



**Issue Date: 13 January 2015**

**CASE NO.: 2015-TLC-00014**

**ETA CASE NO.: H-300-14228-403183**

*In the Matter of:*

**JYW, JESSE WOMACK III,**  
*Employer*

Certifying Officer: Lynette Wills  
Chicago National Processing Center

Before: **PATRICK M. ROSENOW**  
Administrative Law Judge

## **DECISION AND ORDER**

This matter 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,<sup>1</sup> and the implementing regulations promulgated by the Department of Labor.<sup>2</sup> This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration. Since Employer requested an expedited administrative review, I considered only the evidence that was before the Certifying Officer (“CO”), with no new evidence submitted on appeal. In expedited administrative review cases, the administrative law judge has five working days after receiving the AF to issue a decision on the basis of the written record.<sup>3</sup> The AF for this case was received on 6 Jan 15.

## **BACKGROUND AND LAW**

On 5 Nov 14 and 14 Nov 14, respectively, Employer filed ETA Form 790 and Form ETA 9142 requesting temporary labor certification for the position “Farmworkers, Farm, Ranch, and Aquacultural Animals.” The period of intended employment was to begin on 12 Jan 15.<sup>4</sup>

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<sup>1</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

<sup>2</sup> 20 C.F.R. Part 655, Subpart B.

<sup>3</sup> 20 C.F.R. § 655.171(a).

<sup>4</sup> AF 70-92.

The CO issued a Notice of Deficiency on 20 Nov 14, notifying Employer of four deficiencies in its application: (1) it provided two different addresses, making it unclear whether Employer met the definition of a “fixed-site employer” or an H-2A Labor Contractor; (2) it failed to establish temporary need as required by 20 C.F.R. §655.103(d); (3) it mistakenly checked off the pay rate offered as monthly instead of hourly; and (4) it failed to list vaccinating as a job duty on either Forms ETA 790 or 9142, but included it on its seasonal statement of need.<sup>5</sup>

On 21 Nov 14, Employer responded to the Notice of Deficiency, addressing all four deficiencies. On 28 Nov 14, the CO replied to Employer’s response and asked Employer to answer three more questions concerning temporary need and ownership of farm animals. On 1 Dec 14 and 2 Dec 14, Employer responded to the CO’s questions. On 4 Dec 14, the CO issued a Notice to Employer stating that its’ H-2A temporary labor certification application was accepted for processing. That Notice detailed the requisite positive recruitment of U.S. workers for Employer to comply with 20 C.F.R. § 655.154 and instructed Employer to submit a report of those efforts as specified by 20 C.F.R. § 655.156.<sup>6</sup>

The CO issued the Notice of Denial on 12 Dec 14 because Employer violated Departmental regulations 20 C.F.R. § 655.122(a) and § 655.152, which state in pertinent part that:

The 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. . . . All advertising conducted to satisfy the required recruitment activities under sec. 155.151 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.<sup>7</sup>

On its Application for Temporary Employment Certification, Employer indicated that no experience was required to perform the job duties and did not indicate that there would be post-hire drug testing or background checks as a condition of employment. However, Employer’s advertisements submitted to the Chicago NPC stated that workers must have two months of experience and also indicated that there would be post-hire drug testing and background checks.<sup>8</sup>

The CO concluded that Employer cannot advertise for higher experience requirements and/or stricter terms or conditions of employment than were originally identified in the Application for Temporary Employment Certification and subsequently accepted by the CO. The CO also noted that Employer’s advertisements cannot contain terms and conditions of employment which are not less favorable than those offered to the H-2A workers.<sup>9</sup>

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<sup>5</sup> AF 51-56.

<sup>6</sup> AF 33-50.

<sup>7</sup> AF 16-18.

<sup>8</sup> AF 17.

<sup>9</sup> *Id.*

On 12 Dec 14, Employer sent the CO proof that it had run new advertisements in all states (LA, TX, OK, and NM) and corrected the discrepancy between the previous advertisements and the original Application for Temporary Employment Certification. The same day, Employer filed a request for an expedited administrative review of the CO's determination. Employer explained that the Notice of Denial was the first time the discrepancy had been brought to his attention and argued that if the DOL had notified him of the error previously, he would have resubmitted the advertisements with the correct description. Employer also noted that the moment he received the Notice of Denial, he contacted all the newspapers carrying the incorrect advertisement and resubmitted the advertisement with the correct description. Employer has not had any interested applicants.<sup>10</sup>

### **DISCUSSION**

Employer's appeal of the CO's Notice of Denial is timely. Employer's original advertisements required job experience and indicated there would be post-hire drug testing and background checks. However, in its application, Employer required no job experience and made no mention of drug testing or background checks. Therefore, the original advertisements were in violation of the regulations, and the CO properly denied certification. Employer's subsequent corrective steps do not retroactively correct the flaw and invalidate that denial.<sup>11</sup>

### **ORDER**

Based on the foregoing, it is hereby ordered that the Certifying Officer's decision is **AFFIRMED**.

**SO ORDERED.**

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

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<sup>10</sup> AF 1-9.

<sup>11</sup> The record clearly substantiates Employer's note in its appeal that this was an inadvertent error for which he takes full responsibility. However, the regulations are strict and require denial of any temporary labor certification application where the job requirements and terms and/or conditions of employment differ from those presented to U.S. workers. The labor certification procedure is a streamlined process which does not allow for continued back and forth between the CO and Employer making amendments to the application and/or advertisements. The regulatory scheme often sacrifices equity at the expense of efficiency. Employers are required to proofread and ensure consistency between all documents prior to submitting applications and placing advertisements. This employer's attachment of the new and correct advertisements is evidence of its good faith, but the regulations are not concerned with motive or intent. They are strict and require consistency between the *original* advertisements and the application. The burden is on employers to submit error free documents in order to save agency resources in post application corrections. *HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*).