

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



Issue Date: 25 February 2005

CASE NUMBERS: 2005-TLC-00003, 2005-TLC-00004

ETA CASE NUMBERS: R6-04336-24665, R6-04336-24667

In the Matter of:

GLOBAL HORIZONS (ZIRKLE FARMS) and
GLOBAL HORIZONS (GREEN ACRE FARM),
Employer,

and

JOSE GUADALUPE PEREZ-FARIAS and
HERMAN C. SANTIAGO
Petitioners for Intervention.

Appearances:

Natalie K. Brouwer, Esq.
Attorney for Employer Global Horizons

Vincent C. Costantino
Senior Trial Attorney for Employment & Training Administration

Rachel da Silva, Esq.
Attorney for the Petitioners for Intervention

DECISION AND ORDER

This case arises under the temporary agricultural labor or services provisions of the Immigration and Nationality Act, 8 U.S.C. §1101(a)(15)(H)(ii)(a), and its implementing regulations set forth at 20 C.F.R. Part 655.

On November 24, 2004, Employer filed applications for ninety H-2A temporary workers from January 10, 2005 to November 10, 2005 to work at Green Acre Farm and for 300 workers from January 10, 2005 to November 15, 2005 to work at Zirkle Fruit Company. On December 6, 2004, the Certifying Officer ("CO") for the Employment Training Administration ("ETA") refused to accept the applications for consideration. In both cases, Employer was given an opportunity to submit a modified application. Employer submitted modified applications on

December 13, 2004. On December 20, 2004, the CO again refused to accept the applications and on December 27, 2004, Employer again submitted a modified application.

On January 3, 2005, the CO denied Employer's application for temporary alien labor certification. In his denial letters, the CO stated that Employer's application was accepted on November 29, 2004. He then denied certification on two grounds: 1) the two motels Employer proposed as housing for the workers did not meet applicable state standards and 2) Employer's state farm contractor license expired on December 31, 2004 and Employer's application for renewal was denied by the Washington State Department of Labor and Industries.

On January 10, 2005, Employer requested a *de novo* hearing. On February 9, 2005, Employer withdrew its request for a live hearing and agreed to an adjudication based solely on the written record.¹

On January 20, 2005, Jose Guadalupe Perez-Farias and Herman C. Santiago ("Petitioners"), representing a class of similarly situated individuals, filed a petition to intervene in this matter.

On review of the record and the parties' arguments, the CO's rejection of Employer's applications is **HEREBY AFFIRMED**. Because this proceeding does not require me to grant or deny certification, Petitioner's motion for intervention is **HEREBY DENIED**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The CO's Denial of Certification is Properly Construed as a Refusal to Accept Employer's Application

The INA allows employers to hire temporary alien agricultural workers under the H-2A visa program. An employer seeking to employ foreign agricultural labor must apply to the Employment and Training Administration for certification that:

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188. The regulations implementing the INA's H2-A provisions require the employer to submit a copy of its labor certification application to the local office of the state employment service agency. 20 C.F.R. § 655.100. The application must include a copy of the job offer describing the terms and conditions of employment.

¹ During a telephone conference on January 24, 2005, the Department of Labor and the Intervenors agreed to an adjudication on the written record.

Once the application is filed with the ETA, the CO reviews the application. The CO must notify the employer of any deficiencies which render the application “not acceptable for consideration” and must give the employer an opportunity to submit an amended application. 20 C.F.R. § 655.101(c)(2). If the CO determines that the application meets the requirements of 20 C.F.R. §§ 655.101-655.103, he accepts the application for consideration. 20 C.F.R. § 655.105(a). At this point in the process, the employer must carry out the assurances contained in Section 655.103 with respect to the recruitment of U.S. workers. If the CO determines that the employer has not satisfied the requirements for recruitment of U.S. workers, he must deny the labor certification application. 20 C.F.R. § 655.105(d).

Given the procedural posture of the case, I construe the CO’s “denial” as a third refusal to accept Employer’s applications. The CO twice informed Employer that its applications were not accepted for consideration: first on December 6, 2005 and again on December 20, 2005. He then denied certification of the applications on January 3, 2005. In the denial letter, the CO stated that Employer’s applications had been accepted on November 29, 2004. This is clearly inaccurate since the CO’s refusals to accept the applications were issued subsequent to November 29, 2004. Moreover, the regulations explicitly distinguish refusal to accept an application for consideration and denial of certification, and contemplate that the former should precede the latter.

Under the regulations, an application is only accepted once the CO determines that the application meets the requirements of Sections 655.101-655.103. Once the application is accepted, the recruitment phase of the certification process begins. If the CO determines that the employer has not complied with the regulations governing recruitment of U.S. workers and adverse effect, the CO must deny certification. Thus, denial of certification occurs only after the recruitment phase of an application has been completed.

Since Employer’s application was never accepted by the CO, Employer never entered the recruitment phase of the application process. Therefore, the CO’s action on January 3, 2005 is properly construed as a refusal to accept Employer’s applications.

II. The Motion to Intervene is Denied

Under 29 C.F.R. § 18.10(b), a petitioner has the right to participate as a party to a proceeding before the Office of Administrative Law Judges if the administrative law judge determines that: 1) the final decision could directly and adversely affect the person seeking intervention or the class he represents; and 2) the petitioner will contribute materially to the disposition of the proceedings and his interest is not adequately represented by existing parties.

Intervenors Jose Guadalupe Perez-Farias and Herman Santiago are agricultural workers who have worked in the Yakima Valley for many years. They allege that they were hired by Employer but were later displaced by H-2A workers. Intervenors wish to intervene in the present matter in order to submit evidence of Employer’s alleged violations of law during past contract periods. They assert that this evidence is relevant to the present proceeding because it shows a habit or standard operating procedure that Employer has used throughout its H2-A activities. They contend that allowing Employer to operate in Washington will adversely affect the wages and working conditions of U.S. workers.

The “final decision in this matter” is whether to accept or refuse Employer’s applications for certification; this matter has not yet reached the recruitment phase of the certification process. The issue in this appeal is not whether to grant certification and allow Employer to operate in Washington, but rather whether to even accept Employer’s application in the first place. Petitioners will not be adversely affected should the application be accepted for consideration; any conceivable adverse impact on Petitioners could only be the result of a grant of certification allowing Employer to hire alien agricultural workers. As we have not yet reached that stage of the certification process, Petitioners have no interest in this matter, nor would their participation materially contribute to the proceeding. Accordingly, the motion to intervene is denied.

III. The CO’s Refusal to Accept Employer’s Application is Affirmed

As discussed above, the H-2A regulations require that an employer recruit domestic workers through the employment service (“ES”) system and file a job offer with the state ES office. 20 C.F.R. § 655.101(b)(1) and c(4). Under Section 655.101(b)(1), the employer’s job offer must comply with the requirements of 20 C.F.R. § 655.102 and 20 C.F.R. § 653.501. Section 653.501 mandates that an employer’s job offer contain “[a]ssurances that the working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws.” 20 C.F.R. § 653.501(d)(2)(vii). In addition, the regulations require the employer to certify that “[d]uring the period for which the temporary alien agricultural labor certification is granted, the employer shall comply with applicable federal, State, and local employment-related laws.” 20 C.F.R. § 655.103(b).

Washington’s requirement that an agricultural employer possess a valid Farm Contractor License is an “applicable state law or regulation” with which Employer must comply. As such, Employer was obliged to provide assurances in its job offer that it had a valid license. Employer’s license expired on December 31, 2004. A December 30, 2004 letter from the Washington State Department of Labor and Industries, received by the CO on January 3, 2005, stated that Employer was not licensed to operate as a farm labor contractor in the state of Washington. It is of no consequence that Employer was subsequently granted a provisional license. On January 3, 2005, when the CO issued his determination, Employer did not have a valid license. Therefore, it was proper for the CO to refuse to accept Employer’s application on that same date.

Although I do not reach the housing issue, I note that, at first blush, Employer’s argument that state regulations do not apply to public accommodations is clearly incorrect. Section 655.102 mandates that an employer’s job offer contain a provision for housing workers. Although an employer may choose to house workers in public accommodations, such housing must meet state standards if no local standards apply. 20 C.F.R. § 655.102(b)(1)(iii). In this case, the Washington State Workforce and the Washington State Department of Health determined that the two motels Employer proposes to use as housing do not meet state standards for housing temporary workers. Therefore, it appears that Employer has not complied with the requirements of Section 655.102(b)(1)(iii) and the CO’s refusal to accept Employer’s application appears to have been proper on this ground as well.

In accordance with the reasons set forth above, the non-acceptance of the temporary alien agricultural labor certification is hereby **AFFIRMED**.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge