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Issue Date: 14 January 2011

OALJ Case No.: 2011-TLC-00119

ETA Case No.: C-10343-25747

In the Matter of

**COOSAW AG, LLC D/B/A
COOSAW FARMS,**
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 30, 2010, Coosaw Ag, LLC d/b/a Coosaw Farms (“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 7, 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 December 9, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for fourteen (14) workers for the position of “Farmworkers and Laborers, Crop.” AF 61-71.¹ On December 15, 2010, the CO issued a Notice of Deficiency (“NOD”), requesting the Employer make several modifications. AF 31-35. The Employer made the requested modifications, and the CO accepted the Employer’s application for processing on December 20, 2010. AF 25-30. 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 22, 2010. AF 25-30. 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 28.

On December 23, 2010, the CO received the Employer’s recruitment report, which indicated that 31 U.S. workers were referred to the position by the South Carolina State Workforce Agency (“SWA”). AF 18-20. Of those 31, the Employer indicated that it hired one U.S. worker, two U.S. workers refused the job, and four U.S. workers failed to report to the interview. AF 19-20. The Employer stated that interviews were scheduled with the remaining 24 referrals on January 3, 2011. AF 19-20.

The CO denied the Employer’s application on December 23, 2010, finding that the Employer unlawfully rejected 13 domestic workers in violation of 20 C.F.R. § 655.165 because it still has pending interviews with 24 U.S. workers. AF 15-17. The Employer requested review with the Board of Alien Labor Certification Appeals. The Employer argues that it did not reject any U.S. workers and that it did not receive the second packet of referrals from the SWA until four days before the recruitment report was due and that it was impossible for it to schedule 24 interviews before the determination date. AF 1-3. Additionally, the Employer argues that it has been its experience that typically, less than 40% of referred candidates attend the interviews, and of those that attend, less than 40% accept the job. AF 3. The Employer states that it requires between 18 and 20 farmworkers this season, 14 of which will be H-2A, and that it hopes to be able to hire six U.S. workers for the remaining positions.

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

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

In this case, the CO argues that because the Employer had 24 interviews pending at the time of denial, the Employer unlawfully rejected 13 domestic workers in violation of 20 C.F.R. § 655.165 workers. I disagree. The Employer had not rejected any U.S. workers for the position and was still in the process of determining the availability of able, willing, and qualified U.S. workers at the time of the denial. As the Employer has not refused to hire any U.S. workers, the Employer has not violated § 655.165. Even though it was the Employer's choice to schedule the interviews on the date that it did, the Employer did not receive these applications until December 18, 2010.² Given the two holidays that fell between the time the Employer received the packet of referrals from the SWA on approximately December 18, 2010, and the date that it scheduled the interviews just over two weeks later, I find that the Employer's scheduling of the interviews on January 3, 2011 was reasonable and not intended to discourage or reject able, willing, and qualified U.S. workers.

Based on the foregoing, I find that the CO's denial of certification on the grounds that the Employer unlawfully rejected able, willing, and qualified U.S. workers to be improper. However, because the results of the January 3, 2011 interviews are unknown, it is appropriate to remand this matter to the CO to provide the Employer with the opportunity to submit a supplemental recruitment report summarizing the result of the January 3, 2011 interviews.

² Because the Employer raised this argument after the denial, under normal circumstances, I would be unable to consider this information under 20 C.F.R. § 655.171(a) because it is new evidence. Nevertheless, because the Employer could not have known that it needed to provide an explanation for the date it chose to schedule its interviews until after the denial, it would be fundamentally unfair to apply this regulation limiting BALCA's scope of review in a manner that prevents the Employer the opportunity to present this argument. Therefore, given the precise facts of this case, I find that § 655.171(a) does not prevent me from considering the Employer's argument that it did not receive the packet of referrals from the SWA until four days before the recruitment report was due on December 22, 2010. AF 2-3.

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.