

U.S. Department of Labor

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Issue Date: 10 January 2011

OALJ Case No.: 2011-TLC-00110

ETA Case No.: C-10328-25592

In the Matter of

KRISTOPHER LANDRY,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
VACATING DENIAL OF CERTIFICATION

On December 27, 2010, Kristopher Landry (“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. § 655.171. On January 3, 2011, 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 business days after receiving the file to issue a decision on the basis of the written record. § 655.171(a).

STATEMENT OF THE CASE

On November 24, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for five (5) workers for the position of “General Farm Worker.” AF 30-49.¹ The Employer stated that it had a seasonal temporary need for the workers from January 15, 2011 to November 15, 2011. AF 30. On its application, the Employer, a rice and crawfish farm, stated that the job duties include field prep, water maintenance, planting, and harvesting of crop, in addition to repair and maintenance of farm equipment, shop, fields, levees, and farm roads. AF 32.

On December 1, 2010, the CO issued a Notice of Deficiency (“NOD”), requesting the Employer make several modifications. AF 16-18. The Employer made the requested modifications, and the CO accepted the Employer’s application for processing on December 13, 2010. AF 7-15. The Notice of Acceptance (“NOA”) required the Employer to conduct certain recruitment and submit a recruitment report to the CO by December 17, 2010. AF 7-11. Additionally, the CO notified the Employer that its housing for foreign workers must comply with the standards set forth at 20 C.F.R. § 655.122(d) and that the State Workforce Agency (“SWA”) would schedule and complete a pre-occupancy inspection of its housing in order to notify the Employer of any deficiencies. AF 10.

On December 21, 2010, the CO emailed the Louisiana SWA inquiring about inspection of the Employer’s provided housing. AF 5. The Louisiana SWA stated the following:

I have [tried] to contact this person several time[s][:] 12/7/2010 at 1:01 pm, 12/14/2010 [at] 8:25 am, then I went out there on 12/8/2010 at 1:00 pm and this morning I [tried] to contact the Employer at 6:50 am but they hung the phone up!!! I e-mail[ed] Shelly Bieber (Agent) about this problem.

AF 5. On December 22, 2010, the CO denied the Employer’s application because the Louisiana SWA made several attempts to contact the Employer in order to schedule a housing inspection, but had been unsuccessful. AF 2-4. Therefore, the CO was unable to determine if the employer provided housing met the standards under 20 C.F.R. § 655.122(d) and denied certification. Employer’s appeal followed the CO’s denial.

¹ Citations to the 49 page Administrative File will be abbreviated “AF” followed by the page number.

DISCUSSION

The H-2A regulations at 20 C.F.R. § 655.122(d) provide, in pertinent part:

(d) *Housing*. (1) *Obligation to provide housing*. The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer provided housing*. Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.494 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations*. Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards will apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing. The employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.

While the Administrative File contains an email from the CO and the Louisiana SWA that the Louisiana SWA tried to contact the Employer on December 7, 2010 at 1:01 p.m., December 14, 2010 at 8:25 a.m., and December 21, 2010 at 6:50 a.m., and “went out there,” (presumably to the Employer’s place of business) on December 8, 2010 at 1:00 p.m., the record is devoid of any evidence demonstrating that the Louisiana SWA ever left a message for the Employer informing him that it needed to schedule an inspection. AF 5. The Employer’s request for review asserts that the Louisiana SWA never left a message for the Employer. AF 1. Although the CO’s brief contends that the Employer should have ensured that the housing inspection took place, the NOA stated that “the SWA will make every effort to schedule and complete a pre-occupancy inspection of your housing and promptly notify you of any deficiencies that must be corrected.” AF 10. Based on this guidance, it is understandable that the Employer did not actively seek out the Louisiana SWA to schedule a housing inspection.

In addition, the Louisiana SWA’s email is quite vague regarding the actual contact, if any, that the SWA made with the Employer or its agent, and the Louisiana SWA did not provide the date that it emailed the Employer’s agent to notify her that it was attempting to schedule the

inspection. Based on the email from the Louisiana SWA to the CO, by never leaving a voicemail for the Employer,² I find that the Louisiana SWA did not make a reasonable effort to apprise the Employer of its desire to schedule a housing inspection. As the Louisiana SWA's inability to schedule a housing inspection was the sole ground for denial,³ I find that this case should be remanded so that the Louisiana SWA can contact the Employer, by cell phone, in order to set up a date for inspection of the employer provided housing.

Based on the foregoing, I find that the CO erred in denying the Employer's application before the Employer was notified that the Louisiana SWA was trying to schedule a housing inspection.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **REMANDED** for further processing consistent with this decision.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.

² I assume that if the Employer did not have an answering machine, this information would have been indicated in the email from the Louisiana SWA to the CO.

³ Although the Employer appears to have failed to comply with other requirements of the NOA, including filing a recruitment report, this basis was not cited in the CO's denial letter, and therefore, is not before me.