

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)



Issue Date: 05 April 2011

OALJ Case No: 2011-TLC-00332
2011-TLC-00345

ETA Case No: C-11046-27772
C-11046-27729

In the Matter of

BRYANT BROTHERS FARM,
Employer

ORDER OF REMAND

On March 16, 2011, Bryant Brothers Farm (“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 March 24, 2011, the Office of Administrative Law Judges received the Appeal File (“AF”) from the Certifying Officer (“CO”).

This case was inadvertently assigned two different docket numbers in this office. The second of the two docket numbers, **2011-TLC-345, is Dismissed** as duplicative.

On February 15, 2011, the United States Department of Labor’s Employment and Training Administration (ETA) received an application from International Labor Management Corporation (ILMC) on behalf of the Employer. On February 22, 2011, the CO issued a Notice of Deficiency (NOD), noting that Federal Employer ID Number (FEIN) given for ILMC on the application was incorrect. AF 11-14. The error on the FEIN was corrected and the application was resubmitted the next day.

On March 9, 2011, the CO issued a second NOD, citing two deficiencies in the revised application. AF 5-10. The Employer requested a *de novo* hearing on March 16, 2011.

The first cited deficiency involved the rate of subsistence pay. The application specified subsistence pay at the then-current rate. While the Employer’s application was pending, the Department published in the Federal Register new subsistence cost reimbursement rates. The Employer’s Job Order and application provided that subsistence costs will “be paid per 20 CFR 655.122(h).” That regulatory provision requires that an employer’s subsistence payment can be no less than “the amount permitted under 655.173(a),” which, in turn, specifies that the Department’s annual update in subsistence rates is effective upon publication. AF 42.

The Employer was required to pay the subsistence rates currently in effect, regardless of the rates listed in their application, even if the Employer had not included language restating that

requirement in their application. The Employer acted appropriately in including that language, to make clear its understanding of its responsibility with regard to subsistence reimbursement. The fact that the prescribed dollar amount changed while the application was under review was not an appropriate basis for finding a deficiency. In a conference call shortly after receiving the Appeal File, counsel for the Department acknowledged that this finding of a deficiency was in error.

The second deficiency was based on an alleged failure by the Employer to comply with the regulatory provision at 20 CFR 655.122(b) relating to job qualifications because the Employer's Job Order contains an arbitration clause relating to employee grievances. The CO alleged that such a clause is "not normal to the occupation of Farmworker and Laborer, Crop, Nursery and Greenhouse." AF 7. In a conference call on March 30, 2011, counsel for the Department conceded that the record does not support the CO's finding that an arbitration agreement is not normal to that occupation.

The Department has agreed to accept the application in the form and with the content contained in the February 23, 2011, response to the Certifying Officer's February 22, 2011 NOD. The Department further agreed that it has completed its review of the Employer's application; that there are no deficiencies in the application; and no further Notices of Deficiencies or requests for modifications will be issued with regard to this application, whether related to the grievance and arbitration clause or any other matter. Therefore, the Department has requested remand of the case to the Certifying Officer so that processing of the application can proceed.

Therefore, in accordance with this concession by the Department, this case is remanded to the CO for acceptance of the application with the disputed arbitration and grievance language. The Department shall expedite processing of the Employer's application and the acceptance letter shall be issued immediately upon the Department of Labor's receipt of the ALJ's remand order. The acceptance letter will give the Employer up to seven calendar days to comply with the remaining requirements for certification that are within his control, but he shall not be required to advertise on a Sunday. If the Employer has fulfilled his obligations under the regulations, including requesting and obtaining a housing inspection, the CO shall grant certification of this application no later than six days after issuance of the acceptance letter.

ORDER

IT IS HEREBY ORDERED that this matter is **REMANDED** to the Certifying Officer for further processing in accordance with the findings above.

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc
Newport News, Virginia