

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 May 2010

OALJ Case Nos.: 2010-TLC-00029

ETA Case Nos.: C-10053-23291

In the Matter of

VOLCANIC FARMS,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

APPEARANCES: Don D. Heffner
For the Employer

Stephen Jones, Esq.
For the Certifying Officer

BEFORE: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER

On April 26, 2010, Volcanic Farms (“the Employer”), filed a request for a de novo hearing reviewing 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 April 30, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after

receipt of the appeal file, and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a).

Statement of the Case

Appeal File

On February 22, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Volcanic Farms ("the Employer") for temporary labor certification. AF 120.¹ In his application, the Employer requested certification for 19 "Farmworkers and Laborers." AF 120. The Employer's application was accepted by the ETA on March 1, 2010. AF 107-110.

According to emails from the Idaho Dept. of Labor to the ETA, 20 refugee clients had been referred to the Employer. AF 55. According to the emails, the workers did not have the requisite tractor experience as required by the job order, but the Employer was told that the agents of the refugees had "already lined up training for the workers and that by the date of need the workers would have had one month experience driving tractor[s]" AF 56. The Employer, according to the agent, responded that the training was not the issue because what he "really wanted was to bring his workers from Mexico." *Id.*

On April 19, 2010, the CO denied the Employer's application. AF 8-9. Citing to 20 C.F.R. § 655.102(k)(v), the CO stated that 20 individuals without tractor experience applied for the job but that the Employer was informed "that these applicants would be provided with the necessary one (1) month of tractor driving experience by the employer's stated date of need." AF 9. According to the CO, the Idaho Department of Labor found these applicants qualified, and thus, since the Employer did not hire the applicants, the CO denied certification.² *Id.* The Employer's appeal for a de novo hearing followed.

¹ Citations to the 136-page Administrative File will be abbreviated "AF" followed by the page number.

² The Idaho Department of Labor notified the CO that on April 12, 2010, a worker filed an age discrimination claim against the Employer, alleging that he had the requisite one month experience, but the Employer refused to hire him

In the Employer's request for hearing, he stated that his agent called him and "warned [the Employer] that the [Idaho Department of Labor] local office [stated] that the employment office was unhappy with Volcanic Farms on many counts and that they were going to insist that Volcanic Farms obeyed the H2A rules . . . and insist that [the Employer] hire the [refugees]."³ AF 1. The Employer also stated that although the agents for the refugees insisted that the refugees would have the necessary tractor experience by the start date of employment, the agents offered no "explanation of how this would be possible." AF 3. Moreover, the Employer further wrote: "I did not put much stock in this proposal since experience in driving a cultivating tractor is derived from actually cultivating with this type of tractor. It was the month of March and no cultivation was possible in Idaho due to the weather and lack of growing crops." *Id.*

De Novo Hearing

Per the parties' agreement, a de novo hearing was held on April 12, 2010. At the hearing, the only exhibit admitted was the 136-page administrative file. Tr. 6. The CO presented six witnesses at the hearing. The Employer testified on his on behalf.

Mr. Joshua Campbell and Ms. Lana Whiteford, both agents of the refugees, testified similarly at the hearing. Mr. Campbell testified that the workers did not have the requisite experience required in the job order, but he and Ms. Whiteford had planned for the refugees to obtain this experience by allowing the workers to use the tractor on uncultivated land. Tr 35. Mr. Campbell also testified that he did not know whether crops would be available, but the workers would have a month to practice "getting the tractor in the rows and making turns." *Id.*

because of his age. AF 20. The Employer disputed the allegations contained in the complaint, but since the worker was not part of the basis for the CO's denial, the issue of whether or not the individual was qualified but not hired is not properly before me. It should also be noted that the CO stated during the hearing that the discrimination claim was not being adjudicated during the May 12th hearing.

³ At the hearing, the Employer suggested that the Idaho Department of Labor ("IDOL") "has tried to see that I don't get certified." Tr. 11. The record contains numerous emails between the IDOL and the ETA. One email stated: "The state doesn't want to make a mistake on our end that causes [the Employer] to certify. We thought that if we sent Chicago a list of all the folks we referred who were qualified, that would be enough to cause him to not certify." AF 27. The emails also reveal that as a result of the complaint by the IDOL, the ETA would be applying a "heightened scrutiny to the application." AF 48. Another analyst noted that the application should "be elevated to the National Office for review and guidance on how to proceed." AF 49.

Mr. Campbell also testified that “people could practice going down those rows and get the same skill set even without there being an actual plant in the row from what I understand.” Tr. 37. Later, however, Mr. Campbell testified that he did not know whether there would be a difference between the ability to operate cultivator tractors in April compared to March because he had never driven a cultivator.⁴ Tr. 39.

Ms. Whiteford testified that the Employer told her after interviewing the refugees that “he didn’t care if they had tractor experience or not. He said he’d teach them himself if he really cared about that. What he told me was that every year, he gets a Mexican.⁵” Tr. 20. After reassuring the Employer that the refugees could get the tractor experience before the date of need, Ms. Whiteford testified that the Employer related to her that: “The issue was every year [the Employer] got his people and that he did not want to hire refugee workers.” Tr. 21.

The Employer testified at the hearing that it was necessary to require the workers to have one month of experience because in the past, he had trouble with inexperienced workers ruining tractors or tractor equipment. Tr. 10. The Employer stated that the workers did not have the required experience and he was not convinced they could get the experience before the start date because “there’s nothing to cultivate.” Tr. 12. The Employer also testified that all of the workers need to be able to operate tractors because the work takes place at multiple locations. Tr. 16. Finally, the Employer testified that if the refugees received the necessary experience, they could reapply for the jobs. Tr. 14.

Discussion

The only issue before the Board is whether the Employer had a “lawful job-related reason(s) for not hiring any U.S. workers.” 20 C.F.R. § 655.102(k)(v). Throughout the alien labor certification process, “the burden of proof ... remains with the employer to establish that

⁴ With the exception of Ms. Whiteford and Mr. Campbell, the other witnesses called by the CO testified to the same information presented by Ms. Whiteford and Mr. Campbell, discussed general procedure matters, or discussed matters relating to the age discrimination complaint, which is not relevant to this appeal.

⁵ Ms. Whiteford testified at the hearing that she had worked with the Employer unsuccessfully in the past to hire refugees for an H-2A position. The Employer had related to her then that the Employer “didn’t want to hire American workers because they were unreliable.” Tr. 19.

the individuals referred are not able, willing, qualified, or eligible because of lawful job related reasons.” *Cal Farms LLC and Washington Farm Labor Source LLC*, 2009-TLC-00049 (BALCA May 29, 2009). To be qualified, an applicant need only “meet the minimum requirements set out in the labor certification process.” *Id.*

At first blush, this case seems inundated with many overlapping issues, but ultimately, the only issue before the Board is whether the Employer had a lawful job-related reason for denying employment to the refugees. Regardless of the Employer’s personal sentiment regarding the hiring of foreign workers and regardless of any animosity that may have existed between any of the parties or witnesses, it is uncontested that the refugees did not have one-month of tractor driving experience. It is equally uncontested, despite the incorrect job order placed by the IDOL, that the Employer required one-month of experience as a “cultivating tractor driver.” Whether or not the workers could eventually get the experience is irrelevant. If and when the workers did obtain the experience, they had the opportunity to reapply for the job. Nothing in the regulations requires that an Employer train domestic workers when he previously required them to possess certain experience. Likewise, nothing in the regulations require him to accept workers that are not, by definition, minimally qualified. Therefore, the Employer had a lawful job-related reason for denying employment, and the CO improperly denied certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **REVERSED** and **REMANDED** for processing consistent with this opinion.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge