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Issue Date: 07 March 2014

OALJ Case No.: 2014-TLC-00049

ETA Case No.: H-300-13354-955067

In the Matter of

Adelsheim Vineyard, LLC,
Employer

Certifying Officer: Chicago Processing Center

Before: **CHRISTINE L. KIRBY**
Administrative Law Judge

DECISION AND ORDER

The above-captioned case involves a request for certification of non-immigrant foreign workers (“H-2A workers”) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (“INA”), as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. In this case, Adelsheim Vineyard, (“Employer”) has filed a timely request for expedited administrative review of the Certifying Officer’s February 14, 2014, denial of temporary labor certification. The *Decision and Order* that follows is based on review of the entire administrative file, as well as briefs filed by Employer, Solicitor, and Legal Aid Services of Oregon (amicus brief). Pursuant to Federal regulations at 20 C.F.R. §655.171(a) evidence that may be considered is that which was before the Certifying Officer and no new evidence submitted on appeal may be considered.

Statement of the Case

On December 10, 2013,¹ Employer, through its authorized agent, Snake River Farmers Association, submitted a Form ETA-790, (“job order”) and attachments to the Oregon Employment Department (“OED”). The Application requested three vineyard/irrigation workers with dates of need from February 15, 2014, through November 15, 2014. (AF 46, 54-75). In an attachment to the Application, in Item 3, entitled “Location and Direction to the Housing,” (AF 65) Employer included the language, “Housing will be provided to workers only.”

¹ In its brief, Employer states that this documentation was submitted on December 10, 2013. I could not discern from the Administrative File when the documentation was submitted.

On December 17, 2013, the OED issued a *Notice of Deficiency* stating that Employer needed to remove the language stating “Housing will be provided to workers only” and replace it with language stating, “Housing is provided at no cost to those who live outside the local commuting area. Fair housing law generally applies to farm labor housing.” Employer was informed that it had 5 days to respond to the *Notice of Deficiency* and the OED would respond within 3 calendar days with either a *Notice of Acceptance* or a *Notice of Denial*. Employer was informed that it could alternatively file an Application for Temporary Employment Certification directly with the Chicago National Processing Center² (“CNPC”) pursuant to emergency filing procedures.

On December 19, 2013, Employer submitted a letter disagreeing with the OED’s interpretation of the H-2A regulations defining “prevailing practice” and requested emergency filing with the CNPC (AF 79). On December 19, 2013, the OED also issued a *Notice of Denial of Job Order* stating that Employer’s application had been denied because it disagreed with the requested modification (AF 80-81).

On December 20, 2013, Employer filed its application with the CNPC. (AF 46, 54-79). On December 24, 2013, Steven Gockley of the CNPC sent email correspondence to Eric Villegas of the OED requesting that he confirm that the “prevailing practice” for the area of intended employment requires family housing (AF 31-32). On December 30, 2013, Villegas responded that under the H2-A regulations family housing is required when it is the “prevailing practice” in the area of intended employment and the occupation to provide family housing, and that it must be provided to workers with families who request it. Villegas went on to explain his belief that where agricultural employers are required by state statute or applicable court decisions to provide family housing to workers with families, then the prevailing practice is to provide family housing and he claimed that the Oregon Fair Housing Act³ (“OFHA”) and court decisions supported this viewpoint. (AF 30-31).

On December 26, 2013, Gockley responded to Villegas by email stating that after consideration, the CNPC is under the belief that FHA regulations would apply to non-H-2A employers, but that H-2A employers are governed by the Immigration Reform and Control Act (“IRCA”)/Immigration and Nationality Act (“INA”), and those regulations require a “prevailing practice” survey (AF 29). On December 30, 2013, Villegas responded that he was forwarding Gockley’s comments to his supervisor and stated that Oregon had entered into a legal agreement in an (unspecified) housing matter and he was not sure if the IRCA could overrule that agreement (*Id.*). In subsequent e-mail traffic, members of the OED set forth OED’s position that state statute⁴ and case law⁵ establish the requirement of family housing as a “prevailing practice” for agricultural employers in the state of Oregon.

² The full title of this office is the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center.

³ 42 U.S.C. § 3601 et seq.

⁴ Oregon Fair Housing Act, ORS 659A.421.

⁵ *Villegas v. Sandy Farms*, 929 F.Supp. 1324 (D. OR, Mar. 1, 1996); *Hernandez v. Ever Fresh Co. and L2K Farms, Inc.*, 923 F.Supp. 1305 (D. OR, May 3, 1996).

In contrast, in email traffic, members of the Department of Labor, Employment and Training Administration (“ETA”) expressed the opinion that the Oregon cases could not be relied upon to require H-2A employers in Oregon to provide family housing and that until the State Workforce Agency (“SWA”) conducted a “prevailing practice” survey and determined through the survey that it is “prevailing practice” in the area of intended employment for employers to provide family housing, H-2A employers could not be required to provide family housing. Furthermore, the ETA stated that unless the State of Oregon has a state law which requires all agricultural clearance orders to include a provision requiring employers to provide family housing, the SWA may not at this time attempt to require H-2A employers to provide family housing (AF 23).

On December 27, 2013, the CNPC notified Employer that its application had been accepted for processing. The letter stated that Employer should continue to cooperate with the SWA and accomplish positive recruitment steps on its own behalf. The letter to Employer specifically stated that newspaper advertisements should *inter alia* include a statement that housing will be made available at no cost *to workers* (emphasis added), including U.S. workers who cannot reasonably return to their permanent residence at the end of each working day (AF 40-45).

On December 30, 2013, Villegas confirmed in an e-mail to Chris Gonzalez of ETA that he did, in fact, conduct a prevailing practice survey and that the answer to whether such agricultural employers provided general housing was “no” and even more so with regard to whether they provided family housing. It thus is clear that the OED did conduct a survey which determined that providing family housing for agricultural workers is *not* the “prevailing practice” in the State of Oregon. Villegas further stated that (unspecified) legal groups involved express the opinion that if a court order or decision requires an employer to provide family housing, then it becomes the “prevailing practice,” regardless of what the actual practice is (AF 22).

On December 30, 2013, Ms. Gonzalez, Supervisory Immigration Program Analyst for the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification expressed the opinion that if family housing is not “prevailing practice”, then H-2A employers could not be forced to offer it (AF 21). Villegas continued to express the opinion, in an email response, that Oregon made it the “prevailing practice” by their decision in the cases mentioned before.⁶

On February 14, 2014, the CNPC issued a letter to Employer stating that its application for temporary labor certification under the H-2A temporary agricultural program had been denied (AF 11-14). According to the letter, the basis for the denial was that OED is party to a settlement agreement with several agricultural workers that requires it to state on all H-2A job orders and related materials that “[f]air housing law generally applies to farm labor housing,” and to reject H-2A job orders with facially discriminatory terms regarding the provision of housing, such as “worker only housing” or “single worker only housing.” The CNCP also cited to Oregon’s Fair Housing Law (ORS 659A.421) and asserted that it requires any employer, if it

⁶ See supra, n. 5.

offers housing, to offer that housing to single workers and families on equal terms.⁷ The CNPC concluded that it is a “prevailing practice” in Oregon to require agricultural employers, when they offer housing, to make that housing available to workers with families. It then went on to state that the OED has indicated that the Oregon statute requires agricultural employers to provide family housing, establishing the provision of family housing as the “prevailing practice” in the area of intended employment in the occupation. It further stated that because Employer has refused, after notification, to amend its job order and application to include language disclosing the prevailing practice, the application is denied.

On February 19, 2014, Employer requested expedited administrative review by the Department of Labor Office of Administrative Law Judges. The undersigned received the Administrative File as well as briefs from the Employer, the Solicitor, and the Legal Aid Services of Oregon, on March 4, 2014, which I have reviewed in rendering this decision.

Employer’s Position

In its brief, Employer contends that it is not required to include language in its job order that “Fair Housing law generally applies to farm labor housing.” It asserts that the provisions of the Fair Housing Act (“FHA”) are preempted by the IRCA, which require that family housing be provided only where it is the “prevailing practice” in the area and occupation of intended employment. It asserts that statements regarding the application of fair housing laws to farm labor housing are not required, or accurate, before this threshold demonstration of “prevailing practice” is made.

Employer argues that the Federal H-2A statute⁸ and accompanying regulations⁹ require a showing that it is a “prevailing practice” for H-2A employers to provide family housing. It states that the 2010 H-2A regulations provide that family housing is only required where it is the “prevailing practice” in the area of intended employment and in the occupation. It contends that the Department of Labor policies require a survey to demonstrate the “prevailing practice” regarding housing and that the OED has not produced a survey which shows that family housing is the “prevailing practice” for vineyard workers located in the area of intended employment. It disputes the OED's contention that the FHA and Oregon case law creates a “prevailing practice” for farm labor family housing and contends that the FHA is preempted by the provisions of the IRCA and that this approach is upheld and confirmed by the Oregon cases cited by the OED.

Employer further asserts that preamble language to the Final H-2A rule published in 2010¹⁰ cannot create a “prevailing practice” for family housing and asserts that the OED's construction and interpretation of the preamble language as binding is not supported by law.

⁷ The statute states, “A person may not, because of . . . familial status . . . of any person... [o]therwise make unavailable or deny a dwelling to a person. ORS 659A.421(1)(j).

⁸ Immigration and Nationality Act, § 218(c)(4).

⁹ 20 C.F.R. § 655.122(d)(5).

¹⁰ See “Final Rule: Temporary Agricultural Employment of H-2A Aliens in the United States,” 75 Fed. Reg., 6910 (Feb. 12, 2010).

Employer argues that the preamble language was not formally incorporated into the plain meaning of the regulation and as a result is not controlling or binding. It also argues that the existence of a settlement agreement between the OED and third parties unrelated to this current employer/case cannot bind non-parties and cannot create an affirmative duty requiring this employer to post a job offer that contains language agreed to by the OED and complainants in a different case.

Finally, Employer asserts that the Department of Labor (“DOL”)¹¹ should have issued a *Notice of Deficiency* advising Employer of its position before issuing the denial and directing Employer to modify the job order. As a result, Employer argues that the DOL failed to provide it an opportunity to respond to the Department's position regarding the job order language and “prevailing practice” for family housing. It states that it proposed compromise job order language which would be more appropriate, but that this language has not been accepted by the OED or the DOL.

Solicitor/Amicus’ Position

The Solicitor representing the DOL asserts that under Oregon state law on family housing, ORS 659A.421, when an employer offers housing, it is required to offer that housing to families on equal terms. The Solicitor argues that the preamble to the controlling regulations at 75 Fed. Reg. 6910 states that where state law requires the provision of family housing, it will be considered a “prevailing practice.” The Solicitor asserts that offering family housing is the “prevailing practice” in Oregon and that Employer is thus required to include this benefit in the job order. I note that the Solicitor does not rely on any Oregon or federal case law to support its position, but rather argues that the Oregon family housing statute establishes the prevailing practice. I note that the Certifying Officer (“CO”) also did not rely on case law in its February 14, 2014, denial letter.

The amicus brief submitted by the Legal Aid Services of Oregon (“LASO”) supports the DOL denial of Employer’s application for H-2A workers. In addition to reiterating the Solicitor's position that the prevailing practice under the Oregon Fair Housing Act is to require employers to provide family housing, it relies on two U.S. District Court decisions to support its position that providing family housing is the “prevailing practice” for agricultural employers in the state of Oregon. It asserts that the prohibition against family housing discrimination should not depend on whether the agricultural employer is or is not participating in the H-2A program, and that the fact that an employer is participating in the H-2A program is thus irrelevant. It further argues that the one federal case in this area that appears to address the exact issue in this case¹² (in favor of Employer) was wrongly decided, would be differently decided today, and is irrelevant because once it is determined that under Oregon state law the “prevailing practice” is to provide family housing, no further inquiry is necessary.

¹¹ Employer refers to the CNPC as the “Department of Labor.”

¹² *Farmer v. Empl. Sec. Comm’n*, 4 F.3d 1274 (4th Cir. 1993).

Issues

1. What standard determines “prevailing practice” for H-2A agricultural employers?
2. Does Oregon have a “prevailing practice” of requiring H-2A agricultural employers to provide family housing for employees?
3. Did DOL err by failing to issue a *Notice of Deficiency* allowing Employer to amend its job order to include modified language?

Discussion

The Immigration & Nationality Act (“INA”) as amended by the Immigration Reform and Control Act of 1986 (“IRCA”), provides:

(4) Housing.-Employers shall furnish housing in accordance with regulations. The employer shall be permitted at the employer's option to provide housing meeting applicable Federal standards for temporary labor camps or to secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation: Provided, That in the absence of applicable local standards, State standards for rental and/or public accommodations or other substantially similar class of habitation shall be met: Provided further, That in the absence of applicable local or State standards, Federal temporary labor camp standards shall apply: Provided further, That the Secretary of Labor shall issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock: Provided further, That **when it is the prevailing practice in the area and occupation of intended employment to provide family housing, family housing shall be provided to workers with families who request it**: And provided further, That nothing in this paragraph shall require an employer to provide or secure housing for workers who are not entitled to it under the temporary labor certification regulations in effect on June 1, 1986. (emphasis added).

8. U.S.C. § 1188(c)(4). The H-2A regulations enacted in 2010 also provide that family housing for H-2A employers is required where it is the “prevailing practice” in the area of intended employment and in the occupation. *See* 20 C.F.R. § 655.122(ii)(5).¹³ “Prevailing practice” is defined in the H-2A regulations very specifically as:

A practice engaged in by employers, that: 1) Fifty percent or more of employers in an area and for an occupation engage in the practice or engage in the benefit; and 2) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation area (including H-2A and non-H-2A employers) for purposes of determinations

¹³ The DOL’s 2010 amendment to the H-2A regulations regarding family housing is the same as the 1987 version of the regulations.

concerning the provision of family housing, and frequency of wage payments, but non-H-2A employers only for determinations concerning the provision of advance transportation and the utilization of farm labor contractors.

20 C.F.R. § 655.103(b). A finding of “prevailing practice” is obtained through the use of local surveys conducted by SWAs through procedures set forth in the Department of Labor Employment & Training Administration Handbook 398. I find that the evidence of record establishes that Mr. Eric Villegas, Foreign Labor Coordinator at the OED, conducted such a survey, which found that providing family housing is *not* the “prevailing practice” for agricultural employers in Oregon (AF 22). Specifically, the survey revealed that it is not the “prevailing practice” to provide any housing for agricultural workers in Oregon, but it is especially not the practice to provide housing for families of agricultural workers. (*Id.*).

Nevertheless, the Solicitor and LASO ignore the results of this survey and argue that the definition of “prevailing practice,” clearly set forth in the regulation should be ignored and that a different standard should apply to determining “prevailing practice.” Specifically, they assert that based on language in the preamble to the regulation, which says that commenters requested that the Department clarify that if a State statute or court decision applicable to the jurisdiction requires an employer to provide family housing, then the State statute or court decision is to be considered the “prevailing practice” with respect to the provision of family housing. They accurately state that the preamble further states that the Department agrees with commenters that where agricultural employers are required by State statute or applicable court decisions to provide family housing to workers with families, the prevailing practice is to provide family housing.

However, they do not comment on the language in the next paragraph of the preamble (following the commenters’ request) which states that the Department is statutorily **prohibited** from requiring compliance with the **stricter** of applicable local, State or Federal standards if multiple standards apply to rental and/or public accommodations or other substantially similar class of habitation. 75 Fed. Reg. 6884, 6909 (Feb. 12, 2010) (emphasis added). Furthermore, they do not cite to any authority for giving precedence to language in the preamble over that which is clearly stated within the text of the regulation and unambiguously explains how to determine a “prevailing practice.” Employer cites to appropriate authority contrary to this position.¹⁴

Accordingly, I find that the “prevailing practice” standard is that set forth in the regulation and is not that asserted by the Solicitor and LASO. I find that under the standard set

¹⁴ “Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.” *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 885(4th Cir. 1984) (quoting *Association of Am. Railroad v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir 1977)); cf. *United States Trustee v. Prines (In re Prines)*, 867 F.2d 478, 483-84 (8th Cir. 1989) (declining to give dispositive weight to preamble language were doing so disregards language of operative section). The United States Court of Appeals for the District of Columbia Circuit has also explained that the preamble to a rule is not more binding than a preamble to a statute and although the preamble may contribute to a general understanding of a statute, it is not an operative part of the statute. *Costle*, 562 F.2d at 1316 (citing *Yazoo Railroad Co. v. Thomas*, 132 U.S. 174, 188, 10 S.Ct. 68, 73, 33 L.Ed. 302 (1889)).

forth and clearly articulated in the regulations, DOL/CNPC did not establish that it is a “prevailing practice” in Oregon for agricultural employers to provide family housing. Rather, the evidence establishes that it is not a “prevailing practice” for agricultural employers in Oregon to offer any housing to workers, and especially not family housing.

Even if I were to agree with the Solicitor and LASO’s argument that a “prevailing practice” could be established by State statute or applicable case law, I do not believe that the evidence establishes, by these alternative methods, that it is the “prevailing practice” for agricultural employers in Oregon to be required to provide family housing.

First, the relevant statute states:

(1) A person may not, because of race, color, sex, marital status, source of income, familial status, religion or national origin of any person:

(j) Otherwise make unavailable or deny a dwelling to a person.

Oregon Fair Housing Act, ORS 659A.421. In its February 14, 2014, enclosure to the denial letter, the CNPC concluded that this statute “**requires** agricultural employers to provide family housing, establishing the provision of family housing as the “prevailing practice” in the area of intended employment and the occupation.” (AF 8-9) (emphasis added). This is not, in fact, what the statute says. The statute imposes no requirement for agricultural employers in Oregon to provide family housing. Rather, it says that *if* they offer housing, they must offer it to families on equal terms. The Solicitor clarified this point in its brief. However, I disagree with the Solicitor’s conclusion that this statute somehow creates a “prevailing practice” for family housing. Clearly, it does not. Nor does the survey which was conducted, as discussed above by the OED, establish the offering of family housing by agricultural employers as a “prevailing practice” in Oregon. I interpret this statute as saying that *if* an agricultural employer offers housing, it must offer this housing to families on an equal basis.

Accordingly, application of this statute to H-2A agricultural employers would create a heavier burden for H-2A agricultural employers than for non-H-2A agricultural employers in the state of Oregon. H-2A agricultural employers are required to offer housing to individual employees (i.e., not to families), if the workers are not reasonably able to return to their residence within the same day.¹⁵ Accordingly, under the terms of the Oregon statute, H-2A employers would always be required to offer family housing, when they offer individual housing. Because non-H-2A agricultural employers are not required to offer individual housing, they therefore would never have to offer any housing, to either individuals or to families. This imposition of a heavier burden on H-2A employers was not the intent of the IRCA. The intent was to require family housing if it were the “prevailing practice” in the area and occupation of intended employment to provide family housing – not to create a heavier burden for H-2A employers than for non-H2A employers or to create a fictional “prevailing practice” as the Solicitor and LASO would do in the current case. Furthermore, as stated above, the preamble to

¹⁵ Under 20 C.F.R. § 655.122(d)(1): (d) *Housing*. (1) Obligation to provide housing. The employer must provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence in the same day.

the regulations clearly state that the Department is statutorily prohibited from requiring compliance with the stricter of applicable local, State or Federal standards if multiple standards apply to rental and/or public accommodations or other substantially similar class of habitation. 75 Fed. Reg. 6884, 6909 (Feb. 12, 2010).

This issue was discussed in one of the cases cited by the OED within the AF as well as by the LASO in its amicus brief. The case, which appears to be the only federal case on the issue, as well as the only one of the three cases that is specifically on point, supports Employer's position. In *Farmer v. Employment Sec. Comm'n*, 4 F.3d 1274 (4th Cir. 1993), the Court explored the issue of which law applies when there is a conflict between the FHA and the IRCA, *i.e.*, whether the prohibition against familial-status housing discrimination in the FHA controls over the IRCA as the controlling expression of agricultural employers' duty to provide family housing to temporary workers. The Court found that the FHA did not control. In reaching this decision it noted that the legislative histories of the two statutes in question are bereft of any mention of one another and are in open conflict, and therefore it applied the basic tenet of statutory construction. Specifically, it relied on the basic principle of statutory construction that when two statutes are in conflict, a specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision. The Court recognized that H-2A employers are a specific, regulated group of employers, who are subject to the more specific provisions of the IRCA than the more general provisions of the FHA. I agree with this reasoning and believe it is applicable to the current controversy.

The Oregon District Court also recognized the unique nature of H-2A employers in one of the cases cited by the OED and LASO. In *Hernandez v. Ever Fresh Co. & L2K Farms*, 923 F.Supp. 1305, 1308 (D. OR 1996), the Court distinguished the case from *Farmer*, stating that *Farmer* is distinguishable because in *Farmer*, the court addressed the issue of discrimination in housing with respect to a **specific, highly regulated group known as H-2A employers**. (emphasis added). In *Hernandez*, the court specifically noted that neither of the employers were H-2A employers. I therefore find that this case does not support the LASO or Solicitor's position. I disagree with the LASO's argument that it does not matter whether the employer in question is engaged in the H-2A program. I find that such status is, in fact, relevant.

Similarly, the final case cited, *Villegas v. Sandy Farms*, 929 F.Supp 1324 (D. OR 1996), also did not involve employers who were involved with the H-2A program. I thus find that it is not on point.

I am also not convinced that a Settlement Agreement (AF 35-38) in an unrelated case, the facts and circumstances of which are unclear and which does not involve the parties in the current dispute has any relevance to my decision in this matter.

I find that the third issue articulated above is moot and thus will not discuss it in detail.

ORDER

The CO's decision is **REVERSED**, and the application for temporary labor certification is remanded for processing in accordance with the H-2A regulations.

CHRISTINE L. KIRBY
Administrative Law Judge