



Issue Date: 16 December 2009

OALJ Case No.: 2010-TLC-00011

ETA Case No.: C-09275-20619

In the Matter of

PETTICOATS ADVANCE,
Employer

Certifying Officer: Charlene G. Giles
Chicago Processing Center

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

DECISION AND ORDER

On November 18, 2009, Petticoats Advance (“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 December 9, 2009, 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 October 2, 2009, the United States Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. AF 37-54.² In particular, the Employer requested certification for three “Farmworkers, Farm and Ranch Animals” between November 15, 2009, and September 15, 2010. AF 37.

On October 7, 2009, ETA issued a notice informing the Employer that its application had not been “accepted for consideration.” AF 20-23. The Employer responded to the notice on October 12, 2009. AF 14-19. On October 22, 2009, the CO accepted the application for processing. AF 10-13. The acceptance letter contained the following instructions related to the Employer’s duty to advertise:

Local Advertisements: Place an advertisement on 2 separate days, which may be consecutive, one of which must be a Sunday, in a local newspaper of general circulation serving the area of intended employment. If your job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, you must, in place of one Sunday edition, advertise in the regularly published daily edition with the widest circulation.

Multi-State Advertisements: Place one (1) advertisement in a newspaper of general circulation in the following states:

Pennsylvania, Virginia

Labor Supply State: Florida

AF 11-12.

On November 4, 2009, the Employer submitted a recruitment report to the CO. AF 5-6. In its report, the Employer stated that it had placed advertisements with the *Lancaster Farmer*, “which is the primary farm paper covering the Mid Atlantic region.” AF 5. The Employer further wrote: “I was waiting another week for calls. None so far, also I haven’t gotten any via SWA. I contacted a previous U.S. worker but he has a full time job and wasn’t interested.” *Id.* The report did not contain any other information regarding the Employer’s recruitment effort.

² Citations to the 54-page Administrative File will be abbreviated “AF” followed by the page number.

On November 12, 2009, the CO denied certification based on deficiencies contained in the Employer's recruitment report. AF 2-4. Specifically, the CO found that even though the Letter of Acceptance instructed the Employer to advertise in Pennsylvania, Virginia, and Florida, the recruitment report "did not provide definitive evidence of positive recruit[ment] in multiple states."³ AF 4. The CO also noted that the Employer's recruitment report was untimely. AF 4. The CO denied certification because the Employer failed to conduct all of the required positive recruitment. *Id.* The Employer's appeal followed.

Discussion

When conducting recruitment under the H-2A program, the Employer must "run two print advertisements" in a newspaper serving the area of intended employment. 20 C.F.R. § 655.102(d)(2). Additionally, the Employer must "recruit in all States currently designated as a State of traditional or expected labor supply with respect to each area of intended employment in which the employer's work is to be performed." 20 C.F.R. §655.102(d)(4). This recruitment entails placing an advertisement in a paper of general circulation in the appropriate states. Since the Employer did not comply with the program's recruitment requirements, the CO properly denied certification.

In its request for review, the Employer wrote:

[After receiving the Letter of Acceptance], [the Employer] immediately got an ad placed in the Lancaster Farmer to which [the Employer] subscribes. The Lancaster Farmer covers the Mid Atlantic region [of] Pennsylvania, New Jersey, Delaware, Maryland, West Virginia and Virginia.

Not having any experience with Florida newspapers [the Employer searched] the internet when a virus shut [the Employer's computer] down. The Florida Today ad, which is very expensive, would be late and [the Employer] waited through Monday and Tuesday before submitting the report. Hind sight says [the Employer] should have asked for a delay.

³ The CO also found that the Employer failed to provide adequate information regarding the total number of job openings the Employer intended to fill as well as the name, address, and telephone number of each U.S. worker who applied for the job. Since I will affirm the CO's denial based on the Employer's failure to advertise in multiple states as instructed in the Letter of Acceptance, I will not address whether the Employer properly reported adequate information regarding U.S. workers who applied for the job opening.

AF 1.

The regulations required the Employer to advertise in a local newspaper for two days as well as place advertisements in the states of Pennsylvania, Virginia, and Florida after the CNPC accepted the application for processing. *See* 20 C.F.R. § 655.102(d) (describing requirements for positive recruitment steps, including newspaper advertisements and job orders); 20 C.F.R. § 655.100(b)(2)(ii) (requiring employers with dates of need occurring prior to July 1, 2009, to conduct post-filing recruitment under the direction of the CNPC); 74 Fed. Reg. 17,597, 17,599 (April 16, 2009) (extending the transition rule at § 655.100(b)(2) to employers with dates of need prior to January 1, 2010). The record before the CO indicates that the Employer failed to advertise in a paper of general circulation in the state of Florida, as required by the regulations. By the Employer's own admission, it did not take these positive recruitment steps before the CO issued his denial, and therefore, failed to follow regulatory requirements. Without these steps, the Employer could not obtain an appropriate test of the labor market, and 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