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Issue Date: 27 March 2015

OALJ Case No.: 2015-TLC-00028
ETA Case No.: H-300-015056-556699

In the Matter of:

REEVES FARMS AND ONTARIO ORCHARDS,

Employer.

Appearances: Andrew Reeves
Reeves Farms
Agent for Ontario Orchards
For the Employer

William L. Carlson, Certifying Officer
Vincent Constantino, Esq.
For the Respondent, Department of Labor

Before: Paul R. Almanza
Administrative Law Judge

DECISION AND ORDER REVERSING PARTIAL DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or service provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188, (the "Act"), and its implementing regulations at 20 C.F.R. Part 655, Subpart B. This decision and order is based on the written record consisting of the Administrative File ("AF") forwarded by the Employment and Training Administration ("ETA").

On March 18, 2015, Employer[1] requested expedited administrative review of the Certifying Officer's ("CO") March 17, 2015 partial certification of Employer's temporary alien agricultural labor certification (H-2A) application. AF 5; AF 8-13. The Office of Administrative Law Judges received Employer's request for expedited administrative review on

[1] In referring to Employer, I refer both to Reeves Farms and Ontario Orchards, recognizing that Mr. Reeves is acting as agent for Ontario Orchards in this matter. AF 119-120.

March 19, 2015, and received the AF on March 20, 2015. I was assigned this matter on March 23, 2015. In expedited administrative review cases, an administrative law judge has five business days after receiving the AF to issue a decision on the basis of the written record, with no new evidence submitted on appeal. 20 C.F.R. § 655.171(a). On March 26, 2015, I received a timely brief on behalf of the CO; I received no brief from Employer supplementing its request for expedited administrative review. This decision and order is based on the written record consisting of the AF and the written submissions of the parties.

Factual Background

On February 23, 2015, the CO issued a Notice of Special Procedures ("NSP") to Reeves Farms pursuant to 20 C.F.R. 655.183(a). AF 121-123. The NSP covers all of Reeves Farms' applications during the period from February 23, 2015, to February 22, 2017. AF 121. The NSP states:

> For all future H-2A applications submitted during the special procedures period, the employer must supply copies of the advertisements required by 20 CFR § 655.151 and § 655.154 to the … CO … once an application has been [a]ccepted for processing and before a favorable final determination can be issued. *The contents of the advertisements must comply with 20 CFR § 655.152.*

AF 123 (emphasis added).

On February 25, 2015, the CO received Employer's ETA Form 9142A, *H-2A Application for Temporary Employment Certification*, and supporting documentation. AF 65-66; AF 85-114. The application requested certification of four Farm Worker and Laborer Crops positions, SOC O*Net/OES Code 45.2092-02. AF 85. The application stated that three months' experience was required. AF 88. On March 3, 2015, the CO issued a Notice of Deficiency to the Employer identifying several deficiencies requiring modification. AF 55-64. The NOD contained six separate numbered deficiencies, the last of which contained four sub-parts. AF 58-64. On March 4, 2015, the Employer responded to the NOD. AF 42-54.

The CO accepted the application on March 10, 2015. AF 32-39. In the acceptance letter, the CO stated:

> In order to receive a final determination on your temporary labor certification application, you are required to: … [c]ontinue to cooperate with the State Workforce Agency (SWA) serving the area of intended employment.

AF 33. The CO also reiterated the requirement that the Employer must comply with the NSP by submitting copies of newspaper advertisements, and that "[t]he contents of the advertisements must comply with 20 CFR 655.152." AF 37.

On March 13, 2015, the Employer submitted what appears to be a recruitment report, together with copies of newspaper advertisements. AF 23, 26-27. With respect to experience

requirements, the advertisements stated, "[m]inimum 3 months previous experience picking strawberries, peas, snap peas, apples and blueberries by piece rate requested." AF 26-27.

On March 17, 2015, the CO partially certified the application, certifying three of the four positions requested by the Employer. AF 8-13. The CO reduced the Employer's requested certification of four workers by twenty-five percent upon concluding that the advertisements did not comply with 20 C.F.R. § 655.152, as required by the NSP, because the advertisements, by requiring "a three month experience requirement with specific crops and wages offered by piece rate," exceeded the "general three month experience requirement in … [the] application." AF 13.[2]

Discussion

At first blush, it would appear the partial certification in this matter should be affirmed. Simply put, there is no dispute that the application, which only calls for three months' experience, contains terms and conditions of employment that are more favorable than those offered in the newspaper advertisements, because the newspaper advertisements have a more stringent experience requirement: three months' experience picking specific crops by piece rate. Indubitably, the newspaper advertisements fail to comply with 20 C.F.R. § 655.152, which requires that "[a]ll advertising … must contain terms and conditions of employment which are not less favorable than those offered to the H-2A workers." This means there is no question that the Employer failed to comply with the requirements of the NSP. It would thus appear that the CO's decision to partially certify the application by reducing it by twenty five percent of the worker's requested positions, from four to three, was appropriate and that the CO's partial certification should be affirmed.[3]

The analysis in the preceding paragraph, however, fails to account for one salient fact not addressed in the CO's otherwise excellent brief: *the specific experience requirement that caused Employer's advertisements to violate 20 C.F.R. § 655.152 was added by the SWA representative.*

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[2] As stated in the NSP, "[w]here an employer fails to comply with special procedures, Departmental regulations at 20 CFR § 655.183(c) permit the Office of Foreign Labor Certification Administrator to reduce by 25 percent the total number of H-2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year." AF 123.

[3] In reviewing the file, it is apparent that there is a discrepancy between the experience requirement in the job order, based on the ETA Form 790 (*see* 20 C.F.R. § 655.103 (definition of "job order"), and the *Application for Temporary Employment Certification*, ETA Form 9142A. *Compare* AF 103 (ETA Form 790) and AF 88 (ETA Form 9142A). Upon receipt of an application, the CO "will promptly review the *Application for Temporary Employment Certification* <u>and job order</u> for compliance with all applicable program requirements…." 20 C.F.R. § 655.140(a) (emphasis added). If the CO identifies deficiencies, the CO is to notify the employer of those deficiencies within seven days. 20 C.F.R. § 655.141(a). The NOD in this case identified several deficiencies, including discrepancies between the ETA Form 790 and the ETA Form 9142A, but did not identify the discrepancy in experience requirements. *See* AF 59-64. Had the CO identified this discrepancy in the NOD, the Employer would have been on specific notice as to this issue (in addition to the notice as to the need to ensure that newspaper advertisements complied with 20 C.F.R. § 655.152 that was given in the NSP, AF 123) and, given the Employer's response to the other issues raised in the NOD, it is likely that this issue would have been resolved before the newspaper advertisements were run. This would likely have resulted in the advertisements being in compliance with 20 C.F.R. § 655.152. All that said, as I resolve this matter on the issue of the Employer following the SWA representative's guidance, I need not further discuss the issue of the NOD not identifying the discrepancy in experience requirements between the ETA Form 9142A and the job order.

This fact was alluded to in Employer's March 18, 2015 letter requesting expedited review.[4] Moreover, this fact is apparent from reviewing the ETA Form 790, where the SWA representative added in her own handwriting the following language to the "job description and requirements" section: "crops include apples, strawberries, s.... peas, peas, and blueberries." AF 103.[5] The AF indicates that the SWA representative who worked on this matter made the notation on AF 103, as the initials by that notation correspond to the name of the SWA representative who signed the SWA Foreign Labor Unit Certification approval of employer-provided housing in this matter and the handwriting is consistent. *Compare* AF 31 and AF 103. It is also apparent that the annotation on AF 103 was made well over a month before the newspaper advertisements ran. AF 103; AF 23, 26-27.

Under 20 C.F.R. § 655.135(c), an employer submitting an application must assure that it "has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply … for the job opportunity…." Given that requirement, reinforced by the statement regarding cooperation with the SWA in the CO's March 10, 2015, letter, AF 33, it is not unreasonable for the Employer to have followed the guidance of the SWA representative by incorporating changes to an experience requirement on the ETA Form 790 into a newspaper advertisement. To conclude otherwise would be to expect an employer to disagree with, or to ignore, the guidance of the SWA representative, which would be inconsistent with the requirement of cooperation.

I have reviewed the cases cited by the CO, particularly *JYW, Jesse Womack III*, 2015-TLC-00014 (ALJ Jan. 13, 2015). If it were not factually distinguishable, I would follow *Womack's* reasoning. In *Womack*, however, unlike in this matter, there is no indication whatsoever that the reason for the discrepancy between the experience requirement in the application and the experience requirement in the advertisements was because the employer was following the guidance of an SWA representative.

In short, in this matter it appears the Employer simply incorporated the changes the SWA representative made concerning the experience requirement in the newspaper advertisements. Because this clearly resulted in the newspaper advertisements violating the requirements of 20 C.F.R. § 655.152, I understand why the CO decided to partially certify the application. Upon reviewing the entirety of the record, however, I find that the discrepancy between the experience requirement listed in the application and that provided in the newspaper advertisements resulted from the Employer following the SWA representative's guidance. I respectfully believe it would be unfair to penalize the Employer for following that guidance, and therefore reverse the partial certification of the application.

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[4] "[S]trawberries, blueberries, snap peas, and peas are all listed on the piece rate sheet and under the 3 month experience *individually added by the NYSDOL representative*." AF 5. This statement does not constitute new evidence, as it merely alludes to evidence already in the record. *See* AF 103. It is thus not barred by 20 C.F.R. § 655.171(a).

[5] The word with an ellipse is hard to read on the copy of the document in the AF.

ORDER

In light of the foregoing, it is hereby ordered that the Certifying Officer's Final Determination partially certifying the Employer's ETA Form 9142A, *H-2A Application for Temporary Employment Certification* for four Farm Worker and Laborer Crops is REVERSED. The CO is directed to grant certification for all four requested positions.

SO ORDERED.

Digitally signed by PAUL R. ALMANZA
DN: CN=PAUL R. ALMANZA,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.