



**Issue Date: 08 October 2014**

**OALJ Case No.: 2014-TLC-00101**

**ETA Case No.: H-300-14216-801512**

*In the Matter of*

**MILLER FARMS, LLC.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **WILLIAM S. COLWELL**  
**Associate Chief Administrative Law Judge**

### **DECISION AND ORDER**

Miller Farms, LLC (“Employer”) appeals the Certifying Officer’s (“CO”) denial of the above-captioned application for H-2A temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188 and the implementing regulations promulgated by the U.S. Department of Labor (“DOL” or “Department”), Employment and Training Administration (“ETA”) at 20 C.F.R. Part 655.<sup>1</sup> For the reasons set forth below, the Certifying Officer’s denial is REVERSED and this matter is REMANDED for further processing.

### **STATEMENT OF THE CASE**

On August 4, 2014, the United States Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification. AF 75 – 92.<sup>2</sup> In particular, the Employer requested certification for forty-seven “Farmworkers and Laborers, Crop, Nursery, and Greenhouse.” AF 75. The application provided that “the employer anticipates hiring a total of 60 workers, 13 from the local area and 47 from outside the local area.” AF 58.

---

<sup>1</sup> The H-2A nonimmigrant visa program enables agricultural employers in the United States to import foreign workers on a temporary basis to perform temporary, agricultural labor or services. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a “temporary labor certification” from ETA. 8 U.S.C. 1188(a)(1).

<sup>2</sup> Citations to the 151-page Administrative File will be abbreviated “AF” followed by the page number.

The CO issued a Notice of Deficiency (“NOD”) on August 11, 2014, to inform the Employer that its application failed to meet the criteria for acceptance. AF 61 – 65. The NOD specified one deficiency not relevant to this appeal and identified the modification required for acceptance. AF 33-35. After the Employer accordingly modified its application, the CO accepted the Employer’s application for processing on August 13, 2014. AF 54 – 60.

On August 19, 2014, the Employer submitted its Recruitment Report. AF 31 – 50. The Report detailed:

Attached is an email provided by the SWA office that contains four individuals that have been referred to the employer. Unfortunately, none of the four individuals listed have contacted the employer. The employer left a message at the SWA office looking for contact information for each of the individuals. As of today, the SWA office has not returned that phone call. Also attached is the Applicant Log supplied by the employer. The log contains the four individuals referenced in the SWA email as well as one individual that was a walk-in. Robert Weldon did not show any interest in the job once he found that work didn’t start until October. He told the employer that he would contact the SWA office at a later date if he had not found employment elsewhere by the start date.

Attached is a Call-Back Log that contains the twenty-six prior season domestic workers that were provided the opportunity to return this season. The twenty-six individuals listed were already considered when the employer requested 47 H-2A workers. Twenty-two have indicated that they will return. Four have not responded to the employer.

The employer was anticipating hiring 13 workers from the local area. To date, they have not hired any. In addition, the employer anticipated the return of 26 prior season domestic workers when they requested 47 H-2A workers. Therefore, since the employer anticipated hiring 13 local workers and has not hired any to date, the employer is seeking certification for the original request of 47 workers. The employer’s total need is 86 workers; having already taken into account the fact that the employer anticipated hiring 13 local workers; also taken into account was the 26 prior season domestic workers that the employer thought would be returning, they are still in need of certification for the full 47.

AF 32.

On August 14, 2014, the CO issued a partial certification of the Employer’s application pursuant to 20 C.F.R. § 655.165 and thereby reduced the Employer’s application by twenty-two workers and granted certification for twenty-five workers. The CO cited the Employer’s failure to identify a sufficient number of able, willing and qualified U.S. workers as being available at the time and place needed to fill all of the job opportunities for which certification has been requested. AF 5 – 10. In particular, the CO found that:

The recruitment report indicates that the employer anticipated hiring 13 workers from the local area, the return of 26 workers from the previous season and the requested 47 H2-A workers for a total need of 86. The 26 returning workers were not, in any way, discussed until the recruitment report. The hiring of the 13 workers did not take place.

Departmental regulation 20 C.F.R. § 655.153 state that employers are required to contact former U.S. workers as part of the post-acceptance requirements. In addition, Departmental regulations 20 C.F.R. § 655.135(c) and 20 C.F.R. § 655.135(d) indicate that the employer has specific obligations in regards to the recruitment and employment of U.S. workers. Therefore, the 22 workers from the prior season must be viewed as hired pursuant to the requirements of the H-2A program. As such, the only course of action available to the CO is to reduce the certification by the number of U.S. workers hired, and issue a partial certification.

AF 11 – 12. Accordingly, the CO treated the additional 26 domestic workers as an increase in the total number of workers sought to be certified. The CO therefore also partially denied the Employer's application pursuant to 20 C.F.R. § 655.145(a) (requirement that increases of more than 20% be justified by previously unforeseen circumstances) and 20 C.F.R. § 655.122(d)(1) (housing requirements).

On September 22, 2014, the Employer appealed the CO's denial to the Office of Administrative Law Judges (OALJ). Both the Employer and the CO filed briefs in this matter.

### **DISCUSSION**

The CO's reduction of the Employer's certification is not supported by the regulations in this case. The applicable regulations provide that the CO will 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). In order to satisfy this requirement, the employer must 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). 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.

The employer must prepare, sign, and date a written recruitment report that: (1) Identifies the name of each recruitment source; (2) States 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) Confirms 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, explains the lawful job related reason(s) for not hiring the U.S. worker. 20 C.F.R. § 655.156(a). The employer must contact, by mail or other effective means, U.S. workers formerly employed by the employer in the occupation at the place of employment

during the previous year and solicit their return to the job. 20 C.F.R. § 655.153. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance and documentation sufficient to prove contact must be maintained in the event of an audit. *Id.*

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. 20 C.F.R. § 655.165. 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 needed and has not been rejected for lawful job-related reasons, to perform the services or labor. *Id.*

In the present case, the Employer met the regulatory recruitment requirements by properly placing a job order with the SWA, submitting a complete recruitment report, successfully hiring former U.S. employees, and attempting to hire individuals referred to the Employer by the SWA. The SWA provided four referrals to the Employer; however, none of these four individuals applied to the Employer directly, and the SWA did not provide the Employer with contact information for the individuals. Separate from the SWA referral process, the Employer successfully contacted and hired twenty-two former U.S. employees. The Employer contends that it anticipated the return of its former U.S. employees when filing its application and, taking the availability of these workers into account, reduced the number of positions for which it sought certification accordingly. The regulations do not require the Employer to report the rehire of such formerly employed U.S. workers in an initial certification application, nor does the undersigned find that the regulations restrict an employer to only contacting such workers after the job order has been placed. Having successfully recruited former U.S. workers who are able, willing, and qualified to provide some of its required labor, the Employer should not now be penalized by a proportionate reduction of the total number of employees for which it may apply for certification.

As the undersigned does not construe the disclosure of the twenty-two formerly employed U.S. workers as a mid-application increase in the number of workers the Employer seeks to have certified, the requirements that such an increase be justified under 20 C.F.R. § 655.145(a) do not apply to this case. Furthermore, because the formerly employed U.S. workers are local and thus are reasonably able to return to their residence within the same day, the CO's denial pursuant to 20 C.F.R. § 655.122(d)(1) is not appropriate. The CO has not otherwise brought into question the Employer's need for forty-seven Farmworkers. Therefore, the undersigned finds that the Employer is justified in requesting certification for forty-seven workers in addition to the twenty-two formerly employed U.S. workers.

**ORDER**

In light of the foregoing, I hereby REVERSE the denial and REMAND this matter to the CO with instructions to continue processing the Employer's application.

**WILLIAM S. COLWELL**  
Associate Chief Administrative Law Judge