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Issue Date: 31 January 2011

OALJ Case No.: **2011-TLC-00147**

ETA Case No.: **C-10354-25950**

In the Matter of

HIATT HONEY CA, LP,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

On January 14, 2011, Hiatt Honey CA, LP ("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 24, 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 December 20, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor

certification for four workers for the position of "Beekeeper." AF 123-131.[1] On December 27, 2010, the CO issued a Notice of Deficiency ("NOD"), requesting the Employer make several modifications. AF 107-110. The Employer made the requested modifications, and the CO accepted the Employer's application for processing on January 4, 2011. AF 92-96. The Notice of Acceptance ("NOA") required the Employer to conduct certain recruitment of U.S. workers and submit a signed and dated recruitment report to the CO by January 5, 2011. AF 92-96. The CO specified the information that must be included in the recruitment report, including the name and contact information of each U.S. worker who applied or was referred to the job and an explanation of the lawful, job-related reason that the Employer declined to hire any U.S. worker that applied for the position. AF 95.

On January 6, 2011, the CO received the Employer's signed and dated recruitment report. AF 68. In the recruitment report, the Employer stated that no U.S. workers were referred to the position and that two of the Employer's former employees were unable to return this season due to full-time employment elsewhere or other obligations. AF 65-68. On January 6, 2011, the CO partially certified the Employer's application for three workers. AF 51-64. The CO reduced the number of workers certified by one pursuant to 20 C.F.R. § 655.165, finding that because the State Workforce Agency ("SWA") had referred one worker to the position on December 29, 2010, the Employer had unlawfully rejected one able, willing, available, and qualified domestic worker. AF 54. The Employer filed an appeal of the denial of one worker, stating that it did in fact offer the position to the domestic worker, but that the domestic worker did not show up for work and has not responded to the Employer's phone calls. AF 1-50.

DISCUSSION

The CO may only grant an employer's application to admit nonimmigrant workers on H-2A visas for temporary agricultural employment in the U.S. if there are not sufficient U.S. workers available who are capable of performing the temporary services or labor at the time the employer files its petition. 20 C.F.R. § 655.5(a)(1). In order to apprise U.S. workers of the agricultural position, the regulations require an employer to place a job order with the SWA serving the area of intended employment prior to filing an application for temporary labor

[1] Citations to the 141 page Administrative File will be abbreviated "AF" followed by the page number.

certification. 20 C.F.R. § 655.121(a). The SWA refers individuals to the employer who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing, and available for employment. 20 C.F.R. § 655.155. An employer bears the burden of demonstrating that there are not sufficient U.S. workers that are able, willing, and qualified to perform the work in the area of intended employment. 20 C.F.R. § 655.103(a). Accordingly, under 20 C.F.R. § 655.156(a), an employer must prepare, sign, and date a written recruitment report that must contain the following information:

> (1) Identify the name of each recruitment source;
> (2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;
> (3) Confirm that former U.S. employees were contacted and by what means; and
> (4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

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.

When an employer submits a recruitment report that misrepresents the number of workers referred by the SWA or any other recruitment source, the employer will be unable to meet its burden of demonstrating that there are not sufficient U.S. workers that are able, willing, and qualified to perform the work in the area of intended employment. In this case, although one domestic worker was referred to the Employer by the SWA on December 29, 2010, prior to the date that the Employer submitted its recruitment report, the Employer did not include this

referral in its recruitment report.[2] The Employer did not explain its reason for not hiring this worker when it submitted its recruitment report, and therefore, the CO properly denied certification for one worker under 20 C.F.R. § 655.165.

ORDER

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.

[2] Although the Employer has submitted evidence with its request for review regarding the reasons that it did not hire the domestic worker, this is new evidence that was not part of the record upon which the CO based his denial, and therefore, I cannot consider this evidence on appeal. 20 C.F.R. § 655.171(a). The Employer made no mention of the referral of this domestic worker in its recruitment report, and it cannot attempt to cure this failure by adding additional evidence on appeal.