

**U.S. Department of Labor**

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**Issue Date: 24 January 2011**

**OALJ Case No.: 2011-TLC-00106**

**ETA Case No.: C-10323-25531**

*In the Matter of*

**UNTIEDT'S VEGETABLE FARM,**  
*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 23, 2010, Untiedt's Vegetable Farm ("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 14, 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. 20 C.F.R. § 655.171(a).

**STATEMENT OF THE CASE**

On November 19, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor

certification for 53 workers for the position of “Farmworkers, Crop, Nursery, and Greenhouse.” AF 48-56.<sup>1</sup> On November 24, 2010, the CO issued a Notice of Deficiency (“NOD”), requesting the Employer make several modifications. AF 35-38. The Employer made the requested modifications, and the CO accepted the Employer’s application for processing on November 30, 2010. AF 22-27. The Notice of Acceptance (“NOA”) required the Employer to conduct certain recruitment of U.S. workers and submit a recruitment report to the CO by December 15, 2010. AF 24-25. The CO specified that the recruitment report must contain an explanation of the lawful, job-related reason that the Employer declined to hire any U.S. worker that applied for the position. AF 25.

On December 15, 2010, the CO received the Employer’s recruitment report, which indicated that three U.S. workers were referred to the position and that the Employer had interviews scheduled with these three workers for December 20, 2010. AF 20. On December 16, 2010, the Employer submitted a supplemental recruitment report, indicating that it received one additional referral that was also scheduled for an interview on December 20, 2010. AF 19.

On December 16, 2010, the CO partially certified the Employer’s application. AF 5-8. The CO reduced the number of workers certified by four pursuant to 20 C.F.R. § 655.165, finding that because the Employer scheduled interviews with the three domestic workers on December 20, 2010, the CO assumes the Employer rejected these workers unlawfully. AF 8. The Employer requested review, arguing that it scheduled the interviews at the earliest possible date and that it did not reject any U.S. workers. The Employer also submitted a supplemental recruitment report following the four interviews with U.S. workers. AF 2.

## **DISCUSSION**

The H-2A regulation cited by the CO in denying the Employer’s application appears at 20 C.F.R. § 655.165 and provides, in pertinent part:

The CO may issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives during the course of processing the Application for Temporary Employment Certification, an audit, or otherwise. The number of workers certified will be reduced by one for each referred U.S. worker who is able, willing, and qualified, and who will be available at the time and place

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<sup>1</sup> Citations to the 84 page Administrative File will be abbreviated “AF” followed by the page number.

needed and has not been rejected for lawful job-related reasons, to perform the services or labor.

Although four U.S. workers were referred for the position in this case, when the Employer submitted its recruitment report, it had not refused to hire any of these workers. The Employer was in the process of determining the availability of able, willing, and qualified U.S. workers at the time of the denial, and there is no evidence that the four U.S. workers that were referred for the position were able, willing, qualified, and available for the position. Therefore, the CO incorrectly assumed that the Employer rejected these workers for unlawful reasons, and denial for four workers under 20 C.F.R. § 655.165 was not appropriate. *See Coosaw Ag LLC d/b/a Coosaw Farms*, 2011-TLC-119 (Jan. 14, 2011). Although the Employer submitted a supplemental recruitment report summarizing the results of the December 20, 2010 interviews, this supplemental recruitment report was not considered by the CO prior to forwarding the case to BALCA, and therefore, is beyond my scope of review. *See* 20 C.F.R. § 655.171(a). Accordingly, this case must be remanded so that the CO can review the supplemental recruitment report summarizing the results of the December 20, 2010 interviews to determine whether there are any U.S. workers who are able, willing, qualified, and available for the position that is the subject of the Employer's application.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **VACATED** and **REMANDED** to the Certifying Officer 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.

