THE NUMBER OF WORKERS IN THE WEAREN CREW, AND REPORTING EFFORTS TO COMMUNICATE WITH MR. WEAREN; AND (3) AN "ANALYSIS OF ALIEN EMPLOYMENT APPLICATION" PREPARED ON AUGUST 22, AT A NEW YORK OFFICE OF THIS DEPARTMENT, WHICH CONTAINS THE ENTRY, "CREW SHOWING UP SHORT 5--PER ROY SEGAR

8/21/78."

TITLE 20 CFR 655.212(A) AUTHORIZES A HEARING OFFICER, IN HIS ADMINISTRATIVE-JUDICIAL REVIEW, TO CONSIDER ONLY THE "LEGAL SUFFICIENCY" OF THE RECORD UPON WHICH THE DENIAL OF THE APPLICATION FOR A TEMPORARY LABOR CERTIFICATION WAS BASED: AND FURTHER PROVIDES THAT THE HEARING OFFICER "SHALL NOT RECEIVE ADDITIONAL EVIDENCE." THE RECORD IN THIS CASE IS LEGALLY SUFFICIENT IF IT MAY REASONABLY BE VIEWED AS WARRANTING A FINDING, PURSUANT TO 20 CFR 655.206(A), THAT 15 U.S. WORKERS HAVE A "FIRM COMMITMENT TO WORK FOR THE EMPLOYER" PURSUANT TO THE ABOVE-MENTIONED HARVESTING SCHEDULE, IN THE SENSE THAT THEIR CREW LEADER IS "VERY LIKELY TO SIGN . . . A WORK CONTRACT" WITH THE EMPLOYER.

I AM PERSUADED THAT THE ABOVE-DESCRIBED APPEAL WARRANTING SUCH A FINDING, THAT THE RECORD IS THEREFORE LEGALLY SUFFICIENT, AND THAT THE APPEALED-FROM DENIAL OF A TEMPORARY LABOR CERTIFICATION FOR 15 OF THE 20 ALIEN WORKERS SOUGHT MUST THEREFORE BE AFFIRMED. THE DOCUMENTATION EVIDENCES DEPARTMENTAL MONITORING OF THE WEAREN CREW'S SIZE AND ADHERENCE TO ITS HARVESTING SCHEDULE; AND THE UNEQUIVOCAL NATURE OF THE FINAL PERTINENT ENTRY, "CREW SHOWING UP SHORT 5," STRONGLY SUGGESTS THAT IT WAS BASED UPON DIRECT COMMUNICATION WITH THE CREW LEADER.

IN ITS TELEGRAM REQUESTING ADMINISTRATIVE-JUDICIAL REVIEW, THE EMPLOYER OFFERS NEW EVIDENCE OF THE UNAVAILABILITY OF THE 15 U.S. WORKERS IN MR. WEAREN'S CREW. AS NOTED ABOVE, 20 CFR 655.206(A) PROHIBITS MY RECEIPT AND CONSIDERATION OF SUCH ADDITIONAL EVIDENCE. HOWEVER, AS MENTIONED AT 20 CFR 655.0(C), THE EMPLOYER HAS THE RIGHT TO AN ADJUDICATORY REVIEW OF THE DEPARTMENT OF LABOR'S DETERMINATION IN THIS MATTER BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE (SEE 8 CFR 214.2(H)(3)), AND MAY SUBMIT SUCH ADDITIONAL EVIDENCE TO THE INS FOR ITS CONSIDERATION IN CONNECTION WITH SUCH ADJUDICATORY REVIEW.

ACCORDINGLY, IT IS ORDERED THAT THE DENIAL OF A TEMPORARY LABOR CERTIFICATION FOR 15 OF THE 20 ALIENS SOUGHT BY THE EMPLOYER HEREIN IS AFFIRMED.

WALTER MORSE
HEARING OFFICER