

**U.S. Department of Labor**

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**Issue Date: 25 May 2006**

**CASE NO. : 2006-TLC-8**

**IN THE MATTER OF:**

**GUADALUPE SAN MIGUEL FARMS**

**Employer**

BEFORE: LEE J. ROMERO, JR.  
Administrative Law Judge

**FINAL DECISION AND ORDER**

This is an expedited administrative review requested on May 10, 2006, by Guadalupe San Miguel Farms (herein Employer) of the decision by a U.S. Department of Labor Certifying Officer (herein CO) denying Employer's application for employment of H-2A temporary alien agricultural workers.

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) (herein the Act), and its implementing regulations codified at 20 C.F.R. Part 655 (herein the Regulations).

This Decision and Order is based on the written record, consisting of the Employment and Training Administrative Appeal File (herein AF) and the written submissions of the parties. See 20 C.F.R. § 655.112(a)(2). On May 17, 2006, this Office received the AF and on May 18, 2006, a telephonic conference call was conducted with the parties during which the accelerated regulatory time constraints for briefing and issuing a decision were waived and written arguments were scheduled to be filed by close of business May 22, 2006.

## STATEMENT OF THE CASE

### Procedural History

On February 27, 2006, Employer filed its H-2A Application For Alien Employment Certification (ETA Case No. C-06058-01946) with the Employment and Training Administration, Division of Foreign Labor Certification, Chicago National Processing Center (AF, pages 109-115). In its application, Employer sought to fill fourteen (14) positions at a work site in Mercedes, Texas described as "Farmworker," pursuant to the definition in the Dictionary of Occupational Titles (herein DOT), Occupational Code 402.663-010 and Occupational Title "Farmworker Vegetable I." (AF, pp. 106, 109, Boxes 9 and 18). The anticipated period of employment is May 29, 2006 to March 29, 2007. (AF, p. 110). The application did not require any minimum education, training or experience for a worker to satisfactorily perform the job duties. (AF, p. 109, Box 14). The application described the job duties as:

Drives and operates farm machinery to plant, cultivate, and harvest vegetables, such as peas, lettuce, tomatoes, and cabbage: Attaches farm implements, such as plow, planter, fertilizer applicator, and harvester, to tractor and drives tractor in fields to prepare soil and plant, fertilize, and harvest crops. Thins, hoes, and weeds row crops, using hand implements. Irrigates land to provide sufficient moisture for crop growth, using irrigation method appropriate to crop or locality. May adjust and maintain farm machinery.

(AF, p. 109, Box 13).

On February 28, 2006, the CO notified Employer that its application for employment of temporary alien agricultural labor had been accepted for consideration. (AF, pp. 106-108). In the notification letter, the CO advised Employer that it must comply, inter alia, with the following requirements: (1) carry out a positive recruitment plan; (2) cooperate with the Workforce system in recruiting workers identified through clearance of your job order throughout Texas and the nation; (3) interview all workers referred by the State Workforce Agency; any U.S. worker who has applied to Employer, but whom Employer rejects for other than lawful, job-related reasons or with whom

Employer has not provided a lawful, job-related reason for rejection, will be counted as available; and (4) document all referrals, interviews, and results, and, if a worker is not hired, state the reason(s) not later than April 27, 2006. (AF, pp. 106-107).

On May 4, 2006, the CO determined that a sufficient number of able, willing and qualified U.S. workers had been identified as being available at the time and place needed to fill all job opportunities for which certification had been requested and denied certification for the fourteen job opportunities. The CO further advised Employer it could not be determined or certified that the employment of H-2A temporary alien agricultural workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. (AF, pp. 6-7).

Specifically, the denial further states that on May 1, 2006, the Texas Workforce Commission (herein TWC) referred sixteen (16) qualified applicants to Employer.<sup>1</sup> Despite the qualifications and interest of the 16 applicants, Employer did not hire them. On May 4, 2006, the TWC reported that two additional qualified and interested applicants were interviewed by Employer, with TWC personnel in attendance, and Employer declined to hire the two workers. Consequently, pursuant to 20 C.F.R. § 655.106(b)(1)(i), the CO denied the certification of the 14 job opportunities.

### **The Request For Administrative Review**

On May 10, 2006, Employer filed its Request For Expedited Administrative Judicial Review with the Office of Administrative Law Judges pursuant to 20 C.F.R. §§ 655.104(c) and 655.112(a). (AF, pp. 3-5). Employer contends it complied with the recruitment assurances pursuant to 20 C.F.R. § 655.106(b)(1) and the adverse effect criteria set forth at 20 C.F.R. § 655.102. Employer represents it interviewed referrals and hired two U.S. workers who were qualified and willing to work.

It is the contention of the Employer that the U.S. workers must meet the qualifications required of the job described in the ETA-750 application. Employer further asserts that it

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<sup>1</sup> The 16 "qualified applicants" referred to Employer by TWC were: Esmeralda Morales; Jose Ruiz; Elizabeth Sierra; Yadira Zuniga; Jesus Zuniga; Jose Zuniga; Francisco Chavez; Paulino Arevalo; Laura Arevalo; Eliezar Hernandez; Juan Zuniga; Jose Cortes; Angelina Cortes; Ricardo Cortes; Catalina Cortes; and Armando Vasquez. (AF, pp. 20, 27, 29-63).

informed the U.S. Department of Labor (herein DOL) of its efforts to hire applicants by a letter dated April 27, 2006, which the parties stipulated constitutes Exhibit A referenced in Employer's Request for Administrative Review. (AF, pp. 71-72).

Employer inexplicably indicates it did not interview the list of 16 referrals "on the letter dated May 5, 2006" (sic) issued by the TWC to DOL. Employer further indicates it did not hire applicants Guadalupe Alejos and Sara Alejos because they "did not know how to operate farm machinery, attach farm implements, use irrigation equipment and could not maintain farm machinery." In sum, Employer announced it was willing to "hire a certain amount of U.S. worker (sic) and H2A workers."

## **DISCUSSION**

### **The Act and Regulations**

The Immigration and Nationality Act's H-2A program is governed by 8 U.S.C. § 1101(a)(H)(ii)(a) and 20 C.F.R. § 655.90, et seq., and allows an employer to hire temporary alien agricultural workers if DOL determines that there are insufficient qualified, eligible U.S. workers who will be available at the time and place needed to perform the identified work, and that the wages and other terms and conditions under which the alien workers will be employed will not adversely affect U.S. workers similarly situated. 8 U.S.C § 1188; 20 C.F.R. § 655.100(a)(4)(ii).

Once the CO accepts the application for consideration, an employer is required to carry out the assurances contained in 20 C.F.R. § 655.103(d) to engage in positive recruitment of U.S. workers.

If the CO determines that the temporary alien agricultural labor certification should be denied, as here, the employer may request an administrative review before an administrative law judge. The review process does not permit the administrative law judge to remand the case or receive any additional evidence. 20 C.F.R. § 655.112(a)(1). The decision of the administrative law judge shall then be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application. 20 C.F.R. § 655.112(a)(2).

The burden of proof in the labor certification process remains with the Employer. Garber Farms, Case No. 2001-TLC-5

(ALJ May 30, 2001); Giaquinto Family Restaurant, Case No. 1996-INA-64 (May 15, 1997); Marsh Edelman, Case No. 1994-INA-537 (Mar. 1, 1996). If an employer asserts, as here, that any worker who has been referred is not an eligible worker or is not able, willing or qualified for the job opportunity for which the employer has requested H-2A workers, the burden of proof is on the employer to establish that the individual referred is not able, willing, qualified or eligible because of lawful job-related reasons. 20 C.F.R. § 655.106(h)(2)(i).

Prefatorily, it is noted that the request for administrative review is contained in a letter by Counsel for Employer. Any assertion of purported facts by Counsel which were not before the CO and are not supported by the AF do not constitute evidence. See Moda Lines, Inc., Case No. 1990-INA-424 (Dec. 11, 1991); Personnel Services, Inc., Case No. 1990-INA-43 (Dec. 12, 1990). Therefore, I will not consider any asserted facts which were not in the record before the CO.

Supporting briefs were timely filed by Counsel for Employer and the CO.

### **Employer's Contentions**

In brief, Employer argues that it complied with the filing of the application, housing inspection, workers' compensation insurance, advertising the job posting and positive recruitment. Employer asserts that during the posting it "received many phone calls inquiring about the job posting, but very few applicants were seen by or interviewed by the employer." Employer contends that all of the workers named in the denial letter, with the exception of two, did not have the job qualifications stated in the offer or application in that they had no qualifications to operate farm machinery, use irrigation equipment and maintain farm machinery.

Employer further contends it interviewed referrals and hired two U.S. workers who were qualified and ready to start to work.<sup>2</sup> It is argued that Employer or its agent "made several attempts to contact the referrals," but in one instance the telephone number provided to Employer was wrong or different. Of the two applicants interviewed telephonically by Employer,

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<sup>2</sup> According to Employer's representative, Robert Hernandez, whose credentials are not of record, was hired as a tractor driver for the farm on or before April 5, 2006. (AF, p. 90). During the week before April 28, 2006, Employer hired Noe Leijar, whose resume is not of record, as a "labor worker." (AF, p. 24).

Mr. and Mrs. Alejos, Employer avers neither was qualified. Thus, Employer contends it determined "some [without any further specificity] of the referrals were not qualified for this position," and the certification should be granted.

### **The Contentions of the CO**

Counsel for the CO argues certification was properly denied since the record demonstrates Employer did not fulfill its obligation under the Act in that it did not comply with the positive recruitment requirements of the regulations, did not actively recruit U.S. workers and did not hire qualified and available U.S. workers.

### **Recruitment**

The central issue presented is whether Employer engaged in positive recruitment. A review of the Appeal File clearly demonstrates that Employer's recruitment effort was totally insufficient and inadequate and Employer failed to meet its evidentiary and regulatory burden.

As Counsel for the CO correctly notes the statutory scheme seeks to promote and balance two competing interests "to assure [American farmers] an adequate labor force on the one hand and to protect the jobs of the citizens on the other." Flecha v. Quiros, 567 F.2d 1154, 1156 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978). Furthermore, it is the clear desire of the INA "to protect domestic workers," not to protect employers or alien workers. Elton Orchards v. Brennan, 50 F.2d 493, 499 (1st Cir 1974). This policy permeates the immigration statutes that domestic workers rather than aliens are to be employed wherever possible. Salazar Calderon v. Presido Valley Farmers Association, 765 F.2d 1334, 1341 (5th Cir. 1986), cert. denied, 475 U.S. 1035 (1986).

In the certification process, DOL provides overall direction to the employer and the appropriate State agency in the recruitment of U.S. workers based on the application job offer. 20 C.F.R. §§ 655.105(b) and 655.204(b). Pursuant to the CO's acceptance letter, Employer was informed it must actively recruit U.S. workers and hire them if they are qualified and available for the job positions and, failing to do so, would result in a denial of the certification.

Notwithstanding the Employer's compliance with other regulatory provisions and requirements, it must engage in

positive recruitment of U.S. workers which requires that such recruitment be conducted in good faith. Garber Farms, supra @ 3; Peri & Sons Farms, Inc., Case No. 1994-TLC-6 @ 4 (ALJ Aug. 15, 1994).

In brief, Counsel for the CO does not suggest that Employer engaged in bad faith, but rather demonstrated a lack of understanding with the H-2A process. Counsel for Employer acknowledges in brief that this is Employer's first participation in the H-2A program. Nevertheless, the regulatory requirements mandated by the certification process must be adhered to by employers.

The CO avers that on March 16, 2006, Employer expressed a desire to bring two families from Mexico to work on his farm and to utilize U.S. workers to perform other work at other locations not set forth in the instant application. Employer was informed that it would be inappropriate to use U.S. workers in such a manner which would not satisfy the positive recruitment requirement of the H-2A job opportunity. The CO further argues Employer, nevertheless, did "exactly what [it] sought to do." (AF, p. 1). Employer subsequently offered U.S. workers, in response to their referral for positions in the job order or application, other jobs as packing shed work in Pharr, Texas for onion season or detasseling corn in the Rio Grande Valley. (AF, pp. 16, 21, 77).

The Appeal File reveals Employer did not actively cooperate with the TWC in recruiting efforts for U.S. workers. On March 20, 2006, applicant Baltazar Morales waited two hours for an interview appointment with Employer, who never showed. (AF, p. 17). In April 2006, seven applicants, deemed qualified and available by TWC, were referred for interview, but informed by Employer or its representative that all workers had been hired and were not offered interviews or jobs. (AF, pp. 27, 56, 78, 95-97).

Although on May 3, 2006, Employer was requested to furnish the names of individuals hired, the Appeal File is devoid of any such list.<sup>3</sup> (AF, p. 9). On May 5, 2006, 16 applicants were scheduled for interviews with Employer which were apparently never conducted. (AF, p. 10). Moreover, Employer's representative disclosed that Employer rejected workers referred for the May 29, 2006 job order because they were not available

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<sup>3</sup> Employer's representative provided the names of two individuals hired which does not fulfill the requested 14 positions advertised in the job order.

to work in April 2006, which clearly does not correlate with the job order dates. (AF, p. 81).

Furthermore, Employer's recruitment report, which the parties stipulated and agreed constitutes pages 70-72 of the Appeal File, is also deficient in that it provides little or no detail regarding Employer's good faith effort to recruit U.S. workers. (See also AF, pp. 82-83). Contrary to the directive from the CO to document all referrals, interviews, and results, and if a worker is not hired to state the reasons therefor, the recruitment efforts were at best ineffective and perfunctory.

Employer's documented efforts on April 24, 2006, reflect the name of the individual referred and the lack of success in contacting the worker annotated with such comments as "no answer," "busy," "not home," "wants to start in May," and "already working." (AF, pp. 82-83). On April 27, 2006, Employer again attempted telephonic contact with applicants similarly annotating efforts with comments "not home," "no answer," and "busy." (AF, pp. 71-72).

The Appeal File is devoid of any further action taken by Employer to contact workers; no information was provided about whether messages were left with a person who informed that the applicant was not at home; whether alternative means of communication were attempted, such as correspondence; or providing information about whether the applicant will be working during the time of the job opportunity available through the job order. Inexplicably, Employer or its representative spoke with five applicants on both occasions who were informed to contact "Mr. San Miguel to set up appt." or "set up to call San Miguel Farms" rather than scheduling an interview or interviewing the applicant. Employer's efforts gathered a dearth of information upon which it based its actions that is considered completely deficient. See Yaron Development Co., Inc., Case No. 1989-INA-178 @ 2-3 (ALJ April 19, 1991).

Employer's efforts are the antithesis of positive recruitment envisioned by the regulations. Merely indicating "no answer" or "not home" or leaving a message are insufficient to meet Employer's burden. See Bruce A. Fjeld, Case No. 1988-INA-333 @ 3 (May 26, 1989); Dove Homes, Inc., Case No. 1987-INA-680 @ 2-3 (May 25, 1988). A third party conversation has been deemed insufficient to demonstrate a reasonable, good faith attempt by an employer to consider all qualified and available U.S. workers. Bay Area Women's Resource Center, Case No. 1988-INA-379 @ 3 (May 26, 1989).

Other than the mere assertion that the applicants were not all qualified, Employer has not affirmatively established that it made all reasonable attempts to contact the applicants. See Creative Cabinet & Store Fixture Co., Case No. 1989-INA-181 @ 3-4 ((ALJ Jan. 24, 1990). Employer acknowledges, without further explanation, that it did not interview the 16 applicants for whom appointments were established. (AF, p. 4). In brief, Employer avers that with the exception of two applicants who were hired, "**all** of the workers . . . did not have the qualifications for the job offer" and in reviewing their resumes, "**most** of the workers had no qualifications to operate farm machinery, use irrigation equipment and maintain farm machinery."

Employer failed to document which applicants were not qualified, the reasons why they were not qualified, and consequently did not establish which applicants were not able, willing, qualified or eligible because of lawful job-related reasons. Given the paucity of information available in the record regarding the two individuals hired by Employer, it cannot be determined whether they were in fact qualified for the positions offered in the job order and for this reason the certification will not be reduced by such hires.

Moreover, a cursory review of the resumes of the 16 applicants submitted by TWC to Employer reveals, at a minimum, the following applicants had experience, inter alia, as machinery mechanics and/or tractor operators: Jose L. Ruiz; Jesus J. Zuniga; Francisco Chavez; Paulino Arevalo; Laura Arevalo; Juan P. Zuniga; and Ricardo Cortes. To the extent an ambiguity or question existed regarding the applicant's qualifications, it was incumbent upon the Employer to further investigate the applicant's credentials by interview or contact, which Employer failed to do in the instant matter. See Nancy, Ltd., Case No. 1988-INA-358 (April 27, 1989).

Lastly, to the extent Employer contends the applicants lacked the experience necessary to perform the jobs offered, it is noted that the application did not expressly require any experience. The evidence establishes that no education, training or experience was required to perform the job duties set forth in the application. (AF, pp. 109-113). It would certainly be improper for Employer to reject any applicants for not having experience where none was required.

Consequently, since Employer has offered no substantial evidence to contradict the conclusions reached by the CO about the recruitment process, the CO's finding that Employer failed to engage in good faith positive recruitment and the denial of certification is affirmed as Employer has not establish that the applicants were not able, willing, qualified or eligible because of lawful job-related reasons.

**ORDER**

Based on the foregoing, I find and conclude that the CO's determination to deny the temporary alien labor certification in the instant case should be **AFFIRMED**.

**ORDERED** this 25th day of May, 2006, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge