

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 July 2010

OALJ Case No.: 2010-TLC-00068

ETA Case No.: C-10169-24495

In the Matter of
THOMPSON FEEDLOT,

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On July 12, 2010, Thompson Feedlot (“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 19, 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 18, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Thompson Feedlot ("the Employer"). AF 65.¹ The Employer requested certification for three "Farmworkers, Farm and Ranch Animals" from August 3, 2010, until May 3, 2011. *Id.* The Employer listed the following job descriptions on its application:

Attend to live farm, ranch animals that may include cattle, swine. Duties may include feeding, watering, herding, castrating, branding and loading animals. May maintain records on animals; assist in birth deliveries; and administer medications, vaccinations. May clean and maintain animal housing areas. High school degree 3 mo. experience required. Must have or be able to obtain drivers license within 30 days.

AF 67.

The CO issued a Notice of Deficiency ("NOD") on June 14, 2010. AF 33-54. Citing to 20 C.F.R. § 655.122(b), the CO stated that although the Employer required the workers to obtain a driver's license within 30 days, "the job duties described do not contain any type of driving requirements." AF 35. As a result, the CO required the Employer to "explain why an applicant [was] required to have or obtain a drivers license, or remove this requirement from the application." *Id.*

On June 28, 2010, the Employer responded to the NOD. AF 9-32. The Employer stated in reference to the driver's license requirement: "To be able to legally operate employers vehicles so they can get to work[,] Employees will need a drivers license to be insurable. To be able to drive to get groceries, supplies and take care of personal business." AF 13.

On July 2, 2010, the CO denied the Employer's application. AF 3-6. Again citing to 20 C.F.R. § 655.122(b), the CO stated:

The employer's job offer as described on the application does not contain any driving requirements and the explanation submitted by the employer does not provide a valid job related reason for the driver's license requirement. Therefore, it has been determined by the Department of Labor that the requirement for the drivers' license is an employer preference rather than a job requirement.

¹ Citations to the 86-page appeal file will be abbreviated "AF" followed by the page number.

Furthermore, requiring a drivers' license may prevent otherwise qualified U.S. workers from applying and obtaining this position.

AF 5. The CO denied the Employer's application, and the Employer's appeal followed.

In its Request for Review, the Employer stated that it provided the workers with a vehicle to travel between the worksite and the housing, but the workers would need a license to be insurable. AF 1. Further, the Employer asserted that the "normal duties require driving vehicles for feeding, hauling feed, driving to the feedlots, etc." *Id.*

Discussion

20 C.F.R. § 655.122 requires that "each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops."

Although the Employer clarified that workers would need to drive a vehicle in order to transport or haul feed, nothing in the original application nor in the information before the CO at the time of determination indicated that the workers needed a license to perform the actual job duties. Rather, the regulations require that the Employer provide transportation to workers, and from the Employer's response to the NOD, it appeared that the Employer required the workers to have a driver's license so that the Employer would not have to provide a driver or otherwise arrange transportation other than providing a vehicle to the workers. Moreover, this transportation arrangement smacks of an Employer's preference, rather than a job requirement.

Regardless of the reason for the driver's license requirement, the Employer bears the burden to prove certification is appropriate. In the present case, the Employer needed to prove that it was a normal and accepted requirement for workers in similar non-H2A settings to have a driver's license. The Employer did not meet this burden. Because the Employer failed to prove that a driver's license was a normal and accepted requirement for workers in a similar non-H2A setting, the 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

Washington, D.C.
WSC:AH