



Issue Date: 10 March 2011

OALJ Case No.: 2011-TLC-00233

ETA Case No.: C-10326-25564

*In the Matter of*

**ROJAS FARM, LLC,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

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

**DECISION AND ORDER**  
**AFFIRMING IN PART AND REVERSING IN PART**  
**DENIAL OF CERTIFICATION**

On February 23, 2011, Rojas Farm, LLC (“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 March 3, 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 November 22, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for 10 farm laborers. AF 85-95.<sup>1</sup> On December 9, 2010, the CO issued a *Notice of Acceptance* to the Employer, instructing it to provide, among other documentation, a signed and dated recruitment report summarizing its recruitment of U.S. workers on January 27, 2011. AF 50-54.

The CO denied the Employer's application for temporary labor certification on January 28, 2011 on two grounds. AF 33-35. The CO found that the Utah State Workforce Agency ("SWA") failed to provide a housing report and the Employer failed to provide a written recruitment report. AF 35. On January 31, 2011, the Utah SWA responded to the CO's January 28, 2011 email, notifying the CO that the Employer's housing was inspected on January 12, 2011 and had a capacity for ten workers. AF 30-31. Also, on January 31, 2011, the CO received a signed and dated recruitment report from the Employer. AF 26-29. In the recruitment report, the Employer identified 15 referrals from the SWA and the reasons that the applicants were not hired for the position. *Id.* The Employer indicated that it did not hire Dustin Black because "he was not able to provide a job history or resume, without any referrals or background check we could not proceed." AF 27. The Employer also stated that it did not hire Javier Beristain because "he had too many layoffs for absenteeism." AF 28.

BALCA received the Employer's request for review on February 4, 2011. The CO subsequently reconsidered its determination, and on February 16, 2011, partially certified the Employer's application for eight temporary farm laborers. AF 9-22. In stating the reason for denying the Employer two requested workers, the CO explained that the Employer's rejection of Dustin Black and Javier Beristain was unlawful. AF 12. The CO found that rejection of Dustin Black was unlawful because the Employer did not require any experience for the position and did not indicate that a background or reference check was a condition of employment. AF 12. Additionally, the CO found that rejection of Javier Beristain was unlawful because the Employer did not establish that he was unable, unwilling, unavailable, or unqualified to perform the job. AF 12. The Employer's appeal followed.

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<sup>1</sup> Citations to the 95-page Administrative File will be abbreviated "AF" followed by the page number.

## 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). Accordingly, the regulations require an employer to conduct certain recruitment to ensure that no U.S. workers are available for the position in the application. 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 regulations permit the CO to grant partial certification if an employer is able to fill some of its labor needs with domestic workers. Twenty C.F.R. § 655.165 provides:

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.

It is the employer's burden to explain the lawful job-related reasons for rejecting a U.S. applicant. *See Marnic Realty*, 1990-INA-48 (Nov. 21, 1990). The mere suspicion of an applicant's shortcomings does not satisfy the employer's burden to document a lawful, job-related reason for rejection. *See Western-Bagel Baking Corp.*, 1990-INA-72 (May 22, 1991); *Marnic Realty*, 1990-INA-48 (Nov. 21, 1990); *Hill-Fister Engineers, Inc.*, 1989-INA-114 (Feb. 6, 1990).

In this case, the CO found that the Employer did not have a lawful, job-related reason for not hiring Dustin Black or Javier Beristain. I agree with the CO that the Employer's basis for

rejecting Dustin Black was unlawful, because the Employer did not require referrals or a background check of any other worker.<sup>2</sup> Indeed, this farm laborer position does not require *any* employment experience. AF 88. Therefore, the CO properly reduced the number of H-2A workers for certification by one because the Employer’s rejection of Mr. Black was not lawful. However, I find that the Employer’s rejection of Mr. Beristain because of his work history, which includes layoffs for absenteeism, is lawful and job-related. An employer is permitted to refuse to hire a domestic worker that it deems to be unreliable and unfit for the job opportunity based on that individual’s past work history. Here, the Employer did not have only a “mere suspicion” of Mr. Beristain’s perceived shortcomings, it actually had information regarding Mr. Beristain’s employment history that gave it a reasonable basis for determining that the applicant would be an unreliable employee.<sup>3</sup>

Accordingly, I find that the CO’s partial certification should be affirmed as related to the Employer’s rejection of Dustin Black and reversed as related to Javier Beristan.

### **ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED** in part and **REVERSED** in part, and the Certifying Officer shall grant certification for one (1) additional farm laborer.

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**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

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<sup>2</sup> In its request for review, the Employer provided additional reasons for rejecting both Mr. Black and Mr. Beristain. However, this is new evidence not in the record upon which the CO based his denial, and therefore, I cannot consider this new evidence on appeal. 20 C.F.R. § 655.171(a).

<sup>3</sup> I note that the H-2A regulations only require an employer to “explain” the lawful, job-related reasons for rejection, rather than requiring an employer to provide documentation to support its assertion that it had a lawful, job-related reason for rejection. Furthermore, the CO did not request any additional documentation from the Employer related to Mr. Beristain’s history of layoffs for absenteeism, so I find that the Employer sufficiently met its burden to explain the lawful job-related basis for not hiring Mr. Beristain.