U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 03 June 2011

OALJ Case No.: 2011-TLC-403

ETA Case No.: C-11097-28912

In the Matter of:

Frey Produce & Frey Brothers #2,
Employer

****

OALJ Case No.: 2011-TLC-404

ETA Case No.: C-11097-28907

In the Matter of:

Frey Produce & Frey Brothers #3,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

These matters arise under the provisions of the Temporary Labor Certification provisions of the Immigration and Nationality Act (the Act).[1] They involve requests by Employer, Frey Produce and Frey Brothers, for administrative reviews of decisions by Respondent United States Department of Labor Office of Foreign Labor Certification.[2] In cases of this nature, the

[1] 8 U.S.C. §§1101(a)(15)(H)(ii)(a); 1188(c).

[2] Employer originally requested a de novo hearing, but during a conference call to schedule that hearing, agreed to waive the hearing and submit a brief on the legal issues in the interest of expediting a decision.

administrative law judge has five working days after receiving the file to "review the record for legal sufficiency" and to issue a decision.[3] The above captioned cases involve the same Employer and present the same issues.

Frey Brothers #2

On 22 Mar 11, Respondent received Employer's H-2A[4] request for the approval of 142 farm worker positions from 23 May 11 through 10 Nov 11. On 12 Apr 11 the Certifying Officer ("CO") issued a notice of deficiency ("NOD") for reasons not relevant to this decision. On 13 Apr 11 Employer sent an email to the CO correcting the identified problems and on 18 Apr 11, the application was accepted. However, on 5 May 11, the CO issued a new letter, stating that the application failed to meet the criteria for certification because it contained grievance and arbitration language that is not normal or common in the area of proposed employment. Employer was given the option of removing the unacceptable language prior to the determination or submitting documentation that establishes the appropriateness of the requirement. On 11 May 11, Employer requested a *de novo* formal hearing,[5] arguing that Respondent's interpretation of the regulations is incorrect and contrary to the statute.

Frey Brothers #3

On 22 Mar 11, Respondent received Employer's H-2A[6] request for the approval of 18 farm worker positions from 30 May 11[7] through 23 Dec 11. On 12 Apr 11 the Certifying Officer ("CO") issued a NOD for reasons not relevant to this decision. On 13 Apr 11 Employer sent a clarification letter and on 15 Apr 11, the application was accepted. However, on 5 May 11, the CO issued a new letter, stating that the application failed to meet the criteria for certification because the application contained grievance and arbitration language that is not normal or common in the area of proposed employment. Employer was given the option of removing the unacceptable language prior to the determination or submitting documentation that establishes the appropriateness of the requirement. On 11 May 11, Employer filed a request for a *de novo* formal hearing.[8]

I received the administrative file on the cases on 23 May 11, contacted the parties the following day, and conducted a telephone conference call with counsel for Employer and Respondent on 26 May 11. During that call, the parties agreed to join the cases and Employer's counsel determined that a *de novo* hearing was not necessary and an administrative review would suffice. The parties agreed there were two major issues in the case: 1) whether Respondent's rejection of the application was untimely and void and 2) whether the inclusion of the arbitration clause was a valid substantive reason for rejection. Pursuant to my order, the parties filed briefs on 1 Jun 11.

---

[3] 20 C.F.R. § 655.171(a).
[4] 20 C.F.R. § 655.9.
[5] 20 C.F.R. § 655.104(c); 20 C.F.R. § 655.112.
[6] 20 C.F.R. § 655.9.
[7] Employer's request for *de novo* hearing provides a start date of 30 May 11, however notes on brief that the corrected start date is 23 May 11.
[8] 20 C.F.R. § 655.104(c); 20 C.F.R. § 655.112.

POSITIONS OF THE PARTIES

Timeliness

Employer argues that the failure of the CO to comply with the statutory and regulatory deadlines for issuance of a NOD or determination (particularly after having issued an acceptance) results in the approval of the application. Respondent replies that the regulations allow for the CO to issue modification orders at any time up to final determination. Employer rejoins that such an application of the regulation, whether by its plain language or by interpretation conflicts with the language of the statute and Congressional intent that the H2A program operate in an expedited manner. Respondent answers that Administrative Law Judges are not empowered to invalidate regulations as contrary to statute and points out that even if the CO failed to comply with the timeliness requirements of the statute or regulation, there is no statutory or regulatory language indicating that such a failure results in an approval of the application.

Arbitration Clause

The CO's denial was based on his determination that the arbitration and grievance clause is a qualification or requirement that is not normal or common in the area of proposed employment. Employer responds that the arbitration clause is not a qualification or requirement and therefore not subject to the requirement that it be normal or common in the area of proposed employment. Respondent maintains that the CO's interpretation of the regulation is reasonable. Employer answers that such an interpretation is not reasonable and represents a drastic departure from the long established practice of the agency, noting that thousands of applications containing such clauses have already been approved.

LAW

Unless specifically provided for, administrative adjudicative bodies lack the inherent authority to rule on the validity of a regulation or invalidate regulations as written.[9] It is clear that, upon review of administrative actions, even Article III judges must give deference to an agency's reasonable interpretation of its own regulations and may not substitute their interpretation for that of the agency.[10] This is particularly true where a regulatory provision is ambiguous.[11] In determining the agency's interpretation, it is the "DOL's interpretation, not the ALJ's or the BRB's interpretation, to which [Article III courts] owe the usual deference that courts give agencies' interpretations of their own regulations or governing statutes.[12]

---

[9] *Dearborn Pub. Schools*, 1991-INA-222 (Dec. 7, 1993) (en banc).
[10] *Cf,. e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[11] *Smith v. Harvey*, 458 F.3d 669 (7th Cir. 2006).
[12] *Old Ben Coal Co. v. Dir., OWCP*, 292 F.3d 533, 538 (7th Cir., 2002).

Timeliness of Issuance of NOD

The Department cannot require an employer to submit an application more than 45 days before the date of need[13] and must render a decision to certify or not certify the application no fewer than 30 days before the employer's date of need.[14] If the CO determines the application or job order are incomplete, contain errors or inaccuracies, or do not meet the requirements, the CO will notify the employer within 7 calendar days of the CO's receipt of the application.[15] The notice must state the reasons for the notice; offer the employer an opportunity to submit a modified application; and state that the CO's determination will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification in a manner specified by the CO.[16] Prior to the issuance of the final determination, the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions.[17]

Not every failure of an agency to observe a procedural requirement voids subsequent agency action, especially where important public rights are at stake; when there are less drastic remedies available for failure to meet a statutory deadline, a court should not assume that Congress intended for the agency to lose its power to act.[18]

Reason for NOD

The burden is on the Employer to show that certification is appropriate.[19] The employer's 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.[20] Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H-2A workers.[21]

The H-2A regulations provide that "[e]ach 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[22] and the employer must attest to such. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job order."[23]

---

[13] 8 U.S.C. §1188(c)(1) and 20 C.F.R. §§ 655.130.
[14] 8 U.S.C. §1188(c)(2) and 20 C.F.R. §§ 655.141, 655.143.
[15] 20 C.F.R. 655.121.
[16] *Id.*
[17] 20 C.F.R. 655.121(e). Such modifications must be made or certification will be denied pursuant to Sec. 655.164 of this subpart.
[18] *Brock v. Pierce County,* 476 U.S. 253 (1986).
[19] 20 C.F.R. §655.103(a).
[20] 20 C.F.R. 655.122(a).
[21] *Id.*
[22] 20 C.F.R. § 655.122(b).
[23] *Id.*

The Job Order is defined as the document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its inter- and intra-state job clearance systems based on the employer's Agricultural and Food Processing Clearance Order (Form ETA-790), as submitted to the SWA.[24] The job offer is that which is 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.[25]

A Bona Fide Occupational Qualification (BFOQ) means that an employment decision or request based on age, sex, national origin or religion is based on a finding that such characteristic is necessary to the individual's ability to perform the job in question.[26] Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR parts 1604, 1605 and 1627.[27]

DISCUSSION

At the outset, I note that I am constrained to apply agency regulations and uphold reasonable interpretations and applications of the regulations by the CO. To the extent Employer is requesting that I find agency regulations or reasonable interpretations and applications of those regulations to be invalid as contrary to statute, its request is denied.

Timeliness

Employer argues that its date of need was 23 May 11 and concedes that in both cases, the NODs related to the typographical errors or internal inconsistencies in the filing was timely issued by the CO within the 7 day deadline. Employer filed its corrections the next day and the applications were subsequently accepted.

Pursuant to the statute, the certifications should have been issued by 23 Apr 11, but were not, despite Employer's repeated inquiries. On 5 May 11, after both the seven day and the thirty day regulatory and statutory deadlines, the CO issued a new demand letter reflecting his determination that the arbitration and grievance clause conflicted with H2A requirements. Even if the regulatory authority to modify is not inconsistent with the statute (and I lack the authority to make that finding) it is still limited by its own terms to the period before issuance of the final determination, which was required to be issued at least thirty days prior to the date of need. Any interpretation that would allow for an indefinite period for issuance of the final determination and by implication allow for modification at any time would be contrary to the entire purpose of the statutory and regulatory scheme and is patently unreasonable. Consequently I find that the CO failed comply with the regulations and his NOD was untimely.

[24] 20 C.F.R. 655.103
[25] *Id.*
[26] 20 C.F.R. §651.10 Definitions of terms used in parts 651-658.
[27] *Id.*

Nevertheless, the regulatory language provides no indication that a failure to comply with the timeliness requirements provides aggrevied Employers with any specific procedural or substantive rights or remedies. Although the facts of these cases would appear to present compelling arguments for equitable relief and *de jure* approval, this is not a forum of equity and neither the statute, regulations, nor past decisions support such a remedy.[28] I therefore decline Employer's request to reverse the CO's demand letter on the basis of timeliness.

Reason for NOD: Arbitration and Grievance Clause

The clear purpose of the statute and implementing regulations is to ensure that before employers hire H-2A workers, they can demonstrate there are no U.S. workers willing and able to fill those positions. Implicit in that policy is the requirement that the jobs offered the U.S. workers have the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers. There is no suggestion by the CO that the arbitration language was not included in the positions as they were described for and offered to U. S. workers.

Rather, the CO relied on the recent addition of the words "and requirement" in the section of the regulation that states "[e]ach 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.[29] The CO determined that the arbitration and grievance clause is a qualification and requirement and must qualify as 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.[30]

Thus, the ultimate question is whether the CO's determination that the arbitration clause is a qualification and requirement is a reasonable interpretation of the regulation. I find it is not. The plain meaning of qualifications and requirements for a job is the minimum requisite characteristics of a successful applicant, whether they are educational, experiential, physical, or mental. The fact that a position is subject to mandatory arbitration is a term and condition of employment fundamentally no different from the method of calculating overtime wages or earning vacation hours, The CO's interpretation is that "requirement or qualification" includes an employee's willingness to be subject to the arbitration clause. That interpretation, taken to its logical conclusion, would demand a similar finding that wages and hours are qualifications or requirements, because employees must be willing to work for the offered hours at the offered wages.

---

[28] *See* U.S.C. §1188(c)(2) and *Brock v. Pierce County,* 476 U.S. 253, (1986).

[29] 20 C.F.R. § 655.122(b). (Italics added).

[30] I find the CO's determination that such clauses are 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 to be supported by a preponderance of the evidence in the record.

Such an interpretation is unreasonable and inconsistent with the clear meaning of the regulations. The CO's NODs based on that substantive ground are vacated.[31]

ORDER

The Certifying Officer's Notice of Deficiency in the certification application is hereby partially **AFFIRMED** and partially **DENIED**. It is therefore **ORDERED** that this matter be **REMANDED FOR FURTHER PROCESSING CONSISTENT WITH THIS OPINION.**

A

PATRICK ROSENOW
Administrative Law Judge

[31] Solicitor cited and I have reviewed two recent ALJ decisions, *Head Brothers*, 2011-TLC-394, and *Moss Farms*, 2011-TLC-395, that reached an opposite conclusion and upheld an interpretation that the arbitration clause is a job "qualification or requirement." While I have considered the opinion and reasoning in those cases, I am not bound to follow them and decline to do so. Unfortunately, it appears that there is no straightforward method within the TLC statutory or regulatory construct to resolve such conflicts between ALJ's, meaning future decisions may depend on which ALJ is assigned to the case.