

U.S. Department of Labor

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Issue Date: 02 May 2008

OALJ Case No.: 2008-TLC-00025

ETA Case No.: A-08098-06605

In the Matter of:

CAROL PAUL

Respondent

Certifying Officer: Renata Jones Adjibodou
Atlanta Processing Center

Appearances: Tito Gonzales
Agent for the Respondent

Harry Sheinfeld, Esquire
Counsel for Litigation
For the U.S. Department of Labor

BEFORE: JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

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), and its implementing regulations, found at 20 C.F.R. Part 655, Subpart B.¹ On April 15, 2008 Carol Paul (“Respondent”) requested a *de novo* hearing before an administrative law judge on the non-acceptance for processing of its H-2A application for temporary alien labor certification, pursuant to 20 C.F.R. § 655.112(b). The Employment and Training Administration (“ETA”)

¹ Unless otherwise noted, all regulations cited in this decision are in Title 20.

case file was received on April 17, 2008. Pursuant to 20 C.F.R. § 655.112(b)(ii) a telephone conference hearing was scheduled for and held on April 25, 2008, where the parties had full opportunity to present evidence and argument. This Decision and Order is based upon an analysis of the record, the arguments of the parties, and the applicable law and regulations.

Statement of the Case

Respondent has appealed the determination of the Certifying Officer (“CO”) at the Atlanta National Processing Center (“NPC”) of the U.S. Department of Labor, Employment and Training Administration denying its request for temporary agricultural labor certification for seventy-five job opportunities.

Respondent, a Farm Labor Contractor, is in the business of providing workers to farms. Respondent filed its H-2A application with the RA on April 7, 2008. (AF 17-18). This application was for workers to harvest blue berries in the State of New Jersey and then the State of Maine. Respondent sought to fill seventy-five positions described as “Harvest Worker Fruit.” (AF 17). The commencement of the anticipated period of employment is 5/25/08, and the anticipated end of employment is 11/30/08. (AF 18).

Upon review by the CO, a number of deficiencies were noted in Respondent’s H-2A application. The CO issued a modification letter on April 14, 2008. (AF 3-6). The modification letter required Respondent, *inter alia*, to complete four categories of modifications. First, the Respondent was required to file an application with the New Jersey State Workforce Agency (“SWA”) for the work to be performed in the State of New Jersey, and file another separate application with the Maine SWA for the work to be performed in the State of Maine. (AF 5). Second, Respondent was required to amend its H-2A application to include the precise starting and ending dates of employment, the addresses of the worksite locations where the workers would be working in Maine, a copy of the lease or rental agreement for the New Jersey address where the workers will be residing, a lease or rental agreement for the Maine address that reflects the dates that the workers will be residing in the facility, documentation showing adequate transportation, and a valid Farm Labor Contractor Employee Certificate that authorizes the driver to drive for the Employer. (AF 5-6). Third, Respondent was required to amend its H-2A

application to include an address and telephone number for referrals to be sent in its referral instructions, as required by 20 C.F.R. § 655.101(a). (AF 6). Fourth, Respondent was required to provide a written agreement that specifically shows how the workers meals will be provided while working in the State of Maine as required by 20 C.F.R. § 655.102(b)(v)(4) and *ETA Handbook 398*. (AF 6).

Instead of providing the information that the CO requested, Respondent chose to appeal to the Office of Administrative Law Judges on April 15, 2008. (AF 1-2). Respondent asserts in this appeal that the CO's requested modifications are arbitrary, not necessary, and are not required by the Code of Federal Regulations or any other code. The parties were given until noon on April 23, 2008 to file and exchange with the representative of the opposing party a witness list, any briefs or position papers, and any new documentary evidence which would be offered at the hearing. (Notice of Assignment, Order Directing Prehearing Exchange, and Notice of Hearing (April 18, 2008)).

Discussion

The *ETA Handbook 398*, p. II-24-25 states:

SESA and Regional Office staff should be careful to look behind any applications filed by farm labor contractors to ensure that the contractor is operating in accordance with MSPA requirements, *and that the job opportunities for which workers are being sought are bona fide*, and all the conditions associated with them comply with applicable laws and regulations. Consultations with ESA and with known fixed-site growers in the area of intended employment are recommended for this purpose (emphasis added).

See CX L for entire Section F of the *Handbook*. In *Servicios Agricolas Mexicanos (SAMCO)*, 2003-TLC-7 (ALJ July 24, 2007), the ALJ noted that a CO must not abuse his or her discretion in reviewing and determining acceptance of H-2A applications. However, he also found for the reasons stated in the *ETA Handbook 398* that a CO has the authority to require a Farm Labor Contractor to furnish specific details and confirmation of his agreements with the fixed site employers. I concur that 20 C.F.R. Parts 653 and 655 provide a regulatory framework for the assessment of H-2A applications, and that COs have reasonable discretion to request a document

or information which has a direct bearing on the resolution of an issue concerning the application and is obtainable by reasonable efforts. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

In this case, the CO requested the Respondent to modify its application. (AF 3-6). The Respondent objected to completing the modifications and requested a *de novo* hearing. (AF 1-2). Based on a preponderance of the evidence of record, I conclude and find that the CO's requested modifications were authorized under the law, and that her determination denying the acceptance for processing of the Respondent's application requesting H-2A temporary alien labor certification for seventy-five job opportunities was correct as the Respondent was given an opportunity to modify its application and refused to do so.

1. *Requirement that a Farm Labor Contractor Apply in Each Jurisdiction when Worksites Cross Jurisdictional Boundaries*

According to the *Training and Employment Guidance Letter No. 11-07, Change 1, Section 4(A)(ii), Worksites Crossing Jurisdictional Boundaries*, a farm labor contractor that is an employer with job opportunities in two states is required to file a separate application with the SWA in each state before submitting its H-2A application to the appropriate NPC. Respondent argues that filing one application with the SWA in New Jersey was sufficient. (TR. 17). According to the Respondent, the fact that it filed an application with the SWA in New Jersey and then submitted its H-2A application to the Atlanta NPC, was not in violation of the regulations because the Atlanta NPC put the SWA in Maine on notice that employment opportunities were also available in Maine. (TR. 14). The CO argues that according to 20 C.F.R. § 655.101, applications for labor certification are to be filed with the SWA serving the area of intended employment. (TR. 9). According to the CO, the area of intended employment in this case is two different locations hundreds of miles apart. (TR. 9). Therefore there are two discreet job opportunities, and as such, the DOL requires that the Respondent file separate applications with the SWA in each state. (TR. 19). I agree with the RA on this issue. The purpose of this requirement is to inform the SWA in the area of intended employment that a job opportunity is available in their state. This requirement gives the SWA an opportunity to inform U.S. workers in their state that these job opportunities are available and allow U.S. workers to apply for the job

opportunities. A grant of temporary labor certification is based on the unavailability of able, willing, or qualified U.S. workers. The Respondent failed to inform the SWA in Maine that these job opportunities were available. Therefore, the CO could not certify that in the State of Maine there are no able, willing, and qualified U.S. workers. The fact that the Respondent filed its H-2A application with the Atlanta NPC did not place the U.S. workers in the State of Maine on notice of these job opportunities and give them an adequate opportunity to apply for these jobs.

2. Requirement of Compliance with 20 C.F.R. Parts 653 and 655

a. Fixed Site Starting and Ending Dates

According to ETA Handbook No. 398, p. II-25, a farm labor contractor seeking H-2A certification must comply with all the other requirements of the regulations at 20 C.F.R. Part 653 and 20 C.F.R. Part 655. This includes the requirement that there be precise anticipated starting and ending dates of employment. The anticipated number of days and hours per week for which work will be available must also be stated. The Respondent argues that it provided the start and ending dates of employment on its ETA Form 750 and that should have been sufficient. (TR. 27). According to the Respondent, JSM Blueberries and Costal Blueberries (“fixed situs employers”) do not want to provide specific starting and ending dates because of possible legal liabilities and the regulations do not require that they do so. (TR. 27, 29). The CO argues that regardless of the fact that the Respondent, which is a Farm Labor Contractor, placed a starting and ending date on its ETA Form 750, the actual work comes from the fixed situs employers and it is the fixed situs employers that know when the work is needed. (TR. 24). According to the CO, she needs to see in the letters provided by the fixed situs employers what their dates of need are, in order to confirm that the workers are needed for the starting and ending dates provided by the Respondent on its ETA Form 750. (TR. 25). I agree with the RA on this issue as well. The nature of temporary labor certification requires that an employer have a date when it expects – based on historic experience – workers will be needed. The DOL needs to know where alien workers granted temporary labor certifications are going to be and when. In order to substantiate the starting and ending dates provided by the Respondent on its ETA Form 750, the DOL needs

to see documentation from the fixed situs employer that says those are, in fact, the dates they think they are going to need the workers. *See Servicios Agricolas Mexicanos, supra.*

b. Vague Itineraries

According to ETA Handbook No. 398, p. II-25, a vague, unconfirmed itinerary is not acceptable for H-2A filing purposes. With respect to the first and second itineraries being inadequate because the language used was vague, the Respondent argues that it provides maps to show the approximate location of the worksite locations in Maine. (TR. 39). According to the Respondent, it provided maps because there are not any addresses for the locations of the farms in Maine. (TR. 40). The CO argues that the DOL has no idea where in the five counties in the State of Maine the workers will be working or how far apart the worksite locations are. (TR. 38). According to the CO, this issue goes to the enforcement of the regulations. (TR. 39). The DOL needs to know the workers and where the worksite locations are in order to perform the necessary follow-up and enforcement activities. I agree with the CO on this issue. A request for the addresses of the worksite locations in Maine is not an unreasonable request. The argument that there are no mechanisms or methodologies available to describe where in the five counties these worksite locations are located is not credible. Maine is the largest producer of blueberries in the world, the fixed situs employers pay property taxes, and Maine has a Department of Agriculture, Food and Rural Resources. (<http://www.maine.gov/agriculture/index.shtml>). It is probable that with a bit more initiative the Respondent could have obtained the addresses for the worksite locations in Maine.

c. Lease for the New Jersey Housing and the Maine Housing

According to 20 C.F.R. § 655.102(a)(1), an employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the workers. The Appeal File does not provide a copy of a lease or rental agreement for the New Jersey address where the workers will be residing. At the hearing the Respondent provided documentation from JSM Blueberries and testimony from Guerline Dagrín (“Witness”). The Witness asserted that the reason a copy of a lease or rental agreement for the New Jersey address was not provided is because the fixed situs employer in New Jersey provides housing to the workers for free. (TR. 55). According to the Respondent, sufficient housing exists for seventy-

five workers. (TR. 51). The CO argues that if the Respondent had provided him with this information in response its modification letter, she would have accepted this explanation on this point. (TR. 60). Unfortunately, the CO added that it is now her position that at this point this explanation is too late. (TR. 61). I accept the Respondents explanation on this issue. However, this demonstrates that had the Respondent explained and completed the modifications requested by the CO before requesting this hearing, perhaps its H-2A application for temporary labor certification would have been granted.

With respect to the leasing agreement not providing the dates that the workers would be residing in the facility in Maine, Respondent argues that the documentation it submitted provided the dates. (TR. 50). The CO argues that the documentation provided by the Respondent does not provide specific dates when the workers will be residing in the facility. (TR. 49). I agree with the CO on this issue. Short of specific dates when the workers will be residing at the facility, the DOL has no way of confirming that the facility in Maine intended to house the workers during the starting and ending dates provided by the Respondent on its H-2A application.

d. Driver Authorization

According to 20 C.F.R. § 652.102(a)(5)(iii), an employer shall provide transportation between the worker's living quarters (*i.e.*, housing provided by the employer pursuant to paragraph (b)(1) of this section) and the employer's worksite without costs to the workers, and such transportation must be in accordance with applicable laws and regulations. Included in this regulation is that the driver must have a valid Farm Labor Contractor Employee Certificate with authorization to drive for the Employer. Respondent argues that it provided a copy of the driver's license for the driver, and additional documentation to show that the driver was authorized to drive for the Employer. (TR. 68). The CO argues that at the time Respondent filed its H-2A application, and at the time the modification letter was issued, their driver was not authorized to drive under MSPA. (TR. 66). A close examination of the MSAP Certificate submitted at the hearing demonstrates that the driver is still not authorized to drive for the Employer. (Exhibit A-1 attached with Respondent's April 21, 2008 documents). When the Respondent filed its H-2A application it did not have complete information on the qualifications

of the driver. (AF. 44). Although the Respondent has attempted to cure this deficiency the documentation is still inadequate. I agree with the CO on this issue.

3. Referral Telephone Number and Address

According to 20 C.F.R. § 655.101(a)(2), an agent may be authorized by the employer to file on its behalf. Where an agent is filing the H-2A application on behalf of an employer, it is reasonable for the CO to require that there be an identifiable telephone number and address for the agent and instructions provided for individuals to make referrals. Respondent argues that it included two telephone numbers, one for the Farm Labor Contractor and one for the Agent. (TR. 71). Moreover, the Respondent argues that it has been filing applications this way for years without problem. (TR. 71). The CO argues that only by looking at the letterhead at the top of the page (AF 27) would it be clear where the referrals are supposed to take place. (TR. 70). Moreover, the CO asserts that it was simply looking for some more clarification because, again, the letterhead at the top might or might not have been where the referrals were supposed to go. (TR. 70). I agree with the CO on this issue. Had the referral instructions stated that referrals should be sent to the Agent at the address listed on the top of the page, that would have been sufficient to inform individuals where to send referrals.

4. Requirement of Documentation of How Workers Will Be Fed

According to 20 C.F.R. § 655.102(b)(v)(4), when an employer does not have centralized cooking and eating facilities designed to feed workers, the employer shall provide written documentation to show that each worker will receive three meals a day or will be provided with free and convenient cooking and kitchen facilities for the workers to enable the workers to prepare their own meals. Respondent argues that it stated on the ETA Form 750 and 790 that the motel in New Jersey has adequate central cooking facilities and someone altered that statement to state that it did not. (TR. 73, 75). The Respondent further argues that the motel rooms have kitchenettes for the workers to cook their food. (TR. 76). The CO argues that in her judgment, based on long experience, in the rooms of most motels there are not convenient cooking facilities. (TR. 76). Moreover, the CO argues that although the workers will have an opportunity to buy the groceries that they will cook, there has been no evidence supplied that there are any cooking facilities in the motel rooms provided for the workers. (TR. 73). I agree with the CO on

this issue. Had the Respondent provided documentation in its response to the modification letter stating that the motel has adequate convenient cooking facilities that would have been sufficient to address this deficiency in its H-2A application.

ETA's regulatory scheme is important to the enforcement of the United States Department of Labor's temporary agricultural labor certification program. In sum, the CO informed the Respondent of the deficiencies in his H-2A application and afforded it the opportunity to modify its H-2A application. Instead of modifying its H-2A application and submitting the requested documents, the Respondent chose to challenge the CO's requested modifications as being arbitrary, not necessary, and not required by the C.F.R. The CO was fully authorized to request the modifications before accepting the Respondent's application. The CO correctly cited to the relevant and applicable regulatory violations in the C.F.R. as it pertains to temporary labor certification and therefore appropriately did not accept the Respondent's H-2A application for processing.

Based on this record, the questions raised by the CO were reasonable and consistent with her responsibilities under the regulations. None of the issues raised appeared to be beyond Respondent's ability to respond to adequately. In the future, Respondent would be well advised to work with the CO to cure any deficiencies raised and to at least consult with the CO about the questions raised. Perhaps then Respondent would not have to seek *de novo* review and instead obtain a favorable determination on his application.

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JOHN M. VITTON
Chief Administrative Law Judge