



Issue Date: 25 June 2009

OALJ Case No.: 2009-TLC-00054  
ETA Case No.: C-09121-19559

*In the Matter of*

**WISSEL BROTHERS,**  
*Employer*

Certifying Officer: Robert E. Myers  
Chicago Processing Center

### **DECISION AND ORDER**

On June 12, 2009, Wissel Brothers (“the Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“the CO”) determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a).<sup>1</sup> On June 18, 2009, the CO submitted the Administrative File. In expedited administrative review cases, the administrative law judge must review the CO’s determination for legal sufficiency within five working days after receiving the Administrative File. 20 C.F.R. § 655.115(a)(2).

#### **Statement of the Case**

On May 1, 2009, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. *See* AF 7.<sup>2</sup> The Employer requested certification for 11 farmworkers from June 29, 2009, to November 1, 2009. AF 64. The Employer requested workers mainly to harvest cabbage, green beans, pumpkins, squash, and watermelons. AF 77-78; *see* AF 66. On the application, the Employer listed no education, training, or experience requirements. AF 67. On May 7, 2009, the CO issued a letter informing the Employer that the application was “not being accepted for processing” and requesting corrective action. AF 37-40. On May 15, 2009, the Employer submitted a response. AF 21-34. Satisfied with the response, the CO accepted the Employer’s application for processing and provided instructions for domestic recruitment for the opportunities. AF 17-20;

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<sup>1</sup> 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; *see also* 74 Fed. Reg. 25,972 (May 29, 2009) (suspending the new rules for nine months effective June 29, 2009). Since the Employer filed its application after the new regulations took effect, I will apply the new regulatory provisions, which can be found at 73 Fed. Reg. 77,207-77,229 (Dec. 18, 2008). I will cite the regulations as they would appear if codified.

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

*see* 20 C.F.R. § 655.100(b)(2)(ii) (requiring employers with periods of need beginning prior to July 1, 2009, to conduct, *inter alia*, post-filing recruitment).

On June 2, 2009, ETA received the Employer's recruitment report. AF 12-14. Therein, the Employer reported that 28 individuals applied for the position and that the Employer sent a "letter to rehire" to 8 former employees. AF 13-14. In the "reason for not hiring" column for each individual, the Employer wrote "season not started." *Id.* At the bottom of the last page of the report, the Employer wrote "11 positions available." AF 14. On June 5, 2009, the CO denied the application. AF 7-9. The CO explained that the Employer rejected 28 applicants for an unlawful reason unrelated to the job in violation of 20 C.F.R. § 655.105(a). AF 9. In particular, the CO wrote, "The recruitment report shows that there is a potential supply of U.S. workers available who, if recruited, would be able and willing to fill the job opportunities. Therefore, the employer failed to provide lawful job-related reasons for not hiring these applicants . . . ." *Id.* Ultimately, the CO found that ETA "cannot determine and 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" and denied certification for all 11 opportunities. *Id.*

In its June 12, 2009, request for review, the Employer explained that it had not denied employment to any of the individuals listed in the recruitment report. AF 1. Rather, the Employer "had not hired any harvest workers as of June 2, 2009, but would notify them of the orientation date prior to our date of need." *Id.* The Employer wrote that, on June 8, 2009, it submitted "a corrected report" to ETA. *Id.*<sup>3</sup> Observing that it hired 64 U.S. workers in 2008, the Employer noted that the 28 applicants would fill "less than 50% of our needs." *Id.*

On June 19, 2009, I issued an *Order Setting Briefing Schedule* permitting the parties to file briefs by the close of business on June 23, 2009. The order also required the parties to confer regarding resolution of the matter and to include a status report on those efforts at the time either party filed a brief. On June 23, 2009, the CO filed a brief arguing that, in failing to hire U.S. workers because its harvest season had not begun, the Employer did not provide a lawful, job-related reason for rejecting the applicants. The CO also confirmed that the Employer had submitted an amended recruitment report "stating that there was a misunderstanding with respect to the June 1<sup>st</sup> recruitment report and that it intended to hire the U.S. workers in question." Citing 20 C.F.R. §§ 655.90(a) and 655.100(a)(4)(ii) and several decisions from the Office of Administrative Law Judges, the CO further argued that certification would not be proper because the Employer's recruitment efforts have identified enough able, willing, and qualified domestic workers to fill all of the its job opportunities. The CO reported that a June 23, 2009, settlement discussion failed to produce a resolution.

Later on June 23, 2009, the Employer filed a letter containing the following:

The Employer acknowledges that an error was made on the application regarding the number of worker positions requested for certification. The Employer requires 64 workers in this occupation to begin work by June 29, 2009. The Employer indicated in a June 12 letter to the Chief Administrative Law Judge that

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<sup>3</sup> The Administrative File does not contain this report.

this is the historical need for this occupation and that it is the same number of employees hired for the occupation in 2008. Given the dire need for employees in this time-sensitive occupation as soon as next week, the Employer requests that the application be accepted with the amendment from 11 to 64 workers requested for certification.

### Discussion

Given the standard of review, I must affirm the CO's denial of certification. 20 C.F.R. § 655.115(a) confines the administrative review to the evidence "the CO used to make the determination" and expressly forbids remand to the CO. The CO did not consider the Employer's June 8, 2009, update of the recruitment report or the information contained in the Employer's subsequent filings when he denied certification. Based on the information available to him at that time, the CO had a legally sufficient basis for denying certification.

The recruitment report indicated that the Employer had only 11 openings available and that the Employer had not hired 28 applicants who, due to the fact that the Employer had not specified any education, experience, or training requirements, appeared to be qualified for the positions. *See* 20 C.F.R. § 655.102(k)(1)(i) (requiring employers to "[l]ist the original number of openings for which the employer recruited" in the recruitment report); *In re Bel Air Country Club*, 1988-INA-223, slip op. at 4 (BALCA Dec. 23, 1988) (holding that, ordinarily, a U.S. applicant qualifies for a job if the applicant meets the minimum requirements specified in the labor certification application). The reason offered for not hiring all 28 applicants—"season not started"—was ambiguous and, without more, could not serve as a lawful, job-related basis for rejection. *See* 20 C.F.R. § 655.102(k)(1) (requiring petitioning employers to "explain the lawful job-related reason(s) for not hiring any U.S. workers who applied for the position"). Specifically, the Employer did not indicate that the applicants would not be available to work at the time the harvest season began, leaving unclear whether the Employer planned to hire these workers at a later date. Lacking this information, the CO could not certify that a "sufficient [number of] U.S. workers who are able, willing, qualified, and eligible will not be available *at the time and place needed to perform the work for which H-2A workers are being requested.*" 20 C.F.R. § 655.100(a)(4)(ii) (emphasis added). Accordingly, I find that the CO had a legally sufficient basis for denying certification and affirm his decision.

In its June 23, 2009, filing, the Employer sought to amend the application by increasing the number of workers requested from 11 to 64. 20 C.F.R. § 655.107(d)(1) governs amendments to the number of workers requested in an application. In particular, § 655.107(d)(1) requires petitioning employers to file amendment requests with the CO. Section 655.115(a) narrowly defines the scope of administrative review by the Office of Administrative Law Judges, and only authorizes me to review appeals of denials of amendment requests, not to consider new requests that the CO did not first deny. Since § 655.115(a) also precludes my remanding the case for the CO to consider the amendment request, I must affirm his denial of certification based on the application currently before me. Furthermore, since Item B.7 on ETA Form 9142 instructs employers to enter the "Total Worker Positions Being Requested for Certification," such an

amendment would be disingenuous.<sup>4</sup> The Employer does not actually seek certification for 64 workers. Rather, it appears that the Employer has 64 total openings, 28 of which it has filled already, and 11 of which it seeks to have certified.

**Order**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

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

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<sup>4</sup> As an aside, I note that the application form does not provide an employer the opportunity to indicate its total number of temporary openings versus the number sought to be filled with foreign workers. It is unclear how an employer should proceed if it has more temporary openings in the same occupation than it wishes to fill with foreign workers.