



Issue Date: 07 November 2008

CASE NO: 2009-TLC-00007

In the Matter of:

WHITENER ENTERPRISES,
Employer.

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 On October 31, 2008, USA Works, agent for Whitener Enterprises (“Employer”), requested expedited administrative review of the decision of the certifying officer (“CO”) dated October 28, 2008, not to accept for consideration Employer’s application for temporary alien labor certification. *See* §§ 655.104(c), 655.112(a). On October 31, 2008, the Office of Administrative Law Judges received the case file from the United States Department of Labor’s Employment and Training Administration (“ETA”). On November 4, 2008, I issued an *Order Setting Briefing Schedule* permitting the parties to file supplemental or reply briefs no later than 4:30 pm EST on Wednesday, November 6, 2008. On November 6, 2008, Employer (through its agent) timely filed a brief.

The regulations relating to administrative review of H-2A determinations direct the administrative law judge to review the record “for legal sufficiency” and render a decision within five working days after receipt of the case file. § 655.112(a)(2). Under § 655.112(a)(1), the administrative law judge may not receive additional evidence or remand the matter in the course of this review. On the basis of the written record and after due consideration of any written submissions, the administrative law judge is required to “either affirm, reverse, or modify the OFLC Administrator’s denial by written decision.” 20 C.F.R. §655.112(a)(2).

Statement of the Case

Employer is a grower located in Ooltewah, Tennessee. AF 23, 31.² On October 21, 2008, Employer filed its H-2A application with ETA’s Chicago Processing Center. *Id.* at 16, 21-22. In particular, Employer sought temporary alien labor certification of seven unnamed workers to perform work at its fields in Ooltewah, including the erection of fences, and cultivation of nursery plants, shrubs and trees. *Id.* at 23, 25. On October 28, 2008, the CO informed Employer that its application was “not being accepted for consideration” and requested that Employer

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

² Citations to the 33-page Administrative File will be abbreviated as “AF” followed by the page number.

modify its application. *Id.* at 16-17. Specifically, the CO instructed Employer to submit a modified application that includes:

- (1) provisions for separate sleeping accommodation for male and female workers and for families of workers who have families;
- (2) a copy of the agent's Farm Labor Contractor License if the agent is involved in the recruitment process;
- (3) an amendment to eliminate the inconsistent description of job duties in the ETA Forms 750 and 790 on the one hand, and the attachments to the ETA Form 790 on the other;
- (4) a provision for the reimbursement of workers for transportation subsistence expenses; and
- (5) a modification to Item 11 of the ETA Form 790 indicating the payroll deductions for U.S. workers only, and not foreign workers.

AF at 18-19.

Employer appealed. Included with the appeal is an amended Attachment 2 to Employer's original application, in which Employer has endeavored to address the first four of the five deficiencies that are listed above, as identified by the CO. AF 12-14. Nothing in the record shows that the revised attachment has been submitted to the CO for review as part of a modified application. Because, however, the amended attachment is part of the administrative file, and because I am permitted by the regulations to modify the CO's initial decision if appropriate, I will consider it in this decision and order.

Discussion

1. Separate Accommodations

In instructing Employer to modify its application, the CO cited correctly stated that employer-provided housing must comply either with the full set of OSHA standards set forth at 20 CFR § 1910.142 or the full set of standards set forth at 20 CFR Part 654, Subpart E, "whichever are applicable." Likewise, in deciding whether to accept an application for consideration, the CO is required to evaluate the application under the "timeliness and adverse effect" criteria of §§ 655.101-655.103. Section 655.102(b)(1)(i), like § 654.401, requires that employer-provided housing meet the standards set forth at § 1910.142 or §§ 654.404-654.417, "whichever are applicable." By determining that Employer did not comply with § 654.407(e), the CO implicitly found the latter set of regulations to be applicable.

Under § 654.401, the provisions of Subpart E apply to housing whose construction was completed or started before April 3, 1980 or for which a contract for construction was signed before March 4, 1980. Housing that was constructed or for which a contract for construction was signed after those dates is subject to the requirements of § 1910.42. *See* OSHA Field Operations Manual Ch. XI, Section A. The determination of the applicable regulatory standards is critical to this matter, because § 1910.142 does not contain a requirement of separate sleeping accommodations for families or for male and female workers, while § 654.407(e) does.

Therefore, the date of construction of the proposed housing is essential to determining which standards apply. The record contains no evidence that the CO determined the date of construction of the proposed accommodations.

Nonetheless, Employer, in its amended attachment (AF 12) has committed to providing sleeping facilities that are separated by sex. Employer has further stated that it is not the prevailing practice in the intended area of employment to provide separate family accommodations for workers with families. *Ibid.* Under § 655.102(b)(vi), separate family housing is required only when it is the prevailing practice in the area of intended employment. The CO has not contested Employer's representation that it is not the prevailing practice in Ooltewah, Tennessee.

I find that Employer's revised attachment satisfies the CO's notice of deficiency with regard to separate sleeping accommodations.

2. Recruitment Process

The CO requested that, if Employer's agent were to be involved in the recruitment process, a copy of the agent's Farm Labor Contractor license be included with the modified application. In response, Employer amended its H-2A application to read in pertinent part:

Referral Instructions. Employer prefers referrals be made by faxing the attached Referral Form, when completed, to the attention of the agent (who is not involved in the recruitment process) ... but employer does not require this. The Employer makes all hiring decisions. The Agent provides clerical support to the Employer and maintains a list of referrals made and follow-ups with the employer to record the results of the referrals. US referrals will be accepted from local Job Service Office, through word of mouth, gate hires (walk-up workers) & other sources....

AF 14. Employer also set forth alternate methods for workers to apply for employment, not involving the participation of its agent.

Under § 655.103, an employer submitting an application for temporary labor certification must include assurances that it will abide by the conditions of Subpart B. By doing so, the employer makes assurances that it will engage in positive recruitment of U.S. workers, consistent with the requirements of § 655.103(d). That recruitment effort must include, under the regulation:

- assistance with the Employment Service system in preparing local, intrastate, and interstate job orders;
- compliance with certain advertising requirements;
- cooperating with the ES system and independently contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;
- cooperating with the ES system in contacting schools, business and labor organizations, and other employment agencies throughout the country.

In its initial application, Employer requested, but did not require, that referrals be made by fax to Employer's agent. FA 26. The initial application made no representations regarding the extent of the agent's involvement in the recruiting process, and the CO apparently feared that the agent's involvement would be extensive. Employer, in submitting its amended attachment, clarified the extent of its involvement, showing that it would be limited to clerical support.

The CO identified no requirement in the regulations pertaining to the H-2A program that would require an employer's agent to perform the functions proposed in this matter to hold a Farm Labor Contractor license. The regulation permitting an agent to act on behalf of an employer includes no such requirement. *See* § 655.101(a)(2). In fact, that regulation permits an agent, when authorized by the employer, to interview applicants and make hiring decisions.

Because the regulations do not require the license requested by the CO, the CO's determination regarding the positive recruitment plan lacks legal sufficiency. Employer's revised referral instructions at AF 14 meet the requirements of § 655.103(d).

3. Inconsistent Description of Job Duties

The CO requested that the Employer modify its application to eliminate the inconsistent description of job duties in the Forms ETA 750 and 790 on the one hand, and the attachment to the ETA 790 on the other hand. Specifically, the description of job duties set forth in the attachment to the ETA 790 included "picking up trash, cleaning bathrooms and kitchens, sweeping floors and other similar work" (AF 25, section 3.H), while the description of job duties set out in the ETA 750 and 790 did not include that description. Employer has deleted that description from the revised attachment to the ETA 790. AF 14, section 3.H, and is therefore in compliance with the regulations.

4. Reimbursement of Transportation Subsistence Expenses

The CO requested that the Employer modify Item 1.F in the attachment to its application to include a provision for reimbursement of transportation subsistence expenses under § 655.102(b)(5).³ Employer's initial application did not do so. Employer has amended its application to include such a subsistence payment. AF 12. Employer is therefore in compliance with the regulation.

5. Deductions

Section 11 of the Form ETA 790 consists of check-off boxes for the Employer to indicate which, if any, deductions will be made from the pay of its workers to comply with Federal, state and local law. An applicant is required to check a "yes" box or a "no" box to indicate whether it will deduct Social Security tax, federal income tax, state income tax, meals, and "other" items from a worker's pay. The form does not contain separate sections for U.S. and non-U.S.

³ The CO's rejection notice actually referred to § 655.102(b)(i)(ii); however, there is no such section, and the substantive requirement is found at 2 © 655.102(b)(5).

therefore constitute impermissible preferential treatment of foreign workers. That concern has merit.

How, then can Employer comply with the requirement to show what deductions will be made from a workers' pay, without appearing to favor the foreign worker? The regulations provide a solution to the dilemma: § 655.102(b)(13) requires the employer to "make those deductions from the worker's paycheck which are required by law." Therefore, a "yes" check mark in Section 11 of the Form ETA 790 therefore indicates that the employer will make all deductions that are legally required. The amount of the deduction is not required to be disclosed, and will, of course, vary from worker to worker depending on the amount of pay.

I find that the positions of both the CO and Employer are unsupported by the regulations. Employer is correct that the ETA 790 is applicable to both U.S. and foreign workers, but is not correct that it must make separate entries for each category. The CO is correct that the manner in which Employer disclosed the deductions in this matter appears to give preferential treatment to the non-U.S. worker, but is not correct that Employer must make entries only for U.S. workers. To be a proper application, Section 11 must indicate whether Employer will make "those deductions from the worker's paycheck which are required by law," regardless whether the amount of the deduction is zero or more than zero. In practical terms, then, Employer will comply with the regulations if its revised application has *only* the "yes" column checked off for Social Security and income taxes, and the "no" column checked off for meals and "other" items.

Conclusion

Employer has corrected the first four of the five deficiencies noted by the CO, but must submit a revised application to correct its disclosure of the deductions it intends to make from its workers' pay. Consequently, **IT IS ORDERED** that the CO's decision not to accept Employer's application for consideration is **AFFIRMED** only to the extent that Employer has not properly disclosed payroll deductions. **IT IS FURTHER ORDERED** that Employer shall, not later than five days after the date of this Decision and Order, submit a revised application to the CO including the amended attachment set forth at AF 12-14, and correcting the disclosure of the intended deductions from workers' pay consistent with the discussion above.

SO ORDERED.

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PAUL C. JOHNSON, JR.
Administrative Law Judge