



Issue Date: 19 February 2010

OALJ Case Nos.: 2010-TLC-00020

ETA Case Nos.: C-09364-21717

In the Matter of

ZAMORANO PRODUCE,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

On January 29, 2010, Zamorano Produce (“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 4, 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).²

Statement of the Case

On December 5, 2009, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Zamorano Produce (“the Employer”) for temporary labor certification. AF 189-278.³ In particular, the Employer requested certification for 60 “Packers and Packagers” between February 15, 2010, and November 30, 2010. AF 189. In its statement of temporary need, the Employer wrote, “We are in need of seasonal workers [to load] watermelons in the field on the trucks and semi-trucks, unload the watermelons at the packing facility where the watermelons will be packed into cartons . . . and then palletized.” *Id.* The application included an agreement between the Employer and Jay Bird Farms as well as an agreement between the Employer and Chip Berry Produce. AF 209-210. Both agreements list the Employer as an independent contractor hired to pack watermelons in Edinburg, Texas, and Seminole, Texas. *Id.* According to the agreement, 700 acres of watermelons will be imported from Mexico, while 1900 acres of watermelons are grown on the two farms. *Id.*

On January 4, 2010, the CO found that the application did not meet the requirements of the regulations, and thus, it would not be accepted for consideration unless the Employer submitted a modified application. AF 159-163. The CO identified two deficiencies, only one of which is applicable to this appeal. AF 161-163. Citing to 20 C.F.R. § 655.106(b), the CO stated that the Employer “identified themselves as an individual employer [,] however . . . the employer has indicated that work will be performed on farms not owned or controlled by the employer. If the worksite is not owned or controlled by the employer, the employer must abide by the regulations governing H-2A Labor Contractors.” AF 162. On January 6, 2010, the Employer responded to the CO’s Notice of Deficiency. AF 142-158. The Employer amended it

² The Office of Administrative Law Judges in Washington, D.C., was closed from February 8, 2010, until February 12, 2010, due to weather conditions.

³ Citations to the 278-page Administrative File will be abbreviated “AF” followed by the page number.

application to show that it was an H-2A Labor Contractor rather than an individual employer.
AF 149.

In an email to the Employer on January 13, 2010, the CO stated:

The employer has provided job contracts with two (2) farms: Jay Bird Farms and Chip Berry Produce. Those contracts state that workers will custom pack 500 acres of watermelon in Edinburg, Texas, Hildago County, imported from Mexico. The employer must identify where the imported watermelons are coming from, and who owns and grew the imported watermelons.

AF 126. In a response dated January 15, 2010, the Employer wrote:

[T]he watermelons that are imported are grown by Thomas Helle in Ebano and Gonzalez, Tamaulipas in Mexico. The watermelons are then distributed to Jay Bird Farms or Chip Berry Produce where they are packed for shipping. The imported watermelons started in Feb. 15 and then in [the] middle [of] April [,] Jay Bird Farm and Chip Berry Produce have their own grown watermelons that they will pack.

AF 125.

On January 22, 2010, the CO denied the Employer's application for temporary labor certification. AF 113-115. Citing to 20 C.F.R. § 655.100(d), the CO stated:

DOL regulations . . . require that the job opportunity consist of agricultural labor or services. The employer . . . is filing this application as an H-2A Labor Contractor and will be loading/unloading and packing watermelons on . . . farms not owned by the employer. [The contracts with Jay Bird Farms and Chip Berry Produce Co.] state that the contractors will custom pack watermelons in Edinburg, Texas that are imported from Mexico. . . . [T]he employer stated that the watermelons that are imported are grown by Thomas Helle in Ebano and Gonzalez Tamaulipas in Mexico. Neither Thomas Helle nor Gonzalez Tamaulipas appear to be associated with R. Zamorano, Jay Bird Farms, or Chip Berry Produce. The packing of watermelons not grown or owned by R. Zamorano Produce, or the farms they are contract with, would not be considered agricultural and would not qualify under the H-2A program.

AF 115. The CO denied certification, and the Employer's appeal followed.

In its request for review and in its brief, the Employer argues that the CO mistakenly read the Employer's response to mean that two individuals in Mexico grew the watermelons: Thomas

Helle and Gonzalez Tamaulipas. In fact, only one person, Thomas Helle, grows watermelons in Ebano, Tamaulipas, Mexico, and in Gonzalez, Tamaulipas, Mexico. Further, the Employer argues that Thomas Helle is an employee of Jay Bird Farms and Chip Berry Produce, and accordingly, the CO based his decision off of an inaccurate assumption. More importantly, the Employer argued that the farm will only import watermelons from Mexico for one month out of the 11 month need period. Alternatively, the Employer argues that the packing of watermelons on a farm, even if those watermelons are imported from a separate entity, qualifies as farm labor under 20 C.F.R. § 655.100(d)(2).

The CO's brief argued that "the employer here has submitted information that the actual produce it will process will not be raised by the specific domestic farms mentioned." Further, the CO asserted that the regulations require that more than one-half of the agriculture commodity be produced by the farm pursuant to 20 C.F.R. § 655.100(d)(2)(i)(D)(1).

Discussion

To obtain certification under the H-2A program, the work provided by the temporary laborers must involve agricultural labor or services. 20 C.F.R. § 655.100. Under the regulations, the "handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to marketing, in its unmanufactured state" is agricultural labor or services so long as "[the operator of the farm] produced more than one-half of the commodity with respect to which such service is performed. 20 C.F.R. § 655.100(d)(2)(i)(D)(1).

According to the regulations, as long as the Employer and the farms it contracts with produce more than one-half of the watermelons the Employer packs, then the Employer's need qualifies under the H-2A program as agricultural. The CO correctly identifies in his brief that 50% of the watermelons should come from either the Employer, Jay Bird Farms, or Chip Berry Produce in order for the Employer to qualify under the H-2A program. However, the CO incorrectly interprets the Employer's answers to mean that the majority, if not all, of the watermelons being packed originate in Mexico.

After a review of the record in its entirety, however, the Employer's contracts with Jay Bird Farms and Chip Berry Produce along with the Employer's responses to the CO's emails evidence that the majority of the watermelons being packed are harvested at the two Texas farms. Moreover, the Employer plans to spend only one month out of an 11 month period packing watermelons imported from Mexico. Further, the contracts between the Employer and Jay Bird Farms and Chip Berry Produce evidence that the amount of watermelons being imported from Mexico comprise approximately 25% of the entire contract. Therefore, the farms contracted with the Employer will produce more than 50% of the watermelons. Because the Employer successfully established that more than 50% of the agricultural commodity will be produced by the Employer and the Employer's farm contracts, the CO improperly denied certification.

Order

Accordingly, it is hereby **ORDERED** that the decision of the Certifying Officer is **REMANDED** for further proceedings consistent with this decision.

For the Board:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge