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Issue Date: 29 May 2009

CASE NO. 2009-TLC-00049

ETA CASE NO. C-009075-18731

In the Matter of:

CAL FARMS LLC and WASHINGTON FARM LABOR SOURCE, LLC,
Employer.

Appearances:

Dan Fazio, Washington State Farm Bureau Federation, for the Employer

Gary M. Buff, Associate Solicitor for Employment and Training Legal Services
Vincent C. Costantino, Senior Trial Attorney, Washington, D.C., for U.S. Department of Labor,
Employment and Training Administration

Before: Russell D. Pulver, Administrative Law Judge

DECISION AND ORDER

This matter 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) (the “INA”), and its implementing regulations, found at 20 C.F.R. § 655 (“the Regulations”), based upon a request filed on May 6, 2009 by Dan Fazio as agent of Cal Farms LLC (“Cal Farms” or “Employer”) pursuant to section 218(e) of the INA, 8 U.S.C. § 1188(e), and section 655.112(b) of the INA’s implementing regulations, 20 C.F.R. § 655.112(b), for a *de novo* hearing by the Office of Administrative Law Judges (“OALJ”) regarding the decision of the Employment and Training Administration (“ETA”) of the United States Department of Labor (“DOL”) to deny Cal Farm’s application for a temporary alien agricultural labor certification (“H-2A application”). The matter is subject to expedited hearing and decision rules. 20 C.F.R. § 655.112. This Decision and Order is based on the written record including exhibits and testimony offered at the hearing which was held before the undersigned on May 19, 2009, in Portland, Oregon. Administrative Law Judge Exhibits (“AX”) 1 and 2 were admitted into the record without objection. Employer’s Exhibit (“EX”) 1 and U.S. Department of Labor’s Exhibit (“DX”) 1 were also admitted into the record. The parties were given until May 26, 2009, within which to file post hearing briefs. On May 26, 2009, the post hearing briefs of the parties were received. The record is now closed. This decision is being rendered after having given due consideration to the entire record. Upon review of the record and the parties’ arguments, I find that DOL’s rejection of Cal Farm’s H-2A

application was consistent with the INA and its implementing regulations. Accordingly, I affirm the administrative determination. My findings of fact and conclusions of law are set forth below.

Statement of the Case

Cal Farms filed this H-2A application with the Chicago National Processing Center of the U.S. Department of Labor, Employment and Training Administration, Division of Foreign Labor Certification (“CNPC”) on March 16, 2009. In this application, Cal Farms sought to fill positions for 25 workers as Farm Worker and Labor, Crop at the Cal Farms farm sites located near Madras, Oregon for the period of May 15, 2009, through November 4, 2009. AX 2, pp. 175-184. Following review of this application, Robert E. Myers, the Certifying Officer (“CO”) to whom the RA has delegated the authority to process and approve such applications, issued an acceptance letter to Cal Farms dated March 18, 2009, which advised Cal Farms that in order to receive a final determination on its application Cal Farms must cooperate with the State Workforce Agency (“SWA”) for Oregon in order to conduct recruitment of U.S. workers for the agricultural jobs including specific requirements as to contacting former employees and placing newspaper advertisements for the positions. AX 2, 164-167. The acceptance letter also required that Cal Farms prepare and file with CNPC a written recruitment report by April 14, 2009. *Id.* at 166. Cal Farms submitted its recruitment report which was received by CNPC on April 16, 2009. *Id.* at 116-139. On April 28, 2009, the CO denied Cal Farms’ application for temporary labor certification under the H-2A temporary agricultural worker program on the basis that Cal Farms did not conduct proper recruitment and thus no determination could be made that the Employer had been unsuccessful in locating sufficient U.S. workers for the job opportunities. *Id.* at 80-83. The denial letter noted that there were at least 107 applicants for the 20 job positions referred by the SWA yet Employer’s recruitment report only addressed 68 referrals. The denial letter noted the following specific errors in Employer’s recruitment process:¹

- 1) Three applicants were improperly rejected for no manual labor experience although the Employer did not require any such experience.
- 2) Four applicants were improperly rejected for criminal convictions or charges although Employer did not require background checks or lack of criminal convictions.
- 3) Four applicants were improperly rejected for failure to produce an ID at the interview although the SWA is required to have all applicants complete an I-9 and the Employer did not require that applicants bring an ID to the interview.
- 4) One applicant was improperly interviewed by an unlicensed agent on behalf of Employer.

¹ Although the denial letter also alleged error in that Employer rejected two applicants for not being able to work on Sundays, DOL withdrew this specification of error at the hearing as the job specifications submitted by Employer specified that work on Sundays was required.

- 5) One applicant alleged that she had been a former worker for Employer but had not been contacted for employment by the Employer for the upcoming season.

In the course of the hearing, Lynette Wills, a certifying officer at the CNPC, testified that the denial letter inadvertently left out another reason for denial, that being that three additional workers were improperly rejected for “no basic understanding of the occupation.” The denial letter advised Cal Farms that it could choose to file an appeal to this office requesting either administrative review or a *de novo* hearing. This office received Cal Farms’ Request for *De Novo* Hearing and the case was assigned to the undersigned on May 8, 2009. A hearing was tentatively scheduled for May 15, 2009. Following receipt of a certified copy of the CO’s file on May 11, 2009, and upon receiving advices from Employer’s counsel that he and/or his witnesses would be unavailable for hearing on May 15, 2009, the hearing was rescheduled and heard on May 19, 2009, in Portland, Oregon. In addition to the exhibits admitted at the hearing, testimony was taken from Augustin Alvarez and Ambrose Calagno for the Employer and from Sharon Rood and Lynette Wills for DOL.

Hearing Testimony

Augustin Alvarez testified that he is the program manager for Washington Farm Labor Source LLC (“WFLS”). He testified that he became involved with the application of Cal Farms when he and Dan Fazio met with the owners and manager of Cal Farms and agreed to assist them with the application. Alvarez stated that he contacted some individuals with regard to setting up interviews with Cal Farms personnel but did not conduct any of the interviews himself although his affidavit which was submitted with the Request for Hearing seems to indicate that he did perform some screening of applicants as he indicates in the affidavit that many of the applicants he spoke with had no basic understanding of the job. AX 2 at 50. Alvarez further stated in his affidavit that interviews were set up with “any person who had a basic understanding of the job, as demonstrated in the application or on the basis of a phone call.” *Id.* at 51. Alvarez did prepare the initial recruitment report which was sent to CNPC. He indicated that the date of April 8, 2009, was selected as the cutoff date for the report even though the report was not received by the CNPC until April 16, 2009. The report indicated that 68 referrals had been received from the SWA by April 8, 2009, and that nine of these individuals had been offered a position. Alvarez indicated that the referrals received after April 8, 2009, had been interviewed and that another three or four additional workers had been offered positions.

Ambrose Calcagno testified that he is the field manager for Cal Farms which is owned by his family. He stated that his family has operated vegetable farms just outside the Portland, Oregon area for a number of years and decided a couple of years ago to expand the vegetable farming operation to Madras, Oregon in the interior of the state. Calcagno stated that Cal Farms had been in Madras for two seasons, from approximately mid-May through early November and had experienced problems in keeping a stable workforce there due to a lack of workers willing to perform the arduous tasks associated with vegetable farming including sowing, weeding and harvesting on a daily basis. He noted that other agricultural concerns in the Madras area had concentrated on field crops such as hay or grain which could be harvested and sown mechanically and did not require the same extent of manual labor as do vegetable crops. Thus, Calcagno testified that in these first two seasons in Madras he had a number of local workers

who did not remain for the entire season as they would gravitate to these other easier jobs as the growing season progressed necessitating the use of some of Cal Farms' regular workers from the Portland area which in turn led to shortages of manpower at Cal Farms' Portland operations.

Calcagno stated that he, his sister and two other Cal Farms' foremen interviewed the applicants referred by the SWA in Madras. He indicated that nine positions were offered to workers as a result of the first round of interviews as noted in the recruitment report. He further stated that additional interviews had been conducted of later referrals resulting in offering five additional workers a position of which three or four had already accepted as of the time of the hearing. Calcagno testified that he had initially refused to interview four applicants who failed to present proper identification although he indicated that he eventually gave in to the SWA's demands that he interview applicants without an ID. He stated that he was unaware as to whether the SWA had screened applicants for proper identification for the purpose of filing out I-9 Forms to document the right to work in this country. Calcagno stated that he rejected four applicants on the basis of prior criminal convictions for DUI and distribution of marijuana since he felt that such convictions showed a lack of responsibility. He explained that he needed workers who could follow instructions, particularly with regard to sanitary practices since the farming is conducted following organic practices and is subject to inspections. Calcagno also noted that he had rejected three applicants for no manual labor experience and four applicants for no basic understanding of the job. He explained that he felt these applicants were not really interested in doing this type of heavy work. He further stated that he administered a 60 pound lifting test to some applicants to test their ability to frequently lift and carry 60 pounds. Calcagno did agree that he probably should have indicated on the recruitment report in more detail that these individuals had no real desire to do the work and excused this oversight as being his first experience with the H-2A application process.

Sharon Rood testified that she is in charge of the H-2A program for the State of Oregon Foreign Labor department (SWA) and as such reviews H-2A applications and works with the employer with job applicant referrals and recruitment. She stated that the SWA is required to complete I-9's on all prospective job applicants to confirm legal status to work in this country. Thus, SWA objected to Cal Farms' refusal to interview four job applicants for failure to present ID as Cal Farms had not advised applicants that it was necessary to bring an ID to the interview. Rood presented DX 1, a list of referrals forwarded to Cal Farms as of May 15, 2009, which numbered 178. Rood stated that although Washington Farm Bureau was licensed with the federal government and the state of Washington, it did not have an Oregon license. Thus, she did not believe that they should have been involved with the actual interviewing of applicants even though they had applied for an Oregon license since as of May 18, 2009 that license had not been issued. Rood testified that only one of two houses proposed by Cal Farms to house prospective foreign workers had been inspected with the second house scheduled for inspection on May 31, 2009. Thus, Rood indicated that, at best, only eight H-2A workers could be approved pending successful completion of the additional housing inspection. Finally, Rood agreed that Cal Farms was entitled to reject applicants who refused to work on Sundays as the job advertisement did indicate that some Sunday work was required. Rood also testified that at some point in the recruitment process, she refused to communicate further with Mr. Fazio about the recruitment concerns she had as Mr. Fazio had requested the name of her supervisor in an e-mail and she thus felt that he wished no further contact with her.

Lynette Wills is a Supervising Program Analyst, also known as a Certifying Officer at the CNPC. She stated that she and Robert Myers handled H-2A applications at the CNPC. Wills testified that a CO can certify, deny or partially certify an H-2A application. She indicated that partial certification may be appropriate where the employer has hired some U.S. workers thus reducing the amount of foreign workers needed. In this case, Wills and Myers decided to deny the Cal Farms application for 20 H-2A workers because too many errors had been made in the recruitment process such that she did not feel that she could certify that no U.S. workers were available for the positions being offered by Employer. She noted that although the employer is required to offer employment to all prior hires, Cal Farms had not offered employment to at least one prior hire from the previous season. Wills further stated that applicants may be rejected only for lawful job related reasons. She noted a number of deficiencies in Cal Farms' recruitment report. First, the report only addressed referrals from the SWA through April 8, rather than through the date of the report. She stated that a lift test should not have been given to applicants because that requirement was not listed in the job order. Similarly, she faulted the rejection of three applicants for no manual labor experience since the job order specified that no experience was required. Similarly, Wills stated that Cal Farms should have interviewed the four applicants who showed up without IDs as the SWA had already filled out I-9 Forms on all applicants and the requirement to show an ID at the interview was not placed in the job order. Wills testified that three applicants were improperly rejected for "no understanding of the job" and another four for criminal convictions which she found to be not lawful job related reasons, especially since no mention of these requirements were made in the job order. She further testified that one applicant was not given proper directions to the interview and was not told that he could interview by telephone since he lived over 175 miles from the site of the interviews. Finally, she noted that at least one applicant had been improperly interviewed by Alvarez who was not licensed in Oregon. Based on the errors in recruitment, Wills found that at least 16 applicants had been denied either an interview or a position following interview based on improper reasons. Thus, Wills stated that the H-2A request of Cal Farms was denied. Wills did agree that recruitment must continue beyond the date of the initial recruitment report and that the regulations didn't really address how this continuing recruitment was to be reported.

When recalled in rebuttal, Calcagno testified that the former worker who had not been offered a position this season was rejected because the Cal Farms supervisor had belatedly reported at the start of this season that this worker had brought in friends and family to assist her in her job since she could not keep up on her own. Thus, Calcagno stated that he could not rehire such a worker.

In a post trial supplemental declaration dated May 26, 2009, Calcagno stated that he had offered employment to 17 U.S. workers and that as of May 26, 2009 only six were continuing to work.

Findings of Fact & Conclusions of Law

The Act and Regulations

The H-2A program is governed by 8 U.S.C § 1101 (a) (15) (H) (ii) (a) and 20 C.F.R § 655.90. *et. seq.* and allows an employer to hire temporary alien agricultural workers if the DOL determines that there are insufficient qualified, eligible U.S workers who will be available at the

time and place needed to perform the 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). The application must contain a copy of the job offer describing the terms and conditions of employment and be submitted to the ETA where it is reviewed by the CO. 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. Throughout the alien labor certification process, “the burden of proof ... remains with the employer to establish that the individuals referred are not able, willing, qualified, or eligible because of lawful job related reasons.” 20 C.F.R. § 655.106(h)(2)(i); *see also Keller Farms, Inc.*, 2009-TLC-00008 (ALJ, November 21, 2008).

If the CO determines that the temporary alien agricultural labor certification should be denied, as here, the employer may request a hearing *de novo* before an administrative law judge. The administrative law judge must either affirm, reverse, or modify the CO’s determination. When the employer requests a *de novo* hearing, the administrative law judge is not restricted to a determination of the legal sufficiency of the CO’s determination, but reviews the administrative record and the testimony at the hearing, and makes a *de novo* determination. The statutory scheme for this program seeks to promote and balance two competing interests - “to assure [American Farmers] an adequate work 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). The burden of proof in the labor certification process remains with the Respondents. *Garber Farms*, Case. No. 200 1-TLC-5 (ALJ May 30, 2001); *Giaquinto Family Restaurant*, Case. No. 1996-TLC-INA-64 (May 15, 1997). 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 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 for the specific reasons set out in the letter of denial. In the alternative, counsel for the CO contends that due to offers being made to 14 local workers, only 11 certifications remain at issue and that only eight certifications may be approved due to the housing approval currently for only one house for eight foreign workers.

Employer’s Contentions

Employer contends that the application should be granted because the decision of the CO denying the application was beyond the time limitations set out in the regulations for processing such applications. 20 C.F.R. § 655.109(b) requires the CO to make a determination no later than 30 days prior to the date of need stated in the application, in this case, May 15, 2009. The denial of the application was dated April 28, 2009, almost two weeks after the timeframe set out in the

regulation. No support is offered for this assertion by the Employer. Obviously, the timelines set in the regulations are meant for guidance and cannot be strictly enforced to the detriment of the American worker. Accordingly, I find that the belated decision of the CO to deny the application is not invalidated by the failure to issue such decision within the times set forth in the regulations.

In its post hearing brief, Employer concedes to several of the CO's assertions. First, Employer agrees to offer a position to the individual who traveled over 175 miles but was unable to find the interview site. Next, Employer agrees to interview the four individuals who failed to present ID's on the interview date and to count these four as locally hired workers. Of the four applicants refused due to criminal convictions, Employer notes that one of these also had no ID and will be interviewed for a position but is already accounted for in the four to be interviewed. Employer concedes to interview two of the remaining three applicants who had DUI convictions and will count these two as locally hired workers. However, Employer continues to object to hiring the applicant who had a conviction for distributing marijuana. Employer continues to object to offering positions to the three applicants it found "unable to perform manual labor," and the three applicants who could not demonstrate a "basic understanding" of the position. Employer also conceded that an additional one worker should be counted from the later referrals sent to it by the SWA after the initial recruitment report had been submitted. Employer has therefore conceded to count an additional eight local workers against its original request for 25 workers plus the nine workers offered a position.² Thus, Employer requests certification for eight workers, which also is the maximum number that counsel for the CO asserts may be granted due to the approval of housing for only eight foreign workers to date.

Recruitment

The central issue presented is whether Employer engaged in positive recruitment. 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

² The request for certification for eight workers predates by one day the supplemental declaration of Calcagno which indicates that only six of the seventeen workers offered a position remain working.

conducted in good faith. *Garber Farms, supra* at 3; *Peri & Sons Farms, Inc.*, Case No. 1994-TLC-6 at 4 (ALJ Aug. 15, 1994).

A review of the Appeal File, and the concessions made by Employer in its post hearing brief clearly demonstrate that Employer's recruitment effort was insufficient and inadequate with regard to the seven worker slots it has conceded, that is, the worker who traveled 175 miles, the four workers who appeared without ID, and the two with DUI convictions. The remaining issues involve the denial of employment to the applicant with a distribution of marijuana conviction and the three applicants "unable to perform manual labor" and the additional three workers without a "basic understanding" of the position.

Although Employer claims that the six individuals with no manual labor experience or no basic understanding of the position were "not qualified" for the positions offered, Employer also concedes that although farm experience was desirable, no experience was necessary. AX 2 at 67. An applicant is generally qualified for a job if the applicant meets the minimum requirements set out in the labor certification application. *See Bel Air Country Club*, 1988-INA-233, slip op. at 4 (BALCA Jan. 12, 1988). Here, Employer required no previous work experience. As no other qualifications were listed in the application, Employer could not lawfully reject U.S. applicants for lacking any particular training, skill, or experience. Further, a subjective reason such as lacking a "basic understanding of the job" is not an acceptable, lawful job-related reason for rejecting local applicants. *See Woodmont Properties, Inc.*, Case No. 2008-INA-00054, 2009 WL 737676 (BALCA March 17, 2009). Calcagno admitted that these reasons listed on the recruitment report should have reflected more detail. As for the applicant with a distribution of marijuana conviction, I must agree with the CO that the very general testimony of Calcagno that he needs dependable workers does not constitute a valid, job-related reason for denying this applicant employment as a minimum wage farm laborer, especially since the job requirements did not contain any notice of disqualification for any type of criminal conviction.³

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). Consequently, in the appeal of a denial of a temporary alien labor certification based on the non-availability of referred U.S. workers, the employer must establish by a preponderance of the evidence based on lawful job-related reasons that the referred individuals were not qualified, eligible, or available at the specified time and place of employment. Additionally, as noted in the ETA letter accepting the certification application, any referred U.S. worker rejected for employment for other than a legitimate job-related reason would be counted as available.

In light of the above principles, the determination whether Cal Farms has met its burden of establishing that an insufficient number of qualified U.S. workers are available for the specified period involves some arithmetic. I reduce the number of alien workers required by the

³ As for the claim regarding whether WFLS is properly licensed to assist Cal Farms in its recruitment under the H-2A application, I really am not in a position to gauge whether the application for a license by WFLS is sufficient to proceed while awaiting a decision. However, I do not see that this issue should result in any diminution of the H-2A certification request.

employer under the temporary alien labor certification by the number of U.S. workers rejected for a reason not established by the certification application who will thus be considered to have been available for hire. Based on the above assessments, I conclude the seven workers conceded by employer and the additional seven workers noted immediately above were not properly rejected by Cal Farms and thus are considered as available for employment.

CONCLUSION

Through its temporary alien labor certification, Cal Farms sought 25 workers to work as agricultural laborers in its Madras, Oregon operations. Because the required housing has only been approved for 8 workers, the maximum number possible under this certification is 8 alien workers at this time. In turn, because the 14 referred U.S. workers discussed above were improperly rejected, and are considered to be available, the number of 25 is reduced by 14 to 11. Additionally, the supplemental declaration of Calcagno establishes that despite offering 17 U.S. workers positions, only 6 of those workers continue to be available for work. Thus, the number of certifications must be further reduced by these 6 workers. Accordingly, I find Cal Farms has established the requirement for 5 alien workers due to an insufficient number of U.S. workers. Accordingly, the ETA denial of Cal Farms' application must be reversed and modified to approve a temporary alien labor certification for 5 non-U.S. workers.

ORDER

IT IS HEREBY ORDERED that the determination by the Certifying Officer in the above-captioned matter is **MODIFIED** and the denial of temporary alien labor certification is **REVERSED** as to 5 of the 25 workers for which H-2A permits were sought, and temporary alien agricultural labor certification shall be **GRANTED** to such workers, and the denial of temporary alien labor certification for the remaining workers is **AFFIRMED**.

A

Russell D. Pulver
Administrative Law Judge