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Issue Date: 10 June 2011

OALJ Case No.: 2011-TLC-00408

ETA Case No.: C-11122-29189

In the Matter of

RUSSELBURG FARM,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Leon Sequeira, Esq.
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For the Certifying Officer

Before: Kenneth A. Krantz
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 19, 2011, Russelburg Farm (“Employer”) filed a request for de novo hearing 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.

Procedural History

On May 2, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Employer for temporary labor certification for six farm workers. (AF 22) On May 9, 2011, the Certifying Officer ("the CO") issued a Notice of Deficiency ("NOD"), finding one deficiency. (AF 12) The CO found 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 Kentucky for non-H-2A employers, in violation of 20 C.F.R. 655.122(b). (AF 14) The CO stated that in order for Employer's application to be acceptable, Employer must remove the clause from its application. *Id.* Employer appealed the NOD on May 19, 2011. (AF 4)

On May 23, 2011, the Office of Administrative Law Judges ("OALJ") received the Administrative File ("AF") from the CO. When a party requests a de novo hearing, the administrative law judge ("ALJ") has five calendar days to schedule a hearing after receipt of the AF, and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a). A hearing was timely scheduled for June 3, 2011, however on June 2, 2011, Employer requested that its appeal be modified from a de novo hearing to an administrative review. The ETA was amenable to this request, and the appeal was converted to a request for administrative review. Both parties submitted briefs. 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

The CO issued the NOD because he determined that the arbitration and grievance clause is a job qualification or requirement that is not normal or accepted in Kentucky (the area of proposed employment). Employer asserts that the clause is neither a job qualification nor requirement, but rather a term or condition of employment, and therefore is not subject to the regulatory requirement at §655.122(b) that it be normal or accepted. The ETA maintains that though the statute refers only to "qualification," Section 655.122(b) of the regulations added the term "requirement," and CO reasonably interpreted the regulation to treat the clause as a requirement. Employer responds that such an interpretation is unreasonable and inconsistent with the substantive meaning of the regulations. Employer also argues that the interpretation is

arbitrary and capricious in violation of the Administrative Procedures Act, because it represents a drastic departure from the long-established practice of the agency. Employer asserts that thousands of applications containing such clauses have been approved in the decades-long history of the H-2A program.

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

The primary purpose of the Act and implementing regulations is to ensure that an H-2A worker is not hired when there is a U.S. worker willing and able to fill the position. Accordingly, employers must demonstrate, before they hire H-2A workers, that there are no willing and able U.S. workers for the position. The regulations require employers to offer the same benefits, wages, and working conditions to H-2A and U.S. workers alike. Neither the CO nor Employer suggests that the clause was not offered to U.S. workers, so Employer satisfies this requirement of the regulations.

The CO issued the NOD because he determined that the clause is a requirement and a job qualification under §655.122(b) and therefore is subject to the "normal and accepted"

requirement of that provision. The CO asserts that the clause is not consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops. *Id.*

The issue upon which this case turns is whether the arbitration and grievance clause is a “job qualification and requirement” within the meaning of §655.122(b). I find that it is not. In order to ascertain the meaning of the terms “job qualification and requirement,” it is helpful to examine the history of that language in the regulations.

The Act created the H-2A program in 1986 and used the term “qualification,” stating that “[i]n considering the question of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops.” 8 U.S.C. §1188(c)(3)(A)(ii). The statute did not define the term “qualification.”

The Department of Labor (“the Department”) implemented the H-2A program through regulations promulgated in 1987. The Department interpreted the statutory term “qualification” in the regulations as follows: “[b]ona fide occupational qualifications specified by an employer shall be consistent with the normal and accepted qualifications required by non-H-2A employers.” §655.102(c)(2006). The regulations define bona fide occupational qualification (“BFOQ”) at §651.10¹: “A [BFOQ] means that an employment decision or request. . . is based on a finding that such characteristic is necessary to the individual’s ability to perform the job in question.” *Id.* Applying this definition, Employer argues that the arbitration and grievance clause would not be considered an occupational qualification because it is not a characteristic necessary to the individual’s ability to perform a job. Rather, Employer asserts, it is a general condition of employment, not unlike a prohibition on drug and alcohol possession as a condition of a job. (AF 43)

The Department did not alter the qualification language again until 2008 revisions, leading to renumbering and slightly different wording: “Each job qualification listed in the job offer must not substantially deviate from the normal and accepted qualifications required by

¹ The definitions in § 651.10 apply to Parts 651-658, and therefore are applicable to the usage of the term throughout §655, which governs the H-2A program.

employers that do not use H-2A workers in the same or comparable occupations and crops.” §655.104(b)(2009). In essence, the Department replaced the term “BFOQ” with “job qualification.” The Department provided a definition of this term in the 2008 preamble comments on this Section: “job qualifications typically describe the minimum skills and experience that an employee must have to secure a job.” 73 Fed. Reg. 77110, 77141 (Dec. 18, 2008). The preamble also states the reason for the rewording: “The Department is therefore altering this provision to conform more closely to the language of the statute, and is limiting the restriction in § 655.104(b) to job qualifications.” *Id.* Employer argues that when the 1987 definition is compared to the 2008 definition, it is clear that the substantive meaning of the regulatory provision did not change. In both cases, it is clear that the Department is referring to a characteristic, skill, or experience particular to the individual that affects his or her ability to do the job in question.

In 2010, the Department again revised the regulations, renumbering and rewording the job offer section. This change led to the current regulations, modifying the term from “job qualification” to “job qualification and requirement,” and reinserting the requirement that it be “bona fide.” 20 C.F.R. §655.122(b)(2010). The Department discussed its intent behind these changes in the 2010 Final Rule preamble:

The Department proposed in the [Notice of Proposed Rulemaking] to *retain the same requirements with respect to the job qualifications and requirements* as in the 2008 Final Rule. . . . Having considered the comments received in response to this proposal, the Department has decided to retain the provision, as proposed.

75 Fed. Reg. 6884, 6907 (Feb. 12, 2010)(emphasis added). Employer asserts, and I agree, that the Department clearly did not intend to change the substantive meaning of this provision.

An examination of the history of this provision has shown that since its inception in 1987, the substantive meaning of the term “qualification” has remained the same, despite occasional rewording. The longstanding definition of “qualification” refers to experience, skills, or a characteristic particular to the individual applicant that enables him or her to perform the job in question. The recent addition of the words “and requirement” to the current iteration might in theory have been construed to change this definition. However, in the language quoted above

the Department disclaimed any attempt to make such a change, explicitly stating that the new rule was designed “to retain the same requirements” as the pre-existing rule.

Further, this understanding corresponds with the plain and usual meaning of job qualification or requirement: the minimum characteristics required for a person to perform a job successfully. Those qualities may be physical, mental, educational, or experiential, but in every case, they are characteristics of the *person* applying, not a term or condition of the job that must be accepted by the applicant.

I cannot logically describe an arbitration and grievance clause as experience, a skill, or a characteristic possessed by a job applicant. Consequently, I cannot find that the regulatory language of §655.122(b), “job qualification and requirement,” applies to an arbitration and grievance clause. The CO interpreted the regulation to read that an applicant’s willingness to be subject to the clause is a qualification or requirement, but I find that to be an incorrect interpretation. The logic of that interpretation would suggest that a term and condition such as hourly wage is a job qualification and requirement because the applicant must be willing to be subject to that pay rate. I find that the CO’s interpretation is inconsistent with the longstanding substantive meaning of the regulations, and unreasonable. Accordingly, I vacate the NOD.²

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **REVERSED** and **REMANDED** for processing consistent with this opinion.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/lec/mrc
Newport News, Virginia

² Employer also argued that the CO violated the Administrative Procedure Act by adopting a different definition of “job qualification and requirement” in an arbitrary and capricious manner. Because I have vacated the NOD on other grounds, it is not necessary to reach this question.