

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 December 2009

CASE NO.: 2010-TLC-00004

ETA Case No.: C-09201-20237

In the Matter of:

JOHN STEWART DOWNING FAMILY TRUST,
Employer.

Certifying Officer: Robert E. Myers
Chicago Processing Center

Appearances: Theodore G. Hess, Esq.
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Esq.
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER REVERSING DENIAL OF CERTIFICATION

On October 12, 2009, John Stewart Downing Family Trust (“Employer”) filed a request for a *de novo* administrative hearing on the Certifying Officer’s (“the CO”) denial of Employer’s H-2A application. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009).¹ After receiving the Administrative File on October 21, 2009, I conducted a telephone conference two days later with the parties’ respective counsel. Counsel agreed that there was no factual dispute and that no hearing was necessary; rather, they would advance oral arguments, file briefs, and submit the matter for decision on the record. Both parties consented to a briefing schedule

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). Subsequently, on March 17, 2009, DOL issued notice of proposed rule making, proposing to suspend the 2008 Rule for nine months and reinstate the 1987 rule. On May 29, 2009, DOL issued the new H-2A rule, scheduled to take effect on June 29, 2009. *See* 74 Fed. Reg. 25,972 (May 29, 2009). However, on July 1, 2009, a district court granted a preliminary injunction to enjoin the Department from temporarily substituting the new regulation. *See North Carolina Grower’s Assoc., Inc. v. U.S. Dept. of Labor*, 644 F. Supp. 2d 664 (M.D. N.C. 2009). I will therefore apply the 2008 rule, 73 Fed. Reg. 77,110 (Dec. 18, 2008).

longer than the time contemplated in the regulations for the trial and decision, and I accepted the stipulation. The parties submitted briefs, the last of which I received on November 16, 2009.

The central issue is that Employer received and rejected applications from U.S. workers, one of which rejections the Department found improper. In particular, Employer's application did not list a driver's license as a requirement for the job, yet it rejected an applicant on the grounds that he lacked a valid driver's license. Employer contends: (1) that any worker hired for the job must in fact have a driver's license, and (2) the need for a license is implicit in the work described in the application. The Department argues that (1) an employer may not add new facts or modify its application; it's limited to showing that the application was sufficient, and (2) the work described does not necessary imply that a driver's license is needed.

I conclude that an Employer is not limited to its application and may adduce new evidence at the hearing level sufficient to demonstrate compliance with the requirements for approval of the application. Here, Employer has demonstrated that a driver's license is a legitimate job requirement, that it therefore had a *bona fide* reason to reject the U.S. job applicant, and that its application under the H-2A program should be approved.

Statement of the Case²

On July 20, 2009, the Department of Labor's Employment and Training Administration (ETA) received the Employer's application for temporary labor certification for one farm worker. AF 63. The Employer requested this worker to operate tractors and tractor-drawn machinery; repair, set up, and operate irrigation equipment; clear and maintain irrigation ditches; plant, irrigate and harvest crops; and apply herbicides. AF 65. On July 23, 2009, the Certifying Officer informed the Employer that its application was "not being accepted for consideration" and requested corrective modifications on five deficiencies. AF 59-62.

Employer modified its application, and on August 27, 2009, ETA issued a letter stating that Employer's application was accepted for processing. AF 13. The letter stated that in order for Employer to obtain a final determination on the temporary labor certification application, it was required to cooperate with the State Workforce Agency ("SWA"), accomplish a number of recruitment steps (including contacting former U.S. employees and placing job postings in certain newspapers), and submit a final recruitment report. AF 13-16.

Employer submitted a letter stating that it did not have any former U.S. employees, that it had placed a job-posting in four newspapers (one local and three multi-state), and had cooperated with the Colorado Workforce Agency by posting a job announcement with it. AF 8-9. In addition, it submitted a job recruitment report, indicating it had received four applications. Three of the applicants were no longer interested in the job for a variety of reasons,³ and it had rejected the fourth because he did not have a valid driver's license.⁴ AF 10.

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

³ Specifically, the first applicant desired a permanent position, the second had found another job, and the third was moving and no longer interested in the position. AF 10.

⁴ According to the recruitment report, the applicant had a suspended license, and Employer could not hire this individual, as some driving was required for the job. AF 10.

On October 5, 2009, the Certifying Officer issued a final determination, denying the Employer's application. AF 4. He explained that the Employer had unlawfully rejected the U.S. worker with a suspended driver's license. AF 6. The Certifying Officer noted that under the "Special Requirements" portion of the application, Employer failed to list possession of a valid driver's license as a job requirement. *Id.* The applicable regulation requires that any U.S. worker who applied for or will apply for the job be rejected only for lawful, job-related reasons, and the Certifying Officer found that the rejection of this candidate was unlawful because not job-related. *See* 20 C.F.R. §655.105(a).

On October 12, 2009, Employer requested a *de novo* hearing. AF 1. It cited a Colorado statute which makes it a misdemeanor for anyone to drive on Colorado state highways if that person has knowledge that their license is suspended. AF 2, *citing* C.R.S. 42-2-138(1)(a) and (d)(1). It argues that use of the public highways is "part and parcel of the ranch operation." Employer's Brief at 1. It owns 330 acres and leases an additional 120 acres to grow hay and alfalfa to feed horses on the ranch. County Roads 320 and 321 "bisect the ranch." *Id.* Workers drive trucks on these public highways to bring feed to the horses, which live in pastures around the property. *Id.* Employer provided an aerial photograph to demonstrate how the roads cross the property. This evidence shows that the farm worker position requires the worker to drive on the country roads to get from one end of the ranch to the other and accomplish tasks such as providing feed to the horses.

Discussion

The Act and Regulations. The H-2A program allows an employer to hire temporary alien agricultural workers if the Department of Labor determines that there are insufficient qualified, eligible U.S workers who will be available at the time and place needed to perform the work, and that the wages and other terms and conditions under which the alien workers will be employed will not adversely affect U.S workers similarly situated. 8 U.S.C § 1188; 20 C.F.R. §655.100(a)(4)(ii). The application must contain a copy of the job offer describing the terms and conditions of employment and be submitted to the ETA, where the Certifying Officer reviews it. Once the Certifying Officer accepts the application for consideration, an employer is required to recruit U.S. workers. *See* 20 C.F.R. § 655.103(d). It is the employer's burden to show that U.S. workers referred for employment are not able, willing, qualified, or eligible because of lawful, job related reasons. 20 C.F.R. § 655.106(h)(2)(i); *see also Keller Farms, Inc.*, 2009-TLC-00008 (ALJ November 21, 2008).

If the Certifying Officer determines that the temporary alien agricultural labor certification should be denied, as here, the employer may request a hearing *de novo* before an administrative law judge. The administrative law judge must affirm, reverse, or modify the Certifying Officer's determination.

When the employer requests a *de novo* hearing (as opposed to "administrative review"), the administrative law judge is not restricted to a determination of the legal sufficiency of the Certifying Officer's determination, but reviews the administrative record and additional evidence, including testimony at the hearing, and makes a *de novo* determination. The decision

of the administrative law judge is the final decision of the Secretary, and no further review is permitted. 20 C.F.R. § 655.112(a)(2).

The H-2A program promotes and balances two competing interests: “to assure [American farmers] an adequate work force on the one hand and to protect the jobs of the citizens on the other.” *Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978). The immigration laws are aimed at protecting domestic workers, *Elton Orchards v. Brennan*, 50 F. 2d 493, 499 (1st Cir. 1974), and the burden in the labor certification process remains with the employer. *Garber Farms*, Case. No. 200 1-TLC-5 (ALJ May 30, 2001); *Giaquinto Family Restaurant*, Case. No. 1996-TLC-INA-64 (May 15, 1997).

Reviewing the administrative record and Employer’s additional evidence, I find that the farm worker position requires that the worker have a valid driver’s license. The worker must drive on public highways to access certain portions of the ranch and to provide feed to the horses. Applicable state law requires that persons driving on roads such as those on the subject property have valid drivers’ licenses.⁵ It follows that Employer rejected the U.S. worker because he was unqualified to perform an essential job duty, a legitimate basis for such a rejection under the H-2A program.

Certifying Officer argues that I cannot look past the application. This reading of the regulatory scheme would collapse the administrative hearing procedure into the administrative review procedure. When the employer requests a *de novo* hearing, it is allowed to submit additional evidence and is entitled to the administrative law judge’s determination based on the full, amplified record. The administrative review process places the administrative law judge essentially into the same position as the Certifying Officer, reviewing the administrative file only. But here Employer availed itself of the hearing process, including the possibility of adducing new evidence.⁶

Conclusion and Order

I find that the farm worker position for which Employer seeks approval under the H-2A program requires the worker to possess as valid driver’s license. The U.S. applicant lacked this requirement and thus was unqualified for the job. Employer’s rejection of the U.S. worker was

⁵ I reject Employer’s argument that the ability to drive is an implicit requirement of the farm worker position. Employer misplaces its reliance on *Matter of Saturn Plumbing*, 92-INA-194 (1994). There, the plumber’s job duties including house calls in residential neighborhoods; that requires driving on public roads in a manner that need not arise while driving a truck on a private ranch.

⁶ As the Certifying Officer conceded at oral argument, if I affirmed, Employer would simply file another application with the requirement of a driver’s license included, and the Certifying Officer could approve the application despite the availability of a U.S. worker who had no valid driver’s license. This wasteful process can be avoided here because the regulatory scheme allows an administrative law judge to consider new evidence in the hearing process.

consistent with the H-2A program. The determination of the Certifying Officer is REVERSED, and application is APPROVED.

SO ORDERED.

This Order shall be served by fax.

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STEVEN B. BERLIN
Administrative Law Judge