



Issue Date: 03 March 2009

OALJ Case No.: 2009-TLC-00028
ETA Case No.: C-08338-15825

In the Matter of

SANDY'S PLANTS, INC.,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On February 13, 2009, Sandy's Plants, Inc., ("the Employer") filed a request for expedited administrative review of the Certifying Officer's ("the CO") February 6, 2009, denial of its application for temporary alien labor certification. The regulations relating to expedited administrative review of H-2A determinations direct the administrative law judge ("the ALJ") to review the record "for legal sufficiency" and render a decision within five working days after receipt of the case file. 20 C.F.R. § 655.112(a)(2) (2008).¹ Under § 655.112(a)(1), the ALJ 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 ALJ must "either affirm, reverse, or modify the [CO's] denial by written decision." § 655.112(a)(2).

Statement of the Case

On December 3, 2008, the Department of Labor's Employment and Training Administration ("ETA") received the Employer's application for temporary labor certification for four nursery workers. AF 39-40.² Following the CO's request for and the Employer's submission of two modifications, the CO accepted the Employer's modified application for processing on December 24, 2008. Pursuant to § 655.105(b), the CO directed the Employer to recruit for the positions. AF 26.

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). Since the Employer filed its application before the new regulations took effect, I will cite to and apply the regulatory provisions in effect at the time the Employer filed its application.

² Citations to the 52-page Administrative File will be abbreviated as "AF" followed by the page number.

On January 13, 2009, ETA received the Employer's initial recruitment report. AF 21. In the report, the Employer explained that its recruitment efforts had produced only a single hire but that the Employer would continue to accept inquiries and applications. *Id.* On January 14, 2009, the Employer faxed ETA the names, addresses, and social security numbers of four individuals whom the Employer had hired to begin work on January 19, 2009. AF 19. On February 6, 2009, the CO denied the Employer's application. AF 3-4. In his denial letter, the CO explained that he determined that "a sufficient number of able, willing and qualified U.S. workers have been identified as being available at the time and place needed to fill all of the job opportunities for which certification has been requested." AF 3; *see* § 655.106(b)(1)(i). The CO noted that the Employer reported that it had hired four applicants. AF 3. Accordingly, the CO explained that he denied certification because he could not "certify that the employment of H-2A temporary alien agricultural workers in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* The Employer's appeal followed.

Discussion

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). Available workers include those who have "made a firm commitment to work for the employer." § 655.106(b)(1). Nothing in the record suggests that the four hired workers made qualified or otherwise infirm commitments to the Employer. Accordingly, I find that the CO had a legally sufficient basis for denying the Employer's application.

In its request for review, the Employer argues that certification should be granted due to the fact that the Employer has experienced difficulty maintaining its seasonal workforce with U.S. workers in the past. *Id.* The Employer added that it does not intend to replace the four U.S. workers it hired with foreign laborers. *Id.* Instead, the Employer seeks the "peace of mind" that certification would provide in the event that history repeats itself. *Id.* Even if the Employer had properly documented its "history with unreliable local help" to the CO, its arguments do not provide an adequate basis to grant certification under the regulations. The regulations unambiguously require denial when an employer fills its openings with U.S. workers. If the Employer's fears become reality—and local recruitment efforts then fail to produce enough able, willing, and qualified workers—certification may be appropriate in the future. However, based on the record and the parties' written submissions, **IT IS ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

A

JOHN M. VITTON
Chief Administrative Law Judge