



Issue Date: 19 May 2009

OALJ Case No.: 2009-TLC-00042
ETA Case No.: C-08330-15710

In the Matter of

GAULDING FARMS
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 On March 23, 2009, Gaulding Farms (“Employer”) appealed the Certifying Officer’s (“CO”) March 10, 2009, denial of its H-2A application for temporary alien labor certification. *See* § 655.112. Employer requested a de novo hearing under 20 C.F.R. § 655.112(b). The regulations relating to de novo hearings for H-2A determinations direct the administrative law judge (“ALJ”) to render a decision within ten working days after the hearing. § 655.112(b)(1)(iii). On the basis of the hearing record, the administrative law judge must “either affirm, reverse, or modify the OFLC Administrator’s determination.” § 655.112(b)(2). In this case, in lieu of an oral hearing, I held a conference call. The parties stipulated that the case would be decided on an expanded administrative record, which includes the 79-page Administrative File, the Employer’s letter supplementing the recruitment report, and the Employer’s representative’s responses to my questions during the conference call.

Statement of the Case

Employer, a farming operation located in Hamshire, Texas, states that it requires an alien “farmworker” to assist in rebuilding ditches and levees, and to harvest rice and crawfish. AF 23.² ETA received Employer’s last modified H-2A application on January 16, 2009.³ AF 22-23. The job description listed in item 13 of the application on Form ETA 750 reads:

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

² Citations to the 79-page Administrative File will be abbreviated as “AF” followed by the page number.

³ ETA received Employer’s initial H-2A application for employment certification of Salinas Cervando on November 25, 2008. AF 71-79.

Assist in preparation of field by widening or rebuilding ditches and levees;
Maintain the correct level of water in the fields;
Plant, plow, and till soil for rice;
Operate, repair clean and weld heavy farm equipment;
Repair and place crawfish traps and also bait them;
Harvest grade and sack crawfish; and
Aid in the harvest of rice

AF 23.

Additionally, Employer stated on ETA Form 790, in item 14, that it required the applicant to have one month of experience in the job offered. AF 23. In item 10, for job specifications, Employer stated that “the individual must have one month experience in the rice and crawfish industries.” AF 22-23.

On December 2, 2008, the CO notified Employer of several deficiencies in its application, specifically in Forms ETA 790 and 750, preventing consideration of the application. AF 67-70. In response to the CO’s notification of deficiencies, the Employer re-filed the H-2A application, which was received by ETA on December 5, 2008. AF 61-64. Employer’s H-2A application went back and forth from Employer to CO to correct deficiencies in the application until January 16, 2009, when the CO notified Employer that it had accepted the application for processing and stated the recruitment requirements. AF 18-21. On March 4, 2009, ETA informed Employer that the recruitment report was incomplete and that it needed to supply the names of each applicant and whether they were hired or not. AF 10.

On March 7, 2009, Employer faxed a more detailed recruitment report to ETA. On March 10, 2009, ETA informed Employer that its application would be denied since “no lawful, job-related reason was given” for not hiring two individuals listed on the recruitment report. AF 3. The denial stated that pursuant to 20 C.F.R. § 655.106(b)(1)(i), it had been determined that a sufficient number of able, willing and qualified U.S. workers had been identified as being available to fill the job opportunity for which certification had been requested. *Id.*

On March 23, 2008, this office received a request from Employer for administrative review. AF 1. In subsequent telephone conversations clarifying this request, Employer stated that he preferred de novo review and would submit additional evidence in support of his application. On April 30, 2009, Employer submitted a letter which stated that one month of prior experience was required for the position and discussed the qualifications of the two domestic applicants rejected by Employer. Specifically, Employer stated that applicant #1 had experience only in rice farming and no experience in crawfish production. Regarding applicant #2, Employer claimed that his knowledge in regard to crawfish and rice farming was “somewhat slim” and thus made Employer uncomfortable about applicant #2’s ability to fill the position.

I held a conference call on May 5, 2009, in which Vincent Costantino (counsel for the Certifying Officer) and John Gaulding (Employer’s manager/general partner) participated. The purpose of this call was to discuss the CO’s counsel’s proposal to decide the case on an expanded administrative record in lieu of an oral hearing. During this call, Employer was asked if applicant #2 was qualified for the position in the H-2A application. Specifically, Employer was asked if the applicant had one month of experience in all of the job duties described in item 13 of ETA Form 750. Employer replied that he did.

Discussion

Section 655.106(h)(2)(i) requires that, if an employer rejects U.S. applicants for a job opportunity, the employer must document that it rejected the applicants solely for lawful job-related reasons. The regulations prohibit the CO from granting an application for temporary labor certification if he determines that “[e]nough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer’s job opportunities.” § 655.106(b)(1)(i). Ordinarily, a U.S. applicant qualifies for a job if the applicant meets the minimum requirements specified in the labor certification application. See *In re Bel Air Country Club*, 1988-INA-223, slip op. at 4 (BALCA Dec. 23, 1988). An employer may not reject an applicant who meets the minimum requirements listed in the application only because the applicant lacks experience in the duties the employer listed in the job description. *Id.* (citing *In re Microbilt Corp.*, 1987-INA-635 (BALCA Jan. 12, 1988)). However, by requiring experience in the job offered in item 14 of the application, an employer may incorporate, as a job requirement, experience in the job duties described in item 13. *In re Latin American Enterprises, Inc.*, 2008-INA-82, slip op. at 5 (BALCA Mar. 3, 2008). In the instant case, Employer incorporated job duties from item 13 into the one month experience requirement in item 14.⁴ The Employer nevertheless stated that applicant #2’s knowledge in regard to crawfish and rice farming was “somewhat slim” and made Employer uncomfortable about applicant #2’s ability to fill the position. This is not a lawful job-related reason for rejecting an application from a U.S. worker. In the subsequent conference call, Employer stated that applicant #2 possessed one month of experience in the job duties listed in item 13 of the labor certification application. Having met the only requirements listed in the application, applicant #2 qualified for the position. Under 20 C.F.R. § 655.106(b)(1)(i), the regulations prohibit the CO from granting an application for temporary labor certification if he determines that “[e]nough able, willing, and qualified U.S. workers have been identified as being available to fill all the employer’s job opportunities.” Since applicant #2 qualified for the Employer’s one opportunity, and nothing in the record suggests that he was unable or unwilling to take the job, the Certifying Officer’s denial of labor certification was proper.

Order

IT IS HEREBY ORDERED that the Certifying Officer’s denial of temporary labor certification is **AFFIRMED**.

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JOHN M. VITTONI
Chief Administrative Law Judge

⁴ In item 10 of ETA Form 790, Employer stated that “ the individual must have one month experience in the rice and crawfish industries.” However, item 10’s purpose is to state job specifications, not job requirements. I will not address here whether it is proper to list job requirements in item 10. Typically job requirements are listed in items 13 and 14.