



Issue Date: 03 February 2011

OALJ Case No.: 2011-TLC-00170

ETA Case No.: C-10344-25758

In the Matter of

TRI-TURF SOD FARMS, INC.,
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 21, 2011, Tri-Turf Sod Farms, Inc. (“the Employer”) filed a request for a de novo hearing to review 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 26, 2011, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”), and a conference call was held with the parties on February 1, 2011 for the purpose of scheduling the hearing. During the conference call, the Employer requested expedited administrative review of the determination rather than a de novo hearing. 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 10, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for twelve farm workers from February 15, 2011 to December 15, 2011. AF 33-41.¹ On December 13, 2010, the CO accepted the Employer's for processing. AF 19-23. 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 13, 2011. AF 22.

On January 12, 2011, the CO received the Employer's signed and dated recruitment report. AF 24-28. In the recruitment report, the Employer stated that it had hired ten U.S. workers as a result of its recruitment. AF 25-27. On January 6, 2011, the CO partially certified the Employer's application for two workers and reduced the number of workers certified by ten pursuant to 20 C.F.R. § 655.165 because the Employer was able to hire ten domestic workers for the position. AF 9-11. The Employer appealed the denial of the ten workers, stressing that it needs dependable labor due to several large projects beginning March 1, 2011 and that in its experience, the domestic workers that it hires typically quit after one or two weeks on the job. AF 2.

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). 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

¹ Citations to the 52 page Administrative File will be abbreviated "AF" followed by the page number.

needed and has not been rejected for lawful job-related reasons, to perform the services or labor.

Because the Employer was able to hire ten domestic workers as a result of its recruitment effort, the CO properly reduced the number of certified workers to two. While I am mindful of the Employer's concern regarding the dependability of its domestic hires, and the deleterious impact that it could have on the Employer's business if the domestic hires choose to quit in the middle of a project, I am bound by the clear regulatory requirements.²

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 If such a scenario does unfold, and the Employer's domestic hires quit, the Employer may be able to file an emergency request pursuant to 20 C.F.R. § 655.134.