

**U.S. Department of Labor**

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**Issue Date: 09 March 2011**

**OALJ Case No.: 2011-TLC-00251**

**ETA Case No.: C-11011-26499**

*In the Matter of*

**STROPKEY NURSERY**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **CLEMENT J. KENNINGTON**  
Administrative Law Judge

**DECISION AND ORDER**  
**AFFIRMING PARTIAL CERTIFICATION**

On February 6, 2011, StropKey Nursery (“the Employer”) filed a request for administrative review 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 (2010). On March 1, 2011, the Office of Administrative Law Judges received the Administrative File (“AF”) from the Certifying Officer (“the CO”). In cases of this nature, the administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and to issue a decision. 20 C.F.R. § 655.171(a).

**Statement of the Case**

On January 11, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification. AF 81-116.<sup>1</sup> On January 18, 2011, the CO issued a Notice of Deficiency (“NOF”) setting forth three (3) deficiencies pertaining to the Employer’s Job Offer. AF 48-53. Employer subsequently submitted a modified application pursuant to 20 C.F.R. § 655.142 correcting the deficiencies, and on January 27, 2011, the CO issued a Notice of Acceptance (“NOA”). AF 20-41. On February 1, 2011, the CO issued a Partial Certification letter to Employer wherein eight (8) of the requested nine (9) temporary labor certifications were granted. AF 3-7.

Pursuant to 20 C.F.R. § 655.165, the CO reduced the requested number of foreign workers due to the Employer’s Unlawful Rejection of a domestic worker. 20 C.F.R. § 655.165 (2010). The CO determined that the Ohio State Workforce Agency (“SWA”) had referred an able, willing, available, and qualified domestic worker who was unlawfully rejected. AF 6. The Employer’s request for administrative review followed the CO’s Partial Certification. AF 1-2.

### **Discussion**

The CO may only certify an employer’s application to admit nonimmigrant workers on H-2A visas for temporary agricultural employment in the U.S. if the employer is able to demonstrate there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed. 20 C.F.R. § 655.103(a) (2010). The employer also bears the burden of demonstrating that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.103(a). The applicable 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 certification in order to apprise U.S. workers of the agricultural position. 20 C.F.R. § 655.121(a) (2010). The SWA refers individuals who have been apprised of all 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 (2010).

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<sup>1</sup> Citations to the 116-page Administrative File will be abbreviated “AF” followed by the page number.

Under 20 C.F.R. § 655.156(a), an employer must prepare, sign, and date a written recruitment report that must: (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. 20 C.F.R. § 655.156(a) (2010). The Employer also must update and maintain this report throughout the recruitment period. 20 C.F.R. § 655.156(b) (2010).

The regulations further provide that in making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason or who has not been provided with a lawful job-related reason for rejection by the employer. 20 C.F.R. § 655.161(b) (2010).

Based upon information the CO receives during the course of processing the Application for Temporary Employment Certification, the CO may issue a partial certification by reducing the number of H-2A workers being requested for certification. 20 C.F.R. § 655.165 (2010). The regulation also provides that the number of workers certified will be reduced by one for each able, willing, and qualified U.S. worker who will be available at the time and place needed, who has not been rejected for lawful job-related reasons, and who was referred to the employer. *Id.*

The Employer argues that the CO incorrectly determined only Partial Certification was justified and that the CO should have certified all nine (9) requested positions. More specifically, Employer asserts no domestic worker was unlawfully rejected based on the following factual events. Despite the Ohio SWA's referral on January 19, 2001, the worker did not contact Employer about the position until February 2, 2011, and no representative of the Ohio SWA ever contacted Employer about the "possible worker for hire." According to

Employer, it therefore had no knowledge of the potential employee until February 2, 2011, which is the day after it filed the recruitment report.<sup>2</sup>

However, the CO found that the Ohio SWA referred a U.S. worker to Employer on January 19, 2011. AF 46-47. Regarding this referral, the record shows that Employer was contacted on January 19, 2011, by a representative of the Ohio SWA and that an interview appointment was set for February 4, 2011.<sup>3</sup> AF 46-47. The Employer submitted its recruitment report twelve (12) days later on January 31, 2011. AF 8-14. In the recruitment report, the Employer fails to mention the Ohio SWA's referral and, consequently, also fails to explain the reasons for not hiring the referred worker. AF 8-14.

In the report, the Employer is required to "state the name and contact information of each U.S. worker who . . . was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker." 20 C.F.R. § 655.156(a) (2010). Further, when an employer submits a recruitment report that misrepresents the number of workers referred by an SWA, the Employer will be unable to meet its burden of demonstrating there are not sufficient U.S. workers that are able, willing, and qualified to perform the work in the area of intended employment.<sup>4</sup> In this case, Employer's recruitment report does not include the Ohio SWA's referral of a domestic worker; therefore, the CO properly determined the Employer failed to make the required showing of insufficient U.S. workers.

Furthermore, the CO may reduce the number of requested workers "based upon information the CO receives during the course of processing" the application or otherwise received. 20 C.F.R § 655.165 (2010). Based on the information obtained in this case, the CO determined sufficient U.S. workers were able, willing, qualified, and available to justify the

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<sup>2</sup> Any argument made by Employer regarding evidence not submitted to the CO cannot be considered by the undersigned as new evidence cannot be considered during an Administrative Review. 20 C.F.R. § 655.171(a) (2010).

<sup>3</sup> The interview occurred after the recruitment report was issued and after the CO made his decision because the Employer was unavailable. Employer informed the Ohio SWA that a representative would not interview the worker until February 4, 2011. In addition, the record clearly indicates Employer had knowledge of the referral prior to the submission of the recruitment report.

<sup>4</sup> Any reason(s) submitted by the Employer to explain the failure to hire the U.S. worker that was not part of the record on which the CO based his determination is new evidence and, therefore, cannot be considered on appeal. 20 C.F.R. § 655.171(a) (2010).

reduction of requested temporary foreign workers by one. After reviewing the record and written submissions of the parties, the undersigned finds the Employer has not shown any legal deficiency in this determination.

When issuing Partial Certification under Section 165, the CO must reduce the number of workers requested by one for each U.S. worker referred by an SWA unless the worker was rejected for “lawful job-related reasons.”<sup>5</sup> 20 C.F.R. § 655.165 (2010). Therefore, after the Ohio SWA referred the worker, the burden fell to the Employer to show either the worker was not qualified, able, willing, or available or the worker was rejected for a lawful job-related reason. 20 C.F.R. § 655.165 (2010); 20 C.F.R. § 655.161(b) (2010). Because the record is devoid of evidence that would have allowed the CO to determine this was a lawful rejection, the undersigned finds the CO’s determination was proper.

In summary, the CO found that Employer failed to include a referred domestic worker in the submitted recruitment report and, therefore, failed to make the required showing of insufficient domestic workers. Thus, the CO granted only Partial Certification. Based on the foregoing, the undersigned finds the Employer failed to meet its burden of showing there are not sufficient U.S. workers qualified, willing, and able and finds no legal deficiency in the CO’s decision. Accordingly, the CO’s issuance of Partial Certification is affirmed.

### **Order**

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

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**CLEMENT J. KENNINGTON**  
Administrative Law Judge

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<sup>5</sup> By accepting the referral, the worker has indicated he is “qualified, able, willing, and available for employment.” 20 C.F.R. §655.155 (2010).

