

U.S. Department of Labor

Office of Administrative Law Judges
Washington, DC



DATE: FEB 18 1988
CASE NO. 87-JSA-6
87-JSA-7

IN THE MATTER OF

ALTIERI JEAN, et al.
Complainant

v.

HEPBURN ORCHARDS, INC.
Respondent

ROLIN BENOIT, et al.
Complainant

v.

HEPBURN ORCHARDS, INC.
Respondent

Gregory S. Schell, Esq.
For the Complainants

Thomas E. Wilson, Esq.
For the Respondent

BEFORE: STUART A. LEVIN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Wagner-Peyser Act of 1933, 29 U.S.C. §49 et seq., and the regulations governing the Job Service System found at 20 C.F.R. Part 658. This decision is rendered on the record compiled before the state agency (hereinafter State File or "S.F."), the investigation and determination of the Regional Administrator (hereinafter Federal File or

"F.F."), and the written arguments of the parties as determined in accordance with 20 C.F.R. §658.424(b).¹

Statement of the Case

Complainants in this case are eleven migrant and seasonal farmworkers, all of whom are Haitian nationals. Each of the complainants applied for work at Respondent Hepburn Orchards, Inc. (Hepburn) during the 1984 harvest season. Each failed a United States Department of Labor (DOL) approved pre-employment "ladder test" administered by Terry Hepburn, Vice-President and General Manager of the orchard, and as a consequence, were not hired. The ladder test requires fruit-picker job applicants to lift and manipulate a wooden ladder, approximately 24 feet in length and weighing up to 45 pounds, and brace it up against a tree.

Complainants Rolin Benoit, Sainatus Bonhomme, and Lusa Versulien filed job service complaints with the local job service office in Hagerstown, Maryland on August 7, 1984 alleging that Hepburn's administration of the ladder test violated the H-2 temporary foreign worker program regulations.² Specifically, complainants' alleged a violation of the requirement that an employer's job clearance order must offer United States workers the same benefits which are offered to H-2 workers in the hiring process and on the job. 20 C.F.R. §655.202(a). On August 31, 1984, Altieri Jean, Pierre Polinice, Nelson Felix, Jean Magliore, Pierre Benjamin, Menou Desilien, Orel Victor, and Henrique Policarpe filed similar complaints against Hepburn.

The local job service office dismissed the complaints on the grounds that the ladder test was acceptable noting that it was incorporated into the job specifications of an agricultural clearance order approved by the Regional Employment and Training Administration (ETA) in Philadelphia. The complainants then filed a timely request for review by the state office pursuant to 20 C.F.R. §658.416(c).

On October 5, 1984, Stuart Douglas, Director of the Maryland Job Training Service, Department of Employment and Training, issued a determination reversing the local office decision. He advised Hepburn that it was in violation of 20 C.F.R. §§655.202(a) and 655.203(e), by requiring the complainants, domestic workers, to take a pre-employment ladder test which it did not require of its temporary, Jamaican H-2 workers.

¹In accordance with my Order dated May 27, 1987, Complainants submitted a brief on June 19, 1987. Respondent subsequently submitted a letter on July 2, 1987 indicating it would not file a brief.

²Such use of temporary foreign labor is permitted by the Immigration and Naturalization Act and regulations promulgated thereunder, when a United States employer asserts and DOL certifies that (1) there are no United States workers available to accept the employment sought by foreign workers, known colloquially as "H-2's"; and (2) that the admission of H-2 workers will not otherwise adversely affect similarly employed domestic laborers. 8 U.S.C. §1101(a)(15)(H)(ii); 20 C.F.R. §655.

On October 19, 1984, Hepburn requested a state hearing regarding the complaints. The discontinuation of Job Services was stayed during the pendency of Hepburn's appeal. Upon agreement of the parties, the two cases were consolidated for hearing before the State Special Hearing Examiner Robin L. Brodinsky. Hearings were held on two separate dates, April 9 and May 14, 1985.

Special Hearing Examiner Brodinsky issued a decision on May 31, 1985, overruling the determination of Director Douglas. Examiner Brodinsky's decision turned on two points. First, contrary to Director Douglas' decision, at the time these complainants took the ladder test, there were no H-2 employees at Hepburn who had signed employment contracts prior to their arrival in Maryland: complainants and Jamaican H-2's were both required to take the ladder test before they were offered employment with Hepburn in July and August of 1984. Thus, U.S. workers were treated identically to the H-2 workers then employed. Second, the DOL Regional Office in Philadelphia approved and accepted the ladder test in Hepburn's 1984 job orders. State of Maryland employees additionally observed the testing of both domestic and foreign workers and found the test to be administered in a non-discriminatory fashion. Examiner Brodinsky concluded that the ladder test was non-discriminatory, fairly and properly administered to both complainants and H-2 workers, and thus not a violation of 20 C.F.R. 655.202(a).

Pursuant to 20 C.F.R. §§658.418(c) and 658.421(b), complainants filed a timely appeal to the Regional Administrator of the Employment and Training Administration, William J. Haltigan. On March 16, 1987, the Regional Administrator issued two opinions relating to the consolidated complaints. In the first opinion, he affirmed the decision of the Special Hearing Examiner finding that based on the facts before the examiner, Hepburn had not violated 20 C.F.R. §655.202(a). In a second opinion issued the same day captioned In the Matter of the Hepburn Ladder Test, the Regional Administrator addressed issues raised by a June 5, 1986 administrative decision rendered by Judge George A. Fath, in Miller v. Hepburn Orchards, Inc., No. 85-JSA-2; a decision and supplemental information not available to the Special Hearing Examiner. In Miller, it was determined that the ladder test given by Hepburn during the 1983 harvest season was discriminatory, and that the very nature of the test was "suspect". The Regional Administrator re-examined the 1984 ladder test in light of this opinion and concluded that Hepburn's administration of the ladder test was suspect. He noted the variables in the manner in which the test was administered and the fact that all the complainants were subsequently hired by another orchard after successfully passing a similar ladder test, and found that the test was administered in violation of 20 C.F.R. §§655.202(a) and 655.203(e). Despite these findings, the Regional Administrator found that the DOL Regional Office's approval of Hepburn's 1984 job order and no acts of bad faith by Hepburn rendered the ineligibility sanction of 20 C.F.R. §655.210 inappropriate.

In his March 16 ruling, the Regional Administrator offered the complainants the opportunity to seek a hearing, which they pursued in a timely manner.

Findings of Fact

A. The 1984 Job Order

Hepburn is a family-owned business which cultivates and harvests peaches and apples, predominantly in western Maryland for the commercial fresh fruit market. It employs approximately thirty people year-round, and, since 1976, supplements its permanent workforce with several hundred migrant and seasonal workers during the peach and apple harvesting months, typically July through October. (SF, Tabs G, H).

The system involved in procuring domestic and foreign migrant and seasonal farmworkers is complex. (See generally SF, Tab I, testimony of Joseph Beard, Secretary-Treasurer of Washington County Fruit Growers Assoc., and SF, Tab M). An agricultural employer first applies for workers by submitting a "criteria job order" to DOL. In Hepburn's case, each criteria job order contained two documents: an agricultural and food processing clearance order ("clearance order") and a job offer for alien employment, Form MA-7-50B ("7-50B"). Domestic, U.S. workers are recruited against the clearance orders; foreign, H-2 workers are recruited against the 7-50B's. Clearance orders and 7-50B'S must contain identical terms and conditions of employment for a criteria job order to be approved. 20 C.F.R. §655.200.

Upon approval, a clearance order is circulated through those portions of the national job clearance system most likely to produce qualified U.S. workers; in this case, the clearance orders were circulated in Maryland and along the East coast. (SF, Tab M). The U.S. worker then travels to the worksite, performs any notified pre-employment conditions, and if qualified is preferentially hired over any H-2's within the first fifty percent of the work period listed in the employer's clearance order. 20 C.F.R. §655.203(e).

In the event that an employer's labor needs are not being filled by U.S. workers, DOL certifies the employer as eligible to employ H-2's, and an appropriate foreign labor pool, generally already on alert, is activated, resulting in the rapid arrival of a contingent of foreign workers. The H-2's and U.S. workers must be treated equally both in the hiring process and on the job. 20 C.F.R. §655.202(a), 655.202(e).

In the instant case, Hepburn submitted clearance order No. 4072492 on March 19, 1984, requesting 130 qualified U.S. fruit pickers to assist in the harvest of peaches and apples during the 1984 harvest season. (S.F. Tab A: Tab N, p.3: F.F. Tab 8, p. 1). Job specifications attached to the clearance order stated that applicants would be required to take a "ladder test" (S.F. Tab A, item no. 5, attachment no. 11). The job qualifications explained that the fruit pickers were required to brace a ladder up to 24 feet in length, weighing up to 45 pounds up against a tree while wearing a metal framed canvas bucket over their shoulders. The canvas bucket can weigh up to 50 pounds when filled. The picking of apples specifically required "careful handling and use of a ladder", while specifications in the picking of peaches indicated that it "could involve the use of a ladder." The qualifications stated that workers would be tested "on their ability to

handle the ladder as a part of the employer's pre-employment standards." They further stated that Hepburn would "provide three days of training, or allow three days of work, from the commencement of employment, at the conclusion of which workers must have reached production standards" relating to the amount of undamaged fruit picked. Failure to adhere to set production standards at the end of the three-day trial period was a "for cause" grounds for dismissal. (S.F. Tab A, attachment 5; Growers Exhibit 14, Clause 5(b), Clause 10(a)(ii). Employees were additionally guaranteed employment for 75 percent of the job period once hired, unless the worker was terminated for cause under Clause 10 of the contract.

On June 26, 1984, the ETA Regional Office approved the clearance order and 7-50B, which contained identical terms and conditions for employment as required by the regulations. The Regional Office issued a temporary labor certification to Hepburn for 78 workers to be employed from July 9, 1984, to October 31, 1984, the peach and apple harvest season. (S.F. Tab B). The certification contained the caveat under 20 C.F.R. §655.202(a) that I' . . .no job offer may impose on U.S. workers any restriction or obligations which will not be imposed on the employer's foreign workers..."

The certification also acknowledged a controversy surrounding Hepburn's use of a ladder test during the 1983 harvest. The Certifying Officer noted that the issue of whether Hepburn "violated the terms and conditions of the 1983 labor certification by applying more stringent hiring requirements upon U.S. workers than were required of foreign workers, cannot be fully or fairly resolved prior to the commencement of the 1984 peach/apple harvest." The Certifying officer, therefore, accepted the assurance of Hepburn's attorney that the regulations were not violated in 1983 by the use of a ladder test as a condition to the 1984 labor certification of the job order. (S.F. Tab B).

On July 5, 1984, a public meeting was held in Hagerstown, Maryland, to discuss labor concerns for the upcoming harvest season. (S.F. Tab C, p.2; Tab D, p.2; F.F. Tab 8, p.5). In attendance were representatives from the Maryland Department of Employment and Training, Regional Administrator, William J. Haltigan, agricultural farmers, including Terry Hepburn, and the Maryland Legal Aid Bureau. (S.F. Tab I, testimony of Terry Hepburn at 193-194). Counsel for the U.S. worker's questioned the appropriateness of a ladder test for peach picking, noting that the 24 foot ladder used in the test was considerably higher than what was needed or usually used in peach picking. (S.F. Tab A, attachment 5, p. 3). Regional Administrator Haltigan stated at the meeting that he viewed the ladder test as inappropriate for peach picking, and advised the growers that otherwise qualified U.S. workers could, therefore, not be refused a peach picking job on that basis. (S.F. Tab D, p. 2; Tab I, p. 193-94). Terry Hepburn questioned the Regional Administrator about this policy, noting that summer apples are harvested simultaneously with peaches, and that summer apple trees required use of a 24-foot ladder for harvesting. The Regional Administrator reiterated his policy prohibiting the ladder test as a screening device for the peach harvest and noted that domestic workers unable to handle the 24-foot ladder could be utilized exclusively on peach harvesting activities during this period, eliminating the need to use the long ladder. Respondent subsequently contended, however, that to divide work up in the job order as the Regional Administrator suggested would, in effect, treat U.S. and H-2 workers differently, in violation of 20 C.F.R. §202(a). (S.F. Tab M, p. 11).

Upon notice that Hepburn continued to use the ladder test for apple and peach harvesting jobs, the Regional Administrator, by telegram of August 8, 1984, reiterated his belief that the test was inappropriate for peach harvesting duties (S.F. Tab D, P* 3; Tab J., p. 4; F.F. Tab B, p. 5). Finding that Hepburn's rejection of U.S. workers for failure to pass the ladder test during the 1983 and early 1984 season to be a violation of 20 C.F.R. §655.203 (e), the Regional Administrator denied labor certification for 54 additional workers during the 1984 harvest. It was later decided, however, after a meeting in Washington with Hepburn, his counsel, the National Office Solicitor, Employment and Training Staff, and the Regional Administrator, "to defer a final decision regarding the use of the ladder test and proceed with issuance of the 1984 certification." (F.F. Tab 8, pa 6).

B. Jamaican Recruitment Scheme

To supplement its workforce, Hepburn sought to recruit experienced apple pickers from Jamaica. (S.F. Tab G, p. 4; Tab I, testimony of Joseph Beard, p. 77, Tab N. p. 3). Hepburn's 1983 scheme of H-2 recruitment was to require H-2 workers to sign the H-2 standard worker contract, the 7-50B's, in Jamaica prior to their arrival in Maryland. (S.F. Tab I, Hepburn testimony P* 156; F.F. Tab 7, p. 2; Tab 9, p. 2). In July, 1984, however, a group of 32 H-2 workers were permitted to leave Jamaica without signing the standard worker contract. (S.F. Tab I, p. 78; Tab N, P= 3; F.F. Tab 4, p. 3). The U.S. counsel for the West Indies Central Labor Organization explained that the Jamaican Minister of Labor permitted these workers to leave without first signing the contract "because the revised standard worker contract for 1984 had not as yet been printed." (S.F. Tab K, complainants exhibit 21, February 14, 1985 letter from Morris Kletzkin to counsel for both parties included in F.F. Tab 9, p. 3). Counsel also noted that every H-2 worker employed by Hepburn after August 29, 1984, signed the employment contract prior to leaving Jamaica.

During the 1984 harvest season, all new H-2 workers from Jamaica were required to take the ladder test as a condition for employment. All 32 of the Jamaica workers recruited in July 1984, passed the test and were employed. (S.F. Tab N, p. 3).

On or about August 28, 1984, a group of Jamaican workers arrived at Hepburn Orchards. Each subsequently passed the ladder test and then signed the standard worker contract under circumstances similar to the 32 Jamaicans employed in July. (S.F. Tab N, p- 4).

C. Complainants' Recruitment Scheme

Complainants are Haitian nationals, paroled into the United States by the INS in 1980 or 1981³, and granted employment authorization by the Attorney General of the United States pursuant to their special parole status as Cuban-Haitian entrants. (See 1 C. Gordan and H. Rosenfield, *Immigration Law and Procedure*, 2-188.3 (1987). Complainants all had prior experience picking oranges. (S.F. Tab N, p. 4). One complainant had experience picking apples (S.F. Tab C, Altieri Jean's complaint). At least eight of the complainants had harvested citrus

³The record is unclear as to the precise immigration status of the individual complainants.

fruit from 17-foot ladders during the winter and spring months in Florida (S.F. Tab C; Tab K, complainants' testimony pp. 285, 320, 328, 351, 365, 381).

Between August 2 and August 16, 1984, complainants were referred to Hepburn in two groups, pursuant to Hepburn's 1984 clearance order, through the Hagerstown and Cambridge local offices of the Maryland Department of Employment and Training. (S.F. Tab C; Tab I, p. 202, testimony of complainants' pp. 286, 320, 330, 353, 367, 386; Tab N, p. 4; F-F. Tab 8, p. 2). All the complainants understood and were aware that they would have to pass a test, to demonstrate their ability to use a ladder to pick apples and peaches, as a condition of employment once they arrived at the orchard. (S.F. Tab I, complainants' testimony, pp. 289, 326, 357, 368, 387; Tab N, p. 4).

D. Administration of the Ladder Test

The ladder test is administered on a flat area and requires the applicant to lift a 24-foot (25 rung) ladder from a horizontal to a vertical position, carry it for 10 to 15 feet and brace it up against an apple tree. (S.F. Tab I, Hepburn testimony, p. 167; Tab K, testimony of Merlin Williams, pp. 338-340). During the summer of 1984, the ladder test was given to all new workers, domestic and alien. Applicants previously hired by Hepburn were not required to take the test prior to employment. (S.F. Tab I, Hepburn testimony p. 192-93, 205).

If the applicant did not speak English, a state official would interpret and describe the test. (Tab K, p. 339, 343). Upon the request of Hepburn, during the summer of 1984, Mr. Merlin Williams (Spanish translator) or Mr. Peter Bittner (Haitian-Creole translator), from the Hagerstown office of the Maryland Department of Employment and Training, observed and translated instructions for the ladder test during the 1984 harvest season. Mr. Williams did not monitor the ladder tests given to the complainants; however, he and six of the complainants testified that Mr. Bittner was present during complainants' tests. (S.F. Tab I, pp. 34, 183; complainant's testimony pp. 291, 321, 331, 357, 350, 387; Tab K, pp. 256, 258, 344-45; Tab N., p. 3; F.F. Tab 8, p. 2). Mr. Williams testified that he observed the test on other occasions and noted that it was administered in a like manner to both domestic and foreign applicants. (S.F. Tab I, p. 341). Mr. Bittner was unavailable to testify.

Several of the complainants testified that after being told about the test, they were led to a part of the orchard and given the test as Mr. Bittner and Mr. Hepburn observed. (S.F. Tab I, pp. 21, 321, 331, 357, 370, 387). Hepburn testified that he administered the ladder test in the same manner to all new applicants. (S.F. Tab I, pp. 156, 214). Mr. Williams testified that based on his observations of the ladder test, though admittedly not to these complainants, Hepburn gave each applicant at least two chances to lift the ladder. (S.F. Tab I, p. 340). An August 12, 1984, report on the test to Regional Administrator Haltigan stated "Hagerstown job service local office staff advised that, at Hepburn, applicants are given more than one try to pass the test." (S.F. Tab D, p. 3). Six complainant's acknowledged that they were given two chances to lift and place the ladder into position. (S.F. Tab I, pp. 292, 333; Tab L, pp. 7-9, 12, 13). Three testified, however, that they were given only one chance. (S.F. Tab I, pp. 321, 357, 372). Six indicated they could not lift the ladder very far off the ground, and complained that the Hepburn ladder was heavier than the

type of ladder they were used to for picking oranges. (S.F. Tab I, pp. 292, 321, 333, 362, 372, 387).

Terry Hepburn testified that the ladder test is necessary to screen out unqualified workers. It tests a worst case scenario: the ability to raise a possibly wet ladder, of the type generally used for apple harvesting in his orchard, without assistance, and to carry it vertically under control for some distance. He noted, however, that in practice, employees are allowed to help each other with the ladders and ladders are carried horizontally when moving them a considerable distance, particularly at the end of a long day. (Tab I, p. 235-238). Complainants were all advised by Hepburn that they had failed the test and would not be hired. They subsequently applied for harvesting jobs with another nearby agricultural employer, Fairview Orchards, in Hancock, Maryland. Fairview also administered a pre-employment ladder test to the complainants, which they passed. They were immediately employed as peach and apple harvesters. (S.F. Tab C, Tab K, pp. 295, 324, 334, 362, 375, 390, Tab N, p. 3; FF. Tab 8, p. 2).

Complainants testified the test ladder used at Fairview was lighter than the Hepburn ladder. (S.F. Tab K, p. 295, 325, 334, 362, 375, 390). The Fairview ladder also was pointed at its base, making it easier for complainants to raise it against a tree. Hepburn's ladders have flat or barely rounded feet. (S.F. Tab I, p. 207, 208; Tab K, pp. 365, 390). Mr. Williams observed various tests at Fairview and believed their ladders were 22-feet long, the approximate size of Hepburn's ladders. (S.F. Tab K, p. 346).

Conclusions of Law

A. Complainants Are U.S. Workers

On March 16, 1987, the day the Regional Administrator issued his two opinions, Hepburn filed additional pleadings raising for the first time the issue of the immigration status of the complainants. Hepburn argues that complainants, as Haitian nationals, are not "U.S. workers" within the meaning of 20 C.F.R. §655.200 (b), and are, therefore, not entitled to the protections of the H-2 regulations. (Respondents Brief pp. 4-11: see also, Azor v. Hepburn Orchards, Inc., 87-JSA-1 (December 14, similar discussion regarding Haitian nationals as "U.S. workers").

Complainants' allegations with respect to Hepburn's administration of its ladder test in 1984 are premised solely on violations of the H-2 program job service regulations which afford certain protections to U.S. workers.⁴ Thus, Hepburn can only be found to have violated job service Regulations if complainants qualify as "U.S. workers" within the meaning of those regulations. (See also Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 596 (1982): the

⁴See, 20 C.F.R. §655.202 "... each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering to temporary foreign workers:" and 20 C.F.R. §655.203 (e)... "the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract...."

purpose of the Part 655 regulations is not intended to benefit alien workers, but to protect U.S. workers).

Section 655.200(b) defines a U.S. worker as "any worker who, whether U.S. national, citizen or alien, is legally permitted to work permanently within the United States." Complainants are neither U.S. nationals, nor U.S. citizens. The issue, therefore, is whether they can be defined as "U.S. aliens permitted to work permanently within the United States".

The Immigration and Nationality act provides that:

the term "permanent" means a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.

8 U.S.C. §1101(a)(31). This section has been interpreted as establishing that "'permanently' does not mean forever." Sudomir v. McMahon, 767 F.2d 1456, 1462 (9th Cir. 1985); Holly v. Lavine, 553 F.2d 845, 851 (2d Cir. 1977) cert. denied sub. nom. Shang v. Holley, 435 U.S. 947 (1978).

Holley and Sudomir concerned the eligibility of aliens for Aid to Families with Dependent Children (AFDC) program under the requirements of 42 U.S.C. §602(a)(33). the definition of "permanently residing" These cases analyzed and looked to the INS definitions of "permanent" as an alternative guide. In Holley, the court found that the INS's discretionary refusal to use its enforcement powers to deport an illegal alien requesting AFD, was an assurance that the alien's status was fixed, and permanent, allowing the alien to be "permanently residing under color of law." Holley, 553 F.2d at 849-850. In Sudomir, the Court found that aliens who entered and remained in the United States illegally, and then applied for asylum, were not "permanently residing" as required by AFDC regulations. Since the applicants were not allowed to enter or stay in the United States by the INS, and the pending asylum application only gave rise to a possibility of an authorization to reside temporarily, the court found that the alien's presence was "merely tolerated during the period necessary to process their applications; it was not legitimated by an affirmative act." Sudomir, 765 F.2d at 1462. The Court distinguished these asylum applicants from those aliens who are granted asylum or temporary parole and stated that "aliens who have official authorization to remain indefinitely until their status changes, reside permanently." (Id.)

Complainants are Haitian nationals who arrived in the United States in 1980 or 1981. Their exact immigration status is unknown. If they entered the United States between April 28, 1980 and October 11, 1980, they, as Haitians, were granted a special temporary parole status with employment authorization for a six-month period as "Haitians (status pending)". Regardless of when the complainants entered the country, however, the INS has not used its discretionary powers to deport them, and thus, under the Holley analysis, have given its assurances that complainants' status is fixed and permanent. Those complainants who were granted special temporary parole status have official authorization to remain indefinitely, and thus permanently within the meaning of Sudomir, until the INS changes their status. While the instant case

concerns permission to work permanently rather than permission to permanently reside as in Holley and Sudomir, the INS principles and policies in both cases are related. Permission to reside implies permission to work.

In addition, both parties have defined the complainants' work status as "indefinite", based on DOL Regional policy regarding Haitian parolees.⁵ Under Sudomir, complainants' entitlement to remain indefinitely renders their immigration status as permanent. Thus, under the analysis provided by Holley and Sudomir, and the parties affirmation of DOL Regional policy, complainants are legally entitled to seek employment indefinitely, and thus permanently within the United States Being entitled to work permanently, . they are U.S. workers within the meaning of 20 CFR §655.200(b).⁶

Respondent's arguments to the contrary are not persuasive. Respondent relies on the decision in Phillips v. Brock, 652 F. Supp. 1372, (D. MD 1987), which refused to certify the class requested by the plaintiff farmworkers, in part, because Haitian plaintiff Marcel Joseph was issued a work permit which allowed him to seek employment on a temporary or indefinite basis. The court held only that while Mr. Joseph was not an adequate class representative, he could proceed with a job service suit as an individual plaintiff. Phillips, 652 F. Supp. at 1378. Complainants in this case, however, rely upon persuasive authorities for the finding that they are allowed to seek employment in the United States indefinitely, and therefore permanently pursuant to the analysis in Holley and Sudomir, and are thus "U.S. workers" within the meaning of the job service regulations.⁷

⁵On October 20, 1982, Regional Administrator William J. Haltigan, sent a General Administrative Letter ("GAL") to State Employment and Training agencies stating that based on INS policy, Haitian parolees are legally entitled to work indefinitely in the United States and therefore were "U.S. workers" within the meaning of H-2 regulations. (Complainant's Brief, Exhibit D, GAL N. 46-81 at 3, Oct. 20, 1982 and April 7, 1983 telegram from Regional Administrator Haltigan.)

⁶It should be noted that Section 202 of the new Immigration Reform and Control Act of November 6, 1986, P.L. 99-603, 100 Stat. 3359, authorizes the Attorney General to grant lawful permanent residence to Haitians, such as complainants here, who arrived in the United States prior to January 1, 1982. Congress, recognizing that such Haitians have been "permanently residing in the United States under color or law:", expressed its intent to grant these Haitians formal status consistent with "the reality of their permanent residing in the United States." 99th Cong., 2d Sess. H.R. Rep. No. 682(I), 75-76 reprinted in 1986 U.S. Code, Congressional and Administrative News, 5649.5679-80.

⁷Nor does Farmworkers Rights Organization, Inc. v. Weatherrford, 81 8423-Civ-JCP, slip op. (S.D.Fla., 767 F.2d 937 (11th Cir. 1985), support the respondent's argument that entrants who are permitted to work in the United States indefinitely, have no standing to sue under INA regulations which protects only U.S. citizens and permanent resident aliens. (Respondent's Brief, p. 11). The court in Farmworkers Rights Organization noted, granting a motion to dismiss, that

B. HEPBURN'S LADDER TEST

This case is the second administrative decision involving the Hepburn Orchards "ladder test" to reach the federal administrative level. In Miller v. Hepburn Orchards, Inc., No. 85-JSA-2 (1986), nine domestic farmworkers were denied fruit-picking jobs with Hepburn during the 1983 harvest season for failure to pass the ladder test. The workers brought job service complaints against Hepburn, which were consolidated for hearing and decided on June 5, 1986. The decision upheld the workers' claims and found that Hepburn's use of the "ladder test" during the 1983 season violated 20 C.F.R. §655.202(a) and 655.203(e). Under the relevant regulations, this ruling became the final decision of the Secretary of Labor. 20 C.F.R. §658.425(c). Complainant's contend that the present case is controlled by the decision in Miller and that no relevant factual differences exist between the present case and Miller. These contentions, however, are unsupported by the record.

The criteria job order submitted by Hepburn in 1983 contained a brief description of the work, and stated that a worker must be able to handle ladders up to 24 feet, climb, and carry bags of fruit weighing from forty to fifty pounds: . . ."there is no mention that the applicant would be required to demonstrate an ability to handle a ladder as a condition of hire." Miller at 2. The job description in the 1984 clearance order, however, stated that applicants would be required to take a "ladder test", would be tested "on their ability to handle the ladder as a part of the employers' pre-employment standards," and included the description of handling the ladders similar to the 1983 order. (See S.F. Tab A, item 5, attachment no. 11). Unlike the facts in Miller, the ladder test was a component of the 1984 clearance order.

Similar to the Jamaican's who arrived at Hepburn on September 1984, with employment contracts in hand, the Jamaican H-2 workers involved in the 1983 controversy also signed their 7-50B's in Jamaica, prior to passing Hepburn's ladder test. Miller at 4. Clearance orders and 7-50B's are considered by the courts to be "essentially an offer for a contract of employment." Western Colorado Fruit Growers Ass'n. v. Marshall, 473 F. Supp. 693, 696 (D. Colo. 1979). The 1983 and 1984 contracts both include the 75 percent job guarantee once hired, unless the employee was fired for cause, i.e., low production standards after three days of training. (S.F. Tab A, FF. Tab 6, p. 10, Miller at 2, supra, p. 10). Thus, the H-2 workers in Miller had an executory contract with Hepburn prior to leaving Jamaica and a three-quarter work guarantee, a benefit not given to U.S. workers found to be in violation of 20 C.F.R. §202(a) in that case.

Complainants in this case were given ladder tests between August 2 and August 16, 1984. The record shows, however, that no H-2 worker who arrived at Hepburn during July and August, 1984 had previously signed a contract. Although H-2 workers after August 29, 1984 were

the Plaintiffs did not cite to authority "for the proposition that as Haitian entrants legally permitted to work in the United States for an indefinite time, are 'permanent resident workers.'" 81-8423-Civ-JCP, slip op. (S.D. Fla. 1983). It should, in this regard, be noted that both the District Court decision and the summary affirmance of it on appeal preceded the Ninth Circuit's discussion of related issues in Sudomir, supra.

required to have a signed contract before they could leave Jamaica, the Jamaicans who were competing with the complainants in this instance were treated in the same manner as the complainants; they arrived at the orchards without an executory contract and were hired based on their completion of the ladder test. Unlike Miller, all workers in this case were treated identically in respect to the pre-employment contracting process.

It must be further noted that unlike Miller, the Regional ETA Office here approved Hepburn's criteria job order including the ladder test requirement. While Complainants emphasize the Regional Administrator's informal view that Hepburn's administration of the test during the 1984 peach harvest season would be inappropriate, see supra p. 12, 13, whatever informal reservations were expressed, ultimately approved both the order and the test. (F.F. Tab 8 and 9).

Moreover, unlike the facts in Miller, the ladder tests in 1984 were monitored by state employees of the Maryland ETA. These officials administer the job service program at the state level and, in effect, stand in the shoes of DOL. They were in the field and actually monitored the testing of the U.S. and H-2 workers. These officials reported no instances of actual unfairness or disparate treatment in the administration of the test to any worker involved in this proceeding during the relevant time period.

Complainants also contend that the ladder test, which Hepburn represents as an objective screening device, is "suspect." I am mindful that Miller found the test to be "a device for the arbitrary rejection of job applicants". Miller at 5. In that instance the test was found discriminatory, and by its very nature "suspect". The Regional Administrator in his second opinion found that "the test administered in 1984 was the same as in 1983." He agreed that the test was suspect,

and given the variables of how the test was administered, the fact that the ladder used in the test was not generally used in peach picking, and the conflicting results when compared to the Fairview test, I cannot conclude that it is lawfully related to the requirements of the job.

In the Matter of the Hepburn Test, Dec. of Reg. Admin. under 20 CFR §655.210, March 16, 1987.

Similarly, the court in Bennett v. Hepburn Orchards, Inc., JH-84-991 (D. MD April 14, 1987), a Migrant and Seasonal Agricultural Worker Protection Act case filed by 35 farmworkers alleging discrimination based on the 1983 and early 1984 ladder tests, found that "the ladder test as administered by defendant does not reasonably and fairly test initiates for job-related skills." Bennett at 12, (emphasis added). The court found that the test was not given in a scientific fashion and was "subjectively given and subjectively judged." Id.

While I do not minimize the potential of this test to serve as a subjective device for the arbitrary rejection of job applicants, as administered by Hepburn in this particular instance, with state officials physically present and looking over his shoulder, the potential never ripened into

actual abuse. The tests were monitored by responsible state officials who reported no discrimination or abuse of any sort in the administration of the test.⁸ Further, upon reviewing the record, it appears that administration of a ladder test for harvesting tree-fruit is a routine practice among local orchards.⁹ As such, it would be difficult to conclude that, as an area-wide practice, it is not a job-related test. And finally, in this particular instance, complainants were treated in the same manner as the Jamaican workers in the initial application and contract process.

As to these particular complainants and Jamaican workers employed in July and August 1984, I find that this record fails to demonstrate that these U.S. workers were subjected to discriminatory treatment by Hepburn Orchards. Accordingly:

ORDER

IT IS ORDERED that the determinations of the Regional Administrator to continue Job Service services to the Respondent be, and they hereby are, affirmed.

STUART A. LEVIN
Administrative Law Judge

SAL:KH:jeh

⁸To the extent the record reflects a discrepancy in respect to the number of times each complainant was permitted to take the test, I have found more credible the statement by Heburn, as corroborated by the state officials, that each U.S. applicant was afforded more than one opportunity to pass the test.

⁹It appears that complainants subsequently took and passed a ladder test at Fairview Orchards using a different, lighter ladder. The regulations require the employer to treat U.S. and alien workers equally given equipment available. Hepburn is not required to invest in new equipment or tools of different design, style, or weight of the type used by its competitors.