

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 23 July 2010

OALJ Case No.: 2010-TLC-00059

ETA Case No.: C-10158-24390

In the Matter of

LSE DESIGN, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

On July 2, 2010, LSE Design (“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). On July 14, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the 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 June 7, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from LSE Design ("the Employer") for temporary labor certification. AF 113.¹ On ETA Form 9142, Section F, the Employer noted in the "Minimum Job Requirements" section that workers would need ".1" month of training in "crop specific issues." AF 116. However, the Employer failed to include the experience requirement on the ETA Form 790. AF 122-123. On ETA Form 790, however, the Employer included the following language under "Employer Furnished Tools and Equipment":

Training will be provided to workers and will include tractor safety and training. Agricultural tool safety will be our prime paradigm. In addition, training will be provided for hygiene and vineyard specific agricultural operations. English Language training materials CD, DVD and equipment will also be made available to use in days where the weather condition do[es] not permit extensive work outdoor. Time spent during the training will be honored at the same working pay rate ("training comments").

AF 129.

The CO issued a Notice of Deficiency ("NOD") on June 14, 2010. AF 91-99. In particular, the CO required the Employer to correct the "inconsistent application" by removing the experience requirement from ETA Form 9142. AF 93-94. The Employer refused to modify the application, and in its response on June 21, 2010, the Employer stated that it did not feel a modification was necessary because of the training comments provided on ETA Form 790. AF 79.

On June 25, 2010, the CO denied the Employer's application and found the Employer failed to cure the discrepancy between ETA Form 9142 and ETA Form 790. Citing to 20 C.F.R. § 655.122(a), the CO stated that the experience requirement listed on ETA Form 9142 was experience required "prior to employment," while the training comments listed on ETA Form 790 was training "provided by the employer post hire." AF 77. The CO denied the application, and the Employer's appeal followed.

¹ Citations to the 151-page Administrative File will be abbreviated "AF" followed by the page number.

Discussion

20 C.F.R. § 655.122 requires H-2A employers to offer to “U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers.” Further, the regulations require that “job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers.” 20 C.F.R. § 655.122 (a).

In order to determine that employers offer the same wages and impose the same restrictions on both domestic and foreign workers, the CO requires that the ETA 790² and the ETA 9142³ match in job training and pre-hiring experience requirements. The Employer argued that its ETA 9142 and ETA 790 matched and the CO incorrectly denied certification because the training requirement listed on the ETA 9142 referred to “post-hire” training, which the Employer argued it also referenced on the ETA 790 during the training comments.

Despite the Employer’s arguments, however, it is clear after reviewing the ETA 9142 that the section entitled “Minimum Job Requirements” refers to training obtained prior to application for the job opportunity. Unlike the .1 month training requirement listed on the Employer’s ETA 9142, the Employer’s ETA 790 makes no mention of “pre-hire” training. Moreover, the Employer cannot now claim that it was confused about whether ETA 9142 referred to pre or post hiring because the CO notified the Employer in the NOD that the training requirement on ETA 9142 referred to “pre-hire” training. Therefore, the Employer was placed on notice by the CO that a modification needed to be made to the application, and the Employer, to its own detriment, refused to make the modification. In order to protect both domestic workers and the expediency of the H-2A program, the CO correctly determined that ETA 9142 and ETA 790 should match. Because the Employer refused to modify its application so that the two forms both indicated that pre-hire training would not be required, the CO properly denied certification.

² ETA Form 790 is submitted for circulation with the local State Workforce Agency.

³ ETA 9142 is the Employer’s application for foreign labor 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

Washington, D.C.
WSC:AH