

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 May 2011

OALJ Case No.: 2011-TLC-00395

ETA Case No.: C-11101-28957

In the Matter of

MOSS FARMS,

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Leon Sequiera, Esq.
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For the Employer

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For the Certifying Officer

Before: Daniel A. Sarno Jr.
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION¹

¹ The hearing in this matter held on May 10, 2011 involved two Employers Head Brothers (2011 TLC 00394) and Moss Farms (2011 TLC 00395). Both cases involved the same issue. Separate decisions are being issued in the respective cases.

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), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On April 19, 2011, Moss Farms (“the Employer”) filed a request for review of the Certifying Officer’s denial of its H-2A application for temporary alien labor certification in the above-captioned temporary agricultural labor certification matter. *See* 20 C.F.R. § 655.112. On April 22, 2011, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after receipt of the appeal file, upon request of the Employer, and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a). The Employer requested additional time to complete discovery in this case prior to holding the hearing. The hearing was held May 10, 2011. On the basis of the hearing record, the administrative law judge must affirm, reverse, or modify the CO’s determination, or remand to the CO for further action.

Statement of the Case

On April 11, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for seven farm workers. CX 2.

On April 15, 2011, the CO issued a Notice of Deficiency (“NOD”), finding two deficiencies. The first was that the Employer included an arbitration and grievance clause requiring workers to use arbitration to resolve grievances, which the CO contended is not “a normal and accepted practice” within Tennessee for non-H-2A employers, in violation of 20 C.F.R. 655.122(b). CX 2. The second deficiency noted was the Employer listed an incorrect adverse effect wage rate (AEWR) in violation of 20 C.F.R. 655.120(a). CX 2. The CO indicated that in order for the Employer’s application to be acceptable, the Employer would need to remove the arbitration and grievance clause from its application amend its application to list the correct AEWR of \$9.48. CX 2.

The Employer responded to the NOD on April 19, 2011, requesting a de novo hearing. CX 2. The Employer argued that the face of the Employer’s job order and application listed the correct AEWR and the incorrect figure listed in the attachment to the job order was a typographical error of no legal significance. CX 2. With regards to the arbitration and grievance

clause, the Employer noted the Department of Labor had recently conceded in a number of other cases that it was unjustified in rejected applications based on identical clauses. The Employer also noted the Tennessee State Workforce Agency had approved the Employer's job order, including the arbitration and grievance clause, a few days before the CO rejected the application. CX 2.

In a conference call between the undersigned, Employer's attorney, Leon Sequiera, and solicitors Jonathan Hammer and Vincent Costantino, on April 26, 2011, the Employer agreed it would amend its application to cure the wage issue and the CO agreed it would accept that change. Thus, the only issue remaining for decision is in regards to the arbitration and grievance clause.

Exhibits

CX 1 - The Administrative File of Head Brothers;

CX 2 - The Administrative File Moss Farms;

CX 3 - April 1, 2011 email from Weldon Floyd to Charlene Giles;

CX 4 – Survey dated March 31, 2011.

The following Employer exhibits were marked for identification and received into evidence.²

EX 1 – 2010 Certification for Moss Farms;

EX 2 – 2010 Certification for Head Brothers.

Summary of the Evidence

A telephonic hearing was held in this case on May 10, 2011 at which time all parties were afforded full opportunity to present evidence and argument. The CO called two witnesses to testify.³

² Attached to its post-hearing brief, Employer submitted two additional exhibits. These proposed exhibits were excerpts from the deposition transcripts of the two individuals who testified at hearing, Weldon Floyd (EX 3) and Marie Christine Gonzalez (EX 4). Those documents will not be admitted into evidence. Both individuals testified at the hearing and the depositions could have been used to impeach their testimony at the hearing. At the hearing, any and all relevant questions could have been asked of both witnesses. Moreover, at the end of the hearing the Presiding Judge closed the record and adjourned the hearing.

Testimony of Weldon Floyd

Weldon Floyd is employed by the Tennessee State Workforce Agency (SWA). He is the Planning and Monitoring Manager. His agency is responsible for receiving and reviewing job orders (also referred to as clearance orders, applications for temporary labor certification and applications) and relevant attachments submitted in the H-2A Program from farmers or their agents. After reviewing these job orders and attachments his agency either issues Letters of Acceptance or Notices of Deficiency. He reviewed the applications submitted by Moss Farms and Head Brothers (Employers) in late March 2011. Nothing in either job order or the attachments he reviewed raised any flags that he felt he should bring to the attention of the Certifying Officer (CO) at the Office of Foreign Labor Certification in the Chicago National Processing Center (CNPC). He subsequently issued Letters of Acceptance. TR 12-14, 23-24. The CNPC later found problems with the applications and contacted Mr. Floyd. The CNPC requested that he and his staff conduct a survey of non H-2A employers in order to determine whether mandatory grievance and arbitration clauses were normal and accepted job requirements those job orders in the State of Tennessee.⁴ TR 14-16. The parameters of the survey were for agricultural occupational codes⁵ for non-H-2A job orders which were filed in the SWA system from January 1, 2009 through March 15, 2011. Subsequent to the survey, it was determined that 23 agricultural non-H-2A job orders had been filed during the relevant period.⁶ After examining the job orders, Mr. Floyd and his staff determined that none of non-H-2A job orders contained mandatory grievance and arbitration language. TR 16-17. Mr. Floyd also explained that unlike H-2A applications, which permit attachments, non-H-2A applications do not allow any attachments to the applications where such mandatory language could be inserted. TR 50-51.

Subsequent to the survey, the State of Tennessee determined that mandatory grievance and arbitration language is not a normal requirement in non-H-2A job orders. TR 21-23. Mr. Floyd readily conceded that prior to the survey requested by the CNPC, his staff never really focused on the mandatory grievance and arbitration language in H-2A job orders and had quite

³ The hearing transcript pages are referenced as TR.

⁴ The mandatory grievance and arbitration language do not appear in the job order summaries. It appeared in Attachment Section P of each job order. CX 1, CX 2.

⁵ The codes are contained in the Dictionary of Occupational Titles. TR 20.

⁶ Mr. Floyd later conceded that the correct number was 22. One of the employers was not seeking workers in Tennessee. The remaining 22 job orders were requesting various agricultural workers to work in Tennessee. TR 40.

routinely sent Letters of Acceptance on job orders with such language. Counsel for the CO stipulated that such errors were made and applications were certified in the past containing such language. TR 24-28.

Testimony of Marie Christine Gonzalez

Marie Christine Gonzalez is a CO with the CNPC. The CNPC administers three temporary labor programs; H-2A, H-2B, and H-1B. She is assigned to the H-2A program. As a CO she reviews and processes applications submitted by H-2A employers under the temporary agricultural worker program. Under that program employers can bring in foreign workers to work for up to ten months on either a temporary or seasonal basis. TR 56-57. She was the CO for the Head Brothers application and John Rotterman was the CO for the Moss Farms application. Ms. Gonzalez is familiar with both applications. Both applications were issued Notices of Deficiency dated April 15, 2011. TR 57-59; CX 1, CX 2. Both applications were deficient because they contained mandatory grievance and arbitration language. TR 59-60.

Prior to issuing the Notices of Deficiency, the CNPC contacted the Tennessee SWA and requested that the SWA conduct a survey of non-H-2A agricultural employers in order to determine whether those applications contained mandatory grievance and arbitration language. On April 1, 2011, Weldon Floyd emailed the CNPC the results of the survey. None of the Tennessee Non-H-2A agricultural employers surveyed had mandatory grievance and arbitration language in their applications. TR 60-61; CX 3, CX 4. Based on the results of the survey conducted by the Tennessee SWA, the CNPC determined that mandatory grievance and arbitration language was not a normal and accepted job requirement by non-H-2A employers in Tennessee. TR 61-62. Therefore, since April 1, 2011, such mandatory language in any job order has resulted in a Notice of Deficiency being issued. The Notices of Deficiency for Head Brothers and Moss Farms are dated April 15, 2010. Ms. Gonzalez readily admitted that prior to April 1, 2010, the CNPC had erroneously approved many applications containing the mandatory language. In fact, she agreed that the 2010 applications from both employers were approved containing the same mandatory language. TR 62-64, 73; EX 1, EX 2.

Ms. Gonzalez emphasized that the mandatory nature of the language compelled job applicants to either accept certain grievance and arbitration procedures as a condition of

employment or to be denied employment. Therefore, the CNPB determined this mandatory condition of employment to be a job requirement. TR 70-72.

Discussion

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. 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.” 20 C.F.R. § 655.122(b). The CO denied certification based on this regulation, explaining that “[t]he employer has included arbitration and grievance language in Section P on page 6 of the ETA Form 790 Attachments that requires workers to use arbitration to resolve grievances. The Tennessee SWA has determined that using arbitration to resolve grievances is not a normal and accepted practice within its state for non-H-2A employers.” (AF 5).

The disputed language reads:

Mandatory Grievance and Arbitration Procedure: As required by Department of Labor regulations, all workers (foreign or domestic) have a right to file a grievance or complaint with the nearest local office of their State Employment Security Commission, as described in 20 C.F.R. 658, Subpart E (Job Service Complaint System). The employer provides grievance and arbitration procedure for the resolution of all grievances by workers arising out of employment under this Clearance Order. This procedure must be used to resolve all grievances. This grievance and arbitration procedure is provided as an alternative to private litigation, and does not constitute a waiver of any rights prohibited under 20 CFR 501.4.
CX 2

The burden is on Moss Farms to show that certification is appropriate. 20 C.F.R. § 655.103(a). Moss Farms has the burden of establishing that the mandatory grievance and arbitration language is a normal and accepted job requirement for workers in similar non-H-2A settings. The regulations state:

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 HH-2A workers in the same or comparable occupations or crops.

20 C.F.R. § 655.122(b). Moss Farms has simply failed to do this. The company did not offer any evidence on this issue. Rather, Moss Farms chose to argue that the mandatory language was simply not a job requirement or qualification. Employer submits that job qualifications and requirements refer solely to the requisite set of skills needed to perform the specific job being offered. This assertion has no merit. While it is true that there is no specific definition for either term in the statute or applicable regulations, Ms. Gonzalez convincingly explained that the mandatory nature of the grievance and arbitration language made it a condition precedent which must be accepted by an applicant prior to being hired by the Employer. As such, I conclude that it certainly should be considered to be a job requirement. Moss Farms failed to show that the mandatory grievance and arbitration language is a normal and accepted job requirement for workers in similar non-H-2A settings. Indeed the CNPC and The Tennessee SWA went one step further, initiating a survey which showed just the opposite to be true.⁷

Moss Farms next argues that the U.S. Department of Labor had a long history of approving certifying H-2A applications that contained mandatory grievance and arbitration language. Head Brothers contends that to no longer continue this practice is somehow arbitrary and capricious. The Presiding Judge disagrees. The CO readily admitted that many such applications were approved and certified in the past. However, the CO avers that this was done in error and was later rectified when CNPC and the Tennessee SWA received the survey results. Consequently, I do not find the actions of the Department to be arbitrary and capricious.

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

⁷ Employer submits that the survey is fatally flawed. I don't find this to be the case. The parameters of the survey were quite reasonable. Of the 22 non-H-2A agricultural applications found, not contained similar mandatory language. Assuming the survey was flawed, Employer still has not met its burden of proof.

DAS/ccb
Newport News, Virginia