



Issue Date: 25 February 2010

OALJ Case Nos.: 2010-TLC-00021

ETA Case Nos.: C-09357-21576

In the Matter of

SYLVA NATIVE NURSERY

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

DECISION AND ORDER

On February 1, 2010, Sylva Native Nursery (“the Employer”), filed a request for review of the Certifying Officer’s 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) (2009).¹ On February 16, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the

¹ On December 18, 2008, the Department of Labor (“DOL”) published new rules governing this process that became effective January 17, 2009. 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued a proposal to suspend these rules for nine months and reinstate the rules that were in effect on January 16, 2009. 74 Fed. Reg. 11,408 (Mar. 17, 2009). On May 29, 2009, DOL adopted the proposal as a Final Rule, which would have taken effect on June 29, 2009. 74 Fed. Reg. 25,972 (May 29, 2009). On July 1, 2009, the United States District Court for the Middle District of North Carolina preliminarily enjoined DOL from temporarily suspending the new rules. *N.C. Growers’ Ass’n v. Solis*, No. 1:09CV411 (M.D.N.C. July 1, 2009). As a result, I will apply the rules that became effective January 17, 2009, which were codified in Title 20 of the Code of Federal Regulations.

administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.115(a).

Statement of the Case

On December 21, 2009, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Sylva Native Nursery (“the Employer”), for temporary labor certification. AF 54-83.² In particular, the Employer requested certification for six “Farmworkers and Laborers, Crop Nursery and Greenhouses” between February 21, 2010, and December 15, 2010. AF 54.

On December 24, 2009, the CO notified the Employer that its application had been accepted for processing. AF 42-45. The notification included, *inter alia*, a copy of instructions in order to complete the application for temporary labor certification. AF 42-45. The instructions required the Employer to cooperate with the local state workforce agency (“SWA”), and “submit a written recruitment report containing your signature.” AF 44. Additionally, the Employer was instructed that it “must interview all U.S. workers who apply.” *Id.*

An email attachment to the CO from the local SWA on January 20, 2010, indicated that 43 individuals had applied for a job with the Employer. AF 38-40. On January 21, 2010, the CO received the Employer’s recruitment report. AF 19-33. The report indicated that the Employer had interviewed 16 applicants for the six positions, and only two of those applicants had the requisite one month experience required by the Employer. AF 20.

On January 25, 2010, the CO denied the Employer application on multiple grounds, only one of which will be addressed on appeal. AF 15-18. Citing to 20 C.F.R. § 655.102(k)(1), the CO stated:

The Pennsylvania State Workforce Agency (SWA) identified forty-three (43) referrals on the PA Careerlink recruitment source for the job opportunity; however, the employer only verified sixteen (16) referrals. In Pennsylvania, it is the employer’s obligation to self serve a list of referrals from the PA Careerlink. However, the employer provided no explanation as to why it did not contact the other twenty-seven (27) applicants listed as interested.

² Citations to the 83-page Administrative File will be abbreviated “AF” followed by the page number.

AF 17. The CO denied certification, and the Employer's appeal followed.

In its request for review, the Employer admitted that it only contacted 16 of the applicants. AF 1. However, the Employer went on to state: “[the other 27 applicants] clicked on a link to show that they were interested in the job [while] the sixteen applicants that were included in our Recruitment Report had actually posted their resume to the job order on our Career Link Page.”³ AF 2.

Discussion

To satisfy the recruitment regulations under the H-2A program, an employer must submit a recruitment report to the CO. 20 C.F.R. § 655.102(k). The recruitment report must: “State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker.” 20 C.F.R. § 655.102(k)(1)(iii).

The Employer concedes that it did not contact all of the 43 individuals included on the SWA report, and that the report does not include these individuals' names. While the Employer argues that the 27 individuals it failed to contact only clicked a link to evidence their interest but failed to post their resumes on the Employer's personal page, the SWA email includes a listing of all 43 individuals entitled “Job Referral List.” AF 39. Moreover, the point of recruitment is to identify interested domestic workers, and the additional 27 individuals were quite clearly interested in the position. It is hard to conceive that these additional people should not be considered “referrals” under the regulations, given that the Employer knew they were interested in the job opportunity based on their activity on the SWA website, and the Employer had the means and opportunity to contact these individuals. Recruitment of workers through the local SWA as well as the other positive recruitment required under the regulations is in place to protect the domestic workforce and to ensure that there are not available U.S. workers. Because the Employer failed to contact every interested referral, it was impossible for the CO to

³ The Employer also included an updated recruitment report, which evidenced that it had contacted additional employees. However, I cannot consider new evidence that was not already before the CO. 20 C.F.R. § 655.115.

determine if the domestic workforce was insufficient to meet the Employer's need. Therefore, CO properly denied certification.

Order

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge