



Issue Date: 23 March 2009

CASE NO: 2009-TLC-00031

In the Matter of:

TURPIN LANDSCAPING, INC.,
Employer.

Certifying Officer: Robert E. Myers
Chicago Processing Center

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 the implementing regulations at 20 C.F.R. Part 655, Subpart B.¹ By letter dated February 19, 2009, received in this Office on February 20, 2009, Employer Turpin Landscaping, Inc. (“Employer”) requested expedited review of or de novo hearing regarding the decision of the certifying officer (“CO”) dated February 13, 2009 that employer failed to provide a lawful, job-related reason for not hiring two able, willing, available and qualified applicants for employment. *See* §§ 655.106(b)(1) and (d), 655.112(a). A member of the staff of this Office contacted counsel for Employer, who clarified that the request was for a de novo hearing so that additional evidence could be submitted. After hours on March 4, 2009, the Office of Administrative Law Judges received the case file from the United States Department of Labor’s Employment and Training Administration (“ETA”). The parties subsequently agreed to stipulate to the admissibility of the additional evidence, which had been included with Employer’s letter of February 19, 2009, and to waive their right to a formal hearing. On March 12, 2009, I issued an order approving that agreement and directing the submission of final argument by the Department of Labor no later than March 18, 2009. The Department did not file a brief.

The regulations relating to de novo review of H-2A determinations direct the administrative law judge to render a decision within ten working days after the date of the hearing. § 655.112(b)(1)(iii). In this case, the hearing date was deemed to be March 12, 2009, in accordance with the above-referenced agreement of the parties. The administrative law judge is required to “affirm, reverse, or modify the OFLC Administrator’s denial by written decision.” 20 C.F.R. §655.112(b)(2).

¹ Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.

Statement of the Case

Employer is a landscaping company with a nursery located in Coatesville, Pennsylvania. AF 5, 8, 9, 64, 82.² On December 12, 2008, Employer filed its initial H-2A application with ETA's Chicago Processing Center, *id.* at 81-93, seeking temporary alien labor certification of nine unnamed workers to work at its Coatesville nursery. *Id.* at 82-83. On December 24, 2008, the CO informed Employer that its application was not accepted for consideration for reasons not relevant to this decision, and requested that Employer modify its application. *Id.* at 71-72. Employer submitted a revised application on December 30, 2008. *Id.* at 56-69. On January 8, 2009, the CO informed Employer that its revised application had been accepted for processing, and instructed Employer to take certain steps to recruit workers for the nine positions it intended to fill and to file a written recruitment report no later than February 12, 2009. *Id.* at 53-55. Employer submitted such a report, detailing its efforts in advertising the jobs and interviewing the applicants for them. *Id.* at 26-51.

Employer's recruiting efforts resulted in seven applications for the nine positions. AF 31. Jason D. Turpin, Employer's president, interviewed all applicants and decided that none of them was qualified for the work. *Id.* at 31-34. Upon review of Employer's decision, the CO determined that two of the applicants to whom Employer declined to offer a job – Chase Drake and Michael Cox – were able, willing, available and qualified U.S. workers. The CO therefore granted temporary alien labor certification for seven positions and denied certification for two. *Id.* at 21-24. Employer timely filed a request for hearing. *Id.* at 1-19.

Employer asserts that it declined to hire the workers because they were "not qualified" (AF 10). Specifically, Employer states that Mr. Drake was "very quiet, seemed uninterested in the job offered and stated that he has no place to live and was looking mostly for a place to live." *Ibid.* Mr. Drake's sole interest appeared to be in the free housing that was offered, asking whether it was furnished or whether he could bring his own furniture. *Ibid.* Employer asserts that Mr. Drake's interest in the housing showed that he was not interested in horticultural work, and constituted a refusal of the position. AF 12. Employer declined to hire Mr. Cox because he had worked his entire life as a carpenter, and was willing to work as a carpenter for Employer rather in the position advertised. *Ibid.* He also related that he "hates digging and working with dirt," which are essential for a horticultural worker in Employer's nursery. AF 10-11.

With respect to both workers, Employer claims that it "did not reject [either] of these applicants so much as they chose to eliminate themselves from further consideration, when they learned that the job involved working with dirt, planting, working as horticultural, agricultural workers." AF 12.

Discussion

The Immigration and Nationality Act and its implementing regulations allow an employer to hire temporary alien workers if the Department of Labor certifies that there are not enough qualified, eligible U.S. workers who will be available at the time and place needed to perform the work for which they are sought, and that employment of the alien workers will not

² Citations to the 93-page Administrative File will be abbreviated as "AF" followed by the page number.

adversely affect the wages and working conditions of similarly-situated U.S. workers'. 8 U.S.C. § 1188; 20 CFR § 655.100(a)(4)(ii). 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." § 655.106(h)(2)(i); *see also Keller Farms, Inc.*, 2009-TLC-00008 (ALJ, November 21, 2008).

Although Employer claims that Messrs. Drake and Cox were "not qualified" for the positions offered, Employer also concedes that no experience was necessary and that the employees would receive on the job training. AF 10, 61. 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 only three years' grade-school education and no previous work experience. AF 61. Both Mr. Drake and Mr. Cox meet the educational requirements listed in the application. *Id.* at 16 and 18. 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.

As a second basis for requesting reversal of the CO's decision, Employer implies, but does not explicitly claim, that Messrs. Drake and Cox rejected job offers that were made to them. The evidence of record does not support that implication. It appears, instead, that Employer simply discussed the requirements of the positions with the applicants and concluded, based on some negative remarks by the applicants, that they were not interested in the jobs. For example, Employer claims that Mr. Cox's statement that "all his life [he has been] a carpenter and ... that he hated digging and working with dirt" implied refusal of the job. Likewise, Employer contends that Mr. Drake's lack of interest in anything but free housing constitutes a refusal of the position.

I find that the applicants' remarks do not constitute refusal of employment, as there is no evidence that an actual offer of employment was made. It is equally likely that they were simply weighing the less-appealing aspects against the prospect of more-than-full-time employment for most of 2009. I conclude that no actual offer was made or rejected.

Conclusion

Employer has not provided lawful job-related reasons for not offering employment to Messrs. Drake and Cox. The Certifying Officer's decision is therefore **AFFIRMED**.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge