



DATE: FEBRUARY 8, 1995

CASE NO: 95-TLC-3

In the Matter of

MOUNTAIN PLAINS AGRICULTURAL SERVICES/  
J.P. WERNER & SONS, INC.  
Employers

DECISION AND ORDER

This action arises upon the Employer's request for review pursuant to 20 C.F.R. 655.110 of the Certifying Officer's (CO)<sup>1</sup> denial of a temporary labor certification for agricultural employment. The application was submitted pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990 (Act) 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 655 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a temporary basis must demonstrate that the requirements of 20 C.F.R. Part 655 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

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<sup>1</sup> Part 656 of 20 C.F.R. refers to a "Certifying Officer" (20 C.F.R. §656.3) whereas Part 655 uses the term "Regional Administrator" (20 C.F.R. §§ 655.92, 655.100). The Regional Administrator may delegate this responsibility. The parties refer to a CO and that terminology will be used in this decision.

This decision is based on the record upon which the CO denied certification of the Employer's request for review as contained in the Appeal File (AF) and any written argument of the parties. 20 C.F.R. §655.112(a)(2).

### Procedural History

Employer filed its application for alien employment certification for "one unknown worker" on November 28, 1994. The application was for the position of livestock worker. The position required the applicant to be on call 24 hours a day and to perform any combination of the following tasks: Attend to livestock on a ranch. Feed and water livestock on range or at ranch headquarters. Herd livestock to pasture for grazing. Examine animals to detect diseases and injuries. Assist with the vaccination of livestock by herding into corral and/or stall or manually restraining animal on the range. Apply medication to cuts and bruises, spray livestock with insecticide and herd them into insecticide bath. Confine livestock in stalls, wash and clip them for and assist in the delivery of offsprings. In addition, the Employer required that an applicant must provide the name, address and telephone number of the previous employer being used as a reference. When an applicant has not worked as livestock worker during the past twelve (12) months, up to two (2) references will be required. A minimum of six months experience as a livestock worker is required.

On December 2, 1994 the CO notified the Employer that its application had been accepted and advised the Employer of the requirements which were necessary for it to be granted.

On January 11, 1995 Employer wrote to the CO notifying him of its efforts to recruit U.S. workers for the job. The letter and attachments indicated that these efforts were unsuccessful. On January 11, 1995 the CO denied the application citing 20 C.F.R. 655.106(b)(1)(i) on the ground that a sufficient number of able, willing, and qualified U.S. workers have been identified as being available at the time and place needed to fill all of the job opportunities for which certification has been requested.

### Timeliness of Request For Review

The CO denied the application in a letter dated January 11, 1995. Employer filed its request for administrative judicial review on January 27, 1995. 20 C.F.R. §655.110(a) provides that a request for review shall be made within seven calendar days of the notice of denial.

Employer contends that the request for review should be deemed timely filed for the reasons which follow: (1) While the notice is dated January 11, 1995, it was not served on Employer until January 19, 1995; (2) The portion of the notice dealing with appeal rights was erroneous. It did not refer to a denial of the application but referred to "the nonacceptance of the application."; (3) Efforts to contact the CO on January 23, 1995 to request a new determination (based on the erroneous notice of appeal rights) were unsuccessful because the CO was in Washington, D.C. The CO returned the telephone call the next day and advised Counsel for the Employer that he would look into the matter when he returned from Washington on January 30th; (4) On January 23, 1995 Employer made a telephone request to the Regional Administrator's Office requesting a new determination and on January 24th submitted that request in writing; (5) On January 25th and 26th Employer's counsel spoke with attorneys in the Solicitor's Office

about the matter and on January 26th was advised that a request for a new determination was not applicable to this case; and (6) The request for review was filed on January 27, 1995.

The regulations provide that where an application for temporary alien agricultural labor certification is denied the employer shall be notified "by means reasonably calculated to assure next day delivery." 20 C.F.R. §655.106(d). The record indicates that the notice of denial was sent via Federal Express on January 18, 1995. (AF 3.) The statement of appeal rights in the notice was erroneous and misleading. It referred to the nonacceptance of the application rather than a denial. Employer and its counsel reasonably relied on the erroneous statement of appeal rights. This is evidenced by the request for a new determination filed on January 24th. This filing was within seven days after the notice was actually sent. The request for judicial review was filed one day after Employer was advised that this was the appropriate remedy. Under the particular facts of this case, I find that the request for administrative judicial review was timely filed. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 537-39 (1970); J. Michael & Patricia Solas, 88-INA-56 (Apr. 6, 1989) (en banc). The request for review will be considered on its merits.

#### Discussion

The request for review is contained in a letter by counsel for the Employer. The letter purports to state facts which were not before the CO. It is well-settled that assertions of an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. Moda Lines, Inc., 90-INA-424 (Dec. 11, 1991); Mr. and Mrs. Elias Ruiz, 90-INA-446 (Dec. 9, 1991); Personnel Services, Inc., 90-INA-43 (Dec. 12, 1990). Furthermore, the regulations preclude the receipt of additional evidence on review. 20 C.F.R. 655.112(a). Therefore, I will not consider any asserted facts which were not in the record before the CO.

As indicated, the CO determined that an able, willing and qualified U.S. worker was available to fill the job opportunity for which certification was requested and that there were not legal job related reasons for rejecting the U.S. worker. (AF 1.) The worker was identified as Lynette Garrison. Employer challenges the determination on the grounds that: (1) Garrison was not qualified for the position; and (2) Garrison had accepted other employment and was not available to fill the position.

Employer is J.P. Werner & Sons, Inc. At all times here involved, it was represented by its agent Mountain Plains Agricultural Services, (MPAS), whose executive director, Oralia G. Mercado, was the person who dealt with the certification application.

On January 11, 1995 Mercado sent a letter to the CO which detailed the results of Employer's recruitment efforts. (AF 6.) With regard to Garrison, the letter stated that: The applicant's experience was questionable in that she had worked with a herd of approximate 100 cows. The applicant stated that she might not be able to completely perform the duties of the position because of the number of first-time-pregnancy heifers which would be in her full care. "First-timers" require special skills, knowledge and care which require the worker to deliver calves with an intensity that she is not accustomed. Because she expressed doubt, MPAS did not refer her to the employer. (AF 7.)

After receipt of Mercado's January 11, letter, the CO contacted the Douglas, Wyoming Job Service Center, which had referred Garrison to MPAS. The CO was advised by Betty Wilson of the Job Service Center that she felt Garrison was qualified for the job. (AF 4.) The CO contacted Garrison who stated that she was qualified for the job and could have done it but was discouraged by Mercado who told her she probably couldn't do it and it would be difficult for her because she was a woman and would have to sleep in the bunkhouse. (AF 4.) It is unlawful to reject an otherwise qualified applicant for employment on the basis of sex. 42 U.S.C. §2000e-2; Therapy Connection, 93-INA-129 (June 30, 1994).

Finally, Employer contends that certification should be granted because Garrison is working elsewhere and not available to fill the job. The record indicates that Garrison would have taken the job if it had been offered at the time she was interviewed by Mercado but that she is now working elsewhere. (AF 4.) The fact that an applicant is currently unavailable does not cure a violation of rejecting the applicant for not legal job related reasons. 20 C.F.R. 655.106(b)(1)(i); Bruce A. Fjeld, 88-INA-333 (May 26, 1989) (en banc); Suniland Music Shoppes, 88-INA-93 (Mar. 20, 1989) (en banc); Flushing Auto Service Corp., 93-INA-204 (June 5, 1994).

I find that Employer has failed to carry its burden of proof that Garrison was not able, willing, qualified or eligible because of lawful job related reasons. 20 C.F.R. §655.106(i).

#### Order

The Certifying Officer's denial of temporary labor certification for agricultural employment is affirmed.

DONALD B. JARVIS  
Administrative Law Judge

San Francisco, CA

DBJ/bg