

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 June 2011

OALJ Case No.: 2011-TLC-00410

ETA Case No.: C-11119-29183

In the Matter of

DEEUGENIO & SONS #2,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Theresa Ward
International Labor Management Corporation
P.O. Box 630
Vass, North Carolina 28394
For the Employer

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For the Certifying Officer

Before: Daniel A. Sarno, Jr.
Administrative Law Judge

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (“the Act”), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On May 26, 2011, DeEugenio & Sons #2 (“Employer”) filed a request for administrative review of the Certifying Officer’s

determination in the above-captioned temporary agricultural labor certification matter. (AF¹ 15-18) *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171.

Procedural History

On April 29, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Employer for temporary labor certification for 14 farm workers. (AF 89-115) On May 6, 2011, the Certifying Officer (“the CO”) issued a Notice of Deficiency (“NOD”), finding two² relevant deficiencies. (AF 66-69) The first deficiency was that Employer had included an arbitration and grievance clause (“the clause”) requiring workers to use arbitration to resolve grievances, which the CO contended is not “normal or accepted” within New Jersey for non-H-2A employers, in violation of 20 C.F.R. 655.122(b). The CO stated that in order for Employer’s application to be acceptable, Employer must either remove the clause from its application or submit documentation establishing the appropriateness of the requirement. (AF 68) The second deficiency was that Employer required one month of experience pruning fruit trees, which the CO contended is not “normal or accepted” in New Jersey under §655.122(b). The CO stated that in order for Employer’s application to be acceptable, the one month experience requirement must be removed.

Employer responded to the NOD on May 12, 2011. (AF 54-65) On May 20, 2011, the CO denied the application, stating that neither of the deficiencies had been successfully addressed. (AF 50-53) Employer appealed the denial on May 26, 2011, requesting administrative review. (AF 15-46)

On June 6, 2011, the Office of Administrative Law Judges (“OALJ”) received the Appeal File (“AF”) from the CO. When a party requests an administrative review, the administrative law judge (“ALJ”) has five business days after receipt of the AF to “review the record for legal sufficiency” and issue a decision. § 655.115(a). The CO submitted a brief and Employer opted to stand by its request for review. On the basis of the AF, the ALJ must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action. §655.171(a).

Positions of the Parties

¹ Citations to the 117-page Appeal File will be abbreviated “AF” followed by the page number.

² The CO identified a third deficiency that was cured by Employer in its response to the NOD and is not an issue in the appeal.

The CO issued the denial because he found Employer did not correct the two deficiencies. In its response to the NOD, Employer stated that it wished to keep the arbitration and grievance clause (“the clause”) because it is a large employer and the clause helps handle issues legally and efficiently. (AF 54) As to the experience requirement, Employer explained that it

requires their workers to have experience pruning fruit bearing trees, to prevent damage to their fruit trees. Summer pruning a fruit tree is the most sensitive time for pruning. An unskilled [worker] performing summer pruning can wipe out the fruit for up to 2 years if they do not properly prune the tree. . . .[S]ummer pruning is a necessity with the fruit trees. Due to this [Employer] decided years prior that they would only hire experienced workers. While according to the Occupational Title they could ask for up to 3 [months’] experience they [feel] if they have a worker with at least 1 [month’s] experience they have the basic skills to perform pruning under intense supervision of the [employer’s] staff.

(AF 55)

The CO’s denial of the application asserted that neither of the deficiencies had been corrected by Employer’s response to the NOD. The CO submitted a report from the New Jersey State Workforce Agency (SWA) supporting its assertion that mandatory grievance and arbitration language is not normal and accepted amongst employers that do not use H-2A workers. It found that Employer had not submitted documentation establishing the appropriateness of the requirement and alternatively, had not removed the clause from its application; therefore it had not corrected the deficiency. The CO also submitted a prevailing practice survey from the New Jersey SWA indicating that one month of experience is not normal or common practice in apple picking in southern New Jersey. The CO found that because the Employer did not remove the experience requirement, it had failed to comply with §655.122(b). (AF 50-53)

In its request for review, Employer stated that it did not remove the arbitration clause because it was not instructed to remove the disputed language but instead was asked to “explain why it was a business necessity.” It also claimed that if it “had been given a chance to remove

the disputed language from their order they would have.” (AF 15) Addressing the experience requirement, Employer submitted O*Net data for 45-2092 Farmworker and Laborers, Crop, which showed that farmworkers whose duties included “planting, cultivating, harvesting, and transplanting trees” fell into O*Net JobZone 1, an occupation which needs “little or no preparation” whose employees “need anywhere from a few days to a few months of training.” (AF 19-20) Employer argued that one month qualifies as little preparation.

Applicable Law

It is the Employer’s burden to show that certification is appropriate. 20 C.F.R. §655.103(a). The job offer “must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers.” §655.122(a). Further, it may “not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer’s H–2A workers.” *Id.* The H-2A regulations provide that

Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops.

20 C.F.R. § 655.122(b) (2010). A “job offer” is defined in the regulations as “[t]he offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.” §655.103(b).

Discussion

In its request for review, Employer stated that it did not remove the arbitration clause because it was not instructed to remove the disputed language but instead was asked to “explain why it was a business necessity.” It also claimed that if it “had been given a chance to remove the disputed language from their order they would have.” (AF 15) However, in the NOD, each deficiency listed was followed with a section entitled “Modification Required.” Following the identification of the arbitration clause deficiency, the Modification Required section reads, “The employer can remove the unacceptable language prior to final determination or submit documentation that establishes the appropriateness of the requirement.” (AF 68) Contrary to its

assertion, Employer clearly *was* given the opportunity to remove the disputed language and was instructed to so.

Employer provided some argument in its response to establish the appropriateness of the requirement. It stated that it used the clause for purposes of efficiency and that it had used the H-2A program for 13 years, and that they had a similar application approved already this season. Employer did not address whether the clause was normal and accepted under §655.122(b) or make any other legal argument. It is Employer's burden to show that certification is appropriate, and the CO found that Employer's response was insufficient to establish the appropriateness of the requirement. In light of the scant evidence provided by Employer and its inaccurate claim regarding the removal of the language, I agree with the CO that Employer failed to carry its burden. Employer did not overcome the deficiency and the denial of its application is affirmed.³

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/lec
Newport News, Virginia

³ One uncorrected deficiency is sufficient to affirm the denial of an application; therefore I do not reach the question of whether Employer carried its burden with respect to the experience requirement.