



Issue Date: 05 June 2009

OALJ Case No.: 2009-TLC-00052
ETA Case No.: C-09093-19243

In the Matter of

MORRIS P. STEWARD
d/b/a
MAGNOLIAS PLANTATION,
Employer.

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On May 22, 2009, Morris P. Steward d/b/a Magnolias Plantation (“the Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“the CO”) determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a).¹ On May 29, 2009, the CO submitted the Administrative File. In expedited administrative review cases, the administrative law judge must review the record for legal sufficiency within five working days after receiving the Administrative File. 20 C.F.R. § 655.115(2)(3).

Statement of the Case

On April 3, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. *See* AF 98.² The Employer requested certification for a farmworker from May 20, 2009, to October 20, 2009. *Id.* The Employer described the position’s duties as: “Plant, tend and harvest crops. Maintain and clean poultry house and poultry, including fecal matter. General farm labor and farm machine

¹ On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008); *see also* 74 Fed. Reg. 25,972 (May 29, 2009) (suspending the new rules for nine months effective June 29, 2009). Since the Employer filed its application after the new regulations took effect, I will apply the new regulatory provisions, which can be found at 73 Fed. Reg. 77,207-77,229 (Dec. 18, 2008). I will cite the regulations as they would appear if codified.

² Citations to the 117-page Administrative File will be abbreviated as “AF” followed by the page number.

maintenance.” AF 100. On the application, the Employer listed no education, training, or experience requirements. AF 101. Based on the lack of job requirements listed in the application, the CO determined that the adverse effect wage rate (“AEWR”) for the position was \$6.59 and that, since the Employer’s offered wage of \$8.53 exceeded the federal minimum wage, the state minimum wage, and the AEWR, the wage offered was proper. AF 87-88.³

On April 9, 2009, the CO issued a letter informing the Employer that the application was “not being accepted for processing” and requesting several modifications, only one of which is relevant to this appeal. AF 82-85. In particular, the CO requested that the Employer submit a letter explaining his temporary need for the farmworker. AF 85-85. On April 14, 2009, the Employer filed a response. AF 53-77. The response contained, *inter alia*, a modified application and a letter explaining the Employer’s need for a temporary farmworker. The letter noted that the Employer runs an organic farming operation and that the temporary worker “is primarily needed for his organic farming experience in order to help with the organic crops operation.” AF 76-77. The amended application again contained no education, experience, or training requirements. AF 60. The Employer did however amend Item F.b.5 of ETA Form 9142 (“Special Requirements”) to include “knowledge and experience in organic crop farming.” *Id.*; *see* AF 101.

On April 15, 2009, the CO accepted the Employer’s application for processing and provided instructions for domestic recruitment for the position. AF 41-44. On April 22, the Employer submitted his recruitment report. AF 37-40. Therein, the Employer reported that nine individuals had applied for the position, two of whose applications were still pending. AF 38-40. The Employer explained that it did not hire the other seven applicants because they either “[l]acked experience and knowledge of organic farming and related job duties,” “[h]ad no experience in organic farming and related job duties,” “[h]ad no experience or knowledge of organic farming and related job duties,” or “[l]acked knowledge of organic farming and related job duties.” AF 39-40.

On May 4, 2009, the Employer filed a request to amend his application. AF 12-32. In the request’s cover letter, the Employer wrote that that “[t]he primary purpose of this amended application is to provide an amended ETA form 790 to the state work force agencies to modify the existing job order, so that it may better reflect job experience or training requirements.” AF 13. The Employer further explained, “The primary duties of the job require someone with organic farming experience, skill, and knowledge, who would then use those skills for an organic crop growing operation at The Magnolias Plantation.” *Id.* The Employer observed that it had not included these requirements on its application, which the state workforce agencies used to post job orders. *Id.* The Employer sought to amend his application to require six months of experience as an “Organic Crop Grower/Farmer” in order “[t]o correct any potential confusion on any applicants’ behalf.” AF 13, 17.

On May 15, 2009, the CO denied the Employer’s amendment request and application. AF 8-10. Citing 20 C.F.R. § 655.107(d)(3), the CO denied the Employer’s amendment request because “the amended application was submitted without a valid business reason and the amendment would have necessitated a higher wage offer and possibly additional advertising.”

³ ETA indicated that Georgia had not reported a prevailing wage for the position. AF 87-88.

AF 10. The CO therefore found that approving the amendment “would not permit our office to make a determination required by 20 CFR 655.109.” *Id.* Noting that the Employer’s un-amended application “contained no minimum job requirements for the position offered,” the CO found that the Employer “failed to provide lawful job-related reasons for not hiring” the seven rejected applicants and denied the application. *Id.*

On May 22, 2009, the Employer filed the request for review. On June 2, 2009, I issued an *Order Setting Briefing Schedule* permitting the parties to file briefs and requiring the parties to confer regarding resolution of this matter. The order also stated that, if the parties file any briefs, they must provide a status report regarding their conference at that time. The Employer did not file a brief, and the CO’s brief contained no such report.

Discussion

The CO correctly determined that, given the lack of an objective experience requirement listed in the Employer’s un-amended application, the Employer improperly rejected applicants for lacking experience. *See Bel Air Country Club*, 1988-INA-223, slip op. at 4 (BALCA Dec. 23, 1988) (en banc) (holding that, ordinarily, a domestic applicant qualifies for a job if the applicant meets the minimum requirements specified in the labor certification application).⁴ This appeal therefore turns on whether the CO correctly denied the Employer’s amendment request.

20 C.F.R. § 655.107(d)(3) permits the CO to approve amendments to the job offer if he determines that “the proposed amendment[s] are justified by a business reason and will not prevent the CO from making the labor certification determination required under § 655.109.” Putting aside the issue of whether the amendment was justified by the business reason, the CO correctly determined that the amendment would prevent the CO from making his labor certification determination because the amendment “would have necessitated a higher wage offer and possibly additional advertising.”

The Employer’s wage offer must at least equal “the highest of the AEW in effect at the time recruitment is initiated, the prevailing hourly wage or piece rate, or the Federal or State minimum wage.” *See* §§ 655.105(g); 655.108(d). While the CO lacked prevailing wage data, he found that the Employer’s offered wage of \$8.53 exceeded the AEW and the governmental minimums. Adding a six-month experience requirement would however change the CO’s AEW calculation. *See Forkland Springs Farm, LLC*, 2009-TLC-34, slip op. at 2-4 (A.L.J. Mar. 19, 2009) (providing a detailed explanation of the AEW calculation process). In particular, it would change the skill wage level used in determining the AEW. *See* § 655.108(g) (describing the four skill wage levels). In determining the appropriate wage skill level, the CO has previously applied the January 9, 2009, final draft of ETA’s *Prevailing Wage*

⁴ While the Employer previously amended Item F.b.5 of ETA Form 9142 (“Special Requirements”) to include “knowledge and experience in organic crop farming,” the Employer nevertheless indicated that no employment experience of any length was required in Item F.b.4. AF 60.

Determination Policy Guidance: Temporary Agricultural Employment (“the Guidance Letter”). See *Forkland Springs Farm, LLC*, 2009-TLC-34, slip op. at 3.⁵

The Guidance Letter directs the CO to use a point system in identifying the appropriate skill wage level. The Guidance Letter at 12. The CO must tally points on the Appendix A worksheet depending on whether the position requires certain experience or skills, or if the position has supervisory duties. See *id.*; AF 88. The Guidance Letter requires the CO to begin the calculation by entering a “1” in the Wage Level column in all cases. The Guidance Letter at 12. For Zone 1 jobs, the Guidance Letter directs ETA to enter a “2” in the Wage Level column when an employer requires six months of experience. *Id.* at 13.⁶ The Guidance Letter further directs the CO to “[d]etermine the wage level by summing the numbers in the Wage Level Column of the worksheet.” *Id.* at 14. The total equals the skill wage level for the AEW determination. *Id.* Had the CO approved the amendment, the wage level would be “3” (2 for the experience requirement + 1 automatic), resulting in an AEW of \$9.09. See AF 89.

The Guidance Letter cautions that the calculation process “should not be implemented in an automated fashion” in order to ensure that the wage level is “commensurate with the experience, special or incidental skills, and supervisory responsibility described in the employer’s job opportunity.” *Id.* at 15. In finding that the amendment would have required a higher wage offer, the CO implied that, despite § 655.108(g)(3)’s description of employees who should receive Level 3 rates, he would not have departed downward to Level 2.⁷ I cannot find that he acted arbitrarily or capriciously in deciding otherwise. See *Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (A.L.J. May 16, 2008) (noting that the administrative review regulations do not define “legal sufficiency” and applying an arbitrary and capricious standard of review). Since the post-amendment AEW would have been higher than the wage offered, the Employer would have had to increase his wage offer to \$9.09. See §§ 655.105(g); 655.108(d). In turn, the Employer would have had to repeat the domestic recruitment process using the \$9.09 wage offer.

Thus, were the CO to accept the amendment, the application would be deficient because it lacked an adequate test of the job market. The CO therefore could not have certified that there are insufficient able, willing, and qualified U.S. workers available to fill the Employer’s need, or that his employment of an H-2A worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. See 20 C.F.R. §§ 655.90, 655.109. In short, accepting the amendment would have prevented the CO from making his certification determination. Accordingly, I find that the CO properly exercised his discretion in denying the amendment request under § 655.107(d)(3), and that the application’s denial must be affirmed.

⁵ The Administrative File contains only Appendix A, the worksheet the CO uses when applying the Guidance Letter. AF 88.

⁶ The O*Net JobZone level for general farmworkers is “1.” AF 89-90; see *Forkland Springs Farm, LLC*, 2009-TLC-34, slip op. at 2-3 (explaining the initial steps of the analysis).

⁷ The AEW for Level 2 is \$7.84, which is still lower than the Employer’s offered wage. See AF 89.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

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JOHN M. VITTON
Chief Administrative Law Judge