



Issue Date: 17 January 2014

OALJ Case No.: 2014-TLC-00015

ETA Case No.: H-300-13337-687091

In the Matter of:

STEVE JANSA FARMS,
Employer

Certifying Officer: Chicago National Processing Center

Before: **STEPHEN M. REILLY**
Administrative Law Judge

**DECISION AND ORDER VACATING AND REMANDING
CERTIFYING OFFICER'S DENIALS OF CERTIFICATION**

This case arises from a request for review of United States Department of Labor Certifying Officer's ("the CO") denial of an application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform agricultural work or services of a temporary or seasonal basis, within the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. § 655.103(b). Following the CO's denial of an application, an employer may request review by an Administrative Law Judge. 20 C.F.R. § 655.164; 20 C.F.R. § 655.171.

PROCEDURAL HISTORY

These cases involve Steve Jansa Farms' Application for Temporary Labor Certification filed on December 3, 2013, seeking a temporary labor certification for one farmworker. (AF 2-18).¹ On December 6, 2013, the CO issued a Notice of Deficiency identifying 15 alleged deficiencies. The CO identified in an Enclosure for Unacceptable Applications (AF 83-93) the modifications to the original application that were necessary for the application to satisfy the CO's requirements certification. (AF 21-30).

¹ I have cited to the administrative file in Case No. 2014-TLC-00015. Citations to the Administrative File are abbreviated as "AF."

On December 9, 2013, Steve Jansa Farms filed its response to the Notice of Deficiency. (AF 63-79). The response addressed each of the deficiencies. On December 16, 2013, the CO issued a denial of the application. (AF 56-62). Attached to the Denial Letter was the Enclosure for Denial Letter. This Enclosure listed the three deficiencies the CO claimed that Steve Jansa Farms did not satisfy.

The first deficiency noted by the CO was based on 20 C.F.R. § 655.103(d) which defined seasonal or temporary need. The CO stated that Steve Jansa Farms “failed to articulate what, if any, seasonal or temporary need it has.” (AF-60). The second deficiency found by the CO was Steve Jansa Farms failure “to provide an explanation for how workers will have access to stores for groceries and other necessities.” (AF-61). The final deficiency identified by the CO centered on the wording of Steve Jansa Farms’ agreement to comply with the requirements of 20 C.F.R. § 655.122(o), *Contract Impossibility*. (AF 61-62).

For the reasons discussed below, I find that Steve Jansa Farms met the requirements of the regulations which would allow the hiring of one farmworker under the H-2A visa program. Therefore, I remand the case to the CO with instructions to certify Steve Jansa Farms’ application.

DISCUSSION

Steve Jansa Farms (The Farms) seeks to employ one farmworker from February 1, 2014 through December 1, 2014. This is a 10 month period of time that runs from mid-winter through late fall. The application notes that the Nature of Temporary Need is Seasonal. (AF 2 at #8). In response to two different questions on the application the Farms identified its needs and the Job Duties of the position. (*see* AF 2 at #9 and AF 4 at #5). The Farm’s Temporary Needs and Job Duties are:

Crops: Alfalfa, wheat, Costal Bermuda, and cotton, will repair and do fence, maintain farm equipment, daily hoeing or weeding activities, and will plow to irrigate, hay bailing, load truck and harvest.

The CO finds that “it is unclear how this job opportunity is temporary or seasonal in nature.” (AF 59). The regulations define temporary or seasonal nature:

For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. § 655.103(d).

The CO compares the dates requested on this application to the dates sought and approved for the previous three years. Based on variability of the start and end dates, the CO concludes “this filing pattern indicates that the employer has a year-round need for this job opportunity.” The CO does not explain how she reaches this conclusion. The job opportunity covers 10 month time frame, just as the three previously approved applications each covered 10 months. Based on the 10 month time frame of the request, I find that this job is temporary. Furthermore, three of the four requested start dates are in mid to late winter; the fourth start date is in early spring. I find that the seasonal closeness of the start and finish dates, comports with the regulatory definition of “seasonal in nature.” Therefore, I find that this job opportunity is temporary and seasonal in nature and not a deficiency in the application.²

The second deficiency noted by the CO is Steve Jansa Farms’ failure “to provide an explanation for how workers will have access to stores for groceries and other necessities.” (AF-61). The CO cites 20 C.F.R § 655.122(d)(1)(i) as the regulation governing this requirement.

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 within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter.

A reading of this regulation does not include any requirement that the employer provide in his application “an explanation for how workers will have access to stores for groceries and other necessities.” Further, a reading of the Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142 and the standards at 20 C.F.R. §§ 654.404 through 654.417, also fail to require such an explanation. The CO may not create requirements out of whole cloth. Absent regulatory authority to require “an explanation for how workers will have access to stores for groceries and other necessities,” I find that the CO may not impose such extra-regulatory mandates, and doing so is arbitrary, capricious and an abuse of discretion. Failure of an applicant to follow such a mandate does not create a deficiency in the application. Therefore, I find that Steve Jansa Farms’ application does not containing a deficiency regarding housing.

² In the response to the Notice of Deficiency, the Farms discusses the difficulty in obtaining a worker in a timely fashion (AF 66) because of various government agencies administrative failures to complete this process in time for the employee to start at the needed date. Mr. Jansa’s decision to request a worker earlier than in the past is a good business decision and is not grounds for denial.

The final deficiency identified by the CO centers on the wording of Steve Jansa Farms' agreement to comply with the requirements of 20 C.F.R. § 655.122(o), *Contract Impossibility*. (AF 61-62). The provision at issue follows:

If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the CO.

20 C.F.R. § 655.122(o).

On the notice of deficiency, the modification required by the CO was "The employer must submit a written statement stating its full and complete obligation set forth at 20 CFR sec. 655.122(o) to be included as part of the ETA Form 790." (AF 88).

Steve Jansa Farms' statement addressing contract impossibility began with the inclusion by reference of 20 CFR sec. 655.122(o). "20 CFR sec. 655.122(o) to be included as part of the ETA Form 790." The Farms continues "The employer will terminate the work contract of any worker whose services are no longer required for reasons beyond the control of the employer or an act of God. . . ." The Farms' statement then discusses the responsibility to the workers in the event of termination (which are not in dispute), ending with a reference to "See at 20 CFR sec. 655.122(o)."

The CO states that "The employer's statement implies that it may terminate the contract for any reason it deems to be beyond its control or an Act of God." (AF 61) I disagree. I find that the Farms' statement is an inarticulate effort to rephrase the regulation without copying the exact words of the regulation. I find that the Farms' statement "20 CFR sec. 655.122(o) to be included as part of the ETA Form 790" shows the true intent to incorporate the regulation in its answer and to comply with the regulatory requirements. The CO appears to forget it has the last word on this issue because if, unfortunately, Steve Jansa Farms finds it necessary to terminate a worker, the CO determines "whether such an event constitutes a contract impossibility." I find that Steve Jansa Farms' statement regarding its obligations under 20 C.F.R. § 655.122(o), *Contract Impossibility*, adopts the requirements of the regulation and, therefore, is not a deficiency in the application.³

³ I am somewhat troubled by what appears to be the CO's view that applications must be letter perfect, particularly in light of frequent errors by the CO in processing applications, as demonstrated by the inclusion in the administrative file of this case, pages from the administrative file in a different case.

CONCLUSION

I find the CO erred in holding that Steve Jansa Farms' application for one farmworker was deficient, specifically that it contained three deficiencies.

- (1) I find that this job opportunity under the H-2A program sought by Steve Jansa Farms is temporary and seasonal in nature, and therefore, not a deficiency in the application;
- (2). I find that the CO requiring Steve Jansa Farms failure "to provide an explanation for how workers will have access to stores for groceries and other necessities" is without regulatory authority. Therefore, the requirement is arbitrary, capricious and an abuse of discretion. Steve Jansa Farms' failure to provide such an explanation is not a deficiency warranting a denial of its application; and
- (3). I find that Steve Jansa Farms' statement regarding its obligations under 20 C.F.R. § 655.122(o), *Contract Impossibility*, adopts the requirements of the regulation and, therefore, is not a deficiency in the application.

I find that the CO erred when she denied Steve Jansa Farms' Application for Temporary Labor Certification filed on December 3, 2013, seeking a temporary labor certification for one farmworker under the H-2A program.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decisions are hereby **VACATED** and **REMANDED** to the Certifying Officer with instructions to **GRANT** Steve Jansa Farms' application.

SO ORDERED.

STEPHEN M. REILLY
Administrative Law Judge