

U.S. Department of Labor

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Issue Date: 05 April 2011

OALJ Case No.: 2011-TLC-00337

ETA Case No.: C-11060-28222

In the Matter of

SOUTHWEST AGRICULTURAL,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **PAUL C. JOHNSON, JR.**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On March 21, 2011, Southwest Agricultural (“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. § 655.115(a) (2009). On March 29, 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 working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.115(a).

Statement of the Case

On March 1, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for two Agricultural Equipment Operators. AF 65-84.¹ For its minimum job requirements, the Employer indicated that it required "3 mos with reference." AF 68.

On March 17, 2011, the CO denied certification, finding that the Employer's previous application "did not indicate any reference requirements," and therefore, the Employer did not comply with the requirement at 20 C.F.R. § 655.122(a) and 655.152. AF 7-9.

On March 21, 2011, the Employer appealed the denial, asserting that on ETA Form 9142, page 3, F(b)(4a), which asks if experience is required, it clearly indicated "3 mos with references." AF 1. In the Solicitor's appeal brief, he clarifies that the Employer's application indicated that applicants must possess three months of experience and one reference while its newspaper advertisements state that applicants must possess three months of experience and provide two references.

Discussion

The H-2A regulations at 20 C.F.R. § 655.122(a) provide that "[t]he employer's 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." Additionally, 20 C.F.R. § 655.152 states "[a]ll advertising conducted to satisfy the required recruitment activities under 655.151 must meet the requirements set forth in this section and must contain terms and conditions of employment which are not less favorable than those offered to the H-2A workers."

In this case, the Employer's newspaper advertisements indicate that the applicant must possess three months of experience with two references, whereas the Employer's application indicates that the applicant must possess three months "with reference." The Employer's singular use of the word "reference" on its ETA Form 9142 indicates that foreign workers are only required to submit one reference. The Employer's newspaper advertisement requires U.S. workers to submit one more reference than that listed on its temporary labor application, and

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

therefore contains terms less favorable than those offered to the H-2A workers. Accordingly, the newspaper advertisement is in violation of the regulations, and the CO properly denied certification.

Order

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

A

Paul C. Johnson, Jr.
Administrative Law Judge