



Issue Date: 21 November 2008

Case No.: **2009-TLC-00008**

In the Matter of:

KELLER FARMS, INC.,
Employer.

Before: **PAMELA LAKES WOOD**
Administrative Law Judge

DECISION AND ORDER

The instant case 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) (“the Act”) and its implementing regulations found at 20 C.F.R. Part 655, Subpart B. On October 28, 2008, Keller Farms, Inc. (“Employer”) requested review of the Department of Labor’s October 23, 2008, denial of its application for temporary alien agricultural labor (H-2A) certification for 40 positions in Missouri. In its request for review, Employer did not indicate whether it was requesting an expedited administrative review based on the legal sufficiency of the record upon which the denial was premised, or whether it was requesting a de novo hearing, at which both parties could submit evidence.

At a November 12 telephonic conference call, I advised the parties that the copy of the administrative record that was referred to this office on November 5, 2008, was uncertified and incomplete, and did not include at least one important e-mail attachment (a list of referred applicants) referenced in the record.¹ (Tr. 7, 10 – 12).² Counsel for the Department, Mr. Vincent Costantino, agreed to submit a complete certified copy of the record. The certified copy (certified by the Director of the Chicago National Processing Center) was transmitted to this office on November 13, 2008, and it was received on November 14, 2008. The new file – confusingly dated and purporting to be certified on November 3, 2008 – was not in chronological order and included documents that were not in the record at the time of the denial of certification. Because my task is to determine whether or not the record upon which the denial of certification is premised is legally sufficient to support the decision, I ruled in the November 17 Order that I

¹ The regulations require that “the OFLC [Office of Foreign Labor Certification] administrator shall send a *certified copy* of the ETA [Employment and Training Administration] case file to the Chief Administrative Law Judge by means normally assuring next-day delivery.” 20 C.F.R. § 655.112(a)(1) (emphasis added). Recently, ETA files have been transmitted via e-mails with attached PDF files.

² Citations to the telephonic conference transcript will reference “Tr.,” followed by the page on which the cited material appears. Similarly, the administrative file is cited as “AF,” followed by a relevant page number.

could not consider those documents that were not before the Employment and Training Administration (ETA) of the Department of Labor prior to the issuance of the denial. Specifically, I ruled that I could not consider the call log and “job description” questions submitted by Employer on October 29, 2008, appended to its request for review (AF 1 – 11), and that I could not consider the November 12, 2008, facsimile information submitted by the Department (AF 31 – 49).

My decision is based on the Administrative file submitted by e-mail on November 13, 2008, excluding the material appearing on pages 1 through 11 and 31 through 49.

Procedural History and Factual Background

On August 28, 2008, Employer submitted an application for H-2A temporary alien labor certification for 40 alien workers for employment as farm workers to assist in its horseradish farming operation in Missouri. Employer’s first description of the job, as recorded on its initially submitted form ETA 750, stated:

Keller Farms, Inc is involved in the production of horseradish. Horseradish production is the selection of plants, preparing the plants for transplanting, cultivating, and harvesting of the root. The harvesting trimming, grading, packaging of the product, chopping, weeding and all of the aspects in the production of horseradish. [sic] [T]he packing sheds have to be kept cool so the product will not perish, that being 45 to 55 degrees. The fields are located in Mississippi County and Scott County in Missouri. Duties will include working in the fields in all kinds of weather conditions, in and around planting and harvesting equipment. Other duties will be but not limited to cleaning machinery, weedeating, and mowing the property

Work in the field involves working in and around the harvester out in the elements. The packing shed is kept cool for the perishable product. Employees may be requeste[d] to take random drug testing at no cost to worker. Failure to comply with this request or testing positive may result in immediate termination. Again, care must be taken in the harvesting of the horseradish product.

(AF 78). The daily hours were listed as 7:00 a.m. until 4:00 p.m., for a total of 40 hours per week. *Id.*

On September 2, 2008, Certifying Officer (CO) Robert E. Myers notified Employer that its application had not been accepted for consideration and instructed employer that it could refile its application with modifications. (AF 74). Although the record does not contain a copy of the modified application, the CO notified Employer that it was accepted for processing on September 5, 2008. (AF 58). In the same correspondence, the CO directed Employer to cooperate with the applicable State Workforce Agency (“SWA”), place two advertisements in the local newspaper, and contact former United States workers to solicit their return to employment. (AF 58 – 59).

The Missouri SWA received the job order on September 2, 2008. (AF 15). On September 10 and September 17, 2008, a job advertisement ran in the *Daily Dunklin Democrat*. (AF 55). On October 1, 2008, Employer submitted its “Final Recruitment Report,”³ the body of which stated in its entirety:

[]9/15 → I, Lindsey Keller made calls to a few applicants to see if they were still interested in the position and told them about the job.

9/23 → Craig Keller (owner) and Clark Weckmann (employee) called on all (approx. 50) applicants whose I-9 and resumes we had received from MO Workforce Development [i.e. the Missouri SWA]. If they answered and were still interested in the position we scheduled an interview time.

9/30 → Applicants were to be interviewed at 6:00 am at our warehouse facility in Charleston. Two of our employees were there to conduct interviews from 5:30 to 7:30 am and not one person showed.

(AF 50). According to its referral records generated on October 7, 2008, the Missouri SWA referred 131 potential employees to Employer between September 2 and October 6, 2008. (AF 15 – 19). Of those employees, 109 were referred on or before September 22, 2008 while a total of 124 were referred on or before September 30, 2008. *Id.*

The record also contains a series of e-mails exchanged among the Employment and Training Administration (ETA), Employer, the Missouri Career Center (MCC), and the Missouri Department of Economic Development (DED), generated between September 30 and October 16, 2008. (AF 20 – 30). A representative of the Missouri Career Center wrote on September 30 that “I’ve had several people to call last week saying they were told to go [to Employer] for an interview and I got a call today from one guy who said he went out there but that no one was there.” (AF 29). When questioned about this matter, Lindsey Keller, a representative of Employer, wrote on September 30, 2008, that interviews were scheduled, two employees were present at the interview location for a period of time before and after the interview times, and that no one appeared. (AF 26). In an e-mail dated October 3, 2008, a representative of MCC wrote:

I just wanted to let you know of another US worker who had been contacted by Keller Farms and was told that the hours of would be from 6am until dark 6-7 days a week and that he would not actually be paid 10.44 an hour after taxes were withheld that it would be more like \$8 an hour. Needless to say, this worker turned down the job.

³ Employer had previously submitted two other “Final Recruitment Reports,” one on September 9 and one on September 15, 2008. (AF 54, 57). The first, submitted on September 9, indicated that Employer was running advertisements and had obtained workers compensation insurance. (AF 57). The second, filed on September 15, 2008, merely stated: “NO ONE HAS SHOWN UP FOR INTERVIEWS AND NO ONE HAS RESPONDED TO ANY ADVERTISEMENTS.” (AF 54) (emphasis in the original). Given the date on which the document was written, this apparently solely refers to the “few applicants” Ms. Lindsey Keller called on September 15, as later referenced in the October 1, 2008, Final Recruitment Report.

(AF 27). On October 14, 2008, an agent of DED wrote:

I have been trying to follow up on [the MCC] referrals. Out of 35 phone calls I have only had one person tell me they had been contacted. That person . . . was told it was 6-7 days per week, 10 hours per day; She was told there was no overtime and repeatedly told it was hard work...too hard for a woman. When she asked about mileage and/or housing, she was told she had the wrong information and there was no mileage or housing. Finally he told her, if she was interested, come to B street in Charleston and hung up with no further directions. As the applicant had no idea where that was and she felt the man had definitely been discouraging, she did not go.

(AF 20).

On October 23, 2008, ETA denied Employer's application, citing 20 C.F.R. 655.106(b)(1), which requires that the employer comply with recruitment assurances and which deems "available" any American workers who have applied to the employer, but are rejected for other than lawful job-related reasons or who have not been provided lawful job-related reasons for their rejection. (AF 12 – 13). Specifically, the denial letter stated:

The Missouri State Workforce Agency (SWA) notified the Chicago National Processing Center (CNPC) that there were 100+ referrals generated for the 40 job opportunities made available by the employer. The Final Recruitment Report from Keller Farms dated October 1, 2008 stated that approximately 50 referrals were called and none of them showed up for an interview. The SWA followed up with calls to 35 of the referrals; all but one (1) referral indicated that they had not been called back by Keller Farms. The one (1) referral contacted indicated that she had been discouraged from interviewing with the employer. She was told that the work week was 6-7 days per week at 10 hours per day (the application states 8 hours per day for 5 days per week), that the work was too difficult for a woman and was not given proper directions on how to get to the interview location. The employer showed bad faith in the recruitment of U.S. workers by (1) failing to provide lawful, job-related reasons for rejecting the U.S. workers referred, (2) failing to contact referrals and (3) discouraging at least one worker from interviewing. Further, since the employer did not comply with the written recruitment assurances listed on their Form ETA 790, this case will be denied.

(AF 13).

In an October 29, 2008, letter, Employer appealed the denial. (AF 1 – 2). The case was docketed in this office on October 30, 2008, and it was assigned to the undersigned administrative law judge on November 4, 2008. A telephonic conference call was held between the undersigned administrative law judge and the parties on November 12, 2008. A transcript of the call was recorded and transcribed for the record. Employer requested an expedited administrative review, as it "did not have any new information from what [it] sent [the

Department of Labor] for the appeal.” (Tr. 6 – 7). As noted above, the certified copy of the administrative file was received on November 14, 2008. On November 17, 2008, I issued an Order Clarifying Record and Scheduling Briefing, which provided that the parties were permitted to submit written statements of position by Wednesday, November 19, 2008. Through counsel, the Certifying Officer timely submitted a closing brief; Employer did not submit a written statement. The November 17 Order also stated that, if Employer wished to have a de novo hearing, it was to submit a written request to this office no later than November 19, 2008. No such request was made; accordingly, this matter will be decided upon administrative review of the record for legal sufficiency, pursuant to the provisions of 20 C.F.R. § 655.112(a).

Discussion

Governed by 8 U.S.C. § 1101(a)(H)(ii)(a) and 20 C.F.R. § 655.90 *et seq.*, the Act’s H-2A program 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 similarly situated U.S. workers. 8 U.S.C. § 1188; 20 C.F.R. § 655.100(a)(4)(ii). If during the DOL determination process, the application for temporary alien labor certification is denied, the employer may request an administrative review by an administrative law judge, who will then “review the record for legal sufficiency.” 20 C.F.R. § 655.112(a). During the review, the “administrative law judge shall not remand the case and shall not receive additional evidence.” 20 C.F.R. § 655.112(a)(1). Therefore, as noted above, all evidence that was submitted before this tribunal but was not before ETA at the time it made its decision will not be considered.

It is well-settled that, throughout the labor certification process, “the burden of proof in alien certification remains with the employer to establish that the individuals referred are not able, willing, qualified, or eligible because of lawful job related reasons.” *See, e.g., Garber Farms*, 2001-TLC-00006 (ALJ May 30, 2001) *citing* 20 C.F.R. § 655.106(h)(2)(i) (relating to refiling procedures). Consequently, in an appeal of a denial of temporary alien labor certification, it is the employer’s burden to establish by a preponderance of the evidence that – based on lawful, job-related reasons – the individuals referred by the SWA were not qualified, eligible, or available at the specified time and place of employment. *See, e.g., Mackenzie Farms*, 2007-TLC-00009 (ALJ Apr. 11, 2007). Further, the Employer must conduct the test of U.S. worker availability and the positive recruitment requirements in good faith. *See Mountain Plains Agricultural Svcs.*, 1995-TLC-00003 (ALJ Feb. 8, 1995) (noting that the requirements of Part 655 “include the responsibility of the [e]mployer 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”).

Based upon my review of the record for legal sufficiency, I find that the CO, on behalf of ETA, has set forth legally sufficient bases for denying Employer’s application for temporary alien labor certification. Employer did not comply with the positive recruitment requirements of the regulations, articulated different job requirements during phone interviews than those which were posted in the job announcement, and failed to document its reasons for refusing or failing to contact a large number of workers referred by the Missouri SWA. Employer failed to meet its

burden of establishing that the individuals referred to it by the Missouri SWA were not able, willing, qualified, or available.

In correspondence to Employer dated September 5, 2008, Certifying Officer (CO) Marie Gonzalez stated that the application for temporary labor certification was accepted for processing.⁴ (AF 58). She also notified Employer that, in order for the temporary labor certification to be approved, Employer was required to submit a recruitment report documenting its recruitment efforts:

Based on the results of your recruitment efforts, submit a written recruitment report containing your original signature to our office no later than 09/15/2008. The recruitment report must (a) identify each recruitment source by name, (b) state the name, address, and telephone number of each U.S. worker who applied for the job during the recruitment period, and (c) explain the lawful job-related reason(s) for not hiring each U.S. worker.

(AF 59) (emphasis omitted). Put another way, the CO notified Employer on September 5, 2008, that, in order to allow the Department to determine whether to grant the application for temporary labor certification, Employer would need to fulfill certain requirements indicating that it had engaged in an adequate good-faith test of the U.S. job market.

In her September 5, 2008, correspondence, the CO placed Employer on notice that, to evince an adequate test of the U.S. job market and in order for its application for temporary labor certification to be granted, it would be required to: specifically identify each recruitment source; identify each U.S. worker by name, address, and telephone number; and explain the lawful job-related reason(s) for not hiring any U.S. workers who applied. (AF 59). Employer was legally obliged to comply with these requirements, pursuant to 20 C.F.R. § 655.103(f), which states: “The employer shall perform the other specific recruitment and reporting activities specified in the notice from the OFLC Administrator required by § 655.105(a) of this part [i.e. the notice of acceptance of application for processing]” In its most recent “Final Recruitment Report,” dated October 1, 2008, Employer conceded that, by September 23, 2008, the Missouri SWA had referred approximately 50 applicants. (AF 50). Employer asserted that, on September 23, it called applicants and scheduled interviews for the following week on September 30, 2008. Employer further stated that no applicants arrived for the scheduled interview. There were no attachments, and the report contained no further indicia of what efforts were taken to contact the referrals, which referrals were contacted, which referrals were unavailable, or which applicants were scheduled to attend an interview.⁵ As above, Employer bears the burden of establishing by

⁴ The Certifying Officer who accepted the application for processing was Marie Gonzalez; Robert Myers was the CO who issued the denial determination. As used herein, the term “ETA” will include the COs.

⁵ Appended to its request for review and tendered to this tribunal, Employer submitted a call log indicating which referrals were called, the dates on which the calls took place, and the results of each call. This call log cannot be considered, as it is “new evidence” unavailable to ETA at the time it issued its decision. Even if it were considered, however, it does not advance Employer’s case. For several calls, the log indicates that Employer only made a single call, and hung up when it received no answer. Employer’s failure to pursue referrals beyond a single telephone call does not demonstrate a good-faith effort to recruit and constitutes a corresponding failure to prove that U.S. workers are unable, unwilling, or unavailable for employment. See generally *M.N. Auto Electric Corp.* 2000-INA-00165 (Aug. 8, 2001) (en banc) (Board of Alien Labor Certification Appeals decision concerning permanent alien labor

a preponderance of the evidence that it made a good-faith attempt to employ U.S. workers, if available; by failing to comply with the CO's specified requirements, Employer failed to meet this burden. This, in turn, constitutes a legally sufficient basis on which to deny Employer's application.

Employer has also failed to account for the other approximately 59 referrals it failed to contact on September 23. The record establishes that, on or before September 22, the Missouri SWA referred 109 applications to Employer. (AF 15 – 19). Employer's Final Recruitment Report indicates that on September 23, it had only called approximately 50 referrals. Although Employer has alleged that some referrals were sent to the wrong location (*see* Tr. 22 – 23), there is no evidence in the record that would support this claim, and the record is devoid of any explanation as to why the Employer failed to contact the remaining applicants.⁶ Such a failure constitutes an insufficient attempt to comply with the positive recruitment requirements that are an integral part of the H-2A program. *See* 20 C.F.R. § 655.100 to § 655.103.

The record also contains evidence that Employer did not engage in a good-faith effort to recruit those U.S. workers with whom it made contact. On behalf of MCC and DED, agents contacted two applicants with whom Employer spoke. The first, who was identified by name and applicant identification number, stated that Employer related job requirements that were different from those in the application for alien labor certification. (AF 27). On ETA form 750, Employer attested that the job entailed a 40-hour work week, with daily hours from 7:00 a.m. until 4:00 p.m. (AF 78). However, the first applicant was told that the hours of work were from 6:00 a.m. until dark, six to seven days a week. (AF 27). Likewise, the second applicant, also identified by name and applicant identification number, related to a DED agent that Employer told her the work was too hard for a woman, and that costs for transportation and housing would not be provided. (AF 20). This contradicts the advertisement Employer ran in the local newspaper, which stated that transportation and housing would be provided. (AF 55). When the applicant persisted and indicated her interest in an interview, Employer gave vague directions and hung up. (AF 20). Employer's reported attempts to discourage American workers are unsettling, and they represent a failure to comply with the positive recruitment requirements of the temporary alien labor certification program.

In closing, it bears repeating that this decision is merely a ruling that the record contains a legally sufficient basis for upholding the denial of the temporary alien labor certification application involved here, and my holding does not serve as an endorsement of the Department's methods and processes for developing, compiling, and certifying the administrative file in the instant case. The "legally sufficient" standard is a very low standard of review, which has been equated with the "arbitrary and capricious" standard.⁷ Despite finding that this low standard has been satisfied, I am troubled by the manner in which the record was developed and certified in this case. In addition to the omissions absent from the first iteration of the record (specifically,

certification). Moreover, the list of questions appended to the report (which mentions overtime and other terms not included in the application) corroborates allegations that the U.S. applicants were actually discouraged.

⁶ On the call log attached to Employer's October 29, 2008, request for review, Employer has listed 82 names. The log is inadmissible, but even assuming it were admitted, Employer would still have failed to account for 49 referrals (27 of which were referred by September 22, 2008).

⁷ *See, e.g., Northern Lights Cattle*, 2009-TLC-00004 (ALJ Nov. 3, 2008) (holding that the "legal sufficiency" standard of review is the same as the 'arbitrary and capricious' standard of review").

the list of referred applicants), I am especially troubled by the November 3, 2008, certification date on the “corrected” administrative file. Specifically, on November 5, 2008, this office received the first, incomplete and uncertified copy, dated November 3, 2008; I did not request the certified copy until November 12; and on November 14, this office received the certified copy, again dated November 3, 2008. The file could not have been certified on November 3, as the error was not corrected – or indeed noticed – until well after that date. Likewise, despite the stated prohibition on the introduction of new evidence, the Department included a call log and associated records, sent by facsimile on November 12, 2008, that were neither referenced in the first administrative file nor available to ETA at the time of the denial decision, yet were inexplicably interspersed with earlier records. Because of the absence of these more detailed records, ETA necessarily relied in part upon undocumented e-mails from the state agency incorporating hearsay when it made its decision. The inadequate development of the record and failure by ETA to obtain supporting documentation, coupled with its failure to accurately compile and certify the administrative record on two separate occasions, reflect serious shortcomings.

Nevertheless, the record does contain sufficient evidence to support the ETA’s denial of Employer’s application for temporary alien labor certification. In this regard, Employer failed to comply with the recruitment requirements stated in the September 5 notification of acceptance letter, failed to contact all applicants referred by the Missouri SWA, discouraged one or more of the applicants with whom contact was initiated, and failed to adequately document its recruitment efforts. Employer’s failure to document that it engaged in good faith recruitment and evidence reflecting that its recruitment efforts were not conducted in good faith together demonstrate a failure by Employer to comply with the requirements of the Act and its implementing regulations. The record therefore reflects a legally sufficient basis on which to deny the application for temporary alien labor certification. Accordingly,

ORDER

IT IS HEREBY ORDERED that the determination by the Certifying Officer (on behalf of the Employment and Training Administration of the U.S. Department of Labor) in the above-captioned matter denying Keller Farms, Inc.’s application for temporary alien labor certification for 40 Missouri positions be, and hereby is, **AFFIRMED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.