



Issue Date: 05 February 2009

**OALJ Case No.:** 2009-TLC-00023<sup>1</sup>  
**ETA Case No.:** C-08273-14885

*In the Matter of*

**MCARAVY BROTHERS**  
*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.<sup>2</sup> On Wednesday, January 21, 2009, McAravy Brothers (“Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“the CO”) January 14, 2009, denial of its application for temporary alien labor certification. *See* 20 C.F.R. Part 655, Subpart B. A brief explanation of Employer’s basis for appeal accompanied the request for review. On the morning of Thursday, January 29, 2009, the Office of Administrative Law Judges received the Administrative File from the United States Department of Labor’s Employment and Training Administration (“ETA”). On January 29, 2009, I issued an *Order Setting Briefing Schedule* permitting the parties to file supplemental or reply briefs no later than 4:30 pm EST on Monday, February 2, 2009. Only the Certifying Officer timely filed a brief.

The regulations relating to administrative review of H-2A determinations direct the administrative law judge (“ALJ”) 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.” § 655.112(a)(2).

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<sup>1</sup> The Administrative File supplied by the CO contains a typographical error in the OALJ case number for this matter. The correct OALJ case number, 2009-TLC-00023, appears here. The ETA case number assigned to this matter appears correctly throughout the file.

<sup>2</sup> Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.

## Statement of the Case

Employer, a farming operation located in Dunnigan, California, states that it requires an alien “farmworker” for a wetlands restoration project that will filter waste water from a residential and commercial development. AF 50, 36.<sup>3</sup> Accordingly, ETA received Employer’s H-2A application for employment certification of Khongsak Bupphamart on October 6, 2008. AF 32. The job description listed in Item 13 of the application form ETA 750, and which appeared verbatim in the required newspaper advertisements, reads:

Utilize aquatic plants to remove pollutants from waste water to protect and restore wetlands; gather plant residues used in the production of bio-fuel; develop prototype equipment to assist in planting and harvesting the preferred plant species, and for distilling bio-fuel; assist in the creation of a series of filtering ponds; service and maintain heavy equipment used in this construction phase; help install a water control system to maintain precise water levels in the ponds; monitor and maintain the water control system; make adjustments and improvements to equipment as it is tested in the field; construct a prototype bio-fuel plant; maintain pumps used in the water control system and operate any equipment used to maintain levees or water control structures, such as backhoes, bulldozers, and dump trucks.

AF 38.

On October 10th, the CO notified Employer of deficiencies in its application, specifically in Forms 790 and 750, preventing consideration of the application. *Id.* Item 15 on Form ETA 750 contained the particular deficiency relevant to this matter. AF 34. In Item 15, “Other Special Requirements,” Employer had listed, “Some experience in farm machinery design and development.” AF 36. The CO informed Employer that such job requirements conflicted with DOL regulations at 20 C.F.R. § 655.102(c), which only allow job requirements consistent with normal and accepted qualifications required by non-H-2A employers for comparable job opportunities. AF 34. Faced with the choice of removing the requirement or providing a written statement justifying it, Employer modified its Form 750 by removing the Item 15 requirement.<sup>4</sup> AF 36.

On November 6, 2008, the CO accepted Employer’s modified application for processing and, pursuant to § 655.105(b), directed Employer to follow specific recruitment steps. AF 25. Consequently, on January 5, 2009, Employer submitted documentation substantiating its compliance with these recruitment steps. AF 11. The documentation included a recruitment report in which Employer described the results of interviews with 10 U.S. applicants. AF 12-14. Of the 10 U.S. applicants, two expressed unwillingness to take the position, and one was rejected by Employer because of a poor reference from a previous employer. *Id.* Employer rejected the other seven as being “unable to perform the job duties.” *Id.* According to Employer’s

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<sup>3</sup> Citations to the 57-page Administrative File will be abbreviated as “AF” followed by the page number.

<sup>4</sup> The Administrative File leaves unclear precisely why the CO considered these job requirements inconsistent with comparable non-H-2A job opportunities. The record also leaves unclear why Employer chose not to submit written justification for the requirements or why it chose the job title “farmworker” for so technical a position.

recruitment report, all seven lacked knowledge of one or more of the following: diesel mechanics or fabrication, water management and control, heavy equipment operation, and pump maintenance. *Id.*

In his January 14, 2009, denial letter, the CO discussed Employer's recruitment report:

The report stated 7 of the applicants did not have experience in various areas: such as diesel mechanics or fabrication, water management and control, heavy equipment operation or diesel farming and would not be able to be trained in a reasonable amount of time. . . . [In] Form ETA 750 in Item 14 and 15[,] the employer has not indicated any requirements for experience, training, education or any other special requirements. The employer must provide a lawful, job-related reason for not hiring qualified, able willing and available US Workers. Here, since no experience was required in the ETA Form 750 or ETA 790, using lack of experience is not a lawful, job related reason for not hiring the US workers.

*Id.*

In the request for expedited administrative review, Employer argued that it had never listed lack of experience as the reason for not hiring those seven U.S. applicants. AF 2. Employer wrote, "In fact, the actual phrases used were 'unable to perform the job duties,' and 'wouldn't be able to be trained in a reasonable amount of time' to perform the job duties. These are lawful, job-related reasons for not hiring the applicants." *Id.*

### **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. Ordinarily, a U.S. applicant qualifies for a job if she 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 labor certification application only because she 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, an employer may incorporate into the job requirements the job description listed in Item 13. *In re Latin American Enterprises, Inc.*, 2008-INA-82, slip op. at 5 (BALCA Mar. 3, 2008). Employer did not list any minimum educational or training requirements in Item 14. Since Employer also did not require any experience in the occupation offered, the Employer did not incorporate the job description in Item 13 as a job requirement. Employer also elected to delete the "Other Special Requirements" it had initially listed in Item 15 rather than to provide an explanation for how "[s]ome experience in farm machinery design and development" is a requirement for a "farmworker." By doing so, Employer eliminated any requirements for the job and therefore could not lawfully reject U.S. applicants for lacking any particular training, knowledge, skill, or experience.

Failing to provide objective minimum requirements for a job prevents the CO from gauging the legitimacy of an employer's refusal to hire a U.S. applicant for her inability to perform the job. If the CO cannot determine whether an employer had a legitimate basis for rejecting U.S. applicants, he cannot adequately protect the interests of U.S. workers. While some may view these requirements as being overly technical, requiring employers to use objective job requirements in evaluating U.S. applicants is essential to the H-2A program's stated goals.

### **Conclusion**

Since Employer's recruitment process produced "a sufficient number of able, willing and qualified U.S. workers . . . to fill all of the job opportunities for which certification has been requested," I find that the CO had a legally sufficient basis for denying Employer's application. *See* § 655.106(b)(1)(i).

**IT IS ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge